

Dard Kush II: A comprehensive desk review of refugee policies in Afghanistan

A review of Afghanistan's legal, policy and institutional frameworks on returnees and diaspora

I. INTRODUCTION

The mass displacement of Afghans, both internally and across borders – which began in the late 1970s, peaked in the 1980s and continues to this day – is connected to the different phases of war and conflict. The ebb and flow of the different conflicts has also meant that many Afghan refugees were repatriated or have voluntarily attempted to return and reintegrate back into Afghanistan, often having to flee again due to an escalation of conflict. For instance, after the fall of the Taliban in 2001, an estimated 5.7 million refugees returned home mainly from Pakistan and Iran.¹

This has prompted the Afghan government to develop frameworks dealing with return and reintegration of refugees and internally displaced persons (IDPs) (“returnees”). Nonetheless, throughout this period, Afghans made up one of the largest refugee population in the world, thus creating a large global diaspora. Currently, there are more than 6.5 million Afghan refugees scattered worldwide, of whom 2.43 million are in Iran and 2.40 million are in Pakistan.²

This paper examines the existing legal, policy and institutional frameworks, including multilateral and bilateral agreements, that address returnees in Afghanistan and the Afghan diasporas. The paper attempts to identify the existing gaps and challenges in these frameworks in terms of the reintegration and protection of returnees and the Afghan diaspora.

i. Methodology

The legal system in Afghanistan is based on three pillars: 1) Sharia law, 2) Customary and international law, 3) statutory law (State law). While mentioning the second pillar, which includes international conventions and multi-/bilateral agreements, this study mainly focuses on the third statutory law pillar, which includes legislation, decrees and national policies and strategies.³

The government of Afghanistan has drafted at least 40 documents to help Afghan returnees access rights and privileges available under international laws and standards. It must be noted however, that

¹ IOM (2016). Displacement Tracking Matrix (DTM): Migration Flows from Afghanistan and Pakistan towards Europe: Understanding Data-Gaps and Recommendations. P. 25. Available at: https://afghanistan.iom.int/sites/default/files/Reports/dtm_2016_-_migration_flows_from_afghanistan_and_pakistan_towards_europe_understanding_data_gaps_and_recommendations.pdf (accessed 2 September 2020).

² Ministry of Refugee and Repatriation (MoRR): <https://morr.gov.af/>

³ Norwegian Refugee Council (2016). Access to Tazkera and Other Civil Documentation in Afghanistan. p. 12. Available at: https://www.nrc.no/globalassets/pdf/reports/af_civil-documentation-study_081116.pdf (accessed 2 September 2020).

no laws or policies regarding the Afghan diaspora have as yet been developed by the Afghan government and therefore cannot be analyzed in this paper.

To understand Afghanistan's legal, policy and institutional frameworks on returnees, the study has reviewed nearly 30 documents available online and in hardcopies that were obtained from the Ministry of Refugees and Repatriations (MoRR), Office of the First Afghan Vice President, international organizations, such as International Organization for Migration (IOM) and other related government agencies. The reviewed documents are listed in the references below.

II. LEGAL, POLICY AND INSTITUTIONAL FRAMEWORKS

The country's frameworks on return consists of four parts: 1) International instruments Afghanistan is a party to; 2) Multi-/bilateral agreements the country has signed; 3) National laws and policies enacted by the Afghan government; as well as 4) Institutional framework, which is made up of the relevant institutions in charge of implementing the various agreements laws and policies of Afghanistan.

Afghanistan has signed numerous international instruments as well as multi-/bilateral agreements related to migration. However, most of these documents apply to refugees in general, rather than addressing the specific needs of the returnees. Similarly, some of the national legal and policy measures do not comply with the obligations these international treaties and/or agreements set out for the Afghan government.

i. International Conventions and Declarations

Afghanistan has ratified a number of international conventions and declarations on refugees. The country ratified the 1951 refugee convention and its 1967 Protocol in 2005.⁴ The convention defines the term "refugee" and outlines the rights of displaced persons as well as legal obligations of governments to protect them.

It is also a party to the Fourth Geneva Convention or the Convention to the Protection of Civilians in the Time of War adopted in 1949, which deals with the humanitarian protections of civilians in a war zone and sets forth conditions in case of displacements.⁵

ii. Multilateral and bilateral agreements

Afghanistan has signed a number of agreements concerning the return of Afghans with a number of countries, especially its neighbors – Pakistan and Iran – where most of the Afghan refugees have resided. For instance, Afghanistan has signed agreements with a number of countries concerning

⁴ UNHCR (1951). Convention and Protocol Relating to the Status of Refugees. 28 July 1951. Available at: <https://www.unhcr.org/3b66c2aa10> (accessed 2 September 2020).

