

# Afghanistan's Forced Displacement Legal & Policy Framework Assessment



**Supporting Afghanistan's Forcibly Displaced Population**  
A Joint World Bank & UNHCR Initiative

September 20, 2017



**WORLD BANK GROUP**



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The UN Refugee Agency

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## ACKNOWLEDGMENTS

This Assessment was prepared for the World Bank Group by Ahmad Shakeeb Safai,<sup>1</sup> an Afghan legal expert (World Bank LEGVP Consultant based in Kabul, Afghanistan) and benefited from the expertise and guidance of Mirjana Stankovic<sup>2</sup> (GFM03), an international legal expert on forced displacement. The preparation of this Assessment was overseen by the World Bank's Task Team Leaders' Platform on forced displacement led by Naila Ahmed (Task team leader - Senior Social Development Specialist, GPSURR) and Juan Carlos Alvarez (co-TTL, Senior Counsel, LEGES) who also led the coordination with the World Bank's legal team.

Consultations, individual interviews, and focus group discussions were conducted in Afghanistan during the preparation of this Assessment to solicit opinion from various sources on forced displacement legal and policy framework and its impact on providing assistance and protection to forcibly displaced persons. The resource persons consulted with and interviewed represented various stakeholders involved in forced displacement in Afghanistan, both at central and provincial level, in particular Ministry of Refugees and Repatriation (MoRR), Ministry of Justice (MoJ), and UNHCR. The team is grateful to all those who took part in these consultations and group discussion meetings and provided valuable comments and suggestions.

The team would like to express their deep appreciation to the United Nations High Commissioner for Refugees (UNCHR) Afghanistan, Kabul Office which was led by Yasmine Rockenfeller (Head of Re-integration, UNHCR Afghanistan) and Ministry of Refugees and Repatriation (MoRR) for their honest contribution with substantial input and information. The team would also wish to thank Khyber Farahi, Advisor to Office of the President of the Islamic Republic of Afghanistan on forced displacement, Dr. Alema, Deputy Minister for Refugees and Repatriation of MoRR, and Murtaza Rasooli, Director General for Legal Assistance in MoRR for their assistance and support. The author is also grateful to all individuals who participated in the focus group discussions and interviews.

Despite efforts to be inclusive, the author apologizes to any individual or organization inadvertently omitted from here and expresses gratitude to all those who contributed to this Assessment.

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## ACRONYMS AND GLOSSARY

<b>AFN</b>	The currency of the Islamic Republic of Afghanistan ( <i>Afghani</i> )
<b>AIHRC</b>	Afghanistan Independent Human Rights Commission
<b>ANDMA</b>	Afghanistan National Disaster Management Authority
<b>ANPDF</b>	Afghanistan National Peace and Development Framework
<b>APC</b>	Afghanistan Protection Cluster
<b>CVRRP</b>	Comprehensive Voluntary Return and Reintegration Policy
<b>DiREC</b>	Displacement and Returnees Executive Committee
<b>DoE</b>	Directorate of Education (provincial counterpart of MoE)
<b>DoRR</b>	Directorate of Refugee and Repatriation (provincial counterpart of MoRR)
<b>GoIRA</b>	Government of the Islamic Republic of Afghanistan
<b>GoP</b>	Government of Pakistan
<b>IDLG</b>	Independent Directorate of Local Governance
<b>IDMC</b>	Internal Displacement Monitoring Center
<b>IDP</b>	Internally Displaced Persons
<b>IMCC</b>	Inter-Ministerial Committee on Refugees, Returnees, and IDPs
<b>IOFS</b>	Islamic Organization for Food Security
<b>IOM</b>	International Organization for Migration
<b>LAS</b>	Land Allocation Scheme
<i>Loya Jerga</i>	A Pashto term meaning “grand council.” It refers to the supreme legislative body of Islamic Republic of Afghanistan.
<b>MoE</b>	Ministry of Education
<b>MoJ</b>	Ministry of Justice
<b>MoRR</b>	Ministry of Refugees and Repatriation
<b>MRRD</b>	Ministry of Rural Rehabilitation and Development
<b>NHCDM</b>	National High Commission for Disaster Management
<b>NPP</b>	National Priority Program
<b>NRC</b>	Norwegian Refugee Council
<b>OCHA</b>	United Nations Office for the Coordination of Humanitarian Affairs
<b>PoR</b>	Proof of Registration
<b>PRO</b>	Population Registration Office
<b>SIGAR</b>	Special Inspector General for Afghanistan, a US aid watchdog
<i>Sharia</i>	Islamic Law
<b>SSAR</b>	Solutions Strategy for Afghan Refugees
<i>Tazkera</i>	Personal Identification document (ID card)
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNAMA</b>	United Nations Assistance Mission for Afghanistan
<b>UNHCR</b>	United Nations High Commission for Refugees
<b>USD</b>	The currency of the United States of America (Dollar)
<b>VRF</b>	Voluntary Repatriation Form

## EXECUTIVE SUMMARY

1. This Assessment is conducted as part of a larger platform established in 2016 through a joint World Bank and UNHCR initiative to support Afghanistan's forcibly displaced population. The platform aims to inform and support the dialogue between stakeholders in Afghanistan in order to: (i) seek ways to ensure a meaningful inclusion of durable solutions for the forcibly displaced and returnees in the Afghanistan National Peace and Development Strategy (ANPDF) and development intervention; (ii) identify early recovery and long-term needs of the forcibly displaced persons; and (iii) identify policy level and developmental opportunities that can contribute to the well-being and self-reliance of Internally Displaced Persons (IDPs), returnees, refugees and their host communities. One of the main activities under this joint initiative is Policy and Implementation Analysis, which includes an assessment of Afghanistan's legal and policy framework on forced displacement.<sup>3</sup> Afghanistan's Forced Displacement Legal and Policy Framework Assessment was prepared during the period of January to May 2017 as part of efforts towards completion of this main activity.

2. The main objectives of this Assessment are to: 1) identify and give an overview of the laws, regulations, policies, rules of procedure, and practices that address forced displacement in Afghanistan; 2) identify and give an overview of the relevant forced displacement institutional framework; 3) serve as a starting point in identifying potential gaps, inconsistencies, areas in need of change, and opportunities for reform, and; 4) inform decision-making and policy reform on forced displacement issues in Afghanistan. The Assessment encompasses four groups of forcibly displaced persons: Afghan refugees abroad, mainly in Pakistan and Iran (documented and undocumented), returnees (documented and undocumented), IDPs, and refugees or asylum seekers taking refuge in Afghanistan. These four categories of forcibly displaced persons are collectively referred to as "forcibly displaced persons" in this Assessment. The Assessment also takes into account whether the legal and policy framework addresses the needs of the communities hosting forcibly displaced persons.

3. This Assessment is based on a mixed methodology approach, which includes policy review and qualitative research. It is based on all available legal, regulatory and policy documents as well as information from reliable secondary resources, including publications by UN agencies, Afghanistan Independent Human Rights Commission (AIHRC), Norwegian Refugee Council (NRC), International Organization for Migration (IOM), Amnesty International, legal institutions and independent research organizations. The Assessment started with a desk review of relevant laws and policies and used exploratory and cross-sectional descriptive study designs put together with the UNHCR. The explorative study design employed a content analysis technique synthesizing Afghanistan's legal and policy framework concerning forcibly displaced persons. The cross-sectional study design employed in-depth interviews and group discussions soliciting opinion from various sources on forced displacement legal and policy framework and its impact on providing assistance and protection to forcibly displaced persons. In this regard, the Assessment benefited from meetings and group discussions arranged by the World Bank Group together with UNHCR as part of

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<sup>3</sup> Other main activities under the mentioned initiative consist of: (i) Mapping Exercise to gather data and information regarding IDPs and returnees and conduct a quick mapping various institutions working on forced displacement in Afghanistan; (ii) Internal Review of existing ARTF and World Bank portfolio to seek ways for using aid to implement priorities for durable solutions; (iii) Priority Areas for Durable Solutions and Interventions; (iv) Mainstreaming Data for Development; (v) Ongoing Dialogue, Joint Collaboration with UNHCR.

activities carried under *Supporting Afghanistan's Displaced Population*, a joint World Bank and UNHCR initiative.

4. Consultations, individual interviews, and group discussions were conducted in Afghanistan both at the beginning as well as during the Assessment to gather information and solicit opinion from various sources on forced displacement legal and policy framework and its impact on providing assistance and protection to forcibly displaced persons. Resources persons interviewed and consulted with represented various stakeholders involved in forced displacement in Afghanistan, both in the central and provincial level, in particular Ministry of Refugees and Repatriation (MoRR), Ministry of Justice (MoJ), and the UNHCR.

5. In November 2016, the team met with officials from UNHCR in Kabul to discuss and agree on the prospects, scope, and purpose of this Assessment and obtain opinions, views, and information on forced displacement legal framework and its implementation in Afghanistan. The team also met with Khyber Farahi, Advisor to the Office of the President of the Islamic Republic of Afghanistan, and Dr. Alema, Deputy Minister of Refugees and Repatriations in MoRR to discuss forced displacement legal and policy framework and its implementation. Deputy Governor of Kapisa province was also consulted on how the provincial government in Kapisa supported forcibly displaced persons. A consultative meeting was also conducted with the Director of Refugees and Repatriations and Director of Education in Kapisa province on forced displacement legal and policy framework and forcibly displaced persons' access to education. Individual consultations were also conducted with officials of Directorate of Education in Kapisa province on policies and procedures put in place to ensure IDPs, returnees, and refugees have access to education. In May 2017, the team shared an initial draft of the Assessment with various stakeholders, including the government and international actors, to obtain feedback. The team received and incorporated comments, suggestions, and criticism from these stakeholders. In July 2017, a round table discussion meeting was held in the World Bank's field office in Kabul to discuss the initial findings of the Assessment with stakeholders and solicit opinions. Participants were drawn from various forced displacement stakeholders, including UNHCR, IOM, NRC, Displacement and Returnees Executive Committee (DiREC), Office of the Chief Executive Officer, United Nations Assistance Mission for Afghanistan (UNAMA), ARAZI- Afghanistan Independent Land Authority, United Nations Office for the Coordination of Humanitarian Affairs (OCHA), and MoRR. A further meeting was held in MoRR in Kabul to discuss the initial findings of the Assessment with various Director Generals in MoRR. The team received and incorporated suggestions, including covering the ongoing policy reforms regarding land distribution to IDPs and returnees.

6. Due to lack of reliable statistics, surveys and censuses, it is difficult to obtain reliable statistics and estimations on forced displacement in Afghanistan. Therefore, it is not uncommon to find different estimations for the same indicator.

7. **Afghanistan has a long history of forced displacement, primarily connected with conflict and instability.** The current forced displacement crisis dates back to 1970s, when the war between the Soviet-backed government and the resistance fighters (*Mujahedeen*) following 1978 and the subsequent Soviet Union's invasion of Afghanistan in 1979 resulted in massive displacement movements both from and within Afghanistan. The anti-Soviet war (*Jihad*) that followed against the Soviet by the *Mujahedeen*, the subsequent civil war between different sections of the *Mujahedeen*, as



well as the war between the *Taliban* and the Northern Alliance following 1996 exacerbated the country's forced displacement crisis.

8. **With the relative stability following the toppling of *Taliban* in 2001, significant number of Afghan refugees returned to Afghanistan.** This was accompanied by significant decrease of people being internally displaced. Despite this, the repatriation of Afghan refugees started to decline because of increasing conflict and insurgency following 2006. This put internal displacement on the rise as well. **In recent years, mass repatriation of Afghan refugees is again on the rise due to limited asylum space in host countries. Despite massive repatriations, Afghan refugees are still considered one of the largest refugee groups in the world.** By the end of 2015, there were 2.7 million registered Afghan refugees and asylum seekers, mainly in Pakistan and Iran, a number that constitutes around 12.5 percent of the world's refugee population.

9. Afghanistan's national legal system is constituted of three sources of law: international law, customary and *Sharia* law (Islamic Law), and statutory law (state law). This Assessment focuses on statutory law, including 1) international conventions and declarations, 2) regional agreements, and 3) national legislations, regulations, and policies.

10. **Afghanistan's forced displacement legal and policy framework has been evolving over the years.** Earlier laws and regulations on forced displacement failed to address all aspects of forced displacement, by remaining silent on IDPs and asylum seekers. However, the legal reforms taken following 2001 aimed towards expanding the country's legal and policy framework protection to cover other categories of displaced people as well. For instance, the Government of Islamic Republic of Afghanistan (GoIRA) adopted a Refugee Return and IDP Sector Strategy (RRI Sector Strategy) in 2008 under Afghanistan National Development Strategy for 2008-2013 (ANDS) in order to protect the rights of IDPs and returnees. Nevertheless, ANDS and its RRI Sector Strategy had shortcomings, such as primary focus on return as the preferred durable solution and lack of a clear definition of IDPs and returnees. In addition, they did not elaborate on how to protect the rights of IDPs and returnees.

11. The GoIRA has ratified the 1951 Convention Relating to the Status of Refugees, its 1967 Optional Protocol, and a wide range of other international human rights and humanitarian treaties that contain general protection measures that apply to displaced people. It has also signed agreements and memoranda of understanding with countries that host Afghan refugees and asylum seekers. To fulfil its obligations under international law, GoIRA has put in place laws, regulations, policies, institutional structures, and rules of procedure that guide the national authorities' response to forced displacement, such as the 2013 National Policy on Internally Displaced Persons (IDP Policy), the 2015 Comprehensive Voluntary Repatriation and Reintegration Policy (CVRRP), the 2017 National Policy Framework for Returnees and IDPs (National Policy Framework), and 2005 Presidential Decree Number 104 on Land Distribution for Shelter to Eligible IDPs and Returnees (PD 104). These national legal and policy instruments, along with relevant regional and international legal instruments, constitute the basics of Afghanistan's forced displacement legal and policy framework.

12. In 2012, Islamic Republics of Afghanistan, Iran, and Pakistan, with the support of UNHCR, developed Solution Strategy for Afghan Refugees (SSAR) to provide a regional response to the problems of Afghan refugees in Pakistan and Iran and to assist

host communities. SSAR serves as an overarching comprehensive regional framework for providing durable solutions to Afghan refugees in Iran and Pakistan. The IDP Policy aims to address internal displacement by guaranteeing the rights of the IDPs and setting out the institutional set-up to ensure these rights are protected. The CVRRP constitutes a comprehensive policy framework for addressing repatriation in line with international norms by establishing special measure to ensure returnees enjoy their basic rights in par with other citizens. PD 104 also establishes a basic framework for distribution of lands to IDPs and returnees. These legal and policy instruments, along with relevant provisions of other national legal acts and policies provide the foundation of Afghanistan's legal and policy framework for addressing different aspects of forced displacement. However, besides suffering from gaps, inconsistencies, and shortcomings, the implementation of these acts and policies has been a challenge in and of itself. To address this predicament, in March 2017 GoIRA developed the National Policy Framework in order to provide a holistic, non-fragmented and coordinated response to the crisis of returnees and IDPs, taking into account both the IDP Policy and the CVRRP.

13. Based on the findings of this Assessment, the following areas of law in Afghanistan's current forced displacement legal framework can be considered as issue of concern:

**14. Afghanistan's forced displacement legal framework does not provide full protection for asylum seekers, refugees, and stateless persons.** The current legal and policy measures aim to address two of the most important aspects of the country's forced displacement crisis: IDPs and returnees. However, due to lack of a national refugee legislation, people in need of international protection in accordance with Afghanistan's obligations under international law fall outside of the protective umbrella of the current forced displacement legal framework.

**15. The existing legal and policy instruments contain potential gaps and inconsistencies,** which include: trouble accessing identity documentation, including national identity card (Tazkera); failure to establish an effective land distribution scheme for IDPs and returnees due to strict eligibility conditions, lack of clear land selection criteria, arduous and complicated land distribution procedure; lack of cooperation and coordination among relevant institutions; weak protection against arbitrary displacement; weak communication among institutions in charge of implementation; and lack of resources and capacity.

**16. The implementation of the existing legal and policy instruments has been a challenge in and of itself.** This may be due to shortcomings in the legal framework itself, lack of clear division of roles across relevant institutions, misinterpretation of relevant laws and policies, weak coordination, and weak capacity. There are two types of national coordinating bodies mandated with promoting inter-ministerial and cross-sectoral coordination in addressing forced displacement with no clear delineation of roles and responsibilities: those specifically tasked by the IDP Policy (Inter-Ministerial Committee on Refugees, Returnees, and IDPs (IMCC), Afghanistan National Disaster Management Authority, and National High Commission for Disaster Management (NHCDM)), and those established by GoIRA to address forced displacement in general (the High Commission on Migration and the Sub-Committee of the Ministers Council, as well as DiREC). The latter have not been predicted by the IDP Policy, while the policy instruments establishing them do not make reference to the institutions

established by the IDP Policy. The High Commission on Migration and the DiREC have the potential to improve coordination across different institutions as well as international humanitarian and development actors in implementing and improving the legal framework.

17. This assessment recommends that Afghanistan establish an effective and comprehensive legal and policy framework that provides protection to all categories of forcibly displaced persons, including asylum seekers, refugees, and stateless persons. Furthermore, this assessment recommends reforms in the existing legal and policy instruments that address the specific needs of forcibly displaced persons and promote their access to basic human rights and public services. These include reforms in the following areas: establishment and maintenance of effective registration and data collection system on forced displacement; facilitated access to documentation and simplified procedure for replacement of lost and/or damaged documents; promotion of the forcibly displaced persons' access to land, shelter and housing as well of their land tenure security; harmonization of legal and policy frameworks to ensure compliance with the IDP Policy and the National Policy Framework; and provision of sufficient resources to institutions put in place or responsible for implementing the forced displacement legal and policy framework.

## CHAPTER 1: OVERVIEW

1. **Afghanistan's current forced displacement situation enters into its fourth decade, remaining one of the world's largest protracted forced displacement situations under UNHCR's mandate.<sup>4</sup> It is primarily connected with armed conflict and political instability.** The war between the Soviet-backed government and the *Mujahedeen* following 1978, the subsequent Soviet Union's invasion of Afghanistan in 1979, the anti-Soviet war (*Jihad*) that followed against the Soviet by the *Mujahedeen*, and the civil war between different sections of the *Mujahedeen* after their rise into power in 1992 triggered the forced displacement of millions of Afghans, mostly seeking refuge in Pakistan and Iran. The subsequent war between the *Taliban* and the Northern Alliance following the rise into power of the *Taliban* in 1996 further increased the number of refugee flows both from as well as within Afghanistan. This number was further increased with the US-led intervention resulting to the fall of *Taliban* in 2001 as “aerial bombardment and fear of reprisals against regime supporters forced people from their homes.”<sup>5</sup> A few years of relative stability following the US-led intervention triggered mass repatriation movements of Afghan refugees. However, this relative stability started to go away in 2006, resulting to new displacement movements both from and within Afghanistan.<sup>6</sup>

### Box 1. Afghanistan's major phases of forced displacement are connected to conflict.

**Phase 1- Communist Coup (1978-1979):** In April 1978, the Soviet-backed communist government came in to power through a coup and used violence to suppress the widespread resentment and opposition. As a result, *Mujahedeen* waged armed resistance under the name of *Jihad* (holy war), significant numbers of Afghans died, and many more were forcefully displaced both from and within Afghanistan. The displacement pattern was mainly refugee outflow with some degree of internal displacement. By the end of 1979, violence, insecurity, and conflict had forced about 600,000 Afghans to seek refuge in Islamic Republics of Pakistan and Iran.<sup>7</sup>

**Phase 2- Soviet Union Invasion (1979-1989):** The Soviet Union invaded Afghanistan in December 1979 due to fear of the communist government losing ground in the fight against the *Mujahedeen*. This resulted to a remarkable increase in the number of forcibly displaced persons, mostly seeking refuge abroad. By 1989, there were around 3.2 million Afghan refugees in Islamic Republic of Pakistan, more than 2 million in Islamic Republic of Iran, and about 100,000 in Europe and the rest of the world.<sup>8</sup>

**Phase 3- Civil War (1992-1996):** The Soviet Union withdrew in 1989 and left a puppet communist regime which was defeated by the *Mujahedeen* in April 1992. Afghanistan witnessed massive repatriation for the first time since 1978 as Afghan refugees hoped the *Mujahedeen* would bring peace to their homeland. Not only were the *Mujahedeen* unable to

<sup>4</sup> UNHCR, Solutions Strategy for Afghan Refugees: Regional Overview, Update 2015-2016, p. 4, available at: <http://www.unhcr.org/542522922.html> [last visited March 28, 2017]; MoRR Strategic Plan, p. 13; United Nations in Afghanistan - Population Movement Bulletin, Issue 4 (June 30, 2016) available at:

[https://unama.unmissions.org/sites/default/files/un\\_afghanistan\\_-\\_population\\_movement\\_bulletin\\_-\\_issue\\_4\\_-\\_june\\_2016\\_1.pdf](https://unama.unmissions.org/sites/default/files/un_afghanistan_-_population_movement_bulletin_-_issue_4_-_june_2016_1.pdf).

