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## Realizing National Responsibility for the Protection of Internally Displaced Persons in Afghanistan: A Review of Relevant Laws, Policies, and Practices

Brookings-Bern Project on Internal Displacement and  
The Norwegian Refugee Council

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The Project on Internal Displacement at Brookings was created to promote a more effective national, regional, and international response to this global problem and to support the work of the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons in carrying out the responsibilities of the mandate. The Project monitors displacement problems worldwide, promotes the dissemination and application of the Guiding Principles on Internal Displacement, works with governments, regional bodies, international organizations and civil society to create more effective policies and institutional arrangements for internally displaced persons (IDPs), convenes international seminars on internal displacement, and publishes major studies, articles and reports. The Brookings Institution is a private nonprofit organization devoted to research, education, and publication on important issues of domestic and foreign policy. Its principal purpose is to bring the highest quality research and analysis to bear on current and emerging policy problems. Interpretations or conclusions in Brookings publications should be understood to be solely those of the authors.

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The analysis and recommendations presented in this report are based on key informant interviews combined with a desk study of existing and available laws, policies, and other materials obtained by the author. Interviews with representatives of the Government of the Islamic Republic of Afghanistan, Afghan civil society organizations, international organizations, and international military forces were conducted in Afghanistan in April 2010. Records of relevant sources of authority and interviews are on file with the Brookings Institution.

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## ACRONYMS

AIHRC	Afghanistan Independent Human Rights Commission
ANA	Afghan National Army
ANDMA	Afghanistan Natural Disaster Management Authority
ANSF	Afghan National Security Forces
ANP	Afghan National Police
APC	Afghanistan Protection Cluster
ARCS	Afghan Red Crescent Society
DoRR	Department of Refugees and Repatriation (provincial counterpart of MoRR)
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Person
IOM	International Organization for Migration
ISAF	International Security Assistance Force
MoRR	Ministry of Refugees and Returnees
MRRD	Ministry of Rural Rehabilitation and Development
NGO	Non-governmental Organization
NRC	Norwegian Refugee Council
UN	United Nations
UNAMA	United Nations Assistance Mission to Afghanistan
UNHCR	United Nations High Commissioner for Refugees
UNOCHA	UN Office for the Coordination of Humanitarian Affairs
US	United States

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## INTRODUCTION

The *Guiding Principles on Internal Displacement* are universally recognized as the normative starting point for developing laws, policies, and practices at the national level for the protection of IDPs.<sup>1</sup> In addition to affirming the fundamental rights and freedoms of those who have been displaced within the borders of their own countries, the *Guiding Principles* make clear that national authorities are responsible for protecting these rights and for facilitating durable solutions for the internally displaced. The *Guiding Principles* provide that national authorities have the “primary duty and responsibility” to protect and assist victims of internal displacement.<sup>2</sup> While international actors have a role to play, it is generally construed in most situations of internal displacement as subsidiary to that of the national authorities.

The framework for protecting the human rights of IDPs established by the *Guiding Principles* is based on the fundamental principle of “sovereignty as responsibility.” At its core, this principle recognizes the general right of sovereign and independent states to govern themselves and manage their own affairs without unwarranted external interference. However, sovereignty is no longer viewed in absolute terms or as a license to govern unjustly and inhumanely. Exercising sovereignty within the contemporary system of international relations entails a duty to do so in a responsible manner.<sup>3</sup> This requires states to respect human rights and to provide protection and assistance to everyone within their borders. IDPs are no exception. The legal protection of their human rights is a responsibility of national authorities that must be fulfilled. Moreover, because internal displacement gives rise to particular needs, special measures should be taken to address these needs and ensure that IDPs are treated equally and without discrimination.<sup>4</sup>

In situations of internal displacement, such as that found in Afghanistan, exercising national sovereignty in a responsible manner and protecting the rights and freedoms of IDPs can be a complex challenge. Although the *Guiding Principles* underscore that national authorities have the primary duty to protect and assist IDPs, this instrument does not provide specific guidance to national authorities on what concrete steps should be taken in order to fulfill this duty. The *Guiding Principles* is focused first and foremost on affirming the rights enjoyed by those who have been displaced as well as the general obligations of national and other authorities towards them. It is not intended to serve as a technical or operational guide for preventing displacement,

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<sup>1</sup> The *Guiding Principles on Internal Displacement* has been referenced by or otherwise has shaped the laws and policies of about 20 countries. Similarly, the *Guiding Principles* has also been referenced by regional instruments in Europe, Africa, and the Americas. In addition, the 2005 World Summit Outcome document recognizes the *Guiding Principles* as an “important international framework for the protection of internally displaced persons.” See para. 135, *2005 World Summit Outcome*, Resolution of the General Assembly, UN Doc. A/RES/60/1, September 2005.

<sup>2</sup> Principle 3.1, *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2.

<sup>3</sup> See Francis M. Deng, *PROTECTING THE DISPOSSESSED: A CHALLENGE FOR THE INTERNATIONAL COMMUNITY*, Brookings Institution Press, 1993, at 14-20; Roberta Cohen and Francis M. Deng, *MASSSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT*, Brookings Institution, 1998, at 275-280. See also para.139, United Nations, 2005 World Summit Outcome; *Report of the International Commission on Intervention and State Sovereignty: The Responsibility to Protect*, International Development Research Centre, Ottawa, December 2001.

<sup>4</sup> The prescription of positive and special measures to protect particularly vulnerable groups is supported by established principles of international human rights law. See, for example, Articles 1(4) and 2(2) of the *Convention for the Elimination of All Forms of Racial Discrimination* (CERD); Article 4 of the *Convention for the Elimination of All Forms of Discrimination Against Women* (CEDAW); and the International Labour Organization *Convention 111 on Discrimination*.

protecting the human rights of those who have been internally displaced, or establishing the conditions to facilitate return or other durable solutions.

This report is therefore meant to provide all those concerned with the situation of internal displacement in Afghanistan, chief among them national policy and lawmakers, relevant ministries, and civil society organizations, with guidance in realizing national responsibility for the protection of IDPs in accordance with the *Guiding Principles*. It intends to do so by first discussing the core benchmarks of national responsibility, including the development and implementation of legal and policy frameworks that may be used to uphold the rights of the internally displaced in Afghanistan. The report also identifies and briefly describes specific activities undertaken by Afghan authorities in these core areas of national responsibility. The final section of this report identifies specific provisions of Afghan law that can contribute to the protection of IDPs.

Although this report refers to general provisions of the Afghan Constitution and Afghan laws and policies, along with other normative instruments specifically intended to protect the rights of IDPs, these references should not be considered as a formal assessment or endorsement of the Afghan legal system and the policies of the Afghan government. Rather, this report is intended to identify and then review the nature and scope of these instruments and the applicability of relevant aspects of the existing Afghan legal and policy frameworks to the situation of internal displacement. The report has been developed to provide a basis for further action in light of the obligations of Afghan national authorities and their responsibility for protecting IDPs through national law and policy.

The methodology for conducting the research and structuring this report is based on the core national responsibility benchmarks set forth in *Addressing Internal Displacement: A Framework for National Responsibility*.<sup>5</sup> In addition, this report and its analysis rely on *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*,<sup>6</sup> which describes how to fashion normative frameworks for IDP protection on the basis of the rights and obligations set forth by the *Guiding Principles on Internal Displacement*. The Brookings-Bern Project on Internal Displacement developed both tools in coordination with the UN Representative of the Secretary-General on the Human Rights of Internally Displaced Persons.

The report also draws on approximately 25 informal interviews and discussions with representatives of competent government authorities, Afghan civil society organizations, international organizations and humanitarian actors, and international military forces. These key informant interviews were conducted to identify national responses to displacement, elements of the domestic normative framework relevant to IDP protection, gaps in this framework, and challenges to its implementation.<sup>7</sup>

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<sup>5</sup> *Addressing Internal Displacement: A Framework for National Responsibility*, Brookings-Bern Project on Internal Displacement, April 2005.

<sup>6</sup> *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, Brookings-Bern Project on Internal Displacement, October 2008.

<sup>7</sup> As a report focused primarily on the legal framework as a benchmark of national responsibility, it is a “legal” inquiry and should not be construed as social science.



## CONTEXT AND CHALLENGES TO REALIZING NATIONAL RESPONSIBILITY IN AFGHANISTAN

Displacement and the suffering experienced by those forced to flee their homes, communities, and land is not a new phenomenon for Afghans. As a result of three decades of armed conflict, serious human rights violations and ethnic tensions, along with frequent natural disasters, millions of Afghans have been displaced as refugees and as IDPs.<sup>8</sup> According to a survey conducted by the International Committee of the Red Cross in 2009, 76% of Afghans affected by conflict have experienced some form of forced displacement during their lives.<sup>9</sup> Internal displacement has been a fact of life for several generations of Afghans.

At the present time, the population of Afghan IDPs is estimated by most sources to number somewhere close to 300,000 persons, although insecurity and lack of access continue to impede accurate data collection. However, many consider that the actual population of IDPs throughout the country is significantly larger than most publicly available sources indicate.<sup>10</sup> The caseload of known IDPs has been categorized in a number of ways beginning with the *National IDP Profile* of 2008, which recognized the following causes and characteristics of displacement: 1) protracted caseload, 2) new conflict-affected caseload, 3) secondary displaced returnees and deportees, and 4) displacement due to food insecurity (or natural disaster).<sup>11</sup> In 2009, the causes and characteristics of internal displacement were narrowed somewhat and are presently categorized in the *National IDP Task Force Strategy* as follows: 1) conflict-induced IDPs, 2) disaster-induced IDPs, and 3) protracted IDPs. Regardless of the cause, all IDPs in Afghanistan require protection and assistance. This includes returning refugees (returnees) unable to settle in their homes and communities of origin.

Many Afghans consider the threat of being displaced as one of their worst fears.<sup>12</sup> Given the suffering and social exclusion that accompanies displacement in Afghanistan, this fear is legitimate. Of those who are internally displaced at the present time, most exist on the margins of society and lack basic protection and assistance, including adequate access to food, water, shelter, and health care. Many have also been dispossessed of property, are unable to generate incomes, and are denied basic education. Displacement of such a magnitude and consequence also affects and is inextricably linked to the well-being and development of society as a whole, including the communities which host the displaced. Efforts to prevent internal displacement, protect those who have been displaced, and bring an end to displacement should figure prominently among the national priorities of Afghan authorities.

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<sup>8</sup> For a historical overview of displacement in Afghanistan during this time, including discussion of the six key phases of this displacement, see *Beyond the Blanket: Toward More Effective Protection for Internally Displaced Persons in Southern Afghanistan*, Brooking-Bern Project on Internal Displacement, May 2010, 22-26.

<sup>9</sup> *Our World: Views from Afghanistan, Opinion Survey 2009*, International Committee of the Red Cross, June 2009, 16-17.

<sup>10</sup> For example, research conducted by the The Liaison Office and the Brookings Bern Project on Internal Displacement in Kandahar during the summer of 2009 suggested that roughly 50,000 households or about 322,000 persons were internally displaced in the Kandahar province alone. See *Beyond the Blanket*, *supra* note 8, at 38.