⁵ The Geneva Convention - IV (1949). The Geneva Convention Relative to the Protection of Civilian Persons in Time of War. 12 August 1949. Available at: <file:///Users/aliahmad/Downloads/ATTXSYRB.pdf> (accessed 2 September 2020).

voluntary repatriation of Afghan refugees, such as Pakistan,⁶ Iran,⁷ Sweden, Germany, the Netherlands, the United Kingdom, France and Australia.⁸

1. “Joint Way Forward” on migration issues between Afghanistan and the European Union⁹

Signed in October 2016 by the Government of Afghanistan and the European Union, the Joint Way Forward (JWF) repatriation and readmission Memorandum of Understanding reflects the joint commitment of the EU and the Government of Afghanistan to step up their cooperation on addressing and preventing irregular migration, and on return of irregular migrants. This affects those, in particular, who after the consideration of all relevant international law and legal procedures cannot be granted international protection status. The JWF is not intended to create legal rights or obligations under international law.

2. Solutions Strategy for Afghan Refugees to Support Voluntary Repatriation and Assistance to Host Communities (SSAR)¹⁰

In 2012, Afghanistan, Pakistan, Iran and the UNHCR jointly developed SSAR to address the problems of Afghan refugees, which is a regional issue. The document is aimed at providing a response to these issues by setting up three protection measures: 1) facilitating voluntary return by encouraging local-based investment; 2) capacity building for refugees by providing livelihood opportunities; and 3) helping in finding asylum opportunities and resettlement in third countries. The SSAR also urges the MoRR to identify the needs of the returnees and to ensure this policy framework (SSAR) is included in development plans. The full implementation of SSAR in Afghanistan, however, has been a challenge, due to insufficient resources and a lack of capacity of related government institutions.

3. Tripartite Agreement between Afghanistan, Pakistan and UNHCR¹¹

This document was signed in 2003 to govern the repatriation of Afghan citizens living in Pakistan. It has been extended on a yearly basis since that time. The core of this agreement is the voluntary return of Afghans from Pakistan. It also urges the parties to help the refugees return in dignity, have access to education and information on return, reunite with their families in Afghanistan and validate their travel documents to be able to return.

⁶ UNHCR (2003). Tripartite repatriation agreement between UNHCR and the governments of Pakistan and Afghanistan. Available at: <https://www.refworld.org/topic,50ffbce510,50ffbce537,55e6a5324,0,,MULTILATERALTREATY,AFG.html> (accessed 2 September 2020).

⁷ UNHCR (2002). Joint Program Between the Governments of the Islamic Republic of Iran, the Interim Authority of Afghanistan, and UNHCR for Voluntary Repatriation of Afghan Refugees and Displaced Persons. Available at: <https://www.refworld.org/topic,50ffbce510,50ffbce537,55e6a81b4,0,,MULTILATERALTREATY,AFG.html> (accessed 2 September 2020).

⁸ Visit the MoRR website, at: <https://morr.gov.af/>

⁹ Joint Way Forward (2016). Joint Way Forward on Migration Issues between Afghanistan and European Union, October 2016. Available at: https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf [Accessed 2 September 2020].

¹⁰ UNHCR (2012). Solutions Strategies for Afghan Refugees to Support Voluntary Repatriation, Sustainable Reintegration and Support of Host Countries. Governments of Afghanistan, Iran and Pakistan. May 2012, Geneva, Switzerland.

¹¹ UNHCR (2003). Tripartite repatriation agreement between UNHCR and the governments of Pakistan and Afghanistan. Available at: <https://www.refworld.org/topic,50ffbce510,50ffbce537,55e6a5324,0,,MULTILATERALTREATY,AFG.html> (accessed 2 September 2020).

4. Tripartite Agreement between Afghanistan, Iran and UNHCR¹²

This agreement was signed in 2002, and has been extended yearly since then. It is mainly aimed at voluntariness of the returnees, reuniting them with their families, and validating their Voluntary Repatriation Forms (VRFs) as valid IDs and travel documents.

iii. National legal and policy framework

Afghanistan's legal and policy framework addressing issues related to returnees has been evolving since 2002.

1. Comprehensive Immigration Policy¹³

This document was adopted by the MoRR on August 25, 2019, to respond to the country's complex migration situation in four areas: return and reintegration, regular migration, prevention of irregular migration and migration development. It is a comprehensive immigration policy that clearly prioritizes "ensuring safe return through integration and relocation."