<sup>5</sup> Brooking-Bern Project on Internal Displacement- TLO (2010), 'Beyond the Blanket: Towards More Effective Protection for Internally Displaced Persons in Southern Afghanistan,' May 2010, p. XI, available at:

<http://www.refworld.org/docid/4c3d8cab2.html> [accessed April 1, 2017]; Mehlmann, Isabell, 'Migration in Afghanistan: A Country Profile 2011,' Maastricht Graduate School of Governance (Maastricht, Netherland) p. 19, available at: <http://digitalarchive.maastrichtuniversity.nl/fedora/get/guid:85a6d61b-cf54-4d07-881e-c6b1b92444c3/ASSET1>.

<sup>6</sup> IDMC/NRC, 'Afghanistan: New and Long-term IDPs risk becoming neglected as conflict intensifies,' July 16, 2015, available at: <http://www.internal-displacement.org/assets/library/Asia/Afghanistan/pdf/201507-ap-afghanistan-overview-en.pdf>. [accessed May 10, 2017]

<sup>7</sup> World Bank, 'Sustainable Refugee Return: Triggers, Constraints, and Lesson on Addressing the Development Challenges of Forced Displacement,' August 2015, Washington DC, p. 55.

<sup>8</sup> Id.

bring peace, they started to bring more violence and bloodshed in the country as they started to fight with each other for power. This period initially witnessed significant repatriation followed with renewed mass forced displacement characterized mainly by the refugee outflow from Afghanistan beside some degree of internal displacement.

**Phase 4- The Taliban and the US Led Intervention (1996-2002):** frustration with the Mujahedeen gave rise to the suppressive Taliban movement who took over the country in 1996 and then became engaged in a civil war with the Northern Alliance until toppled by US-led coalition in 2001. The war, the suppressive character of the Taliban regime, along with instances of drought, caused new massive refugee outflow as well as waves internal displacement. This was exacerbated at the early weeks of the US-led coalition's invasion in 2001 as fear of aerial bombardment ignited new waves forced displacement.

**Phase 5- The Relative Stability (2002-2006):** This period is characterized by massive repatriation movements of Afghan refugees and a significant decrease in the number of IDPs due to the relative stability which started to wane after 2006 when the Taliban insurgency started to gradually revive and get momentum.

**Phase 6 – Increased Conflict and Insurgency (2006-Present):** increasing conflict and worsening security following 2006, withdrawal of the US-led coalition, limited asylum space in host countries, as well as instances of natural disasters challenged the previous massive repatriation, triggered new refugee exodus, and increased internal displacement.

**2. With the fall of the Taliban in 2001 and the subsequent relative stability, Afghanistan witnessed massive return of Afghan refugees and a decrease in internal displacement.** In 2002, the President of the Afghan Interim Administration issued the Decree on Dignified Return of Refugees (PD 297) to encourage safe and dignified return of Afghan refugees.<sup>9</sup> It is estimated that between 2002 and 2016, 5.7 million Afghan refugees returned home,<sup>10</sup> constituting 20 percent of Afghanistan's total population, which is estimated to be 33.3 million by 2016.<sup>11</sup> Out of these returnees, 4.8 million were assisted by the UNHCR's largest voluntary repatriation program.<sup>12</sup> The number of Internally Displaced Persons (IDPs)<sup>13</sup> also fell down to around 130,000 by 2006,<sup>14</sup> which shows a remarkable decrease compared to 1.2 million people in 2002.<sup>15</sup>

<sup>9</sup> Decree of the President of the Afghan Interim Administration on Dignified Return of Refugee, No. 297, (3 June 2002) available at: <http://morr.gov.af/Content/Media/Documents/Presidentialdecree104218201110421115553325325.pdf>. [hereinafter PD 297]. The Decree did not cover those returnees who committed war crimes or crime against humanity or acts against the objectives and principles of the United Nations.

<sup>10</sup> IOM, Displacement Tracking Matrix, Migration Flows from Afghanistan and Pakistan towards Europe: Understanding Data-Gaps and Recommendations- Desk Review Report, August 2016, p. 25, available at:

<https://drive.google.com/file/d/0B3CEVcVlpFxOdUs1Z25XcW82c00/view>; Islamic Republic of Afghanistan, 'Ministry of Refugees and Repatriations Strategic Plan,' 2015, p. 13. An unpublished copy was provided by the GoIRA.

<sup>11</sup> UNHCR and The World Bank, 'Fragility and Population Movement in Afghanistan,' p.1. available at: [http://www.unhcr.af/UploadDocs/DocumentLibrary/WB\\_UNHCR\\_policy\\_brief\\_FINAL\\_636117057054310000.pdf](http://www.unhcr.af/UploadDocs/DocumentLibrary/WB_UNHCR_policy_brief_FINAL_636117057054310000.pdf) [accessed May 25, 2017]; Central Intelligence Agency, 'The World Fact book (2016), South Asia: Afghanistan,' available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> [accessed May 25, 2017]

<sup>12</sup> UNHCR, 'Afghanistan Factsheet,' June 2016, available at: <http://reporting.unhcr.org/sites/default/files/UNHCR%20Afghanistan%20Factsheet%20-%20JUN16.pdf> [accessed March 25, 2017]

<sup>13</sup> For the purpose of this assessment, the definition of IDP from the UN Guiding Principles on Internal Displacement which is reflected in Afghanistan's National IDP Policy has been used: "Any person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed and internationally recognized State border."

<sup>14</sup> SIGAR, 'Efforts to Support Afghan IDPs,' SIGAR 16-47-AL, July 25, 2016, p. 2, available at: <https://www.sigar.mil/pdf/alerts/SIGAR-16-47-AL.pdf> [accessed May 30, 2017]; Kuschminder, Katie, 'Migration in Afghanistan: History, Current Trends and Future Prospects,' Maastricht Graduate School of Governance, December 2009, para. 4.1.1.

<sup>15</sup> UNHCR, 'National Profile of Internally Displaced Persons (IDPs) in Afghanistan' (2008), p. 6, available at: <http://www.unhcr.org/49ba33a02.html> [accessed March 15, 2017]

3. **The increasing conflict and worsening security since 2006 however challenged voluntary repatriation, triggered a new refugee exodus, and put internal displacement on the rise once again.** As the conflict and insurgency intensified following 2006, repatriation rate decreased significantly, hitting the historical low rate of approximately 17,000 in 2014,<sup>16</sup> compared to 752,100 in 2005.<sup>17</sup> The number of IDPs on the other hand increased significantly from 470,000 in 2015 to 671,000 in 2016,<sup>18</sup> raising the total number of IDPs to 1.8 million persons.<sup>19</sup> Secondary displacement among IDPs and returnees has also continued to grow due to increasing conflict, natural disasters and lack of absorption capacity in Afghanistan.<sup>20</sup> The rate of secondary displacement among returnees of 2013 is twice higher than those of 2002, despite the fact that the number of returnees in 2002 was 50 times larger compared to 2013.<sup>21</sup>

4. **In addition to armed conflict, natural disasters, human rights violations, and tribal disputes constitute other causes of forced displacement.**<sup>22</sup> Afghanistan is considered to be prone to natural disasters, such as earthquakes, landslides, drought, flooding, and avalanches.<sup>23</sup> For instance, in 1998, 24,000 people were displaced due to a 6.1 magnitude earthquake in northeastern Afghanistan.<sup>24</sup> According to IOM, natural disaster displaced 9,300 individuals and affected more than 90,505 individuals in 2013.<sup>25</sup> In 2012, flooding caused by melting snow in *Hindu Kush* mountain and heavy rains displaced approximately 500 families.<sup>26</sup> Natural disasters affect around 230,000 people on average each year.<sup>27</sup>

5. **With asylum possibilities becoming limited for Afghan refugees-particularly in neighboring-countries due, among other factors, to unstable political relations,**<sup>28</sup> mass repatriation of Afghan refugees has again been on the rise in recent years. Although different sources provide different estimations of the number

<sup>16</sup> UNHCR, 'Enhanced Voluntary Return and Reintegration Package for Afghan Refugees: Funding Proposal,' March 2015, p. 1, available at: <http://www.unhcr.org/562defe26.pdf> [accessed March 12, 2017]

<sup>17</sup> UNHCR, '2005 Global Refugee Trends,' June 9, 2006, p. 5, available at: <http://www.unhcr.org/statistics/unhcrstats/4486ceb12/2005-global-refugee-trends-statistical-overview-populations-refugees-asylum.html> [accessed June 8, 2017]

<sup>18</sup> UNOCHA, Afghanistan: Snapshot of Population Movements (as of July 23, 2017), available at: [http://reliefweb.int/sites/reliefweb.int/files/resources/afg\\_population\\_movement\\_snapshot\\_20170723\\_v1\\_0.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/afg_population_movement_snapshot_20170723_v1_0.pdf) [accessed August 7, 2017]

<sup>19</sup> UNHCR, 'UNHCR Global Trends 2016: forced Displacement in 2016,' June 20, 2017, p. 6, available at: [http://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/06/2016\\_Global\\_Trends\\_WEB-embargoed.pdf](http://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/06/2016_Global_Trends_WEB-embargoed.pdf).

<sup>20</sup> Brooking-Bern Project on Internal Displacement- TLO (2010), Beyond the Blanket, Supra note 5, at. 12.

<sup>21</sup> UNHCR and The World Bank, 'Fragility and Population Movement in Afghanistan, supra note 15, at p. 2.

<sup>22</sup> NRC/Emergency Capacity Building Project/Better Assessments: Better Aid, 'Afghanistan: Conflict and Displacement- Disaster Needs Analysis,' October 10, 2012, p.6, available at:

[http://reliefweb.int/sites/reliefweb.int/files/resources/afghanistan\\_conflict\\_and\\_displacement.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/afghanistan_conflict_and_displacement.pdf) [accessed May 25, 2017].

<sup>23</sup> Ibid., at 6; IDMC/NRC, 'Afghanistan: As Humanitarian Space Shrinks, IDP Policy Must be Implemented,' June 19, 2014, p. 5, available at: <http://www.internal-displacement.org/assets/library/Asia/Afghanistan/pdf/201406-ap-afghanistan-overview-en.pdf> [accessed May 29, 2017]

<sup>24</sup> IDMC/NRC, Justin Ginnett and Chris Lavell, 'The Risk of Disaster-induced Displacement in South Asia (Technical Paper),' (2015) at p. 30 available at: <http://reliefweb.int/sites/reliefweb.int/files/resources/201504-ap-south-asia-disaster-induced-displacement-risk-en.pdf> [accessed January 1, 2017]; UNOCHA, 'Afghanistan-Earthquake OCHA Situation Report No. 7,' (OCHA/GVA-2002/0076), March 30, 2002.

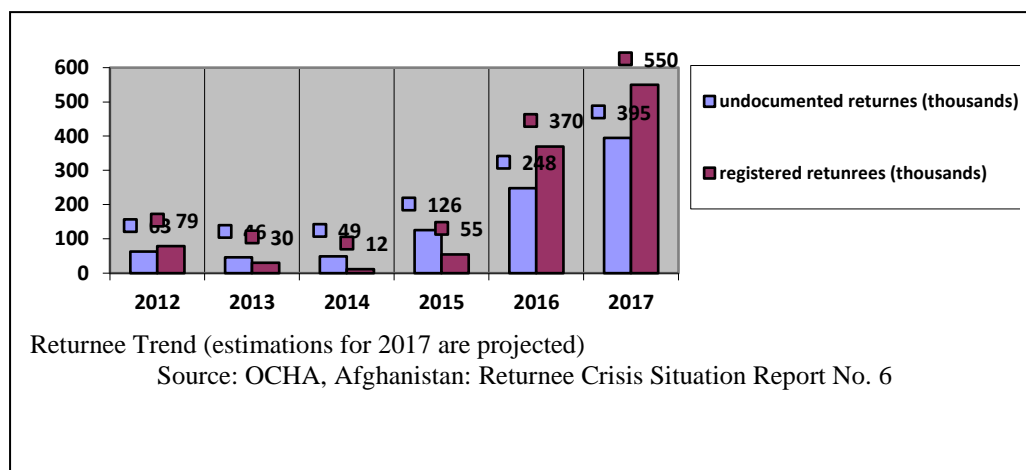
<sup>25</sup> International Organization for Migration, 'Transition, Crisis and Mobility in Afghanistan: Rhetoric and Reality,' January 2014, available at: <http://www.iom.int/files/live/sites/iom/files/Country/docs/Transition-Crisis-and-Mobility-in-Afghanistan-2014.pdf> [accessed May 30, 2017]

<sup>26</sup> UNOCHA, '2012 Humanitarian Bulletin- Afghanistan,' December 2012, available at: <http://www.refworld.org/docid/511e55642.html> [accessed May 29, 2017]

<sup>27</sup> OCHA, '2017 Humanitarian Needs Overview-Afghanistan,' November 2016, p. 8., Available at: [https://www.humanitarianresponse.info/system/files/documents/files/afg\\_2017\\_hno\\_english.pdf](https://www.humanitarianresponse.info/system/files/documents/files/afg_2017_hno_english.pdf). [accessed March 14, 2017].

<sup>28</sup> For more details, see Human Rights Watch, 'Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees, February 2017. Available at: [https://www.hrw.org/sites/default/files/report\\_pdf/pakistan0217\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/pakistan0217_web.pdf) [accessed May 29, 2017]

of returnees over the last year, they all show that the number of returnees has been increasing over the last years. International Monetary Fund estimated that more than 700,000 Afghan refugees returned to Afghanistan in 2016, primarily from Pakistan.<sup>29</sup> UNHCR and IOM estimated the number of registered Afghan returnees and undocumented returnees in 2016 to be 384,000 and 692,157 respectively.<sup>30</sup> However, UNOCHA's report present different statistics of returnees in 2016: 248,000 undocumented returnees and 370,000 registered Afghan returnees.<sup>31</sup> The projected repatriation rate only from Pakistan and Iran and the new internal displacement rate for 2017 are estimated to be around 1 million and 450,000, respectively.<sup>32</sup> Overall, around 1.4 million Afghans returned to Afghanistan only between 2012 and 2017.<sup>33</sup>



### Box 2. Despite mass repatriation, Afghan refugees still remain the second largest refugee group in the world according to country of origin.

Even though the number of Afghan refugees decreased to 2.5 million by the end of 2016 compared to 2.7 million a year before due to mass repatriation movements mainly from Pakistan, they still constitute the second largest refugee group in the world by country of origin.<sup>34</sup> In addition, Afghanistan is the second “most common country of origin” for new asylum claims lodged in 2016, with 237,800 applications.<sup>35</sup> According to MoRR, as of mid-2016, around 6 million Afghans still remain displaced in other countries, of which 2.5 million are in Pakistan (1.5 million registered refugees and around 1 million undocumented Afghans), around 2.4 million in Iran (951,000 registered and around 1.5 million undocumented) and

<sup>29</sup> International Monetary Fund, ‘Return of Afghan Refugees to Afghanistan Surges as Country Copes to Rebuild,’ January 26, 2017, available at: <https://www.imf.org/en/News/Articles/2017/01/26/NA012617-Return-of-Afghan-Refugees-to-Afghanistan-Surges-Country-Copes-Rebuild#> [accessed May 29, 2017]

<sup>30</sup> UNHCR, ‘UNHCR Global Trends 2016: forced Displacement in 2016,’ June 20, 2017, p. 6; IOM, Return of Undocumented Afghans-Weekly Situation Report: 25-31 December 2016, available at: [https://www.iom.int/sites/default/files/situation\\_reports/file/IOM\\_Return\\_of\\_Undocumented\\_Afghans\\_Weekly\\_Situation\\_Report\\_25\\_31\\_December\\_2016.pdf](https://www.iom.int/sites/default/files/situation_reports/file/IOM_Return_of_Undocumented_Afghans_Weekly_Situation_Report_25_31_December_2016.pdf).

<sup>31</sup> OCHA, ‘Afghanistan: Returnee Crisis Situation Report No. 6 (as of January 29, 2017), available at: [http://reliefweb.int/sites/reliefweb.int/files/resources/Afghanistan%20Returnee%20Crisis\\_Situation%20Report%20No%206\\_28Jan2017.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Afghanistan%20Returnee%20Crisis_Situation%20Report%20No%206_28Jan2017.pdf)

<sup>32</sup> OCHA, ‘2017 Afghanistan Humanitarian Response Plan (January-December 2017),’ November 2016, p. 7, available at: [http://fscluster.org/sites/default/files/documents/afg\\_2017\\_hrp\\_english.pdf](http://fscluster.org/sites/default/files/documents/afg_2017_hrp_english.pdf) [accessed May 4, 2017]

<sup>33</sup> IOM, Displacement Tracking Matrix- Baseline Mobility Assessment, June 2017, available at: <https://app.powerbi.com/view?r=eyJrIjojOGIiYmQzOTMtN2Y2Ni00NGQxLTlkN2ItYzJkYzZiOjQxZWJkIiwidCI6IjE1ODgyNjJkLTZmIiwidNDNiNC1iZDZlLWJjZTQ5YzhjNjE4NiIsImMiOiJh9>.

<sup>34</sup> UNHCR, ‘UNHCR Global Trends 2016: forced Displacement in 2016,’ June 20, 2017, at p. 17.

<sup>35</sup> Ibid, at 42; UNHCR, ‘UNHCR Global Trends 2015: Forced Displacement in 2015,’ June 20, 2016, p. 3, available at: <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> [accessed March 28, 2017]

around 1.2 million in other countries.<sup>36</sup> The majority of them are second and third generation refugees with a situation of protracted forced displacement. By the end of 2016, only registered Afghan refugees scattered around the world were 2.5 million, most of whom resided in Pakistan (1.4 million) and Iran (951,100) in addition to Germany (46,300), Austria (20,200), Sweden (16,600), Italy (16,00), and Greece (11,400).<sup>37</sup>

**6. In addition to returnees and IDPs, Afghanistan is hosting refugees and asylum seekers as well.** The insecurity resulting from military operations in North Waziristan in 2014 forced 283,500 people to flee to *Khost* and *Paktika* provinces of Afghanistan.<sup>38</sup> As of September 2016, Afghanistan reportedly hosts 125,000 refugees who fled from North *Waziristan* in Pakistan due to insecurity and sought refuge in south-eastern *Khost* and *Paktika* provinces of Afghanistan.<sup>39</sup>

**7. The return of millions of Afghan refugees coupled with increasing internal forced displacement will put pressure on already-under-pressure public services sector and humanitarian resources in the country and will challenge its economic prospects in a difficult climate of unemployment and poverty.** Since many of the returnees have lived outside for a long time and have less resources and short time to prepare for return, they are in need of support to integrate into the society, which already witnesses increasing conflict and insecurity.

**8. GoIRA considers finding solutions to forced displacement as a priority.** In his inaugural address in September 2014, President Ashraf Ghani underlined balanced and inclusive development to be important in addressing forced displacement situation.<sup>40</sup> He asserted his aspiration to eliminate the word ‘displacement’ from Afghanistan’s vocabulary.<sup>41</sup> GoIRA has considered voluntary repatriation and reintegration to be a priority in addressing forced displacement.<sup>42</sup> This has been articulated in ANPDF, the country’s five-year (2017-2021) strategic plan to achieve self-reliance.<sup>43</sup> The Government of Afghanistan is now considering creation of a separate national priority program under ANPDF focused on providing immediate, short-term, as well as long-term assistance to IDPs and returnees.<sup>44</sup>

## CHAPTER 2: NATIONAL FORCED DISPLACEMENT FRAMEWORK

9. Afghanistan's forced displacement framework is consisted of two parts: (i) legal and policy framework, which encompasses international and regional conventions and

<sup>36</sup> MoRR Strategic Plan, p. 13; UNHCR, ‘UNHCR Regional Plan: Building Resilience and Solutions for Afghan Refugees in South-West Asia (2016-2017)’, p.1, available at:

<http://reporting.unhcr.org/sites/default/files/UNHCR%20Regional%20Plan%20-%20Building%20resilience%20%26%20solutions%20Afghan%20refugees%20in%20SWA%20JUL16-31DEC17.pdf> [Accessed May 1<sup>st</sup>, 2017]; see also MoRR’s Afghan Refugees, Migrants, IDPs and Returnees Statistics at: <http://morr.gov.af/en/page/2204>. [last accessed May 15, 2017]

<sup>37</sup> UNHCR, UNHCR Global Trends 2016: Forced Displacement in 2016, June 20, 2017, at p. 17.

<sup>38</sup> UNHCR, ‘UNHCR Global Trends 2014: World at War,’ 20 June 2015, p.11, available at: <http://www.unhcr.org/556725e69.html>; OCHA, ‘2017 Afghanistan Humanitarian Response Plan (January-December 2017),’ November 2016, p. 6.

<sup>39</sup> UNHCR, OCHA, Operation: Afghanistan-2016 Year-End Report, available at:

<http://reporting.unhcr.org/sites/default/files/pdfsummaries/GR2016-Afghanistan-eng.pdf>

<sup>40</sup> Islamic Republic of Afghanistan, ‘Inaugural Speech by Dr. Ashraf Ghani Ahmadzai as the President of Afghanistan,’ September 29, 2014, available at: <http://president.gov.af/en/news/36954>.

<sup>41</sup> Id.

<sup>42</sup> UNHCR, ‘Solutions Strategy for Afghan Refugees: Regional Overview,’ Update 2015-2016, p. 14.