<sup>11</sup> *National Profile of Internally Displaced Persons (IDPs) in Afghanistan, 2009*. See also *Beyond the Blanket*, *supra* note 8, at 33-34.

<sup>12</sup> *Id.*

In exploring national responses to internal displacement, it should be noted that the precarious situation of IDPs in Afghanistan comes against the backdrop of a larger humanitarian crisis linked to insecurity and violence. For instance, a reported 5,978 civilians were killed or injured as a result of armed conflict between government, international military forces, and anti-government elements in 2009. During the first six months of 2010, 3,268 civilian casualties were documented, including 1,271 deaths and 1,997 injuries.<sup>13</sup> Ongoing military operations and armed conflict will continue to put the Afghan civilian population at risk of harm and likely complicate efforts to prevent further displacement as well as find solutions for those currently displaced. For instance, Operation *Moshtarak* in Marjah, Helmand Province reportedly led to the displacement of around 26,000 persons (UNHCR July 2010). Many have yet to return due to insecurity.<sup>14</sup> Afghan civilians are also fleeing their homes in other regions, such as Kandahar, in anticipation of additional military activities and violence.<sup>15</sup> It is important to note that all parties to the conflict and continuation of violence, including the government, anti-government elements (AGE), and international military forces, contribute to the current situation of displacement in Afghanistan and to the vulnerability of those who have been displaced. AGEs, for instance, were reportedly responsible for 76% of the total number of civilian casualties in the first half of 2010.<sup>16</sup>

Endemic poverty and poor social and economic conditions also leave much of the Afghan population insecure and vulnerable. In terms of the country's development challenges, the 2009 *United Nations Human Development Index* ranks Afghanistan 181st out of 182 countries surveyed.<sup>17</sup> Nine million Afghans, or approximately 36% of the total population, are believed to live in absolute poverty despite the fact Afghanistan has received an estimated \$35 billion in assistance from the donor community between 2002 and 2009.<sup>18</sup> Similar indicators reveal the alarming situation confronting the Afghan population. Afghanistan's maternal mortality rate, for example, is the highest in the world, while child mortality rates are the third highest.<sup>19</sup> Roughly 80% of the population lacks access to safe drinking water.<sup>20</sup> Only 24% of the population over age 15 is considered literate.<sup>21</sup> Addressing the complex needs and vulnerabilities of the Afghan population, including the internally displaced, is not only a humanitarian concern but one that is also linked to the security, stability, and peaceful development of Afghan society.

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<sup>13</sup> *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2009*, United Nations Assistance Mission to Afghanistan (UNAMA), January 2010. See also *Afghanistan: Mid Year Report 2010 on Protection of Civilians in Armed Conflict*, United Nations Assistance Mission to Afghanistan (UNAMA), August 2010.

<sup>14</sup> "Afghanistan: Insecurity Slowing IDP Return to Marjah," Integrated Regional Information Networks (IRIN), 31 March 2010, available at: <http://www.irinnews.org/Report.aspx?ReportId=88602>.

<sup>15</sup> "Afghanistan: Displacement Fears Ahead of Kandahar Operation, Integrated Regional Information Networks (IRIN), 30 March 2010, available at: <http://www.irinnews.org/Report.aspx?ReportId=88620>.

<sup>16</sup> *Afghanistan: Mid Year Report on Protection of Civilians in Armed Conflict*, *supra* note 13 at i.

<sup>17</sup> *Human Rights Development Report, 2009, Afghanistan Human Rights Index*, United Nations Development Programme (UNDP) available at: [http://hdrstats.undp.org/en/countries/country\\_fact\\_sheets/cty\\_fs\\_AFG.html](http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_AFG.html)

<sup>18</sup> *Human Rights Dimension of Poverty in Afghanistan*, United Nations Office of the High Commissioner for Human Rights (OHCHR), March 2002, 2-3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

The implications of this situation of displacement are significant in the context of national responsibility for the protection of IDPs through appropriate laws and policies. It poses considerable challenges for a relatively weak Afghan state, one that is yet unable to effectively govern large areas of the country, particularly in rural areas where the insurgency and local strongmen exert control over the population through intimidation and arbitrary rule. The jurisdiction of Afghan national authorities is also challenged by “shadow” administrations, including tax systems and other services, established by the insurgency and other local power brokers in some areas throughout the country.

According to several estimates, the central government in Kabul exercises effective control over less than 50% of Afghan territory.<sup>22</sup> Afghanistan also continues to suffer deficits of good governance, rule of law and general respect for human rights.<sup>23</sup> Discrimination and violence against women, minorities, and others continue along with other violations of civil and political freedoms.<sup>24</sup> Respect for human rights by Afghan law enforcement and security personnel remains poor. Corruption and abuse of official authority is a major source of distrust between the police and other officials and the population. The massive scale of corruption in Afghanistan also presents one of the main obstacles to obtaining public services and exercising basic rights including land tenure rights.<sup>25</sup> In addition, the formal justice sector is often inaccessible for many Afghans or simply ineffective in seeking remedies and resolving disputes.

The relative ineffectiveness and fragility of the Afghan state in the face of the complex challenges it faces leaves many IDPs lacking adequate protection. Shelter, employment, and access to basic government services, such as health care and education, remain elusive.<sup>26</sup> Ongoing conflict and violence as well as recurring natural disasters threaten other fundamental rights and leave many IDPs at risk of physical harm. Many IDPs must fend for themselves and develop their own coping mechanisms and protection strategies. Flight is a common strategy that many adopt for purposes of physical and economic survival. IDPs are also known to rely on host communities and tribal networks for shelter, security, and access to employment. Where national protection is inadequate, it is also not uncommon for IDPs to seek the patronage and protection of local strongmen or the insurgency.<sup>27</sup> Such a practice inevitably exposes the internally displaced to greater risk of exploitation and other human rights violations. It can also further erode the legitimacy of the Afghan state and national authorities.

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<sup>22</sup> According to the Brookings state weakness index, Afghanistan ranks at the bottom of 141 countries in terms of the state's ability to provide security and basic social services. See *Index of State Weakness in the Developing World*, The Brookings Institution, 2008. See also *Report on Progress Toward Security and Stability in Afghanistan*, US Department of Defense, April 2010, section 3.

<sup>23</sup> Paragraph 2, *Afghanistan Universal Periodic Review State Report*, 24 February 2009, UN Doc. No. A/HRC/WG.6.5/AFG/1.

<sup>24</sup> Human Rights Watch, *WORLD REPORT 2010*, Seven Stories Press, 2009, 258-263.

<sup>25</sup> *Corruption in Afghanistan, Bribery as Reported by the Victims*, United Nations Office on Drugs and Crime (UNODC), January 2010. Afghanistan ranked second from last among the 180 countries surveyed for Transparency International's *Corruption Perceptions Index*. Country rankings are available here: [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table)

<sup>26</sup> *Armed Conflict Forces Increasing Number of Afghans to Flee their Homes*, Internal Displacement Monitoring Centre (IDMC), 15 April 2001.

<sup>27</sup> For an in-depth discussion of coping strategies pursued by the internally displaced in the absence of national protection, including protection of local strongmen and the insurgency, see *Beyond the Blanket*, *supra* note 8, at 73-87.

Internal displacement in Afghanistan is a multi-dimensional phenomenon. It presents particularly complex protection challenges as a result of the large conflict and disaster affected population throughout the country and the critical socio-economic conditions of many Afghans. In addition to its humanitarian and development dimensions, resolving internal displacement is also linked to fundamental issues of human rights, justice, rule of law and how the country is governed. An effective and comprehensive national response to displacement should be cognizant of these issues. It should also address all causes of displacement, including displacement resulting from natural disasters as well as from conflict, violence and human rights violations. The national approach to internal displacement should also encompass all of its phases, from prevention of displacement to protecting the full range of political, civil, economic, social, and cultural rights of those who are seeking durable solutions to their displacement. Frameworks for protecting and assisting displaced persons should also take into account how displacement affects local communities and host families so as to address their needs and to prevent or mitigate social tensions.

#### **NATIONAL RESPONSIBILITY BENCHMARKS FOR IDP PROTECTION**

In order to fully comprehend the nature and scope of national responsibility to protect IDPs, Afghan authorities and other stakeholders are encouraged to consult the *Framework for National Responsibility*. This authoritative resource identifies and describes a series of concrete steps for governments to pursue to fulfill their protection responsibilities in accordance with the *Guiding Principles on Internal Displacement*. Chief among these steps or benchmarks is the creation and implementation of legal and policy frameworks to uphold the rights of the internally displaced and bring displacement to an end. Other core benchmarks of national responsibility include: designating an institutional focal point on IDPs; encouraging national human rights institutions to address internal displacement; collecting data on the number of IDPs and the causes of their displacement; promoting national awareness and human rights training; and allocating adequate resources to address the needs of IDPs.<sup>28</sup>

The section below will identify several core areas of national responsibility and examine, based on available information, efforts undertaken in each of these areas by the Afghan government, sometimes with the assistance of international actors. The discussion that follows is not intended to serve as a comprehensive or definitive accounting of measures taken by national authorities to address internal displacement. It does, however, describe measures known to have been pursued to address internal displacement. Other measures may have in fact been undertaken. Also, it is important to note that these benchmarks should not be used as a checklist by relevant stakeholders to score the effectiveness of the Afghan government in discharging its national responsibilities. Rather, what follows is meant to inform ongoing efforts to guide national authorities in their efforts to address internal displacement over the long term.

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<sup>28</sup> For an in-depth description of all 12 benchmarks or steps, see *Framework on National Responsibility*, *supra* note 5, at 12-26.

**National Responsibility Benchmark: *Legal Framework for Protecting IDP Rights***

National authorities should develop a national legal framework that upholds and protects the rights of internally displaced persons in line with international standards as set forth in the *Guiding Principles on Internal Displacement*.

Afghan national authorities have not developed a comprehensive IDP-specific legal instrument that affirms the human rights of those who are internally displaced or establishes the minimum standards for preventing and responding to situations of internal displacement. Nor have they formally adopted a normative instrument that sets forth a flexible or dynamic concept or definition of who is an internally displaced person for purposes of ensuring full respect for IDPs' human rights. Nevertheless, several basic elements of a framework for addressing the basic needs and vulnerabilities of IDPs can be found among a variety of constitutional provisions and legal instruments, including presidential decrees that are currently in force.<sup>29</sup>

The 2004 *Constitution* obliges the state to respect international human rights standards and “to create a prosperous and progressive society based on social justice, the preservation of human dignity, realization of democracy, attainment of unity, as well as equality between all peoples and tribes...”<sup>30</sup> In addition to affirming the principles of non-discrimination and equality of all citizens before the law, the *Constitution* affirms freedom of movement, the right to health, employment, education, family life, and other fundamental rights and freedoms enjoyed by all Afghans, including those who are internally displaced.

