



Land Governance in an Interconnected World

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IMPROVING ACCESS TO STATE LAND FOR RETURNEES AND IDPS IN AFGHANISTAN

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Abstract

This report focuses on a new legal framework recently developed in Afghanistan to allocate suitable state land to the displaced population. The finalisation, adoption, and implementation of this new legal framework is crucial to ensure that the most vulnerable and landless members of Afghanistan's displaced population receive durable and sustainable land and housing options. This report provides an overview of Afghanistan's previous land allocation framework and explains the events that led to the Government's development of a new and improved framework. It also examines the procedure to assess and allocate land anticipated by the new framework and underscores important innovations. Finally, the report provides recommendations on how, once finalised and hopefully adopted, the Government could operationalise the legal framework to ensure that the carefully crafted provisions translate into actual assessments of suitable land and the allocation of land parcels to Afghanistan's most vulnerable returnees and IDPs.



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1. Introduction

In the coming months, 2.4 million Afghan refugees will start to leave Pakistan and return to Afghanistan. For several decades these Afghan refugees have built their homes, families, and livelihoods in Pakistan. Now they must leave it all behind. Some families have no land or property in Afghanistan; others are simply unable to return to their ancestral land due to ongoing conflict and persistent land grabs. The Government of Pakistan has indicated that in April 2018 unregistered refugees will be the first group to return to Afghanistan. With such high levels of displacement, it is crucial that the Government of Afghanistan (Government) has an effective, functioning, and transparent land allocation system to provide its most vulnerable returning citizens and growing number of internally displaced persons (IDPs) with durable housing solutions and tenure security.

The anticipated returns from Pakistan will add to over two million displaced persons in Afghanistan who also need durable land and housing solutions. In 2016 and 2017, over a million refugees returned to Afghanistan from Pakistan and Iran, and over 807,420 people within Afghanistan were forced to abandon their land to flee the conflict. These returnees and IDPs are currently seeking shelter in and around four regional hubs—Jalalabad, Kabul, Herat, and Pule-e-Khumri—in search of improved services and better security and employment opportunities. Most are landless, vulnerable, and forced to live in over-crowded and under-serviced informal settlements. This influx of returnees has particularly impacted Afghanistan's Eastern region; schools and health facilities are overloaded, wages depressed by 70 percent, and rent increased by 200 percent (*Oxfam, 2017*).

The large number of anticipated returns and existing IDPs mean that access to suitable state land and security of tenure are of paramount concern and comprise key components of the Government's response plan. Since 2016, the Government has taken measures to strengthen its response plan by developing a new legal framework to ensure the transparent and effective allocation of parcels of suitable land to the most vulnerable returnees and IDPs. At the time of writing, the final draft of the legal framework has been submitted to the Cabinet and is currently pending final review and approval. The finalisation, adoption, and implementation of this new legal framework is now crucial to ensure that the most vulnerable and landless members of Afghanistan's displaced population receive durable and sustainable land and housing options.



This report, *Improving Access to State Land for Returnees and IDPs in Afghanistan*¹, focuses on Afghanistan's state land allocation system. The first section provides an overview of Afghanistan's previous legal framework governing land allocation and explains the events and process that led to the Government's development of a new and improved framework. The second section sets out the new legal framework's procedure for assessing and allocating land, highlights its important innovations and developments, and examines its solutions to the previous framework's difficulties and challenges. The third section examines preparatory steps taken by the Government to lay the foundations for the possible implementation of the new legal framework. The fourth section provides short and longer term recommendations on how the Government, with support from the international community, could effectively operationalise this new legal framework and, ultimately, develop an integrated and country-wide state land distribution strategy.

1. Improving Afghanistan's Legal Framework for Land Allocation

This section provides an overview of the previous legal framework governing the allocation of state land in Afghanistan, the major challenges and problems that prevented its successful implementation, and the events that led to the Government's call for a new legal framework. It will also address the practical measures and process adopted by the Government, with support from international stakeholders, to develop a new legal framework.