<sup>43</sup> Islamic Republic of Afghanistan, ‘Afghanistan National Peace and Development Framework (ANPDF) 2017-2021,’ available at: [http://policymof.gov.af/wp-content/uploads/2016/10/Final\\_rev\\_ANPDF-paper-English.pdf](http://policymof.gov.af/wp-content/uploads/2016/10/Final_rev_ANPDF-paper-English.pdf). [last accessed May 10, 2017]

<sup>44</sup> Minister Sayeed Hussain Alemi Balkhi, in his statement during the 28<sup>th</sup> Tripartite Commission Meeting in Islamabad on February 15, 2017 informed that the President had instructed creation of a National Priority Program for Returnees and IDPs. Statement available at: <http://morr.gov.af/fa/documents> [accessed May 12, 2017]



declarations signed and ratified by Afghanistan, the national legal acts and policies, and the rights of the forcibly displaced; and (ii) institutional framework that comprises of all relevant institutions in charge of implementing the legal acts and policies pertaining to forced displacement.

## LEGAL AND POLICY FRAMEWORK

10. The national legal system is mainly based on the Constitution of Afghanistan (the Constitution) which entered into force in January 2004.<sup>45</sup> Two other sources of law have major effects on the Afghan legal system: *Sharia* law and traditional informal justice. The Constitution and other laws recognize *Sharia* law as a source of law.<sup>46</sup> Article three of the Constitution provides that no law can contradict the Islamic beliefs and provisions.<sup>47</sup> Protection measures offered by *Sharia* law create “*local means*” for protecting and assisting displaced people.<sup>48</sup> Afghanistan is also constitutionally bound to abide by the Charter of the United Nations (UN Charter),<sup>49</sup> Universal Declaration on Human Rights (UDHR),<sup>50</sup> and international conventions and treaties ratified by Afghanistan.<sup>51</sup> As a result, Afghanistan’s national legal system is constituted of three sources of law: international law, customary and *Sharia* law, and statutory law.<sup>52</sup> This assessment focuses on relevant statutory law and, to some extent, international law, including relevant 1) international conventions and declarations, 2) regional agreements, and 3) national legislations, regulations, and policies.

## Evolution of the National Forced Displacement Legal and Policy Framework

**11. Afghanistan’s forced displacement legal and policy framework has been evolving and is being influenced by the protracted forced displacement crisis in the country.** Although lacking comprehensiveness and effective implementation, the existing legal and policy framework has improved over time and is striving to incorporate the protection principles contained in international law and policy pertaining to forced displacement.

**12. Afghanistan’s earlier forced displacement laws and regulations failed to address all aspects of forced displacement in a comprehensive manner.** Although forced displacement has a long history in Afghanistan, legal and policy instruments adopted prior to 2001 were focused only on returnees and did not cover IDPs and asylum seekers. Several executive decrees issued in 1980s concerning forced displacement only addressed issues related to returnees, remaining silent on IDPs and

<sup>45</sup> Islamic Republic of Afghanistan, ‘The Constitution of Afghanistan,’ January 3, 2004, available at: [http://supremecourt.gov.af/content/media/documents/constitution2004\\_english241201294958325553325325.pdf](http://supremecourt.gov.af/content/media/documents/constitution2004_english241201294958325553325325.pdf). [unofficial translation] [hereinafter referred to as The Constitution]

<sup>46</sup> The Constitution, at Article 30; Civil Law of the Republic of Afghanistan (Civil Code), Official Gazette (No. 353, dated January 5, 1977), available at: <http://www.asianlii.org/af/legis/laws/clotroacogn353p1977010513551015a650/> [unofficial] [accessed May 28, 2017] [referred to as the Civil Code]

<sup>47</sup> The Constitution, at art. 3.

<sup>48</sup> For detailed discussion in this regard see UNHCR, ‘*the Protection of Forced Migrants in Islamic Law, 2007*, available at: <http://www.unhcr.org/research/RESEARCH/476652cb2.pdf> [accessed April 2, 2017]

<sup>49</sup> United Nations, ‘Charter of the United Nations,’ 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed May 1, 2017]

<sup>50</sup> UN General Assembly, Universal Declaration of Human Rights, December 10, 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed May 1, 2017]

<sup>51</sup> The Constitution, at art. 7 and the preamble; Islamic Republic of Afghanistan, ‘The Law of International Conventions and Treaties, Official Gazette (1236 of November 8, 2016), art. 12, available at: [http://moj.gov.af/content/files/OfficialGazette/01201/OG\\_01236.pdf](http://moj.gov.af/content/files/OfficialGazette/01201/OG_01236.pdf) [In Pashto]

<sup>52</sup> Samuel Hall/Norwegian Refugee Council, Access to *Tazkera* and Other Civil Documentation in Afghanistan, November 8, 2016, p. 12, available at: [https://www.nrc.no/globalassets/pdf/reports/af\\_civil-documentation-study\\_081116.pdf](https://www.nrc.no/globalassets/pdf/reports/af_civil-documentation-study_081116.pdf) [accessed May 1, 2017]

asylums seekers.<sup>53</sup> The 1990 Regulation on Returnee Affairs, which is still in effect,<sup>54</sup> aims to address the protection needs of returnees.<sup>55</sup> It contains provision concerning protection needs and rights of the returnees, including shelter, education, property restitution, health and transportation assistance. However, it does not apply to returnees who were forced to leave the country after June 1990 because it restricts the definition of returnees to cover only those who fled the country prior to June 1990.<sup>56</sup>

**13. The post-2001 legal reforms endeavor to establish a comprehensive legal and policy framework for forced displacement. The current framework has extended protection to the IDPs as well. However, more reforms are needed to extend protection to refugees, asylums seekers, and stateless persons.** Following the fall of *Taliban* in 2001, the United Nations convened a conference in Bonn, Germany (Bonn Conference), which facilitated the adoption of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (the Bonn Agreement).<sup>57</sup> It contained provisions for Afghan refugees' participation in the transitional process. Afghan refugees, IDPs, and minority communities were represented in the Constitutional Grand Council (*Loya Jerga*) of 2004.<sup>58</sup>

14. In August 2002, a Special Property Dispute Resolution Court (Special Court) was established to hear land disputes of returnees. The Special Court was responsible for "*looking after returned refugees in Afghanistan and addressing their complaints, as to hasten the process of resolving their property disputes.*"<sup>59</sup> However, in 2007, the Special Court was discarded by the Supreme Court and its responsibilities were transferred to regular courts.<sup>60</sup> Following the dissolution of the Special Court, returnees reportedly started to face discrimination as they tried to resolve their disputes with local residents.<sup>61</sup>

15. Furthermore, the 2004 Election Law guaranteed participatory rights for IDPs and Afghan refugees abroad by allowing exceptional provisions to enable them exercise their participatory rights.<sup>62</sup> In 2005, a National IDP Policy was adopted which recognized the lead role of government in providing durable solutions in accordance with the United Nations Guiding Principles on Internal Displacement (UN Guiding

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<sup>53</sup> These executive decrees include: Executive Decree Number 321 of 1987 (1365) of the Leading Board of the Revolutionary Council of the Democratic Republic of Afghanistan on Restitution of Returnees Assets; Executive Decree Number 322 of 1987 (1365) of the Leading Board of the Revolutionary Council of the Democratic Republic of Afghanistan on Waiving Land Taxes to be Paid by Returnees; Executive Decree Number 295 of 1988 (1365) of the Leading Board of the Revolutionary Council of the Democratic Republic of Afghanistan on Afghan Refugees Travel to the Country; Presidential Decree Number 72 of 1991 (1370) of On Facilitating the Return of Countrymen Living Outside the Country

<sup>54</sup> MoJ's Database on Collection of Legislations ([http://moj.gov.af/content/files/Pages/OfficialGazetteIndex\\_D-header.htm](http://moj.gov.af/content/files/Pages/OfficialGazetteIndex_D-header.htm)) marks the Regulation to be still in effect. In addition, during the consultation meetings, MoJ officials confirmed the Regulation is still in effect.

<sup>55</sup> Republic of Afghanistan's Council of Ministers' Resolution Regarding the Regulation on Returnee Affairs (No. 161, dated July 16, 1990 (25/4/1369), available at: [http://moj.gov.af/content/files/OfficialGazette/0701/OG\\_0723.pdf](http://moj.gov.af/content/files/OfficialGazette/0701/OG_0723.pdf) [in Pashto]

<sup>56</sup> *Ibid.*, at art. 2.

<sup>57</sup> The Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, December 5, 2001.

<sup>58</sup> Wang, Carol, 'Rule of Law in Afghanistan: Enabling Constitutional Framework for Local Accountability, Harvard Int'l Law Journal 55, 1 (Winter 2014), p. 220.

<sup>59</sup> Islamic Republic of Afghanistan, Decree 89 of the Head of the Transitional Islamic State of Afghanistan Regarding Creation of a Special Property Disputes Resolution Court, November 30, 2003 (9/91382). [Hereinafter referred to as PD 89].

<sup>60</sup> Islamic Republic of Afghanistan, Supreme Court Directive 376 (2007).

<sup>61</sup> Brooking-Bern Project on Internal Displacement- TLO (2010), Beyond Blanket, *Supra* note 5, at. 45.

<sup>62</sup> Decree 28 of the Head of the Transitional Islamic State of Afghanistan on the Adoption of Electoral Law, May 27, 2004, Article 14(2), available at: <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN018178.pdf> [May 7, 2017]

Principles).<sup>63</sup> This was followed by Refugee Return and IDP Sector Strategy (RRI Sector Strategy)<sup>64</sup> adopted under Afghanistan National Development Strategy for 2008-2013 (ANDS)<sup>65</sup> in order to implement *Afghanistan Compact's* benchmark for protecting IDPs and returnees.<sup>66</sup>

**16. ANDS and its RRI Sector Strategy lacked effectiveness in providing protection and assistance to IDPs and returnees.** Although the ANDS and its RRI Sector Strategy recognized IDPs and returnees as vulnerable groups, they failed to provide a clear definition of who constitutes returnee and IDP. They also lacked human rights perspective as they did not explicitly prohibit discrimination against returnees and IDPs on account of their displacement. In addition, although they emphasized on protecting the human rights of IDPs and returnees,<sup>67</sup> neither of them actually elaborated on how to protect these rights. In addition, in context of durable solutions, the RRI Sector Strategy and the ANDS were primarily focused on return with little attention to other durable solutions options.<sup>68</sup>

### International Conventions and Declarations

17. The Constitution is silent on instances where when the national law is in conflict with the principles of international law. However, the Law on International Conventions and Treaties obligates government institutions to adopt new legislative instruments or amend the existing ones if required so by implementation of international conventions and treaties.<sup>69</sup>

18. Afghanistan is party to a wide range of human rights and humanitarian law international treaties, as well as the Rome Statute of the International Criminal Court (Rome Statute) that obligate national authorities to respect, observe and fulfil the rights of the population at large.<sup>70</sup> In 2005, Afghanistan ratified the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and its 1967 Optional Protocol.<sup>71</sup> The main purpose of the 1951 Refugee Convention is to ensure that refugees enjoy “*the widest and most liberal possible exercise of*” their fundamental rights and freedoms as contained in the UN Charter and the UDHR. The 1951 Refugee

<sup>63</sup> UNHCR, National Profile of Internally Displaced Persons (IDPs) in Afghanistan (2008), p. 6; U.N. Econ. & Soc. Council [ECOSOC], Comm'n. on Hum. Rts., Guiding Principles on Internal Displacement, U.N. Doc. No. E/CN.4/1998/53/Add.2 (1998) (prepared by Mr. Francis M. Deng) [hereinafter Guiding Principles].

<sup>64</sup> Islamic Republic of Afghanistan, Afghanistan National Development Strategy, Refugees, Returnees, and IDPs Sector Strategy 1387-1391 (2007/08-2012/13), available at: <http://morr.gov.af/Content/Media/Documents/RefugeesReturneesIDPsSectorStrategy-final199201182911791553325325.pdf>.

<sup>65</sup> Islamic Republic of Afghanistan, Afghanistan National Development Strategy 1387-1391 (2008-2013): A Strategy for Security, Governance, Economic Growth & Poverty Reduction, Islamic Republic of Afghanistan, 2008.

<sup>66</sup> *The Afghanistan Compact*, which was signed in London Conference on Afghanistan in 2006, provided the framework for international cooperation with Afghanistan from 2006 till the end of 2010. One of the three forced displacement related benchmarks of the *Afghanistan Compact* stated that “[b]y end-2010, all refugees opting to return and internally displaced persons will be provided assistance for rehabilitation and integration in their local communities.”

<sup>67</sup> Islamic Republic of Afghanistan, ‘Afghanistan National Development Strategy 1387-1391 (2008-2-13),’ supra note 58, at 130.

<sup>68</sup> Brooking-Bern Project on Internal Displacement- TLO (2010), Beyond the Blanket, Supra note 5, at 89-93; Brookings-Bern Project on Internal Displacement, ‘Realizing National Responsibility for the Protection Internally Displaced Persons in Afghanistan: A Review of Relevant Laws, Policies, and Practices, November 2010, at 15.

<sup>69</sup> Islamic Republic of Afghanistan, The Law of International Conventions and Treaties, Official Gazette (1236 of November 8, 2016), art. 14.

<sup>70</sup> Afghanistan is party to the following treaties: *International Covenant on Civil and Political Rights* (ICCPR), *International Covenant on Economic, Social and Cultural Rights* (ICESCR), *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), *Convention Against Torture* (CAT), *Convention on the Rights of the Child* (CRC) and the two optional protocols, *Convention on the Rights of Persons with Disabilities*, the *Geneva Conventions* and the first two additional protocols, and the *Rome Statute of the International Criminal Court*, *Cairo Declaration on Human Rights in Islam* (2009), .

<sup>71</sup> Geneva Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, as amended by the 1967 New York Protocol, January 31, 1967, 606 U.N.T.S. 267, 6 I.L.M 78. [hereinafter 1951 Refugee Convention] The 1967 Optional Protocol lifted the geographical and temporal limitations of the 1951 Refugee Convention.

Convention and its 1967 Optional Protocol highlight, among other things, the rights of refugees, including freedom of movement, the right to work, education, and access to travel documents. In addition, they protect asylum seekers from being returned to a place where they fear persecution.

19. Afghanistan is also party to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)<sup>72</sup> and the Second Additional Protocol of 1977.<sup>73</sup> The Fourth Geneva Convention provides protection against arbitrary displacement and, in case of necessary displacement, sets forth the conditions to be respected. Afghanistan is also a member of the Organization of Islamic Cooperation,<sup>74</sup> which is “concerned over the plight of refugees in many parts of the world, most of whom are members of the Islamic community.”<sup>75</sup>

20. Furthermore, Afghanistan is a party to the Islamic Organization for Food Security (IOFS), the goal of which is to provide emergency and humanitarian assistance in member states, including through the creation of food security reserves.<sup>76</sup> The IOFS creates regional mechanisms for providing necessary assistance in case of food emergencies in member states, including Afghanistan.<sup>77</sup>

21. Afghanistan has also recognized and incorporated the UN Guiding Principles into its domestic law through the IDP Policy.<sup>78</sup> Although not binding, the UN Guiding Principles reflect international human rights law and humanitarian law<sup>79</sup> and are universally recognized as the main normative framework for guiding national authorities in addressing internal displacement.<sup>80</sup> They provide protection against arbitrary displacement, highlight the rights of the IDPs and the obligation of national authorities to respect and protect them, and guarantee durable solutions for IDPs. The UN Guiding Principles provide that national authorities bear “the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.”<sup>81</sup>

22. Afghanistan has also signed repatriation and readmission agreements, memoranda of understanding, and joint declarations<sup>82</sup> with the European Union<sup>83</sup> and a number of

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<sup>72</sup> International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at: <http://www.refworld.org/docid/3ae6b36d2.html> [accessed May 3, 2017]

<sup>73</sup> International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 3/ 1991 ATS No 29/ 16 ILM 1391 (1977).

<sup>74</sup> Organization of Islamic Cooperation, Member States, available at: <http://www.oic-oci.org/states/?lan=en> [accessed May 1, 017]

<sup>75</sup> Organization of Islamic Cooperation, Resolution No. 32/7-P (IS) on the Problem of Refugee in the Muslim World, December 15, 1994, available at: <http://www.refworld.org/docid/48c7b4e12.html>

<sup>76</sup> Islamic Organization for Food Security, Statute of the Islamic Organization for Food Security, December 11, 2013, art. 4(1)b. available at <http://www.oic-oci.org/upload/pages/conventions/en/STATUTE-IOFS-ENG-FINAL.pdf> [accessed April 3, 2017]

<sup>77</sup> Ibid., at 4(2)j.

<sup>78</sup> Islamic Republic of Afghanistan, National Policy on Internally Displaced Persons, November 25, 2013, §2.2.i, available at: <http://morr.gov.af/Content/Media/Documents/NationalIDPPolicy-FINAL-English2620148304515553325325.pdf>. [hereafter referred to as “IDP Policy”]

<sup>79</sup> Kalin Walter, ‘Guiding Principles on Internal Displacement, Annotations,’ The American Society of International Law, Washington D.C. 2008, at 3 (highlighting in detail the legal basis for each of the principles).

<sup>80</sup> It has been endorsed by the General Assembly of the United Nations on several occasions (See the 2005 World Summit Outcome document (G.A./RES/60/1), paragraph 132, as well as, for example, GA/RES/62/153(2007), paragraph 10), the Human Rights Council (A/HRC/RES/6/32 (2007), paragraph 5.) and by Several regional instruments (African Union, the Economic Community of West African States, Organization for Security and Cooperation in Europe).

<sup>81</sup> Guiding Principles, supra note 56, Principle 3.1.

<sup>82</sup> A list of some of Afghanistan’s agreements with other countries on repatriation of Afghan refugees with their extensions is available at: <http://www.refworld.org/country,,,MULTILATERALTREATY.AFG,,,0.html> [accessed May 29, 2017]

<sup>83</sup> Joint Way Forward on Migration Issues between Afghanistan and EU (October 2016), available at: [https://eeas.europa.eu/sites/eeas/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf) [accessed April 20, 2017]

countries concerning voluntary repatriation of Afghan refugees, such as Pakistan,<sup>84</sup> Iran,<sup>85</sup> Kingdom of Sweden,<sup>86</sup> Germany,<sup>87</sup> Netherland,<sup>88</sup> the United Kingdom,<sup>89</sup> France,<sup>90</sup> and Australia.<sup>91</sup>

## Regional Agreements

Afghanistan is also part of several regional initiatives aimed at assisting forcibly displaced persons.

### Solutions Strategy for Afghan Refugees to Support Voluntary Repatriation and Assistance to Host Communities (SSAR)<sup>92</sup>

23. Islamic Republics of Afghanistan, Iran, and Pakistan, with the support of UNHCR, developed SSAR in May 2012 to identify and implement lasting solutions for Afghan refugees in Pakistan and Iran and to assist host communities. Endorsed by 40 countries,<sup>93</sup> the SSAR affirms that the problem of Afghan refugees is a regional issue and that it needs a comprehensive regional response. It aims to provide this response by setting forth three protection schemes: facilitating voluntary repatriation by community-based investments in areas of high return; building the human capital of Afghan refugees based on livelihood opportunities in Afghanistan; and preserving asylum space in host countries as well as resettlement in third countries. The SSAR tries to bridge the gap between humanitarian assistance and development in order to increase the absorption capacity for return.

24. The SSAR requires MoRR to identify the needs of returnees and set timeframe to address them and to ensure inclusion of SSAR in development initiatives.<sup>94</sup> To implement their obligations under SSAR, the governments of the three countries and the UNHCR have taken measures, including the Afghan National Voluntary Repatriation and Reintegration Policy, Pakistan's National Refugee Policy, the

<sup>84</sup> Tripartite agreement between Afghanistan, Pakistan and UNHCR Governing the Repatriation of Afghan Citizens living in Pakistan (2003); Tripartite agreement between Afghanistan, Pakistan and UNHCR Governing the Repatriation of Afghan Citizens living in Pakistan (2007); MoU Between the Government of the Islamic Republic of Pakistan and Afghanistan.

<sup>85</sup> Joint Programme Between the Government of the Islamic Republic of Iran, the Interim Authority of Afghanistan, and UNHCR for Voluntary Repatriation of Afghan Refugees and Displaced Persons, April 4, 2002, available at: <http://www.refworld.org/pdfid/55e6a81b4.pdf> [accessed February 5, 2017]

<sup>86</sup> Radio Sweden, Sweden Inks Agreement to Send Home Failed Afghan Asylum Seekers, October 6, 2016, available at: <http://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=6535356> [accessed May 25, 2017]

<sup>87</sup> Joint Declaration of Intent on Cooperation in the Field of Migration between the Government of the Federal Republic of Germany and the Government of the Islamic Republic of Afghanistan, October 2, 2016, available at: <https://www.proasyl.de/wp-content/uploads/2015/12/2017-01-18-R%C3%BCcknahmeabkommen-Deutschland-Afghanistan.pdf> [May 25, 2017]

<sup>88</sup> Tripartite Memorandum of Understanding Between the Government of the Netherlands, the Transitional Islamic State of Afghanistan, and the UNHCR, March 18, 2003, available at: <http://www.refworld.org/docid/42fb2c164.html>.

<sup>89</sup> Tripartite Memorandum of Understanding (the MoU) between the Government of the United Kingdom of Great Britain and Northern Ireland (the UK Government), the Transitional Islamic Administration of the Transitional Islamic State of Afghanistan and the United Nations High Commissioner for Refugees (UNHCR), available at: <http://www.unhcr.org/uk/subsites/afghancrisis/3f5d9799a/tripartite-repatriation-agreement-unhcr-governments-united-kingdom-afghanistan.html>

<sup>90</sup> Tripartite Agreement Between the Government of the French Republic, the Government of the Islamic Transitional State of Afghanistan and UNHCR, September 22, 2002, available at: <http://www.refworld.org/docid/3edf5aad2.html>.