Other national legal instruments contain provisions that may be applicable to situations of displacement and to those who have been forcibly displaced from their homes. This includes the 1977 *Civil Code*, which compiles and regulates the core areas of Afghan private law such as nationality, residence, personal status and family relations, contracts and transactions, as well as the sale and use of property. In addition, a variety of instruments of general application such as the labor code, law on population records, election law, juvenile code, and the law on elimination of violence against women can also contribute to a basic, albeit limited, legal framework for addressing the needs and vulnerabilities of IDPs as citizens or habitual residents of Afghanistan.

A series of presidential decrees, most of which address land and property issues, have also attempted to put in place a limited basis for finding durable solutions to displacement. The most IDP specific of these decrees, *Presidential Decree No. 104*, sets forth a basic framework for distributing government land to IDPs as well as to returnees as a means of addressing their needs for shelter. However, this decree does not recognize other fundamental rights or needs of the internally displaced. In contrast, *Presidential Decree No. 297* affirms the full panoply of human rights enjoyed by Afghan returning refugees and protects them from discrimination and persecution. No similar decree or legal instrument at the national level appears to address the human rights of non-returnee IDPs with such a degree of specificity.

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<sup>29</sup> A more in depth discussion of these provisions and instruments is found in the next section, which focuses on the Afghan legal framework.

<sup>30</sup> Article 6, *Constitution of the Islamic Republic of Afghanistan*, 2004.

Afghanistan is also party to a variety of international human rights, humanitarian law, criminal law, and refugee law instruments that obligate national authorities to guarantee and protect the rights of the population at large.<sup>31</sup> These binding instruments can complement existing laws applicable to situations of internal displacement and may be used to fill gaps that exist in national legislation for protecting and assisting those who have been internally displaced. However, none of these instruments make mention of the rights of IDPs. International human rights obligations undertaken by the Afghan state can only be applied to IDPs in a general fashion and are not specifically tailored to address the particular needs and vulnerabilities that internal displacement creates.

**National Responsibility Benchmark: Policy or Plan of Action on Internal Displacement**

National authorities should adopt a national policy or plan of action on internal displacement that identifies institutional responsibilities for addressing all phases and causes of internal displacement in addition to the protection needs of internally displaced persons.

Afghan national authorities have not adopted a comprehensive IDP policy or plan of action specifically focused on internal displacement or the protection of the human rights of IDPs.<sup>32</sup> However, one of the key sector strategies of the *Afghanistan National Development Strategy for 2008-2013 (ANDS)* sets forth the contours of a basic framework to address the situation of IDPs (along with refugees and returnees) and facilitate their reintegration into society through government activities coordinated by the Afghan Ministry of Refugees and Repatriation (MoRR).<sup>33</sup> The adoption of the *Refugee Return and IDP (RRI) Sector Strategy* within the economic and social development pillar of the *ANDS* is aimed at translating the *Afghanistan Compact's* benchmark on protecting and assisting all IDPs and returnees into reality.<sup>34</sup> While this is a positive development, this strategy, like the *ANDS* as a whole, does not fully integrate a human rights perspective in its efforts to address the protection needs of the internal displaced.

The *ANDS* and its *RRI Sector Strategy* do not adopt a definition of who is an internally displaced person in Afghanistan. Neither does either of these instruments explicitly prohibit discrimination

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<sup>31</sup> Afghanistan is party to the following treaties which make up the core of international human rights law: *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)*, and the *Convention on the Rights of the Child (CRC)*. Afghanistan is also a party to the *Geneva Conventions* and the first two additional protocols, and the *Rome Statute of the International Criminal Court*.

<sup>32</sup> The Transitional Islamic State of Afghanistan (TISA) adopted a *National Return, Displacement, and Reintegration Strategy* in March 2003 but this instrument has expired.

<sup>33</sup> *Afghanistan National Development Strategy 1387-1391 (2008-2013): A Strategy for Security, Governance, Economic Growth & Poverty Reduction*, Islamic Republic of Afghanistan, 2008, at 13 and 129 (hereafter *ANDS*). See also *ANDS Executive Summary*, 1.

<sup>34</sup> This benchmark, which was adopted in February 2006, provides “[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.” See Annex I on Benchmarks and Timelines of *The Afghanistan Compact*, London Conference on Afghanistan, 31 January – 1 February 2006, 11. This is a political document that sets forth the framework for international cooperation with Afghanistan for five years.

against Afghan IDPs on account of their displacement.<sup>35</sup> However, the *ANDS* does recognize IDPs as one of the most vulnerable groups among the Afghan population. It also commits the government to provide humanitarian support to all Afghans affected by natural disasters, insecurity and those returning from states of refuge.<sup>36</sup> Notably, the *RRI Sector Strategy* indicates that greater attention should be given to protecting the constitutional and human rights of all IDPs, including women and children, and supporting the right of all Afghans to voluntarily return to their homes.<sup>37</sup> It does not provide any specific policy guidance for how to protect these rights.

Like most formal and informal approaches to internal displacement in Afghanistan, the primary emphasis of the *RRI Sector Strategy* and *ANDS* objectives is on return. They do not address how to facilitate other durable solutions such as local integration or settlement elsewhere.<sup>38</sup> Measures set forth by the *RRI Sector Strategy* to encourage voluntary returns, for instance, are categorized into two main areas: 1) providing housing, facilities, access to land, and social services such as employment opportunities, health care, and education for IDPs; and 2) enhancing government capacity.<sup>39</sup> The latter notably commits the government to undertake promotion of a national protection framework and development of policy guidelines specifically focused on IDPs. To date, however, this objective remains largely unfulfilled. Despite the need, a comprehensive policy or plan of action that prioritizes and focuses the resources of national authorities on the specific human rights and protection needs of IDPs has not been developed.

To a limited extent, the existing policy framework for responding to situations of internal displacement in Afghanistan, as outlined in the *ANDS* and the *RRI Sector Strategy*, is complemented by the National IDP Task Force's strategy and annual work plan.<sup>40</sup> These two documents, which adopt the internationally accepted IDP definition set forth in the *Guiding Principles on Internal Displacement*, guide the coordination of national and international efforts to protect IDPs and facilitate durable solutions to their displacement.<sup>41</sup> However, the Task Force's strategy and work plan do not by themselves provide a sufficient legal or normative basis for protecting the rights of IDPs, facilitating durable solutions, and preventing future displacement. As organizational instruments, they do not have the force of law.

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<sup>35</sup> Notably, the *RRI Sector Strategy* contends that no pattern of discrimination against returnees is discernible. See *ANDS supra* note 33, at 13.

<sup>36</sup> See *ANDS, supra* note 33, at 33; *ANDS Executive Summary, supra* note 33, at 15.

<sup>37</sup> *ANDS, supra* note 33, at 130.

<sup>38</sup> *Beyond the Blanket, supra* note 8, at 89-93.

<sup>39</sup> *Id.*, at 133.

<sup>40</sup> The annual work plan of the National IDP Task Force is currently being implemented and monitored through regional IDP task forces that are comprised of UNHCR and DoRR staff. The National IDP Task Force is discussed in greater detail in the section below on institutional focal points and elsewhere in the text that follows.

<sup>41</sup> More information about the IDP Task Forces 2010 strategy and work plan is provided in the next section on institutional focal points for IDP protection.

**National Responsibility Benchmark: *Institutional Focal Point on IDPs***

National authorities should designate an institutional focal point on internal displacement at the national level and, when appropriate, at the sub-national level to ensure sustained attention to the problem of internal displacement and to facilitate coordination.

The Afghan government has designated two institutional focal points to protect and assist IDPs throughout the country. The MoRR is considered the lead government line ministry and serves as the institutional focal point for addressing the problem of conflict-induced internal displacement.<sup>42</sup> In addition, the short-term needs of those affected and displaced by natural disasters are addressed by the Afghanistan Natural Disaster Management Authority (ANDMA), a sub-ministerial body responsible for coordinating emergency response and post-disaster recovery.<sup>43</sup> Both focal points work to coordinate protection and assistance at the national level with other government bodies and international protection oriented actors. They also work at the provincial level through their respective regional directorates. These focal points, however, are not adequately resourced and lack the necessary capacity and political stature to effectively realize their protection mandates. The MoRR, for instance, has been characterized as a “third tier” ministry that does not receive the backing and resources it requires to fulfill its mandate.

Despite its limitations, the MoRR and its provincial departments (DoRRs) remain active in planning and managing the coordination of protection-related activities and programs, in accordance with the *RRI Sector Strategy* of the *ANDS*. These activities include providing immediate relief and assistance to IDPs, including access to food, water, shelter, health care and other basic needs. The MoRR is also responsible for mobilizing resources to increase absorption capacity and facilitate the necessary conditions for the social well-being and economic livelihoods of IDPs seeking sustainable return, local integration, or resettlement. One aspect of its role in coordinating national relief to IDPs is the MoRR's participation in an inter-ministerial committee on social protection. This body, which meets periodically, brings together senior representatives of ministries of education, health, urban affairs, agriculture, rural development, and other stakeholders to provide IDPs and others with essential food and non-food items. However, its effectiveness as an IDP protection mechanism is yet to be proven, and responsibility for meeting the long term protection needs of IDPs ultimately falls to the MoRR.

The MoRR also serves as co-chair with the UNHCR of the National IDP Task Force. The Task Force was established in 2008 as a sub-group of the Afghanistan Protection Cluster to strengthen the protection of IDPs, including conflict-induced, disaster-induced, and protracted IDPs.<sup>44</sup> To do so, its work plan for 2010 identifies the following main areas of activity and objectives: 1) undertaking a comprehensive overview of the number, profile, location, causes, and needs of IDPs, 2) coordinating responses to IDP protection and assistance needs, 3) facilitating durable

<sup>42</sup> *ANDS Executive Summary*, *supra* note 33, at 15.

<sup>43</sup> *Id.*

<sup>44</sup> The Afghanistan Protection Cluster is chaired by UNHCR, with the NRC and the Human Rights Unit of the United Nations Assistance Mission in Afghanistan (UNAMA) as co-chairs (UNAMA HR redrew mid-2010). In addition to the IDP Task Force, the cluster is comprised of the following sub-groups: 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.



solutions, and 4) strengthening the capacity of the Afghan government for IDP protection.<sup>45</sup> In addition to setting forth time lines for specific activities to realize each of these four objectives, this instrument identifies the responsible task force members and describes the expected outputs.<sup>46</sup>

The National IDP Task Force functions at the national level and works in coordination with Regional IDP Task Forces based in Kandahar, Herat, and elsewhere in the country in addition to assisting other *ad hoc*, informal protection coordination mechanisms at the provincial level. Notably, the National Task Force's work plan, which is currently being implemented and monitored through regional task forces, formally adopts the IDP definition set forth in paragraph 2 of the *Guiding Principles on Internal Displacement* and also recognizes the primary responsibility of national authorities for IDP protection.<sup>47</sup> Increasing its engagement and leadership within the framework of the National IDP Task Force is one way that Afghan national authorities and the MoRR can fulfill its protection responsibilities. This leadership should strengthen and expand over time to include more effective inter-governmental coordination and mobilization of resources for IDP protection. In addition to strengthening its coordination role, the MoRR could also take a more direct role in assisting IDPs and protecting their human rights through its Protection Section. A significant protection challenge to overcome will be the weakness of formal state structures of authority at the regional level.