A. Presidential Decree 104 (2005-2016)

Since 2005, the allocation of land to displaced persons was governed by Presidential Decree 104 on Land Distribution for Housing to Eligible Returnees and IDPs (PD 104). While this decree was intended to provide housing and tenure security for displaced persons, in practice, it was crippled by corruption, suffered severe delays, and failed to provide returnees and IDPs with viable and durable housing options. One of PD 104's biggest problems was that land allocated to displaced persons was not suitable for any form of sustainable settlement. Land allocation sites were mostly barren with no basic services, water, infrastructure, education, health care, or transport services, and located in rural or peri-urban areas miles away from livelihood or employment opportunities. Members of the displaced population who received land parcels quickly found that, despite their new found tenure security, the lack of livelihood and

¹ The views and opinions expressed in this article are exclusively those of the authors and should not be attributed, directly or indirectly, to the United Nations, including the United Nations Assistance Mission in Afghanistan (UNAMA), the United Nations Mission in South Sudan (UNMISS), or UN-Habitat. This article was written in the authors' personal capacity and not at the request of UNAMA, UNMISS, or UN-Habitat.



employment opportunities meant that they could not support their families. As a result, they abandoned their land parcel and housing unit in search of employment and livelihood opportunities in more urban centres.

PD 104 was widely criticized for its failure to provide durable housing options to the most vulnerable members of the displaced population. Afghanistan's Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC), for example, concluded that PD 104 was a "...vague, defective and impractical document which is not based on the realities". MEC also underscored the need for proper internal procedures, rules and guidelines, and expressed concern at PD 104's scant level of implementation and increasing opportunities for corruption (*MEC, 2013*).

Data on the number of land parcels allocated and occupied under PD 104 confirms MEC's concerns. According to the Afghanistan Analysts Network by the end of 2014, there were more than two million landless returnees in Afghanistan who could be eligible for the land allocation scheme and in desperate need of housing. Yet out of a total of 266,000 applications, only 57,500 plots of land had been allocated, and only 21,000 of these plots were actually occupied (*Afghanistan Analysts Network, 2016*). Anecdotal evidence similarly suggests that less than 20% of the land parcels allocated by the Ministry of Refugees and Repatriation (MoRR) are currently occupied. With such low occupancy rates, Afghanistan's previous land allocation system was recognised as having largely failed.

B. Developing a New Legal Framework

In 2016, over one million Afghan refugees—both registered and undocumented—returned to Afghanistan from Pakistan and Iran. For many the decision to return was involuntary, and triggered by push-factors such as loss of host-country support, fear of persecution, and increased difficulty in finding employment or housing. With no land, property, family, or ID cards many of these returnees looked to the Government to deliver on its promises of assistance, shelter, and state land. But in reality, the difficulties with PD 104 and the absence of a functioning state land allocation system meant that the growing number of returnees struggled to find temporary shelter and housing and had very limited means of accessing the state land allocation scheme.

The majority of returnees found temporary shelter in cramped rented housing in sprawling informal settlements. Others stayed in shelters or shacks with relatives or host families or in camp-like settings in makeshift tents, or in open spaces. These settlements lacked safe water, sanitation, electricity, education, and health services (*NRC, 2018*). However, their informal and illegal nature meant that international and national stakeholders were prohibited from providing any long-term development interventions, such as



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sustainable shelter, water, and sanitation facilities. Whether these returnees could receive durable and sustainable housing options, therefore, turned on whether the Government had the political will to address PD 104's shortcomings and create a new, effective, and transparent land allocation framework.

With the onset of winter 2016, the growing number of returnees, and worsening security situation, the Government announced that it would strengthen its response plans to provide returnees with sustainable forms of assistance, including suitable land and durable housing options. In November 2016, the Government started this initiative by establishing the Displacement and Returnee Executive Committee (DiREC) which is co-chaired by the Chief Executive Officer's Office, MoRR, and the United Nations Assistance Mission in Afghanistan (UNAMA). DiREC's task was to find a solution to the huge number of returning refugees and the urgent need for a functioning state land allocation system.

DiREC started by establishing three technical working groups on land, policy, and finance, and adopting the Policy Framework for Returnees and IDPs and the related Action Plan. Goal 4 of the Action Plan required the Government to "improve access to land and adequate housing". To realise this goal, DiREC specifically tasked the Technical Working Group on Land (Land Group) to develop a new and effective legal framework for state land allocation that would resolve PD 104's inherent problems. The Land Group was chaired by the CEO of the Afghanistan Independent Land Authority (Arazi, the equivalent of the Ministry of Land), H.E. Jawad Peikar, and Khyber Farahi, a senior advisor to the President on migration and social development. Its membership included MORR, Ministry of Urban Development and Housing (MUDH), Ministry of Finance (MOF), the Independent Directorate for Local Governance (IDLG), and other related ministries and selected members of the international/national community, including the Afghanistan Housing, Land, and Property Task Force (HLP-TF), UNAMA, UN-Habitat, UNHCR, IOM, NRC and the World Bank. Pending the development of a new legal framework, the Government decided to stop any further land allocations under PD 104.