2. National Policy Framework for IDPs and Returnees¹⁴

The government of Afghanistan adopted this policy in 2017 to organize and coordinate the registration system of the returnees and IDPs. This document sets forward a coordinated framework to provide humanitarian response and emergency support to integrate the returnees and IDPs into hosting communities and provide them livelihoods and employment. It urges the registration of all undocumented returnees who enter Afghanistan through border points with Pakistan and Iran, finding suitable host communities for them – that may or may not be in their region of origin, – emphasizes the reduction of barriers for accessing basic needs, and offers financial packages by national and international agencies.

3. Comprehensive Voluntary Repatriation and Reintegration Policy (CVRRP)¹⁵

The High Commission on Migration (see Institutional Framework below) adopted this document in 2015. It guarantees the returnees' fundamental rights and enables the refugees to make an informed decision about return to Afghanistan by facilitating "go and see visits" to the host areas and accessing information through media. The CVRRP urges the MoRR, in coordination with other relevant ministries, to provide settlements and affordable housing for

¹² UNHCR (2002). Joint Program Between the Governments of the Islamic Republic of Iran, the Interim Authority of Afghanistan, and UNHCR for Voluntary Repatriation of Afghan Refugees and Displaced Persons. Available at: <https://www.refworld.org/topic,50ffbbe510,50ffbbe537,55e6a81b4,0,,MULTILATERALTREATY,AFG.html> (accessed 2 September 2020).

¹³ IRA (2019). Comprehensive Immigration Policy of Afghanistan. Ministry of Refugees and Repatriation. p. 117.

¹⁴ IRA (2017). Policy Framework for Returnees and Displaced Persons. Ministry of Refugees and Repatriation (MoRR). Available at: <https://morr.gov.af/sites/default/files/2019-05/%DA%86%D8%A7%D8%B1%DA%86%D9%88%D8%A8%D9%BE%D8%A7%D9%84%DB%8C%D8%B3%DB%8C%D8%A7%D9%88%D9%84%D9%85%D8%A7%D8%B1%DA%86%281%2931201894422279553325325.pdf> (accessed 2 September 2020).

¹⁵ IRA (2015). Comprehensive Voluntary Repatriation and Reintegration Strategy (CVRRP). Ministry of Refugees and Repatriation (MoRR). Available at: <https://www.refworld.org/docid/5b7299cb4.html> (accessed 2 September 2020).

the returnees. It differentiates between the returnees in urban and rural areas by considering land as a priority for those who return to rural areas, and money and skills for those who return to the cities.

The CVRRP covers both documented and undocumented Afghan refugees and returnees. However, it only provides short-term assistance for the latter, such as food and non-food packages, transport allowance etc. It does not guarantee any durable reintegration services for undocumented returnees. A big gap in the document is that it does not propose any mechanism to support the host communities.

4. Strategic Plan of MoRR¹⁶

In 2015, MoRR developed a five-year strategic plan to manage displacement and provide services to IDPs and returnees. The plan also carries an action plan, which was approved in 2017 by the subcommittee of the High Commission on Migration (see Institutional Framework below). Since migration has a long history in Afghanistan, there are many documents, including presidential executive decrees, that date back to 1980s and earlier, which govern different aspects of migration issues in the country. Policies, laws and regulations enacted before 2001 fail to address IDPs or asylum seekers¹⁷ by mostly focusing on returnees. The current legal and policy framework has improved over time.

Overall, the legal documents related to the migration look good on paper but lack effective implementation mechanisms. For instance, Presidential Decree 104 (PD104)¹⁸ on land distribution for settlement to returnees and IDPs issued in 2005, urges the government to distribute the barren lands of the government to returnees and IDPs. However, it fails to set land selection criteria, resulting in the distribution of land that does not meet living standards and is often far from urban areas.

5. Afghanistan National Development Strategy (ANDS)¹⁹

Developed in 2008 by the Afghan government, ANDS mainly focuses on policies for security, governance, economic growth and poverty reduction. The Seventh Pillar of the document focuses on refugees, returnees and IDPs with an objective to facilitate the voluntary return of the refugees and IDPs to their homes and their reintegration, in the hopes that it will substantially contribute to the economic growth, security and reduction in poverty. According to the document, the voluntary return of the refugees from Pakistan, Iran and other countries is governed by an agreement between the parties involved.

iv. Institutional Framework

¹⁶ Visit the MoRR website, at: <https://morr.gov.af/>

¹⁷ In 2014, Pakistani security forces launched a military operation in North Waziristan, forcing over 280,000 people to flee into Afghanistan's Khost and Paktika provinces:

OCHA (2016). Humanitarian Response Plan: Year-End Report of Financing, Achievements and Response Challenges - Afghanistan 2016. P. 27. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/afg_hrp_2016_year_end_report.pdf

¹⁸ Presidential Decree 104 on Land Distribution for Shelter to Eligible IDPs and Returnees (2005).