The development of a *Protection Checklist* and *Guidance Note on Protection for the Internally Displaced* by the Afghanistan Protection Cluster in July 2010<sup>48</sup> contributes potentially useful tools and information to all agencies and organizations working with IDPs throughout the country. This includes national authorities, such as the MoRR and other national and international organizations such as the national and regional IDP task forces, which can use these resources to perform rapid assessments and address the specific human rights and humanitarian issues affecting those displaced by natural disaster as well as conflict and violence. The *Checklist* and *Note*, for instance, provides a series of questions for examining and enhancing understanding of the causes and impact of displacement by sector. Among the issues addressed are: demographics, public perceptions, causes and prevention of displacement, and protection risks. Both also reflect a human rights based approach to protection issues and focus on the panoply of human rights implicated by displacement such as equality before the law and access to justice as

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<sup>45</sup> *National IDP Task Force 2010 Work Plan on Internal Displacement*, 30 March 2010 (Received from UNHCR in Kabul).

<sup>46</sup> In addition to the MoRR and UNHCR, Task Force members 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 Programme (WFP).

<sup>47</sup> It should also be noted that all regional task forces, with the exception of the Southern Region Task Force, have reportedly finalized their own 2010 work plans. The Southern Region Task Force continues to review their work plan in light of an evolving situation of displacement in Helmand Province and the possibility for additional conflict induced displacement in Kandahar.

<sup>48</sup> These documents were developed following a May 2010 request by the National IDP Task Force to the Afghanistan Protection Cluster for more practical and easy to use resources for assessing protection needs of the displaced. See *Protection Checklist: Internally Displaced Persons*, Afghanistan Protection Cluster, 22 July 2010 and *Guidance Note on Protection for the Internally Displaced: Causes and Impact by Sector*, Afghanistan Protection Cluster, 22 July 2010 (on file with author). Both documents received by UNHCR in Kabul.

well as rights to food, water, housing, shelter, health care, education, and housing, land, and property.

**National Responsibility Benchmark: *National Human Rights Institution and IDPs***

National authorities should vest an institution such as a National Human Rights Commission or an ombudsman's office with the authority and responsibility to monitor and report on the respect and protection of the rights of internally displaced persons.

Although the mandate of the Afghanistan Independent Human Rights Commission (AIHRC) does not vest it with formal responsibility for protecting the rights of IDPs, this body can and does address internal displacement indirectly. The Commission, which is headquartered in Kabul and has field offices in Badakhshan, Bamyán, Daikundi, Faryab, Gardez, Ghoor, Herat, Kabul, Kandahar, Kunduz and Jalalabad, was first established by a presidential decree of the interim administration in June 2002 as an independent national human rights institution to protect, monitor, and promote human rights of all Afghans. In pursuing its general human rights protection mandate, which is now in Article 58 of the 2004 Afghan *Constitution* and articulated in Articles 5 and 21 of the *Law on the Structure, Duties, and Mandate of the Afghanistan Independent Human Rights Commission*, the Commission primarily focuses on the human rights situation of women, children, and the disabled.<sup>49</sup> However, the Commission also seeks to promote and protect the human rights of other vulnerable groups of Afghans. IDPs are included among this group by the Commission, along with Afghanistan's returnee and refugee population.

Internal displacement is recognized as a cross cutting issue in the Commission's work. Through its Human Rights Field Monitoring (HRFM), the AIHRC captures information about the situation of and their protection needs in addition to information about the economic and social rights of other vulnerable Afghans across the country.<sup>50</sup> Section 10 of the AIHRC Human Rights Monitoring Form, for instance, is used to determine IDP status, areas of origin, and causes of displacement. IDPs constituted a significant segment of the HRFM research population for the Commission's 2008/9 annual report on economic and social rights, which indicates that the majority of IDPs living in urban slums and informal settlements lack adequate food, water, health care, and education.<sup>51</sup> This report also reveals that the majority of IDPs are unable to return to their homes and communities on account of insecurity, lack of housing, and disputes over land and property. The AIHRC is also developing a report on protection of civilians and the

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<sup>49</sup> Article 58 of the 2004 *Constitution* also affirms the right of individuals to report human rights violations to the Commission which, in turn, may investigate and refer cases to the competent legal authorities. The Commission's objectives, duties, and powers along with its structure and composition are also set forth in detail in the *Law on the Structure, Duties, and Mandate of the Afghan Independent Human Rights Commission* of 2005.

<sup>50</sup> The Human Rights Monitoring Form is used by AIHRC researchers to conduct individual interviews related to health, education, children water, housing/land, security, and participation in decision-making processes for development programs. This activity is one aspect of the longstanding AIHRC-UNHCR partnership to protect the rights of returnees, refugees, and internally displaced persons in Afghanistan.

<sup>51</sup> *Report on the Situation of Economic and Society Rights in Afghanistan-IV* (2008/9), Afghanistan Independent Human Rights Commission (AIHRC), November/December 2009, 21.

humanitarian consequences, including displacement, that followed Operation *Moshtarak* in Helmand in early 2010.

In addition to monitoring and reporting on the situation of IDPs, the Commission has engaged municipal authorities and host communities on behalf of IDPs in matters related to the issuance of national identity cards (*tazkera*), registration of displaced children in schools, access to water, and disputes over land and property. The Commission also interfaces with the National IDP Task Force but this engagement has largely been *ad hoc* and limited to specific cases. Nevertheless, the Commission does have the potential to complement the work of national authorities and fill gaps in the overall national response to internal displacement. Although Afghan civil society is still relatively weak in some areas, non-governmental organizations and networks, such as the Agency Coordinating Body for Afghan Relief (ACBAR) should also be encouraged and supported as a means of filling protection gaps at the national level. In this regard, provisions of the 2005 *Law on Non-Governmental Organizations* meant to guard against corruption and misappropriation of donor funds should not be applied arbitrarily or in such a way to restrict the ability of legitimate NGOs from providing humanitarian assistance to the displaced. Also, the United Nations Assistance Mission to Afghanistan (UNAMA) Human Rights Unit could take a more active role at the international level in monitoring the situation of the internally displaced as part of its efforts to promote and protect the human rights of all Afghans.<sup>52</sup>

<b>National Responsibility Benchmark: <i>Data Collection</i></b>
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National authorities should establish systems for the collection of data on the numbers, locations, and conditions of internally displaced persons that is also disaggregated by age, gender, and other key indicators so that specific needs can be adequately addressed.
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Data collection and profiling of IDPs, such as that found in the 2008 *National IDP Profile*, have been undertaken, but the accuracy and comprehensiveness of these efforts are challenged by methodological issues as well as by increasing insecurity and limited access to many parts of the country where IDPs are believed to be located, particularly in the southern provinces of Helmand, Kandahar, and Uruzgan. Efforts by the MoRR and international actors to compile precise data in a timely fashion and effectively assess the needs of IDPs have also been complicated by the temporary nature of some situations of displacement (natural disaster-induced displacement in particular) and changing dynamics on the ground that may suddenly trigger new IDP populations.<sup>53</sup> Economic migration and a relatively mobile Afghan population also raise questions about the nature of displacement in the country and give rise to differing understanding of and opinions over who is an IDP, when displacement begins, and when it ends.<sup>54</sup> The true nature and scope of the problem remains largely obscured as a result, leaving

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<sup>52</sup> See in particular, Article 8, *Law on Non-Governmental Organizations*. See also “Justice and Human Rights NGOs in Afghanistan,” Hauser Center for Justice and Human Rights, 6 June 2010.

<sup>53</sup> *Armed Conflict Forces Increasing Numbers of Afghans to Flee their Homes*, Internal Displacement Monitoring Centre (IDMC), 15 April 2010, 4-5.

<sup>54</sup> *Beyond the Blanket*, *supra* note 3, at 23-24. See also *National IDP Task Force 2010 Strategy*, *supra* note 45, which identifies the challenge that Afghan mobility and economic migration pose to determining who is an IDP in Afghanistan.

many persons who have been forcibly displaced unaccounted for and outside targeted protection and assistance responses.

The National IDP Task Force, working through its various international and national partners including UNHCR and the MoRR, takes a leading role in monitoring and profiling the three principal IDP caseloads in Afghanistan, *i.e.* conflict-induced, natural-disaster induced, and protracted IDPs. Their estimates are generally considered to be a primary reference point for planning purposes, although most humanitarian actors and researchers consider the magnitude of displacement to be larger and far more complex than the Task Force's data indicates. According to Task Force estimates reported by the IDMC, there are at least 240,000 conflict-induced and 89,000 natural disaster-induced IDPs as of March 2010. The number of those displaced before January 2003 by conflict and insecurity total 79,000. Of the total number of conflict-induced IDPs, 36% are children.<sup>55</sup>

As previously noted, IDP-related data compiled and reported by the National IDP Task force is considered as a starting point but its accuracy reportedly suffers from gaps in information and analysis as well as timeliness. To address this, the Task Force's 2010 work plan envisaged the establishment of an *ad hoc* Working Group on IDP Data Reconciliation and Harmonisation comprised of technical staff from UNHCR and the emergency section of the MoRR. This Working Group, which is linked to the Task Force's objective to develop a more comprehensive picture of displacement and the protection and assistance needs of IDPs, has reviewed IDP data collection and reporting methodologies of UNHCR and MoRR and sought to identify gaps and discrepancies in UNHCR and MoRR data sets along with their causes.

Based on their review, the Working Group issued a formal note in March 2010 which discussed its findings and offered a series of recommendations to enhance the existing systems of data collection, recording, and reporting. These systems have generally been reliant on the work of the MoRR's various provincial departments and input received from relevant ministries, local authorities, United Nations agencies along with the AIHRC and non-governmental organizations. Managing data collection from disparate sources like these, each of which gathers, records, and reports data somewhat differently, has contributed to concerns over accuracy and comprehensiveness. Even within the MoRR, different departments at the provincial level have varying practices, forms, databases and other ways of compiling and analyzing IDP-related data.

Among the Working Group's 11 recommendations is a call for UNHCR and the MoRR to draft guidelines for collecting and harmonizing this data as part of a more comprehensive "Guidance Package on Protection of IDPs" that also includes elaboration upon the IDP concept and roles of humanitarian and other actors in IDP protection and assistance.<sup>56</sup> In addition, the Working Group recommended establishment of additional regional IDP task forces as well as regular monthly meetings between DoRRs and UNHCR field offices to ensure consistency in IDP data reporting. According to the Working Group, this data should be shared by UNHCR field offices and DoRRs with MoRR and UNHCR in Kabul. Notably, the Working Group also recommended that the International Organization for Migration (IOM) compile natural disaster induced

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<sup>55</sup> UNHCR, *IDP Populations Statistical Analysis*, 31 March 2010, cited in *Armed Conflict Forces Increasing Numbers of Afghans to Flee their Homes*, Internal Displacement Monitoring Centre, *supra* note 53, at 11-12.