Over a period of 17 months, the Land Group convened numerous meetings with members of the Government and international stakeholders. It discussed the hallmarks of an effective land allocation system, identified practical solutions to PD 104's problems, and identified best practices and international standards. The Land Group commenced the process by discussing the HLP-TF's existing guidance notes on what makes land suitable for allocation to the displaced population and the eligibility criteria for receiving land. It then established a sub-drafting committee composed of Arazi's legal counsel, UNAMA Rule of Law, UN-Habitat, NRC, and UNHCR, that distilled these discussions into legal provisions and procedure in both Dari and English.



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In March 2017, after numerous drafts, presentations, research, and discussions, the Land Group produced the first complete draft of a new legal framework. To ensure that civil society's views were incorporated into the framework, the HLP-TF, UN-Habitat, and NRC held a series of public consultations with members of civil society, donors, NGOs, INGOs, and local government in Kabul, Herat, and Jalalabad. The valuable input received from these public consultations helped to streamline the new framework's procedure, enhance its practical application, and create a sense of national ownership. In November 2017, the Land Group finalised the new legal framework and submitted it to H.E. President Ghani for review.

With another 2.4 million returnees expected to return to Afghanistan in the coming months, the Government is cognisant of the urgent need to re-start allocating state land to the most vulnerable returnees and IDPs. At the end of January 2018, H.E. President Ghani requested the Minister of Justice and Arazi to take the necessary steps to adopt and operationalise the new legal framework so that the Government can start allocating state land to eligible displaced families.

2. A New Legal Framework - Procedure, Solutions, and Innovations

If adopted, the new legal framework will provide a streamlined and transparent procedure to identify and allocate free and suitable state land parcels and housing units to the most vulnerable returnees, IDPs, and martyrs of security and defence forces' families.

A. *New Procedure to Allocate Land*

The new legal framework establishes one national land selection committee, chaired by Arazi, that is responsible for identifying and determining the suitability of land for allocation. The process is triggered by the submission of a land request by the relevant municipality or Directorate of Urban Development and Housing to the land selection committee. The form provides details of a possible land allocation site and requests the land selection committee to conduct an assessment to determine whether the land meets the core and recommended criteria and is thus suitable for allocation to displaced persons. To determine whether the proposed land meets these criteria, the land selection committee requests written confirmation from the relevant provincial institutions.

Based on these written confirmations, the land selection committee, first, determines whether the land meets six core requirements including: absence of any mines or explosive remnants of war; close proximity to planned or existing livelihood or employment opportunities; not prohibited from allocation to displaced persons by Afghan law; adequate planned or existing water supplies; no foreseeable risk of



extreme hazards; and less than a 15 percent slope. Land that does not meet all of these core requirements cannot be allocated by the land selection committee.

Next, the land selection committee determines whether the land meets seven additional recommended requirements including: close proximity to planned or existing health clinics, schools, and an access road; no contamination; sufficient soil quality for constructing housing units; not of cultural, religious, or archaeological significance; and close proximity to locally available building materials in order to construct the housing units. Where the proposed land does not meet the recommended requirements, the land selection committee will identify land improvement measures to ensure that within a period of three years the recommended requirements are met and the land is suitable for allocation. In limited cases, land may be occupied by applicants before completion of the improvement measures.

The new legal framework also establishes beneficiary committees in each province of high return that are responsible for assessing applicants' eligibility and vulnerability. Families applying for land must appoint a male and female to act as joint heads of the family unit. The joint heads of the family unit can apply for a land parcel at returnee information centres in the province where they would like to receive land. To be eligible to receive a parcel of state land, a family unit must meet the basic eligibility criteria.

To meet the basic eligibility criteria, just the joint heads of a family unit must provide different forms of documentary proof of displacement. Documented and unregistered returnees must demonstrate return to Afghanistan by providing one of several documents including an MORR returnee certificate, Voluntary Return Form (VRF), or IOM beneficiary card. IDPs must demonstrate at least ten years' continuous displacement, from the date that the new legal framework is adopted, by providing an MORR IDP certificate, IOM beneficiary card, proof of assistance card, beneficiary card from humanitarian agencies, or written community verification. Martyrs' families will automatically meet the eligibility criteria when their names are included on an approved list submitted to the relevant beneficiary committee by the National Security Council. Beneficiary committees shall discontinue assessment of any family units that do not meet the basic eligibility criteria.