<sup>91</sup> Memorandum of Understanding between the Government of Australia, the Government of the Islamic Republic of Afghanistan and the UNHCR on Migration and Humanitarian Cooperation, available at: <http://kabulpress.org/my/IMG/pdf/mou-with-afghanistan-unhcr.pdf> [accessed May 25, 2017]

<sup>92</sup> UNHCR, Governments of Islamic Republics of Afghanistan, Iran, and Pakistan, International Conference on the Solutions Strategy for Afghan Refugees to Support Voluntary Repatriation, Sustainable Reintegration and Assistance to Host Communities, May 2-3, 2012 (Geneva, Switzerland), available at: <http://www.unhcr.org/afghanistan/solutions-strategy.pdf> [accessed May 1, 2017]

<sup>93</sup> Human Rights Watch, 'Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees,' supra note 23, at p. 37.

<sup>94</sup> The Government of the Islamic Republic of Afghanistan, Comprehensive Voluntary Repatriation and Reintegration Policy, 2015, at 1.1., An unpublished copy was provided to the World Bank by GoIRA. [hereinafter referred to as CVRRP],

development in 2014 of country-specific portfolio of projects,<sup>95</sup> and UNHCR's *Regional Plan: Building Resilience and Solutions for Afghan Refugees in South-West Asia*,<sup>96</sup> which is incorporated within the framework of SSAR.<sup>97</sup> Afghanistan has also established a Strategic Committee, consisting of different ministries, in order to achieve the objectives of the SSAR.<sup>98</sup> However, Afghanistan's implementation of SSAR has been challenged lack of institutional capacity,<sup>99</sup> and insufficient financial resources.

### **Joint Programme Tripartite Repatriation Agreement between Iran, Afghanistan and UNHCR Governing the Voluntary Repatriation of Afghan Refugee and Displaced Persons**

25. Initially signed in 2002,<sup>100</sup> the agreement has since been extended (with some amendments) several times.<sup>101</sup> The main objective of this agreement is to ensure that repatriation of Afghan refugees from Iran is voluntary and takes place with safety and dignity. It contains provisions concerning the voluntariness of the repatriation, access to information on return, family unity, and validation of Voluntary Repatriation Forms (VRFs) as valid identification and travel documents for return.

### **Tripartite Agreement between Afghanistan, Pakistan and UNHCR Governing the Repatriation of Afghan Citizens living in Pakistan<sup>102</sup>**

26. Since 2003 when it was signed, it has been extended yearly with the last extension until the end of 2017.<sup>103</sup> It governs the voluntary repatriation of registered Afghan refugees from Pakistan in safety and dignity.<sup>104</sup> It contains provisions concerning the voluntariness of the repatriation, recognitions of returnees' legal status and equivalency of educational certificates by Afghanistan,<sup>105</sup> access to information on return, family unity, and validation of VRFs as valid identification and travel documents for return. Despite voluntariness being the core of this agreement, Afghan refugees in Pakistan have reportedly been coerced to return to Afghanistan due to mass arrests, evictions and other forms of harassment due to unstable political relations between Afghanistan and Pakistan.<sup>106</sup> UNHCR provides returnees with cash grants at the Encashment Center

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<sup>95</sup> The portfolio of projects are available at: <http://www.unhcr.org/pages/4f9016576.html>.

<sup>96</sup> UNHCR, 'UNHCR Regional Plan: Building Resilience and Solutions for Afghan Refugees in South-West Asia (2016-2017)', p.1.

<sup>97</sup> UNHCR, Repatriation of Afghan Refugees from Pakistan, Supplementary Appeal (September-December 2016), UNHCR (19 September, 2016), p. 5, available at: <http://www.unhcr.org/581713917.pdf> [last visited February 16, 2017].

<sup>98</sup> MoRR has also drafted an Action Plan for implementation of SSAR, which is yet not approved by the High Commission on Migration.

<sup>99</sup> SIGAR 2015, 'Afghan Refugees & Returnees: Corruption and Lack of Afghan Ministerial Capacity have prevented implementation of a Long Term Refugee Strategy', August 2015, p. 10, available at: <https://www.sigar.mil/pdf/audits/SIGAR-15-83-AR.pdf>.

<sup>100</sup> Joint Programme Between the Government of the Islamic Republic of Iran, the Interim Authority of Afghanistan, and UNHCR for Voluntary Repatriation of Afghan Refugees and Displaced Persons, April 4, 2002.

<sup>101</sup> The last available extension was signed in 2006 and is available at: <http://www.unhcr.org/en-us/4416d4892.pdf> [accessed May 21, 2017]

<sup>102</sup> UNHCR, Agreement between the Government of Islamic Republic of Pakistan, the Transitional Islamic State of Afghanistan and the United Nations High Commissioner for Refugees Governing the Repatriation of Afghan Citizens Living in Pakistan, March 17, 2003, available at:

<http://www.refworld.org/topic.50ffbce510.50ffbce537.42fb2b7be.0..MULTILATERALTREATY.AFG.html> [accessed May 29, 2017]

<sup>103</sup> UNHCR, Extension of the Agreement between the Governments of the Islamic Republic of Pakistan, Islamic Republic of Afghanistan and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Afghan Citizens Living in Pakistan, February 15, 2017, available at: <http://unhcrpk.org/wp-content/uploads/2013/12/Extention-agreement-of-Voluntary-Repatriation-till-31-Dec-2017.pdf> [accessed May 30, 2017]

<sup>104</sup> Tripartite Agreement Between the Government of the Islamic Republic of Pakistan, the Government of the Islamic Republic of Afghanistan, and the UNHCR Governing the Repatriation of Afghan Citizens Living in Pakistan, art. 1.

<sup>105</sup> Ibid. at Article 10.

<sup>106</sup> For details in this regard, see Human Rights Watch, 'Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees, supra note 23.



education), while taking into account the needs of host communities. The broad protection principles of the Constitution also apply to IDPs and returnees in a general manner. Other national legal and policy instruments contain provisions that may be applicable to forced displacement situations, such as the Passport Act (2015),<sup>115</sup> Registration of Population Act (2014)<sup>116</sup> and other legislative instruments pertaining to documentation, education, labor, participation in public affairs, juvenile justice and child protection, violence against women, and land management. The Civil Code<sup>117</sup> is also relevant in terms of personal status registration, documentation, and protecting property rights. The Penal Code<sup>118</sup> and the Police Law<sup>119</sup> also apply in context of forced displacement for providing protection against arbitrary displacement and protecting rights of those who have been displaced.<sup>120</sup>

***Box 3. There is no national refugee legislation***

Even though Afghanistan is a signatory to the 1951 Refugee Convention and its 1967 Protocol, it has not enacted any national legislation for refugee status determination and refugee protection. Although a national refugee law was expected to be adopted in 2013,<sup>121</sup> it is still in the process of being drafted in accordance with MoRR's pledge during UNHCR's Ministerial Intergovernmental Event on Refugees and Stateless Persons in 2011.<sup>122</sup> **In absence of a national refugee legislation, asylum seekers, refugees, and stateless persons still face difficulties in finding durable solutions.**

30. The 2017 Law on Human and Emigrants Trafficking protects the rights of the trafficked immigrants, including protection against prosecution for illegal entry, unlawful arrest and degrading or inhumane treatment, the right to have permission to stay, and access to health, educational, and settlement services.<sup>123</sup> Yet, it is not sufficient on its own to provide durable solutions and serve as a national framework covering all issues related to asylum seekers and refugees. For instance, it does not contain provisions concerning the refugee status determination. Until the enactment of a refugee legislation, there is no legal and institutional framework for assisting people in need of international protection in accordance with Afghanistan's obligations under international law. This is further exacerbated by conflict and worsening security situation. In addition, Afghanistan has not acceded to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. This negatively affects stateless persons as the current legal framework

<sup>115</sup> Islamic Republic of Afghanistan, Law on Passport, Official Gazette (Number 1193 dated October 25, 2015), available at: [http://moj.gov.af/content/files/OfficialGazette/01101/OG\\_01193.pdf](http://moj.gov.af/content/files/OfficialGazette/01101/OG_01193.pdf) [in Pashto and Dari] [accessed March 1, 2017]

<sup>116</sup> Islamic Republic of Afghanistan, Law on Registration of Population Records, Official Gazette (No. 1154, dated December 16, 2014), available at: <http://www.refworld.org/docid/544a4c434.html> [accessed May 29, 2017] [unofficial translation]

<sup>117</sup> The Civil Code, supra note 41.

<sup>118</sup> Islamic Republic of Afghanistan, Afghanistan: Penal Code, Official Publication of the Government of Republic of Afghanistan (No. 13, dated October 7, 176), available at: <http://www.refworld.org/docid/4c58395a2.html> [accessed May 29, 2017]

<sup>119</sup> Islamic Republic of Afghanistan, Police Law, Official Gazette (No. 994, dated August 27, 2009), available at: [http://moj.gov.af/content/files/OfficialGazette/0901/OG\\_0994.pdf](http://moj.gov.af/content/files/OfficialGazette/0901/OG_0994.pdf) [accessed May 29, 2017] [In Pashto and Dari]

<sup>120</sup> Article 5 of the Police Law concerns the duties of Police for preventing disasters and assisting disaster-affected people, which includes displaced people.

<sup>121</sup> UNHCR, Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: AFGHANISTAN, para. II(1), available at: <http://www.refworld.org/pdfid/51b81fa54.pdf>

<sup>122</sup> MoRR Strategic Plan, p. 25 and 3; UNHCR, Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011, October 2012, available at: <http://www.refworld.org/docid/50aca6112.html>

<sup>123</sup> Islamic Republic of Afghanistan, the Law on Human and Immigrants Trafficking, Official Gazette (No. 1244, dated January 29, 2017), arts. 21 and 24, available at: [http://moj.gov.af/content/files/OfficialGazette/01201/OG\\_01244.pdf](http://moj.gov.af/content/files/OfficialGazette/01201/OG_01244.pdf) [accessed May 1, 2017] [In Pashto and Dari]



of Afghanistan puts strict conditions for acquiring citizenship, including the requirement of having lived in Afghanistan for more than five years.<sup>124</sup>

**31. In absence of a domestic refugee legislation, UNHCR conducts individual refugee status determination under its mandate and on behalf of the GoIRA.**<sup>125</sup>

However, the absence of a legal framework in this regards leads to: ad-hoc and temporary approaches to the management of refugees, exposure of refugees to changes in political and security conditions; and lack of awareness among law enforcement agencies on the rights and duties of refugees, resulting to arbitrary arrests and evictions. Because of the above-mentioned factors, Afghanistan's forced displacement legal framework can be considered to have taken initial steps towards providing protection and assistance to victims of forced displacement, while more steps are still needed, particularly for protecting asylum seekers, refugees, and stateless persons.

### **The Constitution**

32. The Constitution protects the fundamental human rights and determines the structure and obligations of the state. It obligates the country to respect human rights and *“to create a prosperous and progressive society based on social justice, the preservation of human dignity [...] as well as equality between all ethnic groups and tribes...”*<sup>126</sup> It also guarantees the right of all Afghans, including those displaced, to health, education, employment, family life, freedom of movement and other fundamental human rights. The broad human rights protections of the Constitution apply to IDPs and returnees.

### **Presidential Decree No. 297 (PD 297)**

33. It guarantees dignified return for Afghan refugees by affirming their rights and protecting them from discrimination and persecution.<sup>127</sup> It also guarantees returnees' enjoyment of the “same human rights and fundamental freedoms enjoyed by other citizens.”<sup>128</sup> It provides for recovery of returnees' movable and immovable properties, such as land, houses, shops, apartments, etc.<sup>129</sup>

### **Presidential Decree Number 104 on Land Distribution for Settlement to Eligible Returnees and IDPs (PD 104)**

34. **PD 104 establishes basic, but limited, framework for distribution of lands to eligible IDPs and returnees in order to address their need to housing and shelter.** However, by failing to incorporate the land selection criteria set forth in the IDP Policy,<sup>130</sup> it results in selection of lands which do not meet basic living standards and are located far from the cities. For instance, the sterile and arid state lands picked by the PD 104 for its land allocation schemes<sup>131</sup> do not meet basic land selection requirements, such as access to water, job opportunities, as well as health and educational centers.<sup>132</sup> In fact, these sterile and arid state lands will hardly meet IDP

<sup>124</sup> Islamic Emirates of Afghanistan, the Law on Citizenship of the Islamic Emirates of Afghanistan (2000), art. 15, available at: <http://www.refworld.org/pdfid/404c988d4.pdf>. (A stateless child found in Afghanistan though may obtain Afghanistan's citizenship according to Article 12 of the mentioned Law).

<sup>125</sup> UNHCR, Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: AFGHANISTAN, p.1.

<sup>126</sup> The Constitution, art. 6.

<sup>127</sup> PD 297, art. 6.

<sup>128</sup> Ibid. at art. 6.

<sup>129</sup> Ibid. art. 5.

<sup>130</sup> The IDP Policy, at § 7.1.3.2

<sup>131</sup> PD 104, art. 1.

<sup>132</sup> Islamic Republic of Afghanistan, The Law on Managing Land Affairs, Official Gazette (1254/April, 15, 2017), art. 3, available at: [http://moj.gov.af/content/files/OfficialGazette/01201/OG\\_01254.pdf](http://moj.gov.af/content/files/OfficialGazette/01201/OG_01254.pdf). (a “sterile” land is a land which has never been

Policy's land selection requirement concerning availability of potable water and adequate water for sanitation purposes.<sup>133</sup> This has resulted to the allocated land being "unfit for agriculture" and located far away from employment opportunities.<sup>134</sup> A joint NRC and Internal Displacement Monitoring Center report, *Afghanistan: New and Long-term IDPs Risk Becoming Neglected as Conflict Intensifies (2015)* found that many of the lands allocated had not met standard requirement in terms of access to basic services and livelihood.<sup>135</sup> If IDPs/returnees are being given land in less than optimal and "available" areas, which might potentially also be in areas of high risk for natural hazards, which would only increase the vulnerability of IDPs/returnees who presumably for the most part already run low on coping capacity. This really goes for both urban and rural areas, where there are signs that natural hazards keep the most vulnerable parts of the Afghan population trapped in a cycle of poverty.<sup>136</sup>

35. Eligibility for land distribution scheme set forth by PD 104 is based on: 1) holding of *Tazkera* from relevant province; 2) proof of return or displacement and; 3) proof of landlessness in Afghanistan, certifying that the person does not own land or a house in Afghanistan either under his/her name or under the name of his/her spouse or under-aged child.<sup>137</sup> These conditions are strict and provide unnecessary barriers to IDPs and returnees. Strict eligibility conditions also mean limited access to support.

**36. PD 104, unlike the IDP Policy, does not provide for alternative evidence of proof to be considered in lieu of destroyed or lost *Tazkera*, resulting to returnees and IDPs being deprived of receiving lands in case their *Tazkera* is destroyed or lost.** This goes against the provision of the IDP Policy which states: "*failure to issue IDPs with lost or destroyed documents shall not in any way impair the exercise or enjoyment of their human rights.*"<sup>138</sup> It is very difficult for IDPs to present proof of displacement due to lack of an organized IDP registration system. Similar is the case of undocumented Afghan returnees, who are not issued Voluntary Repatriation Form to be considered as proof of return. Although the CVRRP provides for measures to be adopted for registration of undocumented returnees, it has not been fully implemented yet. PD 104 does not allow the use of alternative evidence of proof in these situations. The only available alternative is obtaining approval of the Land Distribution Commission after presenting documents.<sup>139</sup>

**37. In addition, IDPs and returnees whose application for land gets rejected by the decision of the Land Distribution Commission have not been provided with the right to appeal the decision.** Providing a document proving landlessness is also very difficult as some IDPs or returnee may have land in Afghanistan to which they cannot return due to armed conflict. Yet, they will not be considered eligible for land distribution in their place of residence. As a result, majority of IDPs and returnees may be ineligible to receive land for owning home or lands in their place of origin from

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cultivated, and an "arid" is a land which has not been cultivated for more than five years and may be cultivated after establishing new watercourse).

<sup>133</sup> The IDP Policy, at § 7.1.3.2.d. ("The area has enough potable water to meet the needs of the community for drinking water and an adequate water supply for other sanitation purposes").

<sup>134</sup> Amnesty International, *My Children Will Die this Winter-Afghanistan's Broken Promise To The Displaced* (ASA 11/4017/2016), May 31, 2016, p. 30, available at: <http://www.refworld.org/docid/574d33594.html>. [accessed May 6, 2017]

<sup>135</sup> IDMC/NRC, *Afghanistan: New and Long-term IDPs risk becoming neglected as conflict intensifies*, supra note 6, at 10.

<sup>136</sup> The World Bank and Global Facility for Disaster Reduction and Recovery, *Disaster Risk Profile: Afghanistan*, February 2017, available at: [https://www.gfdrr.org/sites/default/files/publication/drp\\_afghanistan.pdf](https://www.gfdrr.org/sites/default/files/publication/drp_afghanistan.pdf).

<sup>137</sup> PD 104, art. 2 (1.1) (2.1)

<sup>138</sup> The IDP Policy, at § 6.3.1(d).

<sup>139</sup> PD 104, art. 4.

which they have been forced to displace. Furthermore, PD 104 does not contain any provision concerning loan to eligible IDPs and returnees to build shelter.

**38. Those who receive land have to pay the cost of the land to be distributed<sup>140</sup> in exchange for weak land tenure rights.** Land receivers will get a temporary ownership document at first, which will be replaced with a permanent ownership document five years later.<sup>141</sup> Yet, they do not have the right to sell the land given to them for a period of ten years.<sup>142</sup> With regards to the payment, the law does not consider any waiver for vulnerable groups among IDPs and returnees who may not be able to afford the cost.

*Box 4. PD 104 challenges and gaps*

PD 104 fails to establish an effective land distribution framework because it:

- sets out strict and difficult-to-meet eligibility conditions;
- requires an arduous process to be followed in applying for lands;
- does not recognize alternative evidence of proof;
- does not uphold the right to appeal the decision for rejection application for land;
- does set transparent and clear land selection criteria; and
- provides for fragile right to land tenure of IDPs and returnees.<sup>143</sup>

Adding to the grievance, its implementation has been challenged by corruption,<sup>144</sup> long and complicated land distribution procedure,<sup>145</sup> lack of cooperation from other government institutions for providing basic services in refugee townships, usurpation of lands allocated for refugee townships, and insufficient cooperation from security forces.<sup>146</sup>

**39. GoIRA is in the process of addressing PD 104 gaps and challenges.** As will be explained later, GoIRA adopted the National Policy Framework for IDPs and Returnees in early 2017 to provide a holistic and non-fragmented approach to the cause of returnees and IDPs, taking into account the current policy gaps and limitations. One of the main objectives of the National Policy Framework is to enable policy environment for improving access to land and housing for IDPs and returnees. To translate this objective into practice, GoIRA in collaboration with relevant international actors has been in the process of preparing the Technical Procedure which will replace PD 104. By the time of writing of this Assessment, the draft of the Technical Procedure has been finalized by DiREC following consultations with stakeholders and submitted to the Cabinet for approval.

**40. The Technical Procedure aims to identify and provide suitable land to eligible IDPs and returnees through establishing an effective land allocation scheme with transparent and fair eligibility criteria.** It proposes significant changes to the current land allocation scheme governed by PD 104, such as:

<sup>140</sup> Ibid. art. 12.1.1

<sup>141</sup> Ibid. art. 13.

<sup>142</sup> Ibid. art 12.1.3

<sup>143</sup> See generally Bjelica Jelena, "Afghanistan's Returning Refugees: Why are so Many Still Landless?," Afghanistan Analysts Network, March 29, 2016, available at: <https://www.afghanistan-analysts.org/afghanistans-returning-refugees-why-are-so-many-still-landless/> [accessed May 30, 2017].

<sup>144</sup> MoRR Strategic Plan, p. 17; Afghanistan Independent Human Rights Commission, Economic and Social Rights Report in Afghanistan-III, December 2008, p. 47, available at: <http://www.refworld.org/pdfid/4a03f56b2.pdf> [accessed May 24, 2017]

<sup>145</sup> Independent Joint Anti-Corruption Monitoring and Evaluation Committee, 'Report of the Public Inquiry into Land Usurpation,' November 2014, p. 28, available at: [http://www.mec.af/files/2014\\_11\\_01\\_Final\\_Report\\_of\\_the\\_Public\\_Inquiry\\_Into\\_Land\\_Usurpation\\_ENGLISH.pdf](http://www.mec.af/files/2014_11_01_Final_Report_of_the_Public_Inquiry_Into_Land_Usurpation_ENGLISH.pdf) (the land distribution procedure to returnees and IDPs require 63 steps).

<sup>146</sup> Id.