<sup>56</sup> *Note on Findings and Recommendations by the IDP Data Reconciliation and Harmonisation Working Group in Afghanistan*, March 2010 (on file with author). Document received by UNHCR in Kabul.

displacement figures and share this information with the National IDP Task Force and with regional task forces on a monthly basis.

**National Responsibility Benchmark: *National Awareness and Training***

National authorities should undertake measures to raise awareness throughout society of the existence and nature of internal displacement and provide for targeted training to government officials, military, and police on the human rights of internally displaced persons.

Although national authorities acknowledge the existence of internal displacement, there is no evidence that the government has sought to raise awareness of the plight of IDPs in a systematic manner through, for example, public awareness campaigns, use of the media, or other sensitization and awareness raising measures. Efforts to create a national consensus or some form of national solidarity with the displaced are largely non-existent or simply have not proven effective. Many Afghans are certainly aware of the problem, but there is no indication that protecting the rights of IDPs and bringing internal displacement to an end is a national priority. Afghan refugee and returnee issues were part of the agenda for the 2010 Consultative Peace *Jirga* on national reintegration and reconciliation but the situation of IDPs was not addressed in a meaningful way, despite the role IDPs can play in peace building processes.<sup>57</sup>

Human rights trainings for government officials, including those in the formal justice and security sectors, take place on a periodic basis and with the support and participation of international partners.<sup>58</sup> Many of these trainings tend to focus on general human rights standards and pertinent issues like rights of the accused, women's rights, child abuse, and access to justice. The AIHRC, for example, has trained police and army recruits on human rights through the National Army Training Center and National Policy Academy.<sup>59</sup> The MoRR and other line ministries have participated in trainings on internal displacement that have been organized by international partners such as the NRC. Members of traditional dispute mechanisms (*jirgas* and *shuras*) have also been trained in basic aspects of Afghan national law that are relevant to resolving property disputes involving IDPs.<sup>60</sup>

In addition, Afghan authorities have established a new Human Rights Support Unit within the Ministry of Justice as a mechanism to facilitate domestic compliance with international human

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<sup>57</sup> See *Addressing Internal Displacement: A Framework for National Responsibility*, Brookings-Bern Project on Internal Displacement, *supra* note 5; *Integrating Internal Displacement in Peace Processes and Agreements*, Brookings-Bern Project on Internal Displacement, USIP Peacemakers Toolkit, 2010. See also “Resolution Adopted at the Conclusion of the National Consultative Peace Jirga, 2-4 June 2010,” available at [http://www.president.gov.af/Contents/88/Documents/1834/resolution\\_English.htm](http://www.president.gov.af/Contents/88/Documents/1834/resolution_English.htm)

<sup>58</sup> “UNAMA Trains Police Officers, Prosecutors on Human Rights,” United Nations Assistance Mission in Afghanistan (UNAMA), 19 February 2010, available at <http://unama.unmissions.org/Default.aspx?ctl=Details&tabid=1741&mid=1882&ItemID=7790>.

<sup>59</sup> *Annual Report, January 1 – December 31, 2009*, Afghanistan Independent Human Rights Commission (AIHRC), 2010, 31-32.

<sup>60</sup> Mary Lindgren, PROPERTY LAW TRAINING FOR JIRGA AND SHURA MEMBERS: THE PROCESS FOR CREATING LEGAL TRAINING, Norwegian Refugee Council (NRC), 2007.

rights obligations across all line ministries.<sup>61</sup> This Unit, if properly resourced and staffed, could contribute to improving the Afghan legal framework for human rights protections in general and for the protection of IDPs in particular. The Ministry of Justice is also reportedly working on a national policy to guide the promotion of public legal awareness, an initiative which presents another opportunity to ensure that the particular human rights of the internally displaced are understood by IDPs themselves and addressed by national authorities.<sup>62</sup> A model for what needs to be done to promote legal awareness and access to justice for Afghan IDPs is perhaps best exemplified by the Information Counseling and Legal Assistance (ICLA) program of the NRC. Through this program, national lawyers and counselors directly assist IDPs around the country in resolving property tenure, land tenure, and family law issues through the formal justice system and traditional dispute resolution mechanisms.<sup>63</sup>

It should also be noted that internal displacement was briefly referenced by Afghan national authorities in the Universal Periodic Review state report on human rights that was submitted to the UN Human Rights Council in 2009. Although this report, which benefited from input received from the AIHRC and civil society organizations, did not address the human rights of IDPs with any degree of specificity, it did recognize the appalling conditions they suffer. A section devoted to the rights of returnees and IDPs focused exclusively on the situation of the former. No information concerning measures taken to prevent internal displacement or protect the rights of IDPs was reported.<sup>64</sup>

<b>National Responsibility Benchmark: <i>Adequate Resources</i></b>
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National authorities should provide for the allocation of human and financial resources, including specifically designating funds in the national budget, necessary to address the needs and protect the rights of the internally displaced persons.
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Efforts to effectively address the situation of IDPs in Afghanistan are challenged by the limited capacity of Afghan institutions and a lack of adequate resources. The MoRR, which serves as the primary line ministry and institutional focal point for IDPs, has only a small IDPs unit headed by a special adviser to the Minister. Funding for the MoRR is allocated from the national budget, but much of this ordinary funding is used to pay salaries and basic operational costs. Some developmental funds are used for social and economic protection of IDPs. According to the Ministry of Finance's FY 2009-2010 National Budget Report, by the end of 2010 "all refugees opting to return and IDPs will be provided assistance for rehabilitation and integration in their local communities; their integration will be supported by national development programs, particularly in key areas of return." The FY 2009-2010 budget allocated \$3 million to the MoRR

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<sup>61</sup> The Ministry of Interior established a Human Rights Department (with branches at the provincial level) in April 2002 to investigate human rights abuses by police.

<sup>62</sup> *The Situation in Afghanistan and Its Implications for International Peace and Security*, Report of the Secretary-General, 10 March 2010, UN Doc. No. A/64705-S/2010/127, 17.

<sup>63</sup> Other organizations providing legal assistance to vulnerable and disempowered Afghans include Legal Aid Organization of Afghanistan (LAOA) and the Afghanistan Independent Human Rights Commission (AIHRC).

<sup>64</sup> See para. 88 on rights of returnees and internally displaced persons in the *Afghanistan Universal Periodic Review*, *supra* note 23.

to fund these efforts.<sup>65</sup> In addition, international humanitarian organizations and the donor community provide significant resources to fill gaps and fund protection oriented programs for the displaced along with other humanitarian activities. The 2010 appeal for the Afghanistan Humanitarian Action Plan totaled \$872 million.<sup>66</sup> However, how this funding will ultimately be used and the impact it will have remains uncertain.

## NATIONAL RESPONSIBILITY AND THE AFGHAN LEGAL FRAMEWORK FOR PROTECTING IDPS

The legal system of Afghanistan is comprised of a complex and diverse body of normative instruments, the major components of which include the *Constitution*, the civil and penal codes, statutes adopted by the National Assembly, and decrees issued by the President. The duality of the Afghan legal system and tradition is evidenced by the promulgation of state law (or official law) that must be consistent with Islamic law (*Sharia*) and religious jurisprudence (*Hanafi*). Custom and traditional practice also serves as sources of authority, particularly in dispute resolution at the local level where many Afghans view these sources of authority and practice to be more accessible and legitimate. The *Constitution* also makes clear that international treaties and standards such as the *Universal Declaration on Human Rights* are a binding part of Afghan law as well.<sup>67</sup>

As noted in the previous section on national responsibility benchmarks, Afghan authorities have yet to adopt a comprehensive law on internal displacement or any other legislative acts specific to the prevention of internal displacement and the mitigation of its effects. Nor have they legally defined or adopted a concept of who is an internally displaced person. The core elements of the current legal framework for protecting IDPs and addressing their needs are drawn from broad human rights guarantees found within the 2004 *Constitution* and substantive provisions of the *Civil Code* that may be of general application in displacement contexts. Other significant laws that may be generally applicable to affirming the rights and freedoms enjoyed by IDPs as citizens or habitual residents of Afghanistan include laws and legal provisions on citizenship, *tazkera*, education, labor, elections and participation in public affairs, juvenile justice and child protection, violence against women, and land management.<sup>68</sup> The penal code and law on police are also relevant to preventing displacement and for protecting the rights of those who have been forced from their homes and communities. These legislative acts are complemented by several displacement-specific decrees that have been issued by the presidential administration over the past decade, chief among them *No. 297 on Dignified Return of Refugees*<sup>69</sup> and *No. 104 on Land Distribution for Settlement to Eligible Returnees and Internally Displaced Persons*.<sup>70</sup>

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<sup>65</sup> *Islamic Republic of Afghanistan 1388 (2009) National Budget*, Ministry of Finance.

<sup>66</sup> *Afghanistan Humanitarian Action Plan 2010*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA), November 2009.

<sup>67</sup> Article 7, *Constitution of the Islamic Republic of Afghanistan*, *supra* note 30, (The State shall observe the *Charter of the United Nations*, international treaties, international conventions that Afghanistan is a party to, and the *Universal Declaration of Human Rights*.)

<sup>68</sup> English language translations of the following legislative acts were acquired and reviewed for this section: *Law on Citizenship*, 2005; *Law on Education*, 2001; *Law on Land Management*, 2000; *Law on Mass Media*, 2006; *Law on Police*, 2009; *Law on Political Parties*, 2004, *Law on the Procedure for Obtaining Rights (Harlequin)*, 1999; *Juvenile Code*, 2005; *Penal Code*, 1976; and the *Decree of the President on the Electoral Law*, 2010.

<sup>69</sup> *Decree of the President of the Afghan Interim Administration on Dignified Return of Refugee*, No. 297, (3 June 2002).

<sup>70</sup> *Decree of the President of the Islamic Republic of Afghanistan on Land Distribution for Settlement to Eligible Returnees and Internally Displaced Persons*, No. 104 (6 December 2005).

Each of these sources of authority contributes to a basic legal framework that may be used, in the absence of more displacement-specific provisions, to address some of the needs and vulnerabilities exhibited by IDPs. The discussion that follows will review elements of this framework and note the relevant substantive and procedural provisions of Afghan law that could be applied during all phases of displacement, including its prevention. Reference will also be made to Afghan policies where they are of particular relevance.

### **Legal Protection From Displacement: *Prevention of Arbitrary Displacement***

Prevention is an essential element of a comprehensive approach to internal displacement, one that requires general respect for human rights and international humanitarian law as well as prohibition of human rights violations, including acts of arbitrary displacement.

The Afghan legal system does not explicitly guarantee an individual's right to be free from arbitrary displacement as set forth in the *Guiding Principles*.<sup>71</sup> However, the *Constitution* does affirm several fundamental rights and freedoms that can prevent Afghans from being forced from their homes and communities. According to Articles 38 and 40 of the *Constitution*, for instance, the homes and property of all persons are considered inviolable and immune from invasion. Similar prohibitions on extrajudicial confiscations or acquisitions of property are affirmed by the *Civil Code*, which provides that no person may be dispossessed of property except by law.<sup>72</sup> In addition, dispossession of another person's residence is also a criminal offense under the *Penal Code*.<sup>73</sup> Although these provisions are clearly intended to protect against trespassing and confiscation of property as opposed to the specific act of arbitrary displacement, they can contribute in a limited manner to the development of a more comprehensive protection framework that deters acts associated with displacement and provides a remedy to those who have been forcibly evicted and separated from their property without a basis in law. This framework, however, would be strengthened considerably by the prohibition of acts of arbitrary displacement or similar crimes.