¹⁹ IRA (2007). Refugees, Returnees, and Internally Displaced Persons Sectors' Strategy. Afghanistan National Development Strategy 2008-2013) available at: https://morr.gov.af/sites/default/files/2019-05/DariRefugeeStrategy_final1992011829118381458322570.pdf (accessed 2 September 2020).

Many government and non-government organizations in Afghanistan are directly or indirectly involved in handling refugee and IDP issues.

1. Ministry of Refugees and Repatriations (MoRR) acts as a main central authority, coordinating affairs related to refugees, IDPs, and returnees with national and international institutions. In addition to policy making, its main responsibilities are encouraging voluntary repatriations and facilitating the reintegration of returnees.
2. The National Leading Committee is run jointly by the MoRR and UNHCR and is constituted of 15 ministries and 7 independent agencies. Its main task is to serve as a platform for coordinating and mobilizing resources.
3. The High Commission on Migration was created in 2015²⁰ to provide political support in response to refugees and IDPs situations. It is the highest government decision-making body concerning policies and programs on migration and displacement directly supervised by the President. The Commission is composed of at least 25 entities that include some key ministries such as Ministry of Interior, Foreign Affairs, Education and Health.²¹
4. The Subcommittee on Migration Affairs was also created in 2015 within the framework of the Office of the Former Chief Executive, which is a part of the Council of Ministers (cabinet members). The subcommittee on migration is tasked with implementing the decisions of the High Commission on Migration, and coordinating with the Council of ministers and the Cabinet.
5. The Displacement and Return Executive Committee (DiREC) established in 2016 is tasked with coordinating resources and efforts both within the government and non-government institutions for immediate response to returnee and IDP issues. It is led jointly by the MoRR, the Office of the former Chief Executive and the United Nations Assistance Mission in Afghanistan.
6. Some other national, international, governmental and non-governmental organizations are also involved or influence the process of policy making and providing assistance for refugees, returnees and IDPs. They include some key ministries such as Ministry of Interior, Ministry of Foreign Affairs, Ministry of Education and Ministry of Public Health, the UN, IOM etc.

III. CONFLICTS AND GAPS:

After reviewing nearly 30 documents, potential gaps and conflicts were identified. Some of them are listed here.

1. There is no national migration law

Afghanistan is a signatory to international conventions that govern refugee issues, however, despite being a signatory and one of the biggest refugee producing countries in the world, it has not enacted national migration or refugee law. The country is governing these issues through short-term policies, laws and executive decrees, thus making it difficult to find a long-lasting solution.

²⁰ Visit the MoRR website, at: <https://morr.gov.af/>

²¹ IRA (2017). About High Commission for Migration. Available at: <https://president.gov.af/en/about-high-commission-for-migration/>

2. The Presidential Decree 104

The Presidential Decree 104, which establishes a regime for land allocation to IDPs and returnees, fails to set selection criteria. It mostly focuses on the profile of the beneficiaries rather than their vulnerabilities or opportunities. It limits the type of land to be distributed to sterile and dire lands. It does not allow the returnees to select where they want to find livelihood opportunities. The lands allocated are not otherwise suitable, being located in isolated areas, with little or no access to basic services.

3. No clear allocation of roles between different sectors

The legal, policy and institutional frameworks do not provide clear allocation of roles and responsibilities between different government agencies involved in refugee and IDP related issues. There are too many institutions involved, which sometimes opens the way for corruption and bureaucracy within the system. There is also poor coordination between the government agencies and lack of clear understanding of the laws and policies within the government.

4. Weak implementation

While the laws, policies and regulations have improved over time, effective implementation is still a challenge. This is mainly because of corruption, weak coordination between different agencies, weak capacity of the agencies, and lack of sufficient resources. Despite the MoRR's role as a central hub, there are many other ministries and agencies involved in addressing the issues of returnees. This makes it difficult for the MoRR, which is insufficiently resourced and lacks capacity, to track all activities.

5. No policy for diaspora

The current legal and policy framework mainly aims to address aspects of returnee and IDP issues. Over the years of migration and displacement, Afghans have formed large diaspora communities in the region (near diaspora) as well as in Europe, Americas and Australia (wider diaspora). The government of Afghanistan, however, still does not have a policy to engage its 'near and wider' diaspora for the benefits of their country of origin. The Afghan diaspora community, who need international protection, falls outside of the umbrella of the current legal and policy framework.

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