- **Setting up transparent and clear criteria on what “suitable land” means and who can be considered eligible**, while focusing particularly on the most vulnerable groups. It divides these criteria into two categories: 1) core requirements which, if not met, results to the land being considered not suitable, and 2) recommended criteria which, if not met, will require improvement measures to be taken within three years period. The core criteria include: proximity to livelihood or employment opportunities; sufficient quantity of water; a slope of no more than 15%; and free from mines, explosive remnants of war, and extreme hazards. The recommended criteria include: close proximity to health clinics, schools, and an access road; free from contamination; and a sufficient quantity of drinking water.
- **Amending the institutional set-up responsible for land distribution.** Unlike PD 104, it makes sure non-governmental national and international actors are involved in various processes of the land allocation scheme. For instance, a Beneficiary Consortium, comprised of UN organizations and non-governmental organizations, is involved in assisting the Provincial Beneficiary Selection Committee. This will have a positive impact in reducing corruption and ensuring transparency.
- Recognizing a wide range of alternative evidence of proof in a manner which is well adapted to the country context. For instance, written community verification and customary marriage certificate can be easily accessed in areas of displacement. This will eliminate the requirement of travelling back to places of origin to prove identity or eligibility.
- Upholding the right to appeal a decision rejecting land application.
- Removal of the focus on distributing land only in one’s province of origin.
- Amending the beneficiary selection process in a way that makes sure not all IDPs and returnees have to go through the procedure. It proposes land distribution to a family unit and requires only head or heads of the family unit to satisfy eligibility requirements.
- Strong and specific measures for preventing forced eviction and mitigating risks in cases of lawful evictions.
- Considering budget aspect of the land allocation scheme by establishing a Monetary Fund.

**41. The Technical Procedure however does not propose any solution for the land needs of IDPs who have been displaced for less than 10 years.** It only addresses protracted displacement by requiring at least 10 years of continuous displacement as one of the eligibility criteria for land distribution.<sup>147</sup> In addition, it does not establish any mechanism to address the land disputes of returnees and IDPs. Furthermore, while its recognition of a wide range of alternative evidence for proving displacement and identity is welcome as a positive step, lack of a well-organized mechanism to verify their validity invites corruption and paves the way for people masquerading as IDPs or returnees. For instance, since a community verification can on its own be considered proof of displacement under the Technical Procedure, people may easily masquerade as IDPs by getting a community verification the issuance of which is not subject to proper oversight. The Technical Procedure states that land shall be distributed to a family unit, represented

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<sup>147</sup> Draft Technical Procedure, at art. 32.

by one or two members of the group who are over 16 years old. In this regards the Technical Procedure states:

*“1. A family unit shall only be eligible to receive land [...] where Provincial Beneficiary Selection Committees [...] determine that the head or heads of a family unit who are over 16 years old and meet the requirements of basic eligibility criteria and also meet the requirements specified in the vulnerability assessment forms.*

*2. [...] a family unit shall select one male and one female who are over 16 years old to act jointly as the heads of a family unit...”<sup>148</sup>*

This provision does not consider the situation of those family units whose heads or the only head are/is younger than 16 years old, a situation that might exist among IDPs and returnees in Afghanistan due to child marriage in this country.<sup>149</sup> In addition to this, head or heads of family unit who is/are over 16 but younger than 18 may face challenges in proving citizenship and identify (which is also an eligibility criteria) as the Technical Procedure’s mechanism for verifying identification and citizenship only applies to those who are over 18 years old. The Technical Procedure states:

*“The head or heads of a family unit who are over 18 years old shall prove their Afghan citizenship by providing one or more of the following documents...”<sup>150</sup>*

As it is indicated from the mentioned provision, the Technical Procedure does not elaborate on how are/is head or heads of a family unit who are under 18 years old and over 16 supposed to prove identification. This creates confusion and makes way for corruption.

## **The IDP Policy**

42. Faced with a growing internal displacement crisis, the GoIRA adopted the IDP Policy in November 2013, and officially launched it in February 2014 to end internal displacement by identifying and providing durable solutions.<sup>151</sup> The IDP Policy was developed through a process of broad public consultations with authorities, IDPs, host communities, civil society, international humanitarian and development actors, academics, and other stakeholders. It has widely been recognized as *“one of the most comprehensive policies on internal displacement in the world.”*<sup>152</sup> Overall, it establishes an effective framework with a comprehensive approach for addressing internal displacement by: 1) covering all causes and aspects of internal displacement; 2) guaranteeing the rights of IDPs as citizens of Afghanistan; 3) mandating adoption of action plans and strategies to ensure the exercise of these rights;<sup>153</sup> 4) providing durable solutions to IDPs while protecting their right to choose any durable solution;<sup>154</sup> and 5) highlighting the roles and responsibilities of different government institutions and other partners in providing protection to IDPs throughout all phases of displacement cycle.

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<sup>148</sup> Islamic Republic of Afghanistan, Draft Technical Procedure for Identification and Distribution of Suitable Land to IDPs and Returnees for Housing, article 29.

<sup>149</sup> Afghanistan Multiple Indicator Cluster Survey 2010-2011 found that 15.2 percent of surveyed women were married before the age of 15.

<sup>150</sup> Ibid. at article 33.

<sup>151</sup> The IDP Policy, 2.1.g. (Section 1.3 of the IDP Policy defines durable solution as “a sustainable solution (whether return, local integration or resettlement), as a result of which the former IDPs no longer have needs specifically related to their displacement and can enjoy the same rights as other Afghans.

<sup>152</sup> Amnesty International, My Children Will Die this Winter-Afghanistan’s Broken Promise To The Displaced, supra note 128, at p. 18.

<sup>153</sup> See Annex III to IDP Policy and § 8.2.

<sup>154</sup> The IDP Policy, § 8 and § 7.1.11.a.ii.

**In doing so, it follows a rights-based approach in accordance with international law provisions** and core international standards reflected in the UN Guiding Principles and takes into account the needs of the host communities<sup>155</sup> as well as of the most vulnerable groups among the IDPs.<sup>156</sup>

43. The IDP Policy outlines actions for emergency response,<sup>157</sup> clarifies the principles governing the provision of assistance,<sup>158</sup> mandates inclusion of durable solutions for IDPs in development plans,<sup>159</sup> and calls on all actors to refrain from acts that lead to forced displacement.<sup>160</sup> It also provides protection against forced evictions by requiring governors to ensure that IDPs in their districts are not subjected to or threatened with forced eviction.<sup>161</sup> It assigns the Government with the primary responsibility to address internal displacement, naming MORR as the lead government agency and institutional focal point in this regard.<sup>162</sup> It requires all relevant ministries to incorporate actions for addressing internal displacement into their annual budget.<sup>163</sup> To implement these provisions, it tasks MoRR for developing a national implementation plan and provincial authorities for developing provincial implementation plans. It removes the previous focus on return as the only possible durable solution by providing also for re-integration and resettlement elsewhere in the country as other durable solutions options.

44. It mandates Ministry of Finance to establish and IDP Trust Fund or an IDP National Budget item, allocate budget to MoRR as well as provincial authorities for and AIHRC for implementation and monitoring affairs of the IDP Policy. It also requires inclusion of activities under the IDP Policy into budget allocations to line ministries.

#### *Box 5. IDP Policy gaps*

- a. Although it provides for “*go and see visits*” to enable IDPs make an informed decision on return, it does not elaborate on mechanisms for doing so.
- b. It does not provide for “*go and see visits*” in cases of resettlement elsewhere, affecting the voluntariness of resettlements.
- c. It does not exempt humanitarian assistance to IDPs from customs and tariffs. Nor does it provide for expedited visa process for achieving humanitarian goals of states and international organizations. This gap has been complemented by other laws.<sup>164</sup>
- d. Its implementation is still faced with challenges,<sup>165</sup> such as lack of an effective IDPs’ registration system, lack of awareness about the IDP Policy among authorities responsible for its implementation as well as among IDPs,<sup>166</sup> lack access to documentation, lack of allocations

<sup>155</sup> Ibid. at § 2.1.c and d; 4.7.

<sup>156</sup> Ibid. at § 2.2.f, § 2.2.g, § 4.7.c, § 3.2.

<sup>157</sup> Ibid. at § 6.

<sup>158</sup> Ibid. at § 7.

<sup>159</sup> Ibid. at § 2.2.q

<sup>160</sup> Ibid. at § 2.2.1

<sup>161</sup> Ibid, at § 4.4.2.1.

<sup>162</sup> Ibid. at § 4.2.

<sup>163</sup> Samuel Hall/IDP Policy Working Group, Policy Brief: National Policy on IDPs in Afghanistan, IDP Policy Brief, 2015, p. 8, available at: <http://samuelhall.org/REPORTS/Afghanistan%20National%20IDP%20Policy%20Brief.pdf> [accessed May 29, 2017]

<sup>164</sup> Islamic Republic of Afghanistan, the Law on Disaster Response, Management and Preparedness in the Islamic State of Afghanistan, Official Gazette (No 1089, dated October 1, 2012), arts. 24 and 22, available at: [http://reliefweb.int/sites/reliefweb.int/files/resources/Afghanistan\\_DM\\_Law\\_%20Englsih\\_Version.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Afghanistan_DM_Law_%20Englsih_Version.pdf) [accessed May 4, 2017]; Approved by PD 140 of 15/11/1394, the SAARC Agreement on Natural Disasters (Art. 11.)

<sup>165</sup> UNHCR, Afghanistan: Conflict-Induced Internal Displacement Monthly Update November 2015, November 2015, <http://www.refworld.org/docid/56af05cb4.html>

<sup>166</sup> amnesty international, My Children Will Die this Winter-Afghanistan’s Broken Promise to The Displaced, supra note 128, at p. 8

of budget specifically focused on IDPs, lack of institutional capacity and financial resources within the institutional focal point for the internal displacement (MoRR), and lack of direct communication and coordination between agencies responsible for implementation. In addition, local integration is not fully supported by authorities who tend to treat IDPs as temporary residents.<sup>167</sup> In some areas, resentment among local residents towards IDPs coming from other areas of the country or other ethnic groups also undermines local integration as a durable solution option.<sup>168</sup> The national implementation plan envisaged in the IDP Policy is yet to be adopted, while only one province (*Herat*) has managed to adopt its provincial action plan for the IDP Policy. Ministry of Finance has failed to fulfil its mandate under the IDP Policy, which is allocation of the IDP Trust Fund and adequate budget for MoRR.

**45. Assistance to IDPs has mostly addressed their urgent and short term needs, while less has been done to meet their long-term needs, such as the right to housing, the right to education, and the right to health.**<sup>169</sup> There is no established system for IDP registration and gathering information as well as statistics concerning IDPs. **Even though the IDP Policy was launched in 2014, yet its implementation has not been successful, with only one province (*Herat*) out of the three intended pilot provinces (*Herat, Nangarhar, Balkh*) having managed to adopt its provincial action plan.**<sup>170</sup> The Government has yet not adopted the national implementation plan predicted by the IDP Policy.<sup>171</sup> Disappointed by little progress in practice, Amnesty International in its 2016 report, *My Children Will Die in This Winter: Afghanistan's Broken Promise to the Displaced*, calls the IDP Policy a “failed promise.”<sup>172</sup> ANDMA and other disaster management agencies have been unable to fulfil their responsibilities under the IDP Policy in terms of managing disasters effectively and reducing disaster risk.<sup>173</sup> Conflict and limited resources have constantly challenged their activities in addressing the current needs in the country.<sup>174</sup> Local authorities are not well trained to implement the IDP Policy. Lack of coordination between the government and the donors has resulted in difference between donor priorities and the provisions of the IDP Policy.<sup>175</sup> The implementation mechanism of the IDP Policy lacks efficiency. MoRR, the assigned institutional focal point for the IDP Policy, lacks the institutional capacity and financial resources to conduct its responsibilities in coordinating the response to internal displacement.<sup>176</sup> MoRR is one of the “*least-funded*” ministries.<sup>177</sup> Other line ministries have also not been successful in fulfilling their obligations under the IDP Policy.<sup>178</sup> **A 2016 Report by Amnesty International found that high ranking officials in line ministries and departments do not know about their obligations under the IDP Policy and that displaced people also knew less about the existence of such a policy.**<sup>179</sup>

<sup>167</sup> IDMC/NRC, Afghanistan: New and Long-term IDPs risk becoming neglected as conflict intensifies, supra note 6, at 10.

<sup>168</sup> Id.

<sup>169</sup> AIHRC, Report on the Situation of IDPs in Afghanistan, 2015, at pp. 84 and 85, available at: <http://www.aihrc.org.af/media/files/Report%20on%20IDPs.pdf>. [In Dari]

<sup>170</sup> The Provincial Action Plans are supposed to translate the IDP Policy into reality in the provincial level.

<sup>171</sup> The IDP Policy, at § 4.2.

<sup>172</sup> Amnesty International, *My Children Will Die this Winter-Afghanistan's Broken Promise to The Displaced*, supra note 128, at p. 8.

<sup>173</sup> AIHRC, Report on the Situation of IDPs in Afghanistan, at p. 12.

<sup>174</sup> OCHA, ‘2017 Afghanistan Humanitarian Response Plan (January-December 2017),’ November 2016, p. 18.

<sup>175</sup> Islamic Republic of Afghanistan, Ministry of Women Affairs, Status Report 2016, Afghanistan’s National Action Plan on UNSCR 1325-Women, Peace, and Security, the Ministry of Foreign Affairs of Afghanistan, p. 21, available at:

<http://mfa.gov.af/en/news/afghanistans-national-action-plan-on-uns-cr-1325-women-peace-and-security> [accessed May 12, 2017]

<sup>176</sup> See generally Amnesty International, *My Children Will Die this Winter-Afghanistan's Broken Promise to The Displaced*, supra note 128.

<sup>177</sup> Ibid. at p. 22.

<sup>178</sup> Ibid. at pp. 24-25

<sup>179</sup> Ibid. at pp. 8 and 22.

## Comprehensive Voluntary Repatriation and Reintegration Policy (CVRRP)

46. Adopted by the High Commission on Migration in 2015, the CVRRP constitutes a comprehensive policy framework for addressing repatriation in line with international norms. It guarantees returnees' fundamental rights, such as the right to make an informed decision, and to return in safety and dignity, as well as the right to education, work, housing, property, and the enjoyment of other basic services. In addition, it provides a policy basis for Enhanced Voluntary Repatriation and Reintegration Package,<sup>180</sup> which has been agreed upon by Afghanistan, Pakistan and UNHCR in order to encourage voluntary repatriation of Afghan refugees and ensure their reintegration.

47. The CVRRP enables refugees to make an informed decision about return by: 1) facilitating "go and see visits" and meetings between representatives of refugees and local authorities as well as mass media; and 2) providing for the delivery of information packages to refugee areas in host countries.<sup>181</sup> It also recognizes the fact that returnees prefer to settle in urban areas and that protracted displacement and urban living in host countries has resulted in returnees' inability to start a productive life in a rural environment.<sup>182</sup> In this regard, the CVRRP mandates MoRR to work with relevant ministries for activating refugee settlement towns and to search alternative measures, such as affordable housing (apartments that will be distributed to returnees in instalments). Upon arrival to Afghanistan, each returnee will be given information concerning their right to basic services and will receive a USD 200 cash assistance package to cover transportation and short-term housing.<sup>183</sup>

48. The CVRRP also provides for measures to help returnees with access to livelihood.<sup>184</sup> In the regard, it differentiates between the needs of those who return to rural areas and those who return to urban areas. Land is considered a priority for rural returnees and small bank loans and skills training are priorities for urban returnees. The CVRRP recognizes the importance of land distribution in urban areas for returnees wishing to return in urban areas. This is critical since PD 104 and other land related laws are concentrated on land distribution in rural areas.

49. Although the CVRRP covers both documented and undocumented Afghan refugee returnees,<sup>185</sup> it does not address long-term protection needs of the latter. While it affirms that undocumented are in the same situation as documented returnees and need same assistance and protection,<sup>186</sup> it only provides them with immediate short-term assistance, such as registration in reception centers, provision of food and non-food materials, transport assistance, family reunification, and referral for resettlement.<sup>187</sup> **It does not uphold their right to housing, land and other durable reintegration services. Furthermore, a big deficiency of the CVRRP is the fact that it does not propose any mechanism for assisting host communities.**

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<sup>180</sup> GoIRA is responsible for resource mobilization to find funds for the package.

<sup>181</sup> The CVRRP, at. 2.2.

<sup>182</sup> Ibid. at 4.

<sup>183</sup> Ibid. at 2.3.

<sup>184</sup> Ibid. at 6.1.

<sup>185</sup> Ibid. at 5.

<sup>186</sup> Id.

<sup>187</sup> Id.



## National Policy Framework for Returnees and IDPs (National Policy Framework)

50. In response to the challenges emanating from lack of organized documentation and registration systems for returnees, lack of coordination on forced displacement issues, and lack of a unified policy instrument on IDPs and returnees, GoIRA adopted the National Policy Framework for Returnees and IDPs in March 2017. The National Policy Framework aims to provide a holistic, non-fragmented and coordinated response to the crisis of returnees and IDPs, taking into account both the IDP Policy and the CVRRP.<sup>188</sup> It establishes the framework for providing this response in three stages: 1) humanitarian stage, which will focus, inter alia, on identification and provision of emergency support and needs assessment; 2) integration stage, which during which the focus shall be on receiving IDPs and returnees while taking into account host areas; and 3) third stage, which will shift the focus on livelihoods, employment, and market support.

### *Box 6. Guiding Principles of the Policy Framework for IDPs and Returnees*

Single policy framework will govern humanitarian and development assistance for returnees and IDPs;

All undocumented returnees arriving through major border points with Pakistan and Iran should be registered;

Adopting a “whole of community” approach wherever possible, ensuring hosts are eligible for humanitarian and development assistance so as to avoid the emergence of conflicts or contestation between displaced groups and host communities;

Reduction of barriers to accessing basic services;

Financial packages provided by national and international agencies and foreign governments will be reviewed to ensure sustainability and harmonization to avoid inequities in treatment;

Access to land will be prioritized following identification of suitable sites and broader improvements in security of tenure through legal reforms;

Settlers will be assisted to join local representative bodies to ensure representation of their concerns and needs.<sup>189</sup>

51. The National Policy Framework recognizes that lack of documentation and registration system has challenged provision of services and that urgent policy reforms are necessary concerning documentation.<sup>190</sup> It also considers provision of assistance to host communities as essential in re-integrating IDPs and returnees. It tries to address the registration of undocumented returnees from Pakistan and Iran by requiring creation of registration centers in border crossing points with the mentioned countries.

52. The priorities of the National Policy Framework are: digital registration of returnees, alternate documentation for access to educational institutions, promoting birth registration, promoting land allocation and security of tenure, waiver of fees for attestation of educational documents, affordable social housing, transitional shelters, clear land selection criteria, eligibility criteria for land distribution, upgrading of irregular settlements on non-contested land, representation in community-based decision making bodies through allocation of a fixed percentage of urban Community

<sup>188</sup> GoIRA is now working on drafting the Action Plan for the Policy Framework for Returnees and IDPs.

<sup>189</sup> Islamic Republic of Afghanistan, National Policy Framework, at para. 18.

<sup>190</sup> Ibid. at para. 14.

Development Councils to informal settlements with high number of IDPs and returnees, improving returnees' access to livelihood and employment opportunities, and facilitated access to labor market.<sup>191</sup>

53. The National Policy Framework also establishes an institutional set-up to ensure its implementation. The High Commission on Migration and the Council of Ministers' Sub-Committee on Migration Affairs, the highest decision-making bodies within the Cabinet and Council of Ministers on forced displacement issues, are each responsible for policy determination and operational affairs, respectively.<sup>192</sup> DiREC<sup>193</sup> leads the implementation of the National Policy Framework through its three different working groups: Policy Support Group; Technical Support Group; and Financial Support Group. An implementation plan is also being drafted to outlining required actions to achieve the objectives of the National Policy Framework.

### MoRR Strategic Plan

54. MoRR developed a five-year Strategic Plan in 2015 for “*managing displacement affairs and providing standard services to refugees, asylum seekers, returnees and IDPs.*”<sup>194</sup> The Strategic Plan provides for separate solution strategies to address protection needs of refugees, returnees and IDPs.

55. MoRR has also developed an Implementation Plan to achieve Strategic Plan's objectives. A Work Plan (2016-2020) for implementation of SSAR, the CVRRP as well as of the IDP Policy has been approved by the Council of Ministers' Sub-Committee on Migration Affairs with USD 2.5 billion budget but still awaits the approval of the High Commission on Migration.<sup>195</sup> MoRR has also drafted a regulation governing the activities of MoRR, which has now been sent to MoJ for further proceedings.<sup>196</sup> By the time of the preparation of this Assessment, MoRR has prepared and submitted the draft of Regulation on Activities of MoRR to MoJ for further proceedings.<sup>197</sup>

## Rights of the forcibly displaced

### Who is considered an asylum seeker, IDP or returnee

56. Returnees are defined as “*returning refugees and migrants deported back to Afghanistan.*”<sup>198</sup> An asylum seeker is “*a person who has crossed an internationally recognized border to exercise his or her right to seek asylum from persecution.*”<sup>199</sup>

57. A refugee is any person who qualifies as a refugee under the 1951 Geneva Convention and its 1967 Additional Protocol, including a “*person who owing external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave*

<sup>191</sup> Ibid. at para. 20.

<sup>192</sup> Ibid. at para. 19.

<sup>193</sup> DiREC is chaired jointly by representatives from Office of the Chief Executive, MoRR, and UNAMA. Other members of the DiREC include nominated representatives from: Office of the President, the National Security Advisor, the Ministry of Finance, the Office of the State Minister for Disaster Management and Humanitarian Affairs, ARAZI, the World Bank, UNHCR, IOM, and OCHA.

<sup>194</sup> MoRR Strategic Plan, at p. 19.