As a state party to the *Rome Statute of the International Criminal Court*, which lists forcible transfer and deportation of civilians among crimes against humanity and war crimes, Afghanistan is obliged to adopt or amend legislation to ensure compliance with the relevant rules of international humanitarian law set forth in the *Rome Statute*.<sup>74</sup> This includes criminalizing forced or arbitrary displacement in national law and prosecuting those who commit such acts. At the present time, it is not readily apparent that these measures have been undertaken by Afghan national authorities. Moreover, the adoption of the *Law on National Stability and Reconciliation*, which purports to recognize the rights of war crimes victims to seek justice, effectively bars Afghan authorities from prosecuting alleged perpetrators of displacement in the absence of a complaint by a victim.<sup>75</sup> Repealing provisions of this law, which has been criticized by the

<sup>71</sup> *Id.*, at Principle 6.1.

<sup>72</sup> Article 1903, *Civil Code of Afghanistan*.

<sup>73</sup> Article 431, *Penal Code of Afghanistan*.

<sup>74</sup> See Articles 7 and 8, *Rome Statute of the International Criminal Court*, 17 June 1998, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

<sup>75</sup> Amin Tarzi, "Afghanistan: Amnesty Bill Places Karzai in a Dilemma," Radio Free Europe/Radio Liberty, 23 February 2007, available at <http://www.rferl.org/content/article/1074897.html>.



international community,<sup>76</sup> and amending the *Penal Code* to provide for the investigation and prosecution of acts of arbitrary displacement would considerably strengthen the framework for preventing internal displacement and ensuring accountability when prevention is unsuccessful.

The legal framework for protecting individuals from displacement would also be strengthened by the adoption of the new draft *Law on Disaster Response, Management, and Preparedness*. This draft law, which is still being reviewed by the executive and legislative branches, outlines disaster prevention and mitigation activities and the mechanisms for managing these activities. It does not mention internal displacement specifically, but it includes among its goals the “rescue of disaster victims” and their “return to normal lives” in addition to overall disaster prevention.<sup>77</sup> The draft is also noteworthy for its recognition of “decisions” rendered by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and for exempting humanitarian assistance brought into the country from customs duties, taxes, and fees.<sup>78</sup> These provisions, if adopted, would enhance efforts to identify beneficiaries and facilitate delivery of humanitarian assistance to disaster victims, including the displaced, in a timely manner and on the basis of need and vulnerability.

**Legal Protection From Displacement: *Non-discrimination and Equality before the Law***

The rights to non-discrimination and equality before the law are among the two most essential elements of a national legal framework for IDP protection. IDPs should not be discriminated against as a result of their having been displaced.

Victims of internal displacement are entitled to the same rights and freedoms enjoyed by all other Afghans. Laws and official practices should not intentionally or unintentionally single out IDPs for less favorable treatment or impose undue burdens that would have the effect of restricting realization of these rights. Optimally, national legal frameworks should include provisions affirming the human rights of IDPs and their rights to non-discrimination and equality before the law.

As previously observed, the Afghan legal framework does not adopt a definition of who is an internally displaced person or explicitly recognize the threat that internal displacement poses to the enjoyment of one's fundamental rights and freedoms. There are no discernible provisions in Afghan laws that specifically affirm the right of IDPs to non-discrimination and equality before the law. Nevertheless, non-discrimination and equality before the law are guaranteed to all Afghan citizens in a variety of legally binding instruments, beginning with the Afghan state's

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<sup>76</sup> See, for example, “Afghanistan: Repeal Amnesty Law,” Human Rights Watch, 10 March 2010, available at <http://www.hrw.org/en/news/2010/03/10/afghanistan-repeal-amnesty-law>; “Top UN Human Rights Official in Afghanistan Calls for Repeal of Amnesty Law,” United Nations News Centre, 25 March 2010, available at <http://www.un.org/apps/news/story.asp?NewsID=34198&Cr=afghan&Cr1>.

<sup>77</sup> See Articles 5.3 and 5.4, *Draft Law on Disaster Response, Management, and Preparedness in the Islamic State of Afghanistan*. If approved, it would supersede the law on disaster response from 1990, a copy of which was not acquired for this report. (Draft law received from representative of the United Nations Development Programme).

<sup>78</sup> *Id.*, Articles 20 and 22.

constitutional obligation to ensure “equality among all ethnic groups and tribes.”<sup>79</sup> In addition, the *Constitution* prohibits “discrimination and distinction between citizens” and guarantees equality of all citizens before the law.<sup>80</sup> Similar non-discrimination provisions can be found in other legal instruments that affirm fundamental rights of all Afghans ranging from the freedom of expression and information, to the right to political participation, and the right to employment.<sup>81</sup> None of these provisions, however, makes note of the particular vulnerabilities of Afghan IDPs.

Provisions of *Decree No. 297 on the Dignified Return of Refugees* are also relevant to the protection of IDPs and could serve as a model for developing similar IDP-specific provisions on non-discrimination or could be applied by analogy to the situation of IDPs. This instrument makes clear that all “returnees” enjoy protection by the state, including freedom from discrimination, and that they also are guaranteed the same rights enjoyed by other Afghan citizens.<sup>82</sup> Similar guarantees for IDPs are fundamental to their protection but are notably lacking from the current legal framework. The *RRI Sector Strategy* omits specific reference to protecting IDPs from discrimination and ensuring their equal treatment under the law.

<b>Legal Protection During Displacement: <i>Civil and Political Rights</i></b>
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Internally displaced persons should enjoy without discrimination the full spectrum of civil and political rights, including substantive and procedural rights necessary for enabling their meaningful participation in public affairs and electoral processes.
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The Afghan legal system guarantees all citizens and habitual residents a broad spectrum of civil and political rights, including the right to life, security of person, and dignity as well as freedom of expression, information, assembly and other electoral-related activities. Civil and political rights like these are of particular significance in displacement contexts and should be protected.<sup>83</sup> They are not only relevant for securing the immediate safety and well-being of those who have been forcibly displaced, but they are also necessary for preventing marginalization and providing some semblance of empowerment during displacement. The right to legal personality and the right to political participation are of particular significance in this regard.

The right to legal personality, which implies a right to documentation, is itself a fundamental human right and can be a prerequisite to the enjoyment of other human rights and legal entitlements. Afghan IDPs who have lost or who are denied documentation, such as national identity cards (*tazkera*) or birth certificates, may be excluded from health care, education, pensions, and other social benefits as a consequence. In addition to recognizing the right to legal personality and documentation, the national legal framework should establish procedures to facilitate issuance of documentation to IDPs whose documentation has been lost or is unavailable.

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<sup>79</sup> Article 6, *Constitution of the Islamic Republic of Afghanistan*, *supra* note 30.

<sup>80</sup> *Id.*, Article 22.

<sup>81</sup> See, for instance, *Law on Mass Media*, Articles 4 and 5; *Law on Education*, Article 2; *Electoral Law* (2010), Article 5; and the Labor Code, Articles 2.1 and 9.1.

<sup>82</sup> See Articles 2 and 6, *Decree No. 297 on Dignified Return of Refugees*, *supra* note 69.

<sup>83</sup> See Principles 10, 11, 12, 14, 20, and 22, *Guiding Principles on Internal Displacement*, *supra* note 1.

The Afghan *Constitution* does not explicitly guarantee the right of legal personality, although it does recognize the inherent right of all Afghans to citizenship.<sup>84</sup> Legal personality is recognized by the *Civil Code*, which also provides for the registration of Afghan male citizens and the issuance of a *tazkera* or national identity card that contains personal and family information along with place of residency, type of occupation, and status of military service.<sup>85</sup> This document serves as an Afghan citizen's primary form of identification and means of accessing legal entitlements and is typically issued by the local population registration department of the Ministry of Interior.<sup>86</sup> According to the *Law on Registration of Population Records*, which regulates issuance of the *tazkera* as well as birth and death certificates, when a person seeking to obtain a *tazkera* and other documents is no longer in his place of normal residence, an application may be submitted to the local registration department.<sup>87</sup> This type of facilitated procedure is essential to ensuring that IDPs enjoy a legal relationship to the state and can realize their rights and freedoms under the law. It should be observed in practice.

In addition to obtaining documentation, IDPs, like other potentially marginalized groups within society, also have a legitimate interest in participating in governmental and public affairs. The ability of IDPs to raise awareness of their situation and influence policies and practices that affect their displacement should be protected by constitutional provisions on freedom of expression, assembly, and association, for example, and should be facilitated by laws on elections and those which support the development of civil society and public discourse.<sup>88</sup> Notably, the *Constitution* guarantees the right to vote along with other freedoms that enable Afghans to participate in elections and public affairs.<sup>89</sup>

The constitutional right to elect and to be elected is given effect by the *Elections Law*,<sup>90</sup> which regulates the organization and conduct of executive and legislative elections from the national to municipal level of government. It is noteworthy for several provisions that set forth the basis for ensuring that the electoral-related rights of IDPs are respected in practice. Not only does this law affirm the right of all citizens to take part in elections, it also prohibits restriction of this right on the basis of "social status."<sup>91</sup> Internal displacement is not formally recognized by law as a particular social status, but IDPs may be construed as falling within this category. Most significant of all from the perspective of IDP protection is the obligation of election authorities to

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<sup>84</sup> Article 28, *Constitution of the Islamic Republic of Afghanistan*, *supra* note 30.

<sup>85</sup> See Article 36 and 47, *Civil Code*, *supra* note 72. Registration is mandatory for all men, but reportedly optional for women. Articles 51-54 regulate residency and appear to define criteria for establishing and confirming residency but complete English language translations of these provisions are not readily available.

<sup>86</sup> Mobile registration units have reportedly been established in other government buildings and courts. For more information on the *tazkera*, see "Frequently Asked Questions: National Identification Cards," United Nations High Commission for Refugees (UNHCR), May 2005, available at: <http://www.unhcr.org/4497b1c12.pdf>.

<sup>87</sup> Article 5, *Law on Registration of Population Records*, 1955. (Efforts to confirm existence of a more recent version of this law or other instruments regulating issuance of population records were unsuccessful.)

<sup>88</sup> These laws include, *inter alia*, those regulating political parties, non-governmental organizations, and freedom of expression and information.

<sup>89</sup> Article 33 (right to elect and be elected); Article 34 (freedom of expression); Article 35 (freedom of association); and Article 36 (freedom of assembly), *Constitution of the Islamic Republic of Afghanistan*, *supra* note 30.

<sup>90</sup> *Decree of President of the Islamic Republic of Afghanistan on Promulgation of the Election Law (Election Law 2010)*, 18 February 2010.