All members of family units that meet the basic eligibility criteria are subsequently assessed to determine their combined vulnerability score. Beneficiary committees will assess family units' vulnerability based on multiple scoring factors including dependency ratio, family composition, income, assets, and current housing conditions. Family units that meet the basic eligibility criteria are eligible to receive land. Priority is given to family units with the highest scores in the vulnerability assessment.



The Government together with the relevant beneficiary committee determines which eligible family units receive land parcels. This determination is based on a list of eligible family units, their vulnerability assessment scores, and the number of available land parcels in the relevant land allocation site.

The highest scoring family units selected to receive land parcels receive a construction permit. This permit provides family units with the right to occupy and construct a housing unit on the land parcel in accordance with specific housing standards and regulations. Once the housing units are constructed, family units can apply to Arazi for a full title deed for their allocated land parcel. The title deed will include the names of both the male and female heads of the family unit, or in the case of single-headed family, just the respective woman's or man's name.

B. Innovations and Solutions in the New Legal Framework

i) Access to Livelihood and Employment Opportunities and Water

As discussed above, one of PD 104's problems was that most allocated land often had no access to livelihood or employment activities and water. PD 104 only required allocated land to be in high altitude and uncultivated sites, intact, and belonging to the state. As a result, land allocation sites were barren, lacked basic services, including water, and were frequently located miles from any employment or livelihood opportunities.

One of the first land allocation sites was located 50 km north of Kabul. It was initially intended to house 1,400 returnee families, but as of 2017 only 300 residents remain, e.g. 21 percent of the initial capacity. Due to the lack of water and livelihood and employment opportunities, the majority of families left their housing units and moved closer to Kabul to find employment.

To address these issues, the new legal framework will introduce core criteria requiring all land allocation sites to be located in close proximity to existing or potential livelihood or employment opportunities and have access to adequate planned or existing water supplies. The land selection committee is responsible for making this determination based on written confirmation provided by the relevant municipality and the Ministry of Energy and Water. To avoid situations where returnees and IDPs are eventually forced to leave land allocation sites in search of livelihood and employment opportunities and potable water, the new legal framework will strictly prohibit the allocation of any land that does not meet both these criteria.

The land selection committee shall, holistically and on a case-by-case basis, assess whether a potential land allocation site is in close proximity to livelihood and employment opportunities. In particular, it will consider whether the distance to employment and livelihood activities exceeds 15 km and whether there



are adequate transport options where the travel time would not exceed 45 minutes and the cost would not exceed 40 AFN (approximately \$0.6).

ii) No Mines or Risk of Extreme Hazards

Under PD 104, land allocated to displaced persons was in some instances mined, contaminated, and at risk of being destroyed by severe hazards such as earthquakes, heavy flooding, or avalanches. One such example is the Baba Sahib land allocation site in the Mihterlam district of Laghman. In 2016, MoRR began to distribute 12,000 land parcels to displaced persons. However, UNMAS raised concerns about the possibility of landmines and explosive remnants war (ERW), given the land's previous use in the 1970s as a notorious battleground between the Russians and Mujahedeen. UNMAS's assessment subsequently revealed that 35 percent of the site (a 6 km radius) was contaminated by anti-tank mines and ERWs, and the remaining area required subsurface clearance. The cost of the necessary clearance activities was estimated at half a million dollars and, therefore, the Government abandoned plans to allocate the land.

The new legal framework will prevent consideration of any land allocation site, like Baba Sahib, that poses a security risk and is costly to clear. It will do so by introducing a core criterion that land can only be allocated once written confirmation is received from the Mine Action Programme of Afghanistan and the National Environment Programme that the land is clear of landmines, ERW such as UXO/AXOs and high levels of contamination.

The new legal framework will, similarly, prevent consideration of potential land allocation sites that carry a foreseeable risk of extreme hazards. It will do so by introducing a further core criterion that land can only be allocated once written confirmation is provided by the Directorate of Urban Development and Housing, based on data provided by Afghanistan's Spatial Data Centre (ASDC) confirming the absence of any foreseeable risk of severe hazards such as earthquakes