<sup>195</sup> Islamic Republic of Afghanistan, Report on MoRR's achievements during 1395 (2016) and programs for year 1396 (2017) submitted to the House of Representatives, at p. 6.

<sup>196</sup> Ibid. at p. 9.

<sup>197</sup> Islamic Republic of Afghanistan, Report on MoRR's achievements during 1395 (2016) and programs for year 1396 (2017) submitted to the House of Representatives, p. 3, available at:

<http://morr.gov.af/Content/Media/Documents/13952012201614112158553325325سازار شکار کردهای وزارت ندر سال.pdf> [in Dari].

<sup>198</sup> The IDP Policy, at § 3.1.a.

<sup>199</sup> Ibid. at § 1.3.

*his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”*<sup>200</sup>

58. The IDP Policy formally adopts the IDP definition set forth by the UN Guiding Principles, with some additions due to the specific circumstances of internal displacement in Afghanistan. According to the IDP Policy, the following persons are considered as IDPs:

- Persons who have been displaced due to “*armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.*”
- Returnees only if unable to return to their place of origin or habitual residence due to “*insecurity resulting from armed conflict, generalized violence or violation of human rights, land mines or ERW [explosive remnants of war] contamination on their land, land disputes or tribal disputes.*”
- Persons or groups of persons who are displaced as a result of a development project and who have not received an adequate housing and/or land alternative or appropriate compensation allowing them restore their lives in a sustainable manner.<sup>201</sup>

59. Thus the IDP Policy’s definition of IDP also covers secondary displacement which is caused by land or tribal disputes. This is important because returnees are particularly vulnerable to land disputes with an ethnic character when reclaiming their land.<sup>202</sup> However, it does not cover secondary displacement caused by natural disasters. Thus, the IDP Policy covers displacement caused by natural disaster (persons who are displaced due to natural disasters), but excludes secondary displacement caused by natural disasters (returnees who cannot return to their home or habitual residence due to natural disasters). In addition, the IDP Policy discriminates against returnees by not recognizing them as IDPs even if they cannot return to their place of origin or habitual residence because of a development project.

### **Documentation and registration of the forcibly displaced persons**

60. In absence of national refugee legislation, UNHCR continues to conduct individual refugee status determination under its mandate and on behalf of the GoIRA. Afghanistan’s forced displacement legal framework does not bestow IDPs with any legal status, considering them as citizens having specific vulnerabilities because of displacement.<sup>203</sup> However, the IDPs may be identified and registered by MoRR only when needed for certain purposes, such as distribution of humanitarian assistance and registration as voters.<sup>204</sup>

61. The IDP Policy requires MoRR and the National IDP Task Force to establish, in consultation with local authorities, criteria needed to identify persons eligible to receive

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<sup>200</sup> Id.

<sup>201</sup> Ibid. at § 3.1.

<sup>202</sup> UNHCR, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, United Nations High Commissioner for Refugees, April 19, 2016, HCR/EG/AFG/16/02, at 77, available at: <http://www.refworld.org/pdfid/570f96564.pdf> [accessed June 8, 2017]

; For a detailed discussion of the ethnic dimension of conflicts, see also Brookings-Bern Project on Internal Displacement- TLO (2010), Supra note 5.

<sup>203</sup> The IDP Policy, at § 3.3.a.

<sup>204</sup> Ibid. at § 3.3.

benefits as IDPs.<sup>205</sup> However, it does not set out a mechanism for doing so, exposing the process to possible corruption. In addition, the IDP Policy does not provide for grievance mechanism for those IDPs who have been denied eligibility for receiving benefits as IDPs.

62. The registration of documented Afghan refugees in Pakistan and Iran is governed by tripartite agreements between Afghanistan, UNHCR and the mentioned countries. The registration of undocumented returnees is governed by the CVRRP, which provides for special measures to register undocumented returnees from Iran and Pakistan and other countries. In July 2017, GoP launched registration of undocumented Afghans living in Pakistan by issuing Afghan Citizen cards that provide protection against arbitrary arrests, detention or deportation.

### Non-discrimination and equality

63. Non-discrimination and equality before the law are upheld by various legal instruments. The Constitution, in article 22, states that: “*Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited.*” IDPs and returnees are entitled to receive fair and just treatment and equal protection without discrimination on account of their displacement. The legal framework provides special protection for particularly vulnerable groups among IDPs and returnees, such as female heads of household, pregnant mothers, children, widows, elderly, and persons with disability or chronic illness. The IDP Policy upholds the principle of non-discrimination and obligates MoJ to review current legislations in order to ensure they uphold the principle of non-discrimination for persons in displacement.<sup>206</sup>

64. The Election Law provides for special measures to ensure that refugees are able to exercise their right to vote.<sup>207</sup> This reflects Afghanistan’s recognition of its protracted refugee crisis. The IDP Policy recognizes the right to vote and getting election cards without having to go back to their place of origin.<sup>208</sup> Election laws allow citizens, including IDPs and returnees, to obtain voter registration cards in their residential province.<sup>209</sup>

### Civil documentation

65. The Constitution protects the right to nationality.<sup>210</sup> International human rights law protects the right to birth registration<sup>211</sup> and the right to marriage registration.<sup>212</sup> The Afghan Civil Code (1977) provides for registration of personal details of citizens, the recording of important life events, and issuance of personal identification documents by the government.<sup>213</sup>

66. **The *Tazkera*** is the primary personal identification document for Afghans and is required for receiving legal protection, government services, obtaining other identification documents,<sup>214</sup> getting work,<sup>215</sup> receiving land, obtaining passport and

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<sup>205</sup> Ibid. at § 3.3.f. ,

<sup>206</sup> Ibid. at Sections 3.2, 5.1.1 (a), 5.1.2, 22.j.

<sup>207</sup> Islamic Republic of Afghanistan, The Election Law, Official Gazette (No. 1226 dated November 25, 2016) art. 5(5), available at: [http://moj.gov.af/content/files/OfficialGazette/01201/OG\\_01226\\_English.pdf](http://moj.gov.af/content/files/OfficialGazette/01201/OG_01226_English.pdf). [accessed May 2, 2017]

<sup>208</sup> The IDP Policy, at § 7.1.11.

<sup>209</sup> See article 5 of the Regulation on Voter Registration (2010); See also article 5.1 of the Election Law, supra note 196.

<sup>210</sup> The Constitution, at art. 4.

<sup>211</sup> ICCPR, at art. 24.2; CRC, at art. 7(1).

<sup>212</sup> CEDAW, at art. 16(2).

<sup>213</sup> The Civil Code, supra note 41, at. Article 47.

<sup>214</sup> Islamic Republic of Afghanistan, Law on Registration of Population Records, supra note 108, at Article 3(3).

<sup>215</sup> Islamic Republic of Afghanistan, Labor Law, Official Gazette (No. 966, dated December 6, 2008), at. Article 13 (1)

marriage certificate, property title deeds,<sup>216</sup> and many other services. Other documents also play a major role in access to services for forced displaced people, including proof of displacement, proof of landlessness, and VRF. **The strict requirement for *Tazkera* and other identification documents leaves those without them less protected and more vulnerable.**

67. The procedure for obtaining *Tazkera* differs based on where the application is submitted. An attestation of identity and residential status by relevant community leader is required soon after an application is submitted. To get an attestation of residential status and identity by a community leader, the IDP must travel to his/her province of origin. In case of IDPs living in Kabul, an official letter from the Population Registration Office (PRO) in Kabul works as alternative to the normal attestation procedure.<sup>217</sup> This is probably due to the fact that because of the existence of data from provinces in the PRO in Kabul, it is able to verify the identity of applicants coming from any province and issue them *Tazkera* without requiring them to travel to their provinces of origin. **However, the record keeping system of PRO is not modern enough to enable provincial PROs (except Kabul) to verify identity of IDPs coming from other provinces, resulting to attestation by community leaders as the only way of attesting identity for obtaining *Tazkera*.** Thus, obtaining *Tazkera* in place of displacement for displaced people still remains a challenge.<sup>218</sup> They are required to travel back to their place of origin to prove identity and obtain *Tazkera*,<sup>219</sup> as well as to prove qualifications for other services.

***Box 7. Ukraine: Good practice in obtaining civil documentation for IDPs***

In Ukraine, IDPs living in areas not controlled by the government were unable to apply for civil documentation in government controlled areas.<sup>220</sup> To address this gap, the new legislation passed in 2016 allowed relatives and other legal representatives to apply to courts in government controlled areas to establish births and deaths in non-government controlled areas.<sup>221</sup> An amendment of the IDP Law expanded the definition of IDPs to include stateless people and displaced foreigners into the definition of IDPs.<sup>222</sup>

68. There is a complicated and lengthy procedure for persons who cannot prove their identity in a standard manner. The distribution of electronic *Tazkera* (*E-Tazkera*) as prescribed by the Population Registration Act of 2014 was halted due to controversies over the content of *E-Tazkera* as set out in Article 6. Recently, a Presidential Decree solved this problem by amending Article 6. The distribution of *E-Tazkera*, which is

<sup>216</sup> Law of the Organisation and Authority of the Courts of the Islamic Republic of Afghanistan (2013), Article 74(1)

<sup>217</sup> NRC, Access to *Tazkera*, supra note 47, at p. 17

<sup>218</sup> Amnesty International, My Children Will Die this Winter-Afghanistan's Broken Promise to The Displaced, supra note 128, at p. 31.

<sup>219</sup> UN Human Rights Council, Report of the Special Rapporteur On the Human Rights of Internally Displaced Persons on His Mission to Afghanistan, April 12, 2017, A/HRC/35/27/Add.3, page 8, available at:

<http://www.refworld.org/country/...AFG..593a98014.0.html>

<sup>220</sup> IDMC, Ukraine: Translating IDPs' Protection into Legislative Actions, December 19, 2016, p. 2, available at:

<http://www.internal-displacement.org/assets/publications/2016/20161219-idmc-ukraine-translating-idps-protection-legislative-action.pdf>.

<sup>221</sup> Id.

<sup>222</sup> Government of Ukraine, Law on Ensuring of Rights and Freedoms of Internally Displaced Persons, October 2014, available at:

<https://www.google.com.af/url?sa=t&rc=1&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjueirsZ7TAhWDORQKHZKpCV0QFgglMAE&url=http%3A%2F%2Funhcr.org.ua%2Fattachments%2Farticle%2F1231%2FIDPlawAmendmE.doc&usq=AFQjCNGhX1KbwVjCZm8XJh0kvvyeBcoBpA&sig2=ALRkAM8Y3WsT8yqAPwvZjw>.

expected to start soon, will address most of the challenges that IDPs and returnees face in terms of civil documentation.

**69. The laws that govern civil documentation and identification do not specifically mention IDPs and returnees.** The IDP Policy recognizes the documentation challenges faced by IDPs and predicts measures to address them. It provides for consideration of alternative forms of proof concerning IDPs' identity and for waiver of fee for *Tazkera* for low-income vulnerable IDPs.<sup>223</sup> This is crucial for IDPs, who generally lack financial resources which limits their ability to travel and to afford obtaining other documents due to fees.<sup>224</sup> Furthermore, it requires measures to be taken in order to facilitate the issuance of *Tazkera* in Kabul and provincial capitals. In general, it provides that failure to issue IDPs with lost document shall not deprive them of their enjoyment of rights.<sup>225</sup> The National Policy Framework for Returnees and IDPs also provide for interim documentation measures in order to eliminate barriers to access to basic services for IDPs and returnees. However, the provisions prescribed by the IDP Policy have not been integrated in legislations, including the Registration of Population Records Act.

***Box 8. Major challenges in obtaining civil documentation***

Limited understanding of relevant laws by staff responsible for civil registration and documentation, weak system of communication across provincial offices, and lack of a modern civil registry system constitute major challenges ahead of access to civil documentation and makes procedure more difficult.<sup>226</sup> Conservative social norms limit women's ability to get *Tazkera*, thus limiting their access to government services.<sup>227</sup> To get a *Tazkera*, women must be accompanied by a male relative to the relevant office.<sup>228</sup> As a result women without male relative or whose male relative do not want them to get *Tazkera* cannot obtain *Tazkera*.

70. Article 36 sets a fee of AFN 500 for the replacement of *Tazkera*, without considering any discount for low-income vulnerable IDPs. Certain laws require that applicants establish registered residency in a place in order to enjoy rights. These requirements should be modified to reflect IDPs' de facto circumstances. The legal framework shall provide measures to allow IDPs residing in a place to be considered to have resided in that place to the extent necessary to be able to enjoy their rights in par with other citizens.<sup>229</sup>

**Protection from arbitrary displacement**

71. The IDP Policy defines arbitrary displacement as “*unlawful displacement, i.e., displacement that contravenes either national law or international law and standards, including forced eviction.*”<sup>230</sup> It obligates national authorities to “*prevent and avoid conditions that might lead to displacement, minimize unavoidable displacement, mitigate its adverse effects, and ensure that any displacement that does occur lasts no longer than required by the circumstances.*”<sup>231</sup> It also recognizes Afghanistan's

<sup>223</sup> The IDP Policy, at § 6.3.2. h and i.

<sup>224</sup> NRC, Access to *Tazkera*, at p. 29.

<sup>225</sup> The IDP Policy, at § 6.3.3.

<sup>226</sup> NRC, Access to *Tazkera*, at p 21.

<sup>227</sup> Ibid. at p. 30.

<sup>228</sup> Id.

<sup>229</sup> Brooking-Bern Project on Internal Displacement, Protecting Internally Displaced Persons: A Manual for Law and Policymakers, October 2008, p. 167, available at: <http://www.unhcr.org/50f955599.pdf> [accessed January 20, 2017]

<sup>230</sup> The IDP Policy, at § 1.3.

<sup>231</sup> Ibid. at § 5.

obligation under the 1949 Geneva Convention and its 1977 Protocol regarding provision of protection from arbitrary displacement and the observance of conditions in case of necessary displacement.<sup>232</sup>

72. The Rome Statute defines arbitrary displacement as a crime against humanity and war crime when conducted under certain circumstances.<sup>233</sup> Although Afghanistan is a signatory to the Rome Statute, it has not effectively penalized arbitrary displacement, not even if it amounts to war crime or crimes against humanity.

73. The IDP Policy requires GoIRA to take action against those who commit “*criminal acts and human rights violations which result in forced displacement*.”<sup>234</sup> However, it fails to effectively penalize these acts. For instance, it does not determine the penalty for actions that cause food insecurity, or for land grabbing, early marriage or child marriage. This provision is ineffective because other laws, including the Penal Code, do not specifically determine penalty for arbitrary displacement.

### **Freedom of movement**

74. The Constitution guarantees every Afghan’s “*right to travel and settle in any part of the country [and] to travel outside Afghanistan and return*.”<sup>235</sup> The IDP Policy also upholds freedom of movement and residence in Afghanistan, subject to lawful restrictions on grounds of national security, public order, health or safety, or the rights and freedoms of other people.<sup>236</sup>

75. The IDP Policy obligates MoRR to ensure that mayors and governors do not prevent IDPs from resettling into their areas.<sup>237</sup> Customs and tariffs are waived over returnees used movable properties,<sup>238</sup> and over humanitarian assistance.<sup>239</sup> For returnees, the VRF is considered as a valid travel document. In practice, however conservative traditional norms confine women to their homes and limit their ability to move.

76. The Passport is necessary for travelling abroad. An applicant for passport must submit an original copy of *Tazkera* attested by Registration of Population Record Office along with the receipt of fee.<sup>240</sup> This provision gives rise to two problems for IDPs: (i) Attestation of the *Tazkera* is only possible in one’s province of origin or in Kabul. To get a passport, IDPs need to travel back to their places of origin or to Kabul in order to attest their *Tazkera*; (ii) Under the new Passport Law (2015), the fee for obtaining passport is AFN. 5000 for adults and AFN. 2750 for children. Since neither Passport Law nor any other law provide fee waiver to disadvantaged and poor IDPs for obtaining passport, they cannot afford to get a passport and, thus, may not be able to move abroad.

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<sup>232</sup> Ibid. at § 5.1.1

<sup>233</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force in July 1, 2002) [hereinafter Rome Statute], art. 7, available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf). (last accessed April 17, 2017)

<sup>234</sup> The IDP Policy, at § 5.1.1.

<sup>235</sup> The Constitution, at art. 39.

<sup>236</sup> The IDP Policy, at § 7.1.2.

<sup>237</sup> Id.

<sup>238</sup> Islamic Republic of Afghanistan, Customs’ Act, Official Gazette (Number 1235 dated October 25, 2016), Article 40 (12), available at: [http://moj.gov.af/content/files/OfficialGazette/01201/OG\\_01235.pdf](http://moj.gov.af/content/files/OfficialGazette/01201/OG_01235.pdf). [in Pashto]

<sup>239</sup> Ibid. at article 40 (5).

<sup>240</sup> Islamic Republic of Afghanistan, Law on Passport, Official Gazette (No. 1193, dated October 25, 2015), Article 8.

## The right to education

77. This right is guaranteed by the Constitution, the Educational Law, and other laws and regulations.<sup>241</sup> Primary education is compulsory and undergraduate education is free in state schools and institutions.<sup>242</sup> The Education Law also guarantees citizen's equal right to education without discrimination of any kind.<sup>243</sup> The IDP policy obligates Ministry of Education (MoE) to ensure that IDP children are provided with free and compulsory primary and secondary education.<sup>244</sup> The National Policy Framework also guarantees IDPs and returnees the rights to access to education and provides for special measures to ensure they enjoy this right.<sup>245</sup> Reduction of barriers to accessing education for IDPs and returnees constitute a basic principle of the National Policy Framework and recognition of alternative documentation for quick access to educational institutions is one of its priority areas.

78. The IDP Policy refers to government's constitutional mandate to provide free education at state institutions to Afghans up to bachelor's degree. It states that IDP students should not be denied access to school for not having school records or *Tazkera*, or for not being able to pay for "*school uniform, school books, supplies or other similar expenses.*"<sup>246</sup> The Policy requires measures for recognizing certificates and training credentials of IDP students and teachers obtained abroad. It also requires special measures, such as establishment of local schools in places where IDPs are living, provision of accelerated education classes for the IDP children whom their age is above the normal age of school children, provision of dormitory facilities for the children of IDPs in nearby cities in order for them to continue their secondary education, and etc.<sup>247</sup>

79. **MoE has taken policy measures to ensure returnees and IDPs have access to education.** These measures include: the National Education Strategic Plan III; Accelerated and Local Training Policy; Rules of Procedure for Determining the Class of Returnees; Rules of Procedure for Determining the Class of Students Whose Education Documents Have Been Destroyed; and most importantly Guidelines on Returnee Students.<sup>248</sup>

80. The National Educational Strategic Plan III (NESP III) emphasizes development of policies to ensure balanced access to educational opportunities for disadvantaged groups, including disabled children, IDPs and returnees.<sup>249</sup> The NESP III commits MoE to improve existing alternative educational methods, accelerated trainings, local trainings, and other programs.<sup>250</sup> It predicts development of strategies to ensure the provision of educational services in emergency situations<sup>251</sup> and reiterates MoE's commitment to provide "*urgent educational services*" to IDPs and returnees in

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<sup>241</sup> The Constitution, at art. 44.

<sup>242</sup> Islamic Republic of Afghanistan, Education Law, Official Gazette (No. 955, dated July 24, 2008), arts. 4 and 17, 19, 21, 25, available at: [http://moj.gov.af/content/files/OfficialGazette/0901/OG\\_0955.pdf](http://moj.gov.af/content/files/OfficialGazette/0901/OG_0955.pdf) [accessed May 29, 2017] [hereinafter referred to as Education Law]

<sup>243</sup> Ibid. at art. 3

<sup>244</sup> See Section 7.1.8 of the IDP Policy.

<sup>245</sup> The Policy Framework, para. 20 (e).

<sup>246</sup> The IDP Policy, § 7.1.8.

<sup>247</sup> Annex II of the IDP Policy, para 12.

<sup>248</sup> Islamic Republic of Afghanistan, Rules of Procedure for Determining the Class of Returnees. Islamic Republic of Afghanistan, Rules of Procedure for Determining the Class of Students Whose Education Documents Have Been Destroyed; A copy was provided by GoIRA;

<sup>249</sup> Islamic Republic of Afghanistan, Ministry of Education, National Educational Strategic Plan III (2017-2021), 2016, at para. 5.3.2. [hereinafter referred to as "NESP III"]

<sup>250</sup> Ibid. at 5.3.2.1.