<sup>91</sup> *Id.*, Article 5.

provide special voting facilities to IDPs.<sup>92</sup> Provisions that take into account the special circumstances of IDPs and facilitate their inclusion on the voter lists during the registration period should also be included in the Afghan electoral framework.

### **Legal Protection During Displacement: *Economic, Social, and Cultural Rights***

The economic, social, and cultural rights of internally displaced persons should be guaranteed in the national legal framework and respected and upheld in practice by national authorities during all phases of displacement.

Legal protection and enforcement of economic, social, and cultural rights is particularly important during situations of internal displacement like that found in Afghanistan. Many Afghan IDPs are in immediate need of shelter, food, and water from the moment they are displaced. Their survival and well-being often depends on realizing their fundamental rights to adequate shelter, sufficient food and potable water, and medical care. Respect for these rights along with labor, education, and property rights is an essential part of comprehensive responses to displacement and efforts to bring displacement to an end.

The Afghan *Constitution* sets forth guarantees for a variety of economic, social, and cultural rights along with the obligation of national authorities to protect human dignity and ensure an adequate standard of living for all Afghans.<sup>93</sup> Many of these rights are regulated by Afghan law and addressed in the *ANDS* and its *RRI Sector Strategy*.

National authorities are required by the *Constitution* to adopt measures necessary to ensure Afghan citizens in need have access to adequate shelter, housing, and land.<sup>94</sup> The rights to food and potable water are not expressly recognized but they can be construed as implicitly part of the right to an adequate standard of living and the right to life. Property rights are protected by the *Constitution* and regulated by provisions of the *Civil Code* and other legislative acts such as the *Law on Land Management Affairs*,<sup>95</sup> which regulates land rights, registration, distribution, and restoration of appropriated lands.

Property and land rights of IDPs are either specifically addressed or generally implicated by substantive and procedural provisions found in a series of executive acts that have been issued since 2001.<sup>96</sup> These include *Presidential Decree No. 297 on the Dignified Return of Refugees*, *Presidential Decree No. 83 on Property*, and *Presidential Decree No. 104 on Land Distribution*

<sup>92</sup> See Article 14, *Election Law 2010*, *supra* note 90.

<sup>93</sup> Articles 13 (standard of living), 14 (standard of living), 43 (education), 44 (education), 48 (employment), 49 (employment), 52 (health) and 53 (health), *Constitution of the Islamic Republic of Afghanistan*, *supra* note 30.

<sup>94</sup> *Id.*, Article 14. See also para. 55, *Afghanistan Universal Periodic Review State Report*, *supra* note 23.

<sup>95</sup> *Law on Land Management Affairs*, 2000. <http://parkerspitzer.blogs.cnn.com/2010/11/05/afghanistan-war-of-choice-or-necessity/>

<sup>96</sup> For a comprehensive and in-depth discussion of Afghan property and land rights, see Conor Foley, *Guide to Property Law in Afghanistan*, Norwegian Refugee Council (NRC), 2005. See also Sheila Reed and Conor Foley, *Land and Property: Challenges and Opportunities for Returnees and Internally Displaced People in Afghanistan*, Norwegian Refugee Council (NRC), June 2009; Liz Alden Wily, *Policy Brief: Land and the Constitution*, Afghan Research and Evaluation Union (AREU), August 2003.

for Settlement to Eligible Returnees. For instance, *Decree No. 297* stipulates that the recovery of property and land will be regulated by legal means, while *Decree No. 83* seeks to regulate property related disputes between individuals and the state. *Decree No. 104* is often cited as the most relevant and potentially useful normative document for addressing the land and shelter needs of IDPs. However, it requires IDPs seeking access to land to provide *tazkera* and also documentation proving internal displacement status. This requirement excludes most IDPs from relying on this instrument to assert their rights and access land allocation schemes that the decree envisages because they do not have the necessary documentation. Implementation of these and other decrees related to property, including *Decree (Circular Letter) No.4035 on Establishment of the Land Property Dispute Court*, has been inconsistent. As a result, they have not proven effective in promoting the land and property rights of IDPs.<sup>97</sup>

The right to work and freely choose employment is constitutionally guaranteed and affirmed by the Afghan *Labour Law*, which regulates the rights and benefits due to those who are employed as well as to those seeking employment and work. The *Labour Law* establishes the terms of recruiting employees and candidate eligibility, including proof of nationality, age, vocational training, and education.<sup>98</sup> It also expressly prohibits discrimination in recruitment, although no mention is made of protecting vulnerable groups, including IDPs, from discrimination.<sup>99</sup> The *Constitution* also entitles Afghans to free health services and education.<sup>100</sup> For its part, the *Law on Education* seeks to ensure that all Afghan citizens are able to equally exercise their right to education.<sup>101</sup> The protection of these substantive rights should be accompanied by procedural guarantees, including facilitated procedures for issuing documentation required for IDPs to realize these rights in practice.

The *RRI Sector Strategy* stipulates that Afghan national authorities will prioritize policies for the social protection of returnees and IDPs. This includes working to overcome what it recognizes to be constraints on those seeking to return in finding employment and housing in addition to accessing health and education services.<sup>102</sup>

<b>Legal Protection During and After Displacement: <i>Movement-Related Rights</i></b>
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Freedom of movement and residency should be recognized in the national legal framework and construed in a manner that takes the situation of internally displaced persons and efforts to find durable solutions into account.
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Movement-related rights, including freedom of movement and the right to freely choose one's place of residence regardless of ethnicity or other characteristics, contribute to the security and well-being of IDPs by allowing them to avoid unsafe areas during their displacement and also

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<sup>97</sup> See Reed and Foley, *Land and Property: Challenges and Opportunities for Returnees and Internally Displaced People in Afghanistan*, *supra* note 96, at 6.

<sup>98</sup> Article 13, *Labour Code*, 2006.

<sup>99</sup> *Id.*, Article 9.

<sup>100</sup> Articles 43 and 52, *Constitution of the Islamic Republic of Afghanistan*, *supra* note 30.

<sup>101</sup> Articles 2 and 6, *Law on Education*, 2001

<sup>102</sup> See *RRI Sector Strategy*, *supra* note 33, at 131 and 133.

eventually find durable solutions.<sup>103</sup> These rights should be enshrined in law and protected in practice. Administrative requirements, *i.e.* possession of *tazkera*, residency permits, and land and property titles, that may unintentionally limit the ability of IDPs to move freely and return to their homes, integrate locally, or settle elsewhere in the country should accommodate the realities of internal displacement. Security-oriented measures that regulate movement of civilians, such as curfews and checkpoints, should also be implemented with the particular circumstances of IDPs in mind, including the fact they may lack documentation proving their identity and residence.

The right to freedom of movement and residency is protected by the *Constitution*, which guarantees all Afghans the ability to “travel and settle in any part of the country” along with the right to leave the country.<sup>104</sup> However, there appears to be no law focused entirely on implementing this constitutional right, such as a law on movement and residency. Similarly, no special measures seem to have been taken to protect the movement-related rights of IDPs. *Presidential Decree No. 297 on the Dignified Return of Refugees* is the closest approximation to an official obligation to guarantee these types of rights, although it is clearly focused on returnees as opposed to IDPs.

The *RRI Sector Strategy* calls for the development of a “comprehensive set of policy arrangements to advance durable solutions” for the country's population of IDP, but it does not explicitly recognize movement-related rights of IDPs and their freedom to choose a durable solution. Although one of the National IDP Task Force's strategic objectives is to create conditions for voluntary return, local integration, or settlement elsewhere, this document does not explicitly affirm the movement-related rights of IDPs or provide a legal basis for IDPs to assert these rights.

## CONCLUSION AND RECOMMENDATIONS

Afghan national authorities have undertaken a number of protection-related initiatives to fulfill their responsibility to address the situation of IDPs. However, the legal and policy frameworks that are relevant to protecting the human rights of those who have been displaced and seeking durable solutions to their displacement contain few displacement-specific provisions. Most human rights guarantees and legal entitlements set forth in the *Constitution* and other normative acts are only of general application and do not by themselves provide a sufficient basis for addressing the specific needs of most Afghan IDPs. In addition, it is unclear if administrative rules and regulations tied to these laws of general application establish procedures and address modalities that allow IDPs to realize their fundamental rights. Moreover, those provisions and legal instruments which are narrowly tailored to IDPs do little to address the full spectrum of substantive and procedural rights that IDPs should enjoy. Therefore, a primary task for national authorities and other stakeholders is to enhance and seek improvements to the existing normative framework for IDP protection and its implementation.

This report provides general recommendations for realizing national responsibility for the protection of IDPs in Afghanistan. Guidance for incorporating specific elements of state

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<sup>103</sup> Principles 14, 15, 28, *Guiding Principles on Internal Displacement*, *supra* note 1.

<sup>104</sup> Article 39, *Constitution of the Islamic Republic of Afghanistan*, *supra* note 30.

regulation in national laws and policies related to displacement are included in Annex I. Although these recommendations and guidance are directed to national authorities and actors, they are also intended to inform the efforts of the international community to support efforts of their Afghan partners to address internal displacement in all its phases and to protect the human rights of Afghan IDPs through national laws, policies, and practices.

Afghan national authorities, other Afghan agencies and international partners are encouraged to consider undertaking the following measures:

- Adopt a flexible and dynamic definition of IDPs on the basis of the internationally recognized definition set forth in the *Guiding Principles on Internal Displacement* that can be used to guarantee the human rights enjoyed by the displaced and the duties owed to them by Afghan national authorities and actors;
- Strengthen the Afghan legal framework to protect the rights of IDPs by adopting and implementing comprehensive laws and policies on internal displacement that address all causes and phases of displacement in Afghanistan;
- Amend substantive and procedural provisions of Afghan national laws and policies to address the human rights of IDPs, including *inter alia* their rights to non-discrimination, legal personality, equality before the law, freedom of movement, and freedom from arbitrary displacement;
- Ensure the rights, needs, and vulnerabilities of IDPs are considered when developing national development strategies and community based interventions;
- Consult with IDPs in the adoption and implementation of Afghan laws, policies, strategies, and initiatives that affect the situation and rights of the internally displaced during all phases of their displacement, including in the delivery of humanitarian assistance, the planning of return, resettlement, or reintegration programs, and the management of development projects;
- Guarantee access of IDPs to formal justice mechanisms for resolving disputes and obtaining effective remedies for human rights violations linked to displacement, and, in those instances in which informal justice mechanisms are relied upon, ensure that these alternatives meet international standards for due process and non-discrimination;
- Facilitate greater participation of IDPs in public affairs and electoral processes, particularly at the provincial and local level, through rights awareness campaigns and voter education and registration programs focused on ensuring inclusivity of IDPs;
- Develop a framework for durable solutions that identifies measures for assessing when displacement ends and promotes the full range of voluntary and dignified options, including local integration and resettlement in addition to return of IDPs to their homes or communities of origin;

- Guarantee safe and unimpeded access by humanitarian organizations and workers to IDPs and/or the safe, unimpeded access by internally persons to humanitarian assistance as well as non-discriminatory delivery of humanitarian assistance to displaced persons, particularly to women, children, and the disabled; and
- Promote greater awareness of and respect for human rights and humanitarian law and distinguish at all times between civilians and combatants including during counter-insurgency operations as a means to protect IDPs and to prevent arbitrary displacement.



## Appendix I: Minimum Essential Elements of State Regulation

In drafting legal and policy frameworks for addressing internal displacement, Afghan national authorities are encouraged to consider the following minimum essential elements of state regulation, which are necessary to adequately protect IDPs.<sup>105</sup> Laws and policies on internal displacement should aim to incorporate these elements, which arguably represent the core obligations of states under international law.

### Part I: General issues

- Adopt a concept of who is an internally displaced person that is consistent with and not narrower than that used in the Guiding Principles on Internal Displacement. The definition of IDP must not create a specific legal status that is granted, refused or ceased in individual cases; it should serve as a factual description of the circumstances of a person that is used to determine the applicability of IDP laws and policies.
- Recognize the right of any IDP to be protected against discrimination on the ground that he or she is internally displaced as well as against discrimination in relation to other IDPs or non-displaced individuals and communities on any ground such as race, color, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, or birth or any similar criteria.
- Provide for measures that cover all three phases of displacement: (1) to prevent or minimize displacement (e.g. disaster mitigation and preparedness plans, training of security forces); to respond to in the immediate displacement phase; and to establish conditions necessary for the achievement of durable solutions.
- Provide for measures to raise awareness of the existence and nature of internal displacement and provide targeted training on the rights of IDPs.
- Establish systems for the collection and protection of relevant data.
- Designate an institutional focal point for IDP issues at the national level and, where appropriate, sub-national level.
- Vest an institution such as the National Human Rights Commission or the Ombudsperson's Office with the authority and responsibility to monitor and report on the respect and protection of the rights of IDPs.
- Ensure the consultation and participation of IDPs in all matters affecting them during all phases of displacement, and provide sufficient information on such matters to enable them to make voluntary and informed decisions about their future.

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<sup>105</sup> These key objectives of laws and policies are drawn from *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, available at [http://www.brookings.edu/papers/2008/1016\\_internal\\_displacement.aspx](http://www.brookings.edu/papers/2008/1016_internal_displacement.aspx). These objectives are consistent with obligations of national authorities and the rights of IDPs as set forth in the Guiding Principles on Internal Displacement.

- Provide for the allocation of necessary human and financial resources.
- Provide the necessary legal basis for cooperation with national and international humanitarian partners, including provisions to facilitate the immediate entry of humanitarian personnel and goods, such as the waiver of regular visa and customs requirements.

*Part II: Protection from displacement:*

- Recognize the right to be free from arbitrary displacement.
- Penalize arbitrary displacement in domestic law under circumstances in which it amounts to a crime against humanity or war crime in accord with the Rome Statute.
- Take penal and administrative measures to ensure compliance with relevant rules of international humanitarian law, including rules on the conduct of hostilities and the duty to distinguish between civilians and combatants and between civilian objects and military objectives.
- Adopt disaster policies that not only regulate response but also focus on disaster risk reduction and preparedness.
- Include in national development plans and resettlement policies a clear articulation that forced displacement or relocation induced by development projects must be authorized by law, justified by compelling and overriding public interests, necessary to protect these interests and carried out with full respect for the human rights of affected persons. Also include provisions on procedures by which any such displacement or relocation will be effectuated, available remedies including resettlement and compensation, and the right to administrative or judicial review.

*Part III: Protection and assistance during and after displacement*

*Humanitarian Assistance*

- Create a mechanism responsible for coordinating the provision of humanitarian assistance to IDPs.
- Assign to relevant authorities or organizations at the national and local levels clear and specific obligations in the area of humanitarian assistance to IDPs, and provide them with the necessary means to do so.
- Establish mechanisms and procedures to identify beneficiaries of humanitarian assistance on the basis of need and particular vulnerability.
- Determine criteria for the delivery of humanitarian goods and services in accordance with recognized international minimum standards.

- Set up criteria and mechanisms ensuring full humanitarian access to all persons in need.
- Eliminate any obstacles hindering the provision of humanitarian goods from domestic sources, such as subsidies or price regulations on domestic commodities that set their prices above global prices.
- Facilitate the import and internal transport of humanitarian goods not sufficiently available domestically (e.g., by waiving or relaxing import restrictions and quotas; customs duties and other taxes) and the speedy entry of foreign humanitarian workers and organizations to the country (e.g. by streamlining visa requirements; expediting permits).
- Provide for the criminal penalization of attacks by state as well as non-state actors against humanitarian relief personnel and their material, transport and supplies where such attacks would amount to a war crime under the Rome Statute.
- Provide, in the aftermath of an armed conflict, other situation of violence or natural or man-made disasters for humanitarian assistance for a transitory period as well measures to reestablish food security, provision of water and sanitation, health services, and education at the locations where IDPs find durable solutions.

#### *Movement-related Rights of IDPs*

- Recognize IDPs' right to freedom of movement, including specifically the rights to seek safety in another part of the country and to be protected against forced return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.
- Abolish administrative obstacles that may exist which limit the possibility of IDPs to reach safe areas or, when conditions allow, to return to their homes.
- Recognize the right of all IDPs to make a voluntary and informed choice between return, integration at the location of displacement or resettlement/relocation in another part of the country.
- Provide for specific measures (such as humanitarian demining, re-deployment of police forces, or demobilization drives in return areas) to ensure safety and security for returning IDPs.

#### *Family Life*

- Recognize or reaffirm the right of IDPs to family unity.
- Assign responsibilities to governmental agencies to search for and reunite members of families who have become separated in the course of displacement; and/or to seek support from the international community for this task.

- If necessary, create national mechanisms responsible for investigating the fate of missing persons and to provide information and, wherever possible, mortal remains and personal effects to survivors; and/or to seek support from the international community for this task.

### *Food*

- Recognize the right to adequate food for IDPs.
- Provide for the penalization, as a war crime, of the use of starvation as a method of war, in accordance with the Rome Statute of the International Criminal Court.
- Designate a governmental authority to be responsible for the procurement, storage and distribution of food to IDPs, and allocation of sufficient funds for that purpose.
- Seek and accept support from the international community if needs cannot be sufficiently satisfied at the domestic level.
- Establish procedures to identify and prioritize beneficiaries of food and other nutritional aid on the basis of need and particular vulnerability.
- Eliminate any obstacles hindering the domestic sourcing of food, such as subsidies or price regulations on domestic commodities that set their prices above global levels.
- Facilitate the importation of food aid (e.g. by waiving import restrictions and quotas, customs duties and other taxes).

### *Water and Sanitation*

- Recognize the right to potable water for IDPs.
- Designate an agency at the local level responsible for the provision and maintenance of water and sanitation services for IDPs, whether or not in camps.
- Seek and accept assistance from the international community if needs cannot be sufficiently satisfied at the domestic level.
- Establish procedures to identify and prioritize beneficiaries of water and sanitation services on the basis of need and particular vulnerability.

### *Basic Shelter and Adequate Housing*

- Recognize the right to basic shelter and adequate housing for IDP.
- Designate a governmental agency responsible for addressing shelter and housing needs of displaced persons.

- Seek and accept support from the international community if needs cannot be sufficiently satisfied at the domestic level.
- Establish procedures to identify and prioritize beneficiaries of basic shelter and adequate housing on the basis of need and particular vulnerability.
- Remove legal obstacles as contained, e.g. in building and similar codes, for the construction of transitional shelters or the rebuilding of houses in return or relocation areas.
- Create specific guarantees to protect IDPs against forced evictions where general guarantees are insufficient.

### *Health*

- Recognize the right to health for IDPs.
- Designate an agency or organization responsible for providing essential health services to IDPs in cases where IDPs cannot easily access regular services available to the general population.
- Seek and accept support from the international community if needs cannot be sufficiently satisfied at the domestic level.
- Establish procedures to identify and prioritize beneficiaries of health services on the basis of need and particular vulnerability.
- Provide for the waiver of standard and universal requirements (e.g. specific documentation, residency requirements, health insurance coverage) that limit or exclude access of IDPs to health services, and for free access to such services on the basis of need and particular vulnerability.

### *Recognition, Issuance and Replacement of Documents*

- Establish institutional mechanisms and facilitated procedures for issuing or reissuing essential documentation to IDPs through facilitated procedures, including use of official records and alternative forms of evidence available to IDPs.
- Ensure that, where appropriate and necessary, the issuance of “IDP cards” for purposes of identification and access to specific assistance is carried out in a rapid and accessible process.

### *Property and Possessions*

- Recognize the property rights of IDPs to their abandoned homes, property and land, including the right to protection and restitution of such property.

- Take basic measures to secure homes, lands and property left behind by IDPs against destruction, unlawful use or occupation and appropriation.
- Develop facilitated procedures to restore or compensate IDPs' rights in housing, land and property; where this is not possible, provide support to informal dispute resolution bodies to take into account human rights law in negotiating solutions to local property claims.

#### *Employment, Economic Activities and Social Protection*

- Recognize the right to work and the right to social security for IDPs.
- Take specific measures to protect IDPs against discrimination in the labor market and access to social security benefits.
- Direct existing governmental agencies responsible for labor and social security related issues to specifically evaluate and take responsive action to unique problems faced by IDPs (e.g. through provisional work programs, access to livelihoods inputs, micro-credit and other support, skills transfers and vocational training, access to labor market and social security programs).
- Provide for measures (such as micro-credit systems; vocational training; distribution of farming implements, seeds or animals) that help former IDPs to regain their livelihoods or engage in new economic activities at the locations where they find durable solutions.

#### *Electoral Rights*

- Provide mechanisms for IDPs to register as voters even during displacement, such as through facilitated procedures to maintain existing registration, to transfer registration, and/or to waive requirements that would prevent IDPs from registering at the site of displacement.
- Allow IDPs to cast their vote at the location of displacement, for either the constituency of their origin (absentee vote) or the constituency of their displacement.

#### *Education*

- Recognize the right of IDPs to receive primary school education that is either free or provided on at least as favorable a basis as it would be for poor members of the host community.
- Abolish administrative obstacles that may unreasonably and discriminatorily limit access to schools because they do not sufficiently take into account the specific problems faced by IDPs (i.e., requirements related to documentation, formal transfer from the previous school, or the pupil's ability to provide books and school uniforms).

- Establish a clear obligation on the part of the competent authority to provide education to IDPs located in areas inaccessible to existing schools.

## **Appendix II: List of Relevant Afghan Legal Instruments**

Constitution of the Islamic Republic of Afghanistan, 2004

Civil Code, 1977

Law on Citizenship, 2005

Law on Education, 2001

Law on Land Management, 2000

Law on Mass Media, 2006

Law on Non-Governmental Organizations, 2005

Law on Police, 2009

Law on Political Parties, 2003

Law on Registration of Population Records, 1955

Law on the Procedure for Obtaining Rights (Huqooq), 1999

Juvenile Code, 2005

Penal Code, 1976

Presidential Decree on Electoral Law, 2010