<sup>251</sup> Ibid. at 5.3.2.7.



compliance with conditions set out by the IDP Policy.<sup>252</sup> It provides for creation of local schools and accelerated training program where formal schools for IDPs and returnees do not exist.<sup>253</sup> MoE also pledges to facilitate easy admission to schools for IDP and returnee children and IDP teachers,<sup>254</sup> and to ease the process of recognizing certificates of Afghan returnees obtained abroad.<sup>255</sup> However, **these measures concentrate more on primary and secondary education and ignore the needs of returnee and IDP students who wish to pursue higher education in Afghanistan or who have earned their higher education abroad.**

**81. MoE adopted a detailed guideline in November 2016 entitled *Guidelines on Returnee Students* to address the challenges returnee students used to face in accessing schools.**<sup>256</sup> **Before the adoption of the Guideline,** the process for determining the class of returnee students and of evaluating their educational certificates earned abroad was complicated and lengthy. Returnee students' documents had to be attested by Directorate of Education (DoE) in Kabul and provinces.<sup>257</sup> Returnee students who claimed to be students of one of classes in secondary education but did not hold documents to prove it, had to travel to Kabul to take a test given by MoE following obtaining a document form MoRR.<sup>258</sup> If they did not pass the test, they had to wait six months before they could re-take the test.<sup>259</sup> **The Guidelines on Returnee Students provide for facilitated access to education for returnee students by instructing all DoEs to:**

- initially enroll returnee students in schools, regardless of whether or not they have educational documents;
- give them a three months period from the date of enrollment to bring educational documents. In case they or their parents cannot bring their documents within this period, MoE will request these documents through Ministry of Foreign Affairs and Afghan consulates in relevant countries; and
- introduce them to placement test in case their documents are not obtained after measures in paragraph b. above are exercised.<sup>260</sup>

82. The placement test is only available to students claiming to have studied up to 9<sup>th</sup> class or lower. Returnee students will be enrolled in the class they claim if their age matches with that class, they and will be allowed to take the annual test for that class. In case they pass the test, they will be formally enrolled in the next class. In case of failure, they will be formally enrolled to retake the class and continue their education. In addition, the Guidelines on Returnees Students also provides for accelerated class to those returnee students whose age is three years higher than the class they claimed to be student of.

**83. Despite being a positive step, the Guidelines on Returnee Students do not cover IDP students and does not contain mechanism for attestation of educational**

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<sup>252</sup> Id.

<sup>253</sup> Id.

<sup>254</sup> Id.

<sup>255</sup> Id.

<sup>256</sup> Islamic Republic of Afghanistan, Ministry of Education, Guidelines on Returnee Students, November 2016, a copy was provided by GoIRA.

<sup>257</sup> Rule of Procedure Rules of Procedure for Determining the Class of Returnees, paras. 1 and 2.

<sup>258</sup> Id. At para. 3.

<sup>259</sup> Id. At para. 10.

<sup>260</sup> Islamic Republic of Afghanistan, The Guidelines on Returnee Students.

**documents of returnees earned abroad. In addition, it seems to be concentrated only on returnees from Pakistan.** Although the Guidelines on Returnee Students make a general reference to all returnee students when instructing DoEs to enroll them in school, its concentration only on returnees from Pakistan when prescribing special measures creates confusion and makes it specific to returnees from Pakistan. It divides returnees into three categories, all of whom returning from Pakistan: 1) returnees who have studied in Afghan schools in Pakistan; 2) returnees who have studied in Pakistani schools in Pakistan as Afghan refugees; and 3) returnees who have studied in Pakistani school in Pakistan as citizens of Pakistan. This has created confusion on whether it applies to returnees from other countries, such as Iran and Tajikistan.<sup>261</sup> As said, IDP students' enrolment to schools is not governed by the Guidelines on Returnee Students and is subject to other guidelines.

84. The process for determining the class of those IDP students whose documents have been lost or destroyed requires *Tazkera* for different purposes, such as to prove that the age of the student at the time that he claims to have been student of a certain class matches that class.<sup>262</sup> School administrations and DoEs should certify the destruction or burning of the records and results.<sup>263</sup> This may require the IDP student to travel back to their place of origin to get the certification of the school and the relevant provincial DoE. By taking the test for determination of their class, these students will not be eligible to take the talent test through which students skip one class and get to a higher class for having special talent. In this regard, there is no mechanism for assisting those students who want to continue their studies in provinces other than their province of origin.

85. MoE has detailed guidelines for attesting educational documents of returnees obtained abroad, with specific focus on documents obtained in Iran and Pakistan. **According to these Guidelines, passport and *Tazkera* is a requirement for document attestation by relevant commission and, accordingly, returnees will not have their documents attested if they have not presented to the commission their *Tazkera* and Passport.**<sup>264</sup> This provision negatively affects returnees not holding Passport and *Tazkera*.

#### **Access to water, sanitation, educational facilities, healthcare and other services**

86. The rights to water and sanitation are integral parts of the right to adequate standard of living as protected by the international human rights treaties.<sup>265</sup> Afghanistan's national legislations, including the Constitution, do not explicitly mention the rights to water and sanitation. However, these rights can be implied to have been protected under the right to life guaranteed by Article 23 of the Constitution. The IDP Policy combines the rights to water with the rights to food and clothes under the Adequate Standard of Living section and obligates MoRR to ensure: "sufficient, continuous and safe water for personal and domestic use," and "sanitation facilities are secure and accessible to

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<sup>261</sup> Interview and consultations with DoE officials in Kapisa.

<sup>262</sup> Islamic Republic of Afghanistan, Rules of Procedure for Determining the Class of Students Whose Education Documents Have Been Destroyed, para. 2. A copy was provided by the GoIRA.

<sup>263</sup> Id. at para. 4.

<sup>264</sup> Islamic Republic of Afghanistan, The Guidelines on Attestation of Returnee Students Educational Documents, art. 2. A copy was provided by GoIRA.

<sup>265</sup> ICESCR, at Article 11(1); CRC, at Article 24(2)(c); Convention on the Elimination of All Forms of Racial Discrimination against Women, Article 14(2)(h).

all.”<sup>266</sup> Despite this, access to water and sanitation remains a challenge.<sup>267</sup> The CVRRP and the IDP Policy take initial steps in providing a policy framework for including returnees and IDPs into development initiatives, including the Citizens’ Charter. However, there is no such guarantee in case of asylum seekers and refugees due to lack of relevant legal framework. In addition, limited access to documentation for IDPs and returnees results in de facto exclusion from social services.

### Property rights, access to land and housing

87. **Land and property rights of returnees and IDPs are protected by a number of displacement specific laws and some substantive and procedural provisions of other laws that generally apply to all citizens.** The Constitution guarantees the right to own land (except for foreigners)<sup>268</sup> and protects land against seizure by state unless the seizure is for ensuring public interest and the owners is provided with prior and just compensation.<sup>269</sup> The Constitution requires national authorities to adopt “*necessary measures for housing and distribution of public estates to deserving citizens...*”<sup>270</sup>

88. The IDP Policy provides that IDPs have the right to own property (moveable and immovable), and the right to its restitution, or its compensation “*in case of displacement, demolition or destruction.*”<sup>271</sup> It mandates the government to provide land and housing to IDPs in both rural and urban areas and to ensure security of land tenure.

89. PD 104 establishes a Land Allocation Scheme (LAS) for IDPs and returnees which has also received recognition in the IDP Policy.<sup>272</sup> The LAS fails to establish clear and sufficient land and beneficiary selection criteria. It focuses more on the profile of beneficiaries than on vulnerability criteria and livelihood opportunities. By limiting the type of land to be distributed to sterile and dire lands, PD 104 and its LAS disregard the fact that returnees should be able to find livelihood opportunities and income generation. A joint NRC and Internal Displacement Monitoring Center (IDMC) report in 2014 found that many lands allocated under the LAS were considered to be unsuitable and located in isolated areas with no access to potable water, educational centers, basic infrastructure, and employment opportunities.<sup>273</sup> It also suffers from lack of capacity.<sup>274</sup> Furthermore, allocating lands according to areas of origin connects lands to the power structure in the province in question, either ethnically or politically. The experience of Sudan presents a good practice in this regard. The government of Sudan in 1970s adopted the policy of settling refugees near large farms in need of laborers, or in areas where land was available for cultivation. This meant that refugees had access to source of income and thus were able to achieve self-reliance.

### Box 9. The problem of land grabbing

<sup>266</sup> The IDP Policy, at § 7.1.5.

<sup>267</sup> Amnesty International, My Children Will Die this Winter-Afghanistan’s Broken Promise to The Displaced, supra note 128, at p. 34.

<sup>268</sup> The Constitution, at art. 41.

<sup>269</sup> Ibid. at art. 40.

<sup>270</sup> Ibid. at art. 14.

<sup>271</sup> The IDP Policy, at § 7.1.9.a.

<sup>272</sup> Ibid. at § 7.1.3.1 g.

<sup>273</sup> IDMC/NRC, Still at Risk: Security of Tenure and the Forced Eviction of IDPs and Refugee Returnees in Urban Afghanistan, February 2014, pp-14-16, available at: <https://www.nrc.no/globalassets/pdf/reports/still-at-risk---afghanistan.pdf> [accessed May 30, 2017]

<sup>274</sup> SIGAR 2015 ‘Afghan Refugees & Returnees: Corruption and Lack of Afghan Ministerial Capacity have prevented implementation of a Long Term Refugee Strategy’; Independent Joint Anti-Corruption Monitoring and Evaluation Committee, VCA Report on the Process of Land Distribution for Repatriations and Displaced People, October 2013, available at: <http://www.mec.af/files/VCAReportLanddistribution.pdf>.

**Afghanistan’s forced displacement legal and policy framework does not effectively guarantee land tenure security for IDPs and returnees.** Although land related laws restrict expropriation of private land only for public purposes, not until most recently did they define what constitutes public purpose.<sup>275</sup> In addition, they do not allow appealing a decision on ‘public purpose’ finding. More importantly, they do not apply to those IDPs and returnees who live on occupied lands. Furthermore, arbitrary deprivation of property and land grabbing has not been effectively addressed by forced displacement legal framework, resulting in forced evictions and widespread forceful grabbing of land,<sup>276</sup> including lands allocated for settlement of IDPs and returnees. The IDPs and returnees in urban areas live under the threat of forced eviction due to their informal settlement<sup>277</sup> and inefficient legal protection against forced eviction. In 2015, 1,430 people living in informal settlements in Kabul received verbal notice of eviction.<sup>278</sup> Land grabbing undermines the enjoyment of human rights of IDPs.

90. The IDP Policy defines land grabbing,<sup>279</sup> commits the government to hold perpetrators of land grabbing accountable,<sup>280</sup> and contains guidelines in Annex 4 for mitigating harm and suffering in cases of forced eviction. The 2017 Law on Managing Land Affairs penalizes land grabbing by clearly defining land grabbing and determining its punishment.<sup>281</sup> However, its provisions on land grabbing seem to be focused on lands presumed to be state lands.<sup>282</sup> In addition, due to bureaucratic obstacles in the formal legal system, land and property disputes are solved by informal justice system,<sup>283</sup> which often decides to the detriment of vulnerable groups and is reportedly exposed to pressure from influential individuals.<sup>284</sup>

**91. The land management laws undermine land tenure for IDPs and returnees who have possessed lands without legally valid documentation.** The land laws recognize the legal status of “land possessor” beside “land owner.” A land possessor is a person who lacks legally valid documentation to the land he/she holds.<sup>285</sup> The conditions for acquiring the status of land possessor status include: neighbors’ approval of the land possessor’s holding of the land for more than 15 years before 1978 (since 1964); existence of signs of agricultural development on the land; non-registration of the land in the principal book of state lands; and non-existence of other person’s possession on the land.<sup>286</sup> These conditions give rise to several obstacles, particularly for refugees, returnees and IDPs:

- The conditions upon which claims of possession can be made (for instance, approval of possessor’s holding by neighbors for a period of more than 15 years before 1978) are not adapted to those households that have possessed lands for a period which is less than the one mentioned required by the law due to forced displacement or other reasons and who do not have legal basis (either customary

<sup>275</sup> Islamic Republic of Afghanistan, Land Acquisition Law, Official Gazette (No. 1258, dated May 10, 2017) (public purpose is defined in Article 5. It is yet to be seen whether the Land Acquisition Law will actually be implemented).

<sup>276</sup> UNHCR, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan, April 19, 2016, HCR/EG/AFG/16/02, at 77.

<sup>277</sup> IDMC/NRC, Afghanistan: As Humanitarian Space Shrinks, IDP Policy Must be Implemented, June 19, 2014, p. 10.

<sup>278</sup> OCHA, Afghanistan Humanitarian Bulletin, Issue 40 (01-30 May 2015), p.1, available at: [http://reliefweb.int/sites/reliefweb.int/files/resources/mhb\\_may\\_final.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/mhb_may_final.pdf).

<sup>279</sup> The IDP Policy, § 1.2 (a). (Land grabbing is defined as “the acquisition of land, often through illegal means and/or at prices well below the market value.”)

<sup>280</sup> Ibid. at § 5.1.1.b.

<sup>281</sup> Islamic Republic of Afghanistan, The Law on Managing Land Affairs, arts. 96 and 97.

<sup>282</sup> Ibid. at art. 92.

<sup>283</sup> Independent Joint Anti-Corruption Monitoring and Evaluation Committee, ‘Report of the Public Inquiry into Land Usurpation,’ November 2014, p. 36. (The Report found out that 58-80% of disputes are resolved beyond the formal legal system).

<sup>284</sup> Ibid. at 38.

<sup>285</sup> The Law on Managing Land Affairs, at art. 3(5).

<sup>286</sup> Ibid. art. 19.

or formal) to their acquired lands. This group of people includes a huge number of Afghans who have moved to urban areas during different phases of the past four decades of war, including IDPs. It also includes returnees who have occupied public lands after their return due to their need for land and housing.

- The requirement that land be under development or cultivation negatively affects the rights of IDPs and returnees who may not be able to cultivate or conduct agricultural activities on their land due to lack of access to their lands.

## **INSTITUTIONAL FRAMEWORK**

### **Relevant institutions**

92. The adoption of the IDP Policy, the CVRRP, the National Policy Framework, and other relevant policy instruments is a big achievement, especially in a time that IDPs and returnees face a challenging space due to increased conflict. However, successful realization of the policy framework requires political will and systematic commitment by all lead implementing agencies. There is no single organization responsible for addressing forced displacement in the Afghanistan. Various organizations are directly or indirectly involved in forced displacement issues.

93. **The National Leading Committee**,<sup>287</sup> which is constituted of 15 ministries and 7 independent agencies, is chaired by MoRR with UNHCR as its secretariat. It was recently established within the framework of the SSAR for organizing repatriation and reintegration.<sup>288</sup>

94. **International Quadripartite Leading Committee.** It was established under the framework of SSAR and is constituted of Islamic Republic of Afghanistan, Islamic Republic of Iran, Islamic Republic of Pakistan and UNHCR. It serves as a platform for coordinating resource mobilization efforts for implementing SSAR in the regional level.

95. **The High Commission on Migration.** The High Commission on Migration and the Council of Ministers' Sub-Committee on Migration Affairs were both established in 2015 to provide political leadership in formulating response to forced displacement. The High Commission on Migration, which is the highest state institution concerning major policies and programs for forced displacement, is a decision-making body directly supervised by the President.<sup>289</sup> Its creation indicates existence of political will at the highest level of the GoIRA (Office of the President) for addressing forced displacement. MoRR conducts executive affairs of the High Commission on Migration.<sup>290</sup>

96. **Council of Ministers' Sub-Committee on Migration Affairs.** It is one of the nine subcommittees of the Council of Ministers within the framework of the Office of Chief Executive Officer with the responsibility of implementing the decisions of the High Commission on Migration, the Cabinet, and the Council of Ministers regarding forced

<sup>287</sup> During the 4<sup>th</sup> Quadripartite meeting of SSAR, it was decided that leading committees be established in Iran, Pakistan, and Afghanistan to facilitate exchange of information.

<sup>288</sup> The CVRRP, at para. 1.1.

<sup>289</sup> MoRR's Strategic Plan, at p. 6.

<sup>290</sup> Ibid. at p. 28.

displacement.<sup>291</sup> It is constituted of ministers and directors of independent agencies with membership in the High Commission on Migration and is led by Chief Executive Officer.

**97. Displacement and Return Executive Committee (DiREC).** DiREC was established in November 2016 to coordinate efforts of both government institutions as well as other actors regarding provision of immediate response and durable solutions to IDPs and returnees. It is chaired jointly by the MoRR, Office of the Chief Executive and UNAMA and oversees the overall coordination of response to displacement.<sup>292</sup> It is assisted by three working groups: Policy Support Working Group; Technical Working Group; and Finance Working Group.

**98. Inter-Ministerial Committee on Refugees, Returnees, and IDPs (IMCC).** IMCC, which is chaired by MoRR, has been established to coordinate inter-ministerial activities in implementing the IDP Policy and ensure the needs of IDPs are included in sectoral policies and programs of other ministries.<sup>293</sup>

**99. National High Commission for Disaster Management (NHCDM).** NHCDM (previously known as National Commission for Emergency and Disaster Management), which is constituted relevant ministries, is chaired by Vice-President and has the responsibility to coordinate disaster response, preparedness and disaster risk reduction.<sup>294</sup> It the highest decision making entity concerning policy directions for disaster risk and vulnerability reductions. In the provincial level, NHCDM works through its Provincial Disaster Management Committees (PDMCs) and their district-level counterparts. PDMCs are established under the supervision of the governor and their district-level counterparts and consist of representatives from member ministries and agencies at the subnational level.

**100. Afghanistan Natural Disaster Management Authority (ANDMA).** ANDMA, now a ministerial body, is responsible for implementing the decisions of the NHCDM and for addressing the short-term needs of persons who have been displaced and affected by natural disasters.<sup>295</sup> It is also responsible to coordinate the activities of line ministries and regional activities in provincial level concerning disaster risk reduction and management. ANDMA has faced challenges in coordination with the central government. In addition, it lacks the technical expertise to guide communities at risk of earthquakes and landslides. In 2011, ANDMA launched a national Disaster Risk Reduction Action Plan to address the risk of future disasters and climate change in a comprehensive and cohesive manner.<sup>296</sup> So far, there have been no remarkable evidence of the implementation of the Action Plan. ANDMA is assigned with the responsibility of providing protection and assistance to victims of forced displacement due to natural disasters.

**101. Afghanistan Protection Cluster.** It came into existence as a result of the “cluster approach” rolled out in 2008 to enhance humanitarian response to forced displacement situations by designating key agencies with leadership roles in a specific

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<sup>291</sup> Ibid. at p. 6; the CVRRP, at para. 1.1.

<sup>292</sup> The DiREC is constituted of the following: Office of the President, Office of the Chief Executive, MoRR, UNAMA, National Security Council, Ministry of Finance, ARAZI, World Bank, UNHCR, IOM and OCHA.

<sup>293</sup> The IDP Policy, at § 4.3.1.

<sup>294</sup> Ibid. at § 4.3.3.

<sup>295</sup> Ibid. at § 4.3.2.

<sup>296</sup> Islamic Republic of Afghanistan, Afghanistan National Disaster Management Authority, Afghanistan Strategic National Action Plan (SNAP) For Disaster Risk Reduction: Towards Peace and Stable Development, March 2011, available at: [http://www.preventionweb.net/files/31182\\_snapfinalversion-230.pdf](http://www.preventionweb.net/files/31182_snapfinalversion-230.pdf) [accessed May 29, 2017]

sector. The cluster system includes six clusters: Emergency Shelter and Non-Food Items; Food Security and Agriculture; Health; Nutrition; Water and Sanitation, and; Afghanistan Protection Cluster. UNHCR chairs the Afghanistan Protection Cluster (APC),<sup>297</sup> while MoRR leads the National IDP Task Force,<sup>298</sup> as an APC sub-cluster aimed to enhance protection of IDPs.<sup>299</sup> The National IDP Task Force<sup>300</sup> works in the national level and coordinates with Regional IDP Task Forces in addition to assisting other protection mechanism. Additionally, the Refugee and Returnees Chapter (a multi-sector cluster until 2014), co-chaired by UNHCR and IOM with its membership drawn from a wide range of humanitarian actors, tries to coordinate humanitarian response Afghan refugees and returnees from Pakistan and Iran.

102. **MoRR.** It is responsible for coordinating issues relating to refugees, returnees as well as IDPs with other actors, including international organizations and civil society. It is assigned as the institutional focal point for addressing internal displacement and has participatory role in formulating and implementing policy response to forced displacement.<sup>301</sup> It has the responsibility to address the situation of Afghan refugees in host countries; promote voluntary repatriation; facilitate returnee's reintegration; address the situation of IDPs after the emergency situation has ended; and provide effective social and legal services to refugees, returnees and IDPs. In the provincial level, MoRR works through its provincial directorates. MoRR's Office of the Deputy Minister for Refugees was created on February 2016 to manage issues related to asylum seekers, Afghan refugees, and returnees.<sup>302</sup> MoRR chairs the IDP Policy Working Group, the IMCC, and the IDP Task Force.<sup>303</sup> The IDP Task Forces are currently active in the Eastern region (*Nangarhar/Jalalabad*), in the Northern region (*Balkh/Mazar and Maymana*), in the North-East region (*Kunduz*), in the Western region (*Herat*), in the South (Kandahar).

103. **The IDP Policy Working Group.** It has been established to guide the implementation of the IDP Policy. It is constituted of Office of Administrative Affairs of the President, the Office of the First Lady, ANDMA, MoRR, UN agencies and the NRC.<sup>304</sup>

104. **Ministry of Rural Rehabilitation and Development (MRRD).** MRRD plays a major role in coordinating disaster risk reduction activities between government and the humanitarian organizations. It provides disaster response by mobilizing and facilitating resources for those affected, including the provision of food, drinking water, clothing and shelter.

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<sup>297</sup> The Afghanistan Protection Cluster is chaired by UNHCR and co-chaired by NRC. The Afghanistan Protection Cluster is constituted of: the IDP Task Force; the Land, Housing and Property Task Force; The Child Protection and Children in Armed Conflict (UNSC 1612) Sub-Cluster; and the Gender-Based Violence Sub-Cluster.

<sup>298</sup> The IDP Policy, at § 4.2.c.ii.

<sup>299</sup> Brookings-Bern Project on Internal Displacement and NRC, *Realizing National Responsibility for the Protection Internally Displaced Persons in Afghanistan: A Review of Relevant Laws, Policies, and Practices*, November 2010, p. 16, available at: [http://www.operationspaix.net/DATA/DOCUMENT/4432-v~Realizing\\_National\\_Responsibility\\_for\\_the\\_Protection\\_of\\_Internally\\_Displaced\\_Persons\\_in\\_Afghanistan\\_A\\_Review\\_of\\_Relevant\\_Laws\\_Policies\\_and\\_Practice.pdf](http://www.operationspaix.net/DATA/DOCUMENT/4432-v~Realizing_National_Responsibility_for_the_Protection_of_Internally_Displaced_Persons_in_Afghanistan_A_Review_of_Relevant_Laws_Policies_and_Practice.pdf) [accessed May 27, 2017]

<sup>300</sup> In addition to MoRR, other members of the IDP Task Force include: International Organization for Migration (IOM), NRC, Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Children's Fund (UNICEF), and the World Food Program (WFP).

<sup>301</sup> The IDP Policy, at § 4.2 a.

<sup>302</sup> Decree No. 215/466 of the President of the Islamic Republic of Afghanistan.

<sup>303</sup> Other members of the IDP Policy Working Group include: UNHCR, OCHA, IOM, NRC, AIHRC, ACBAR, Afghan Women's Network, IDP representatives, Kuchi Council, IDLG, Focal Points of all Ministries members of the IMCC, Red Cross Movement (as observers) plus other co-opted on an ad hoc basis.

<sup>304</sup> Samuel Hall, "Policy Brief: National Policy on IDPs in Afghanistan," March 2015, p. 6.

105. A Joint Committee consisting of MoRR, Ministry of Urban Development Affairs and Housing, Independent Directorate of Local Governance (IDLG), and Afghanistan Independent Land Authority- ARAZI has the responsibility for refugee settlements' need assessment and prioritization.<sup>305</sup>

106. In Afghanistan, UNHCR leads the Protection Cluster, the Shelter/Non-Food Items Cluster, and has also co-chaired the IDP Task Forces with the MoRR.<sup>306</sup> In addition, UNHCR provides “[e]mergency medical services, vaccinations, nutrition screening, assistance with school enrolment, referrals for legal assistance, as well as mine risk awareness education.”<sup>307</sup>

107. **Other Actors.** Some other international organizations and non-governmental organizations are also involved in providing protection and assistance to refugees, returnees and IDPs in Afghanistan. They include but are not limited to: Representative of the UN Secretary-General for the Human Rights of Internally Displaced Persons; United Nations Office for the Coordination of Humanitarian Affairs; IOM; and NRC.

### **Institutional Framework Challenges**

108. **The national forced displacement legal and policy framework fails to provide clear allocation of roles and responsibilities between different institutions.** The direct and indirect involvement of various organizations in addressing forced displacement has resulted in red tape, bureaucracy and poor coordination. Some organizations lack capacity to implement their obligations. Local authorities view protection as a provincial, rather than national matter. They consider their responsibilities to be limited to protecting only those who originate from their relevant province.<sup>308</sup> Provincial governments also resist supporting durable solutions to IDPs in their provinces.<sup>309</sup> There are two types of national coordinating bodies with the mandate of promoting inter-ministerial and cross-sectoral coordination in addressing forced displacement with no clear delineation of roles and responsibilities between them: those specifically tasked by the IDP Policy (IMCC, ANDMA, NHCMD), and those established by GoIRA to address forced displacement in general (the High Commission on Migration, the Sub-Committee of the Ministers Council, DiREC). The latter have not been predicted by the IDP Policy, while the policy instruments establishing them do not make reference to the institutions established by the IDP Policy.

109. The inability of the MoRR to coordinate on national level and the weak role of Directorate of Refugees and Repatriation (DoRRs) in provincial protection measures, coupled with the unwillingness of local authorities to feel responsible for the protection of Afghans, inhibit successful implementation. Almost all DoRRs, except *Herat, Kandahar, and Ghazni*, lack administrative buildings and work from rental houses.<sup>310</sup>

110. In cases of displacement by natural disasters, ANDMA has the leading role of providing emergency protection. However, it is not clear which department is

<sup>305</sup> Report on MoRR's achievements during 1395 (2016) and programs for year 1396 (2017) submitted to the House of Representatives, at p. 2.

<sup>306</sup> UNHCR, Afghanistan- Internally Displaced Persons, available at:

<http://www.unhcr.af/Applications/SitePages/Default.aspx?idx=0&sitepageid=33> [accessed February 25, 2017].

<sup>307</sup> UNHCR, Repatriation of Afghan Refugees from Pakistan, Revised Supplementary Appeal (September- December 2016), October 28, 2016), at 7.

<sup>308</sup> Brooking-Bern Project on Internal Displacement- TLO (2010), Beyond the Blanket, supra note 5, at. 44.

<sup>309</sup> SIGAR, Efforts to Support Afghan IDPs, SIGAR 16-47-AL, July 25, 2016, p. 6.

<sup>310</sup> Islamic Republic of Afghanistan, Report on Activities and Achievements of the MoRR during the 1395 solar year, p. 11, available at: <http://morr.gov.af/Content/Media/Documents/morr.gov.af2832017132628979553325325.pdf>. [in Dari]



responsible for emergency assistance in cases of displacement caused by reasons other than natural disasters.

111. At the provincial level, the governors are responsible for emergency response,<sup>311</sup> while coordination between governors and ANDMA is weak due to lack of direct mutual communication between the two in addressing emergency response.<sup>312</sup> ANDMA is responsible for emergency response, but emergency funding goes to MoRR.<sup>313</sup> MoRR leads the Land Allocation Commission in the national level, which has the responsibility to coordinate activities of relevant agencies in the capital and provinces.<sup>314</sup> However, the land allocation commissions in the provincial level are led by deputy governors.<sup>315</sup> With the deputy governors directly responding to the IDLG and having low level of mutual communication with MoRR, it is hard for the later to fully guide coordination and flow of information to the provinces. Provincial authorities cannot coordinate their activities directly with MoRR, the focal point for the IDP Policy; they shall do so through IDLG.<sup>316</sup> These factors have resulted in multiple institutions performing the same or similar functions concerning forced displacement.

112. There is a lack of communication between MoRR and its national and international counterparts.<sup>317</sup> Low level of cooperation between MoRR and other line ministries has also challenged MoRR's ability to fulfill its obligations under the forced displacement legal and policy framework. The current level of cooperation between MoRR and the security institutions with respect to protecting refugee settlement towns from local power holders is low.<sup>318</sup> Likewise, there has been low-level cooperation between Ministry of Finance and MoRR regarding allocation of sufficient financial resources to MoRR. In addition, MoRR is also complaining about justice sector institutions' low-level cooperation with MoRR in restituting returnees' lands that have been forcefully grabbed.<sup>319</sup>

113. MoRR's capacity to fulfil its obligation under the Solutions Strategy, the IDP Policy and other laws is limited. For instance, MoRR has been unable to effectively distribute lands for eligible IDPs and returnees. No financial resources have been allocated for implementation of the IPD Policy.

114. Afghanistan Protection Cluster only concentrates on IDPs and fails to include protection to refugees and returnees. ANDMA and other disaster management agencies have been unable to manage disasters effectively and to reduce disaster risk.<sup>320</sup> The worsening security situation has restricted humanitarian actors' access to conflict-affected areas.

**115. MoRR lacks technical capacity and financial resources to implement its commitments under the legal framework.**<sup>321</sup>

**116. Other line ministries appear to be facing implementation challenges.** Under the IDP Policy, line ministries are required to incorporate into their plans and

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<sup>311</sup> The IDP Policy, at § 4.4.2.1.i.

<sup>312</sup> According to Section 4.4.2.c of the IDP Policy, the governors are required to coordinate their actions through IDLG with MoRR.

<sup>313</sup> The IDP Policy, at § 8.2.2d

<sup>314</sup> PD 104, art. 10(4)

<sup>315</sup> *Ibid.* at art. 7.

<sup>316</sup> The IDP Policy, at § 4.4.2(c)

<sup>317</sup> MoRR Strategic Plan, p. 18.

<sup>318</sup> Report on Activities and Achievements of the MoRR during the 1395 solar year, at p. 11

<sup>319</sup> *Id.*

<sup>320</sup> AIHRC, Report on the Situation of IDPs in Afghanistan, 2015.

<sup>321</sup> Amnesty International, My Children Will Die this Winter-Afghanistan's Broken Promise to The Displaced, *supra* note 128, at p. 23.

programs “the specific needs of IDPs.”<sup>322</sup> As part of this obligation, line ministries shall request funds in their annual budget for addressing the needs of IDPs.<sup>323</sup>

***Box 9. Weak implementation, conflict, gaps in the institutional framework, and weak rule of law***

Although MoRR serves as the main central authority on issues relating to forced displacement, there are several other ministries and agencies involved in addressing forced displacement, with weak communication and coordination with each other. Struggling with insufficient financial resources and lack of capacity, MoRR has not been successful in effectively coordinating activities of other services agencies and ministries as well as international actors both in the national as well as provincial level.

Lack of clear division of roles and responsibilities across different institutions, poor coordination across various ministries and other actors over forced displacement, limited resources, and weak institutional capacity have constrained the implementation of the commitments made in the forced displacement legal framework. In practice, IDPs, who mostly move to urban area, have limited access to employment opportunities due to “their rural skillset and low literacy rate.”<sup>324</sup> Although the law guarantees the right of IDPs and returnees to access documentation, they still face problems in accessing documents, such as *Tazkera*. The IDPs and returnees are entitled to land, but under strict conditions which makes it almost impossible for them to acquire land.

To address these problems, GoIRA has recently established the **High Commission on Migration**, led by the President of the Islamic Republic of Afghanistan (the President), the Council of Ministers’ Sub-Committee on Migration Affairs, and the DiREC, led by Chief Executive Officer of the Islamic Republic of Afghanistan, as the highest decision making bodies on issues relating to forced displacement to ensure effective coordination across different institutions and ministries. **The creation of these agencies is a positive step as indication of political will in the highest level of the government to address displacement and has the potential to improve coordination across different agencies in implementing the legal and policy framework.** As these two newly established entities have recently started their operation, it remains to be seen what effects they will have in ensuring effective coordination. In Addition, GoIRA is in the process of finalizing a Technical Procedure to facilitates access to suitable land for eligible IDPs and returnees.

117. The establishment of the High Commission on Migration, the Sub-Committee of Ministers’ Council and the DiREC aims to bring all line ministries and other actors together under the leadership of the President and the Chief Executive Officer. While the establishment of these two high level entities has a potential to address the problem of lack of coordination among line ministries and other actor on forced displacement, it is too early to assess their exact impact.

<sup>322</sup> IDP Policy, p. 25.

<sup>323</sup> Samuel Hall/IDP Policy Working Group, IDP Policy Brief, pp. 8 and 10.

<sup>324</sup> UNHCR, 2017 Humanitarian Needs Overview-Afghanistan, supra note 12, at p. 14.

## CHAPTER 3: PUBLIC POLICY RECOMMENDATIONS

118. **Afghanistan has a long history of forced displacement connected with armed conflict and instability.** The current forced displacement situation and the surge in return of Afghan refugees constitute a humanitarian situation in need of immediate attention by the GoIRA and the international community. A significant number of returnees are victims of political tensions between Afghanistan and its neighboring countries. The number of IDPs and returnees is striking, projected to increase in 2017.

119. **Afghanistan is bound by its commitments under international law to provide protection to forcibly displaced persons, most notably refugees and asylum seekers.** The country is party to a wide range of international human rights and humanitarian law treaties, the UN Charter, the Rome Statute, and several bilateral readmission agreements, declarations and other initiatives with other countries in the region and the rest of the world. In addition, it has recognized and incorporated the UN Guiding Principle into its domestic policy on internal displacement.

120. **Afghanistan's current forced displacement legal and policy framework has evolved over time,** by striving to provide comprehensive and effective response to forced displacement, most importantly by extending protection to IDPs through National IDP Policy, the CVRRP and the National Policy Framework.

121. **Despite all these positive development, more remains to be done in order to extend protection to asylum seekers, refugees, and stateless persons in line with international standards.** There is no national refugee legislation and Afghanistan has not ratified international conventions regarding stateless persons. This leads to: ad-hoc and temporary approaches to the management of refugees, exposure of refugees to changes in political and security conditions; and lack of awareness among law enforcement agencies on the rights and duties of refugees.

122. **The existing forced displacement legal and policy framework has not addressed all the challenges that the forcibly displaced persons face,** particularly in terms of access to documentation, access to land, registration, protection from arbitrary displacement and forced eviction, access to education, and freedom of movement.

123. **Efforts are being made to address the gaps and challenges of the current land distribution scheme to IDPs and returnees.** GoIRA is finalizing the draft Technical Procedure to replace PD 104. While the draft Technical Procedure addressed most of PD 104 challenges, it still needs some improvement such as proposing well designed mechanism to avoid people masquerading as IDPs.

124. **GoIRA has undertaken positive steps to facilitate returnee students' access to education.** The Guidelines on Returnee Students adopted by the MoE eliminates most of barriers on returnee students' access education. More steps are needed to do so with regard to IDP students.

125. **Despite the improvements made regarding the forced displacement legal and policy framework, its implementation has been challenged by institutional deficiencies.** On the one hand, the adoption of numerous legislative and policy instruments to address forced displacement and creation of several institutions to implement them reflect government's political will to address forced displacement. On

the other, the proliferation of by-laws and institutional structures indicates shortcomings in ensuring cohesive legal and policy response to forced displacement and in avoiding confusion arising from rapidly changing regulations. In addition, **there is a significant lack of data on forced displacement.**

The following areas require amendments to bring Afghanistan's forced displacement legal framework in line with international standards: (i) protection for refugees, asylum seekers, and stateless persons; (ii) facilitation of access to civil documentation; (iii) protection from arbitrary displacement and forced eviction; (iv) ensuring land and property rights; and (v) addressing the gaps of the institutional framework.

### **Recommendations:**

#### **It is advisable that the GoIRA undertake certain steps in ensuring effective institutional framework in the area of forced displacement**

- 1- Ensure that institutions responsible for implementation of Afghanistan's forced displacement legal and policy framework are provided with sufficient resources.
- 2- MoRR's role needs to be revised in different policies to ensure its role as the institutional focal point for IDPs.
- 3- Revise laws and policies to ensure clear division of roles and responsibilities across institutions tasked with the implementation of the forced displacement legal and policy framework.
- 4- Establish a comprehensive database for gathering information and data regarding forced displacement in line with the IDP Policy and other relevant laws and by-laws.

#### **It is advisable that the GoIRA undertake certain steps to ensure improvement and effective implementation of the existing forced displacement legal framework.**

#### **Public policy recommendations regarding legislation**

- 1- Accelerate efforts to adopt comprehensive legal and policy framework on forced displacement in line with international standards.
- 2- Consider adopting national refugee law in order to comply with the provisions of the 1951 Refugee Convention and its Protocol.
- 3- Consider revising the relevant legal and policy framework to provide protection to stateless persons and guarantee their rights in line with international norms and standards, including the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Not having acceded to these conventions negatively affects stateless persons as the current legal framework of Afghanistan puts strict conditions for acquiring citizenship, including the requirement of having lived in Afghanistan for more than five years.

- 4- Accelerate adoption of the Technical Procedure and ensure it sets a transparent mechanism for determining eligible IDPs and returnee through the alternate evidence of proof it recognizes. Attention also needs to be given to ensure the Technical Procedure contains provision regarding IDPs with a displacement period of less than 10 years. The Technical Procedure also needs to elaborate on citizenship verification for head or heads of family units who is/are over 16 years old but younger than 18 years old.
- 5- Revise the definition of IDPs in the IDP Policy to include returnees who cannot return to their place of origin or residence due to natural disasters and development projects.
- 6- Amend legislation to ensure displaced people have access to documentation and the ability to replace lost or damaged documentation. Accelerating the initiation of *e-Tazkera* distribution can be helpful in many ways.
- 7- Take measures to prevent arbitrary displacement, including criminalizing arbitrary displacement in accordance with the Rome Statute and prosecuting individuals who commits acts of forced displacement.
- 8- Harmonize legislations by revising laws and by-laws to be in alignment with the IDP Policy, the CVRRP, and the National Policy Framework.
- 9- Eliminate legal provisions that require IDPs and returnees to travel to their places of origin to get access to services and obtain or renew identity documents.

**Public policy recommendations regarding implementation**

- 10- Consider inclusion of registered asylum seekers and refugees in social services, including access to healthcare and education.
- 11- It is advisable that the MoRR, in coordination with UNHCR and other stakeholders, conduct an assessment that identifies the needs of IDPs and returnees and develop a timeframe to address them as required by the CVRRP and SSAR.
- 12- Ensure that effective registration system is in place for IDPs and returnees as prescribed by the IDP Policy, the National Policy Framework, and the CVRRP.
- 13- Address as a matter of priority the short and immediate needs of IDPs and returnees, including shelter, food, water and land, and to seek international assistance if necessary.
- 14- It is advisable that the High Commission on Migration ensure that ministries leading National Priority Programs (NPPs) incorporate the needs of IDPs and returnees in their relevant NPPs.
- 15- It is advisable that the High Commission on Migration, DiREC, and Council of Ministers' Sub-Committee on Migration Affairs ensure that: a) Ministry of Finance provides sufficient resources to MoRR as mandated by the IDP Policy;

and b) line ministries incorporate actions for addressing the needs of forcibly displaced persons into their annual budget.

- 16- Ensure effective land management by establishing effective land registration system that protects proprietary rights, facilitates land transfers, prevents forced eviction of IDPs and returnees, and enables land to be used as a guarantee for loan.
- 17- Adopt necessary measures to ensure land, homes, and other properties left behind by the forcibly displaced people protected against destruction, unlawful occupation and land grabbing.
- 18- Establish independent, transparent, and non-discriminatory mechanism for the restitution of properties unlawfully taken or occupied from IDPs and returnees, and request cooperation and assistance from international actors in this regard.
- 19- Establish an effective and independent property dispute resolution mechanism to hear property disputes of forcibly displaced persons.
- 20- Provincial action plans are urgently needed to ensure IDPs' access to durable solutions in accordance with the IDP Policy.
- 21- Ensure specific budget lines are allocated in the annual budget of ministries for activities aimed at addressing specific needs of forcibly displaced persons in the country.

**The global community and the international humanitarian and development stakeholders are called upon to adhere to the following principles:**

- 22- The international community should increase its advocacy to ensure voluntary, safe, dignified, and phased returns.
- 23- Considering the lack of resources and capacity of the GoIRA, international humanitarian and development actors need to provide support for implementation of the forced displacement legal and policy framework.
- 24- The DiREC, international organizations, and other relevant institutions should organize training programs on the rights and needs of IDPs and returnees and the responsibilities of different ministries and organizations outlined in the IDP Policy, the CVRRP and the National Policy Framework.

## Appendix I. Development Initiatives

1. The National Policy Framework considers measures to include returnees and IDPs, including the newly-arrived, into local representative bodies including Community Development Councils (CDCs). MoRR has developed memoranda of understanding with ministries responsible for implementing different NPPs to ensure the needs of returnees and of the host communities are included NPPs.<sup>325</sup> These memoranda<sup>326</sup> require MoRR to identify the needs of returnees, communicate them with relevant ministries, and reassess the needs annually.
2. **ANDS.** Afghanistan developed ANDS in 2008 as Afghanistan's national poverty reduction strategy adopted based on Afghanistan's development goals for a period of 15 years. It reflected Afghanistan's commitment to reduce poverty and improve development. **ANDS** included a refugee sector strategy which was the overarching development framework for reintegration of refugees in Afghanistan. ANDS expired in 2013 and was adjusted at the 2014 London Conference on Afghanistan,<sup>327</sup> where the NUG presented the 'Realizing Self-Reliance' reform strategy.<sup>328</sup>
3. **Afghanistan National Peace and Development Framework (The Self-Reliance Strategy).** ANPDF outlines Afghanistan's vision to achieve self-reliance by building a productive and broad-based economy, creating jobs, eliminating corruption and violence, and promoting rule of law. This vision will be achieved through the NPPs,<sup>329</sup> which are outcome-based development strategies in different fields involving different ministries. The NPPs try to promote sub-national governance and community engagement in order to enhance access to basic services. NPPs in the fields of education, health, water, rural development, and capacity building are crucial for successful voluntary return and reintegration of Afghan refugees as well as IDPs. **Citizens' Charter** is one of the NPPs under the ANPDF aimed at promoting inclusive development. It commits the government to provide Afghans with basic services, based on their prioritization. These services include but are not limited to: access to clean drinking water; quality education in state schools; and healthcare.

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<sup>325</sup> The CVRRP, at para. 1.1.

<sup>326</sup> These memoranda number up to 10.

<sup>327</sup> The Islamic Republic of Afghanistan and the International Community along with other partners, met on 4 December 2014 in London to reaffirm and consolidate their partnership. They renewed their commitment to the Tokyo Mutual Accountability Framework (TMAF) and GoIRA presented a reform strategy built around regional connectivity, good governance, and investments in productivity.

<sup>328</sup> Realizing Self-Reliance: Commitments to Reforms and Renewed Partnership', London Conference on Afghanistan in December 2014.

<sup>329</sup> NPPs are a set of priority program announced in Kabul Conference of 2010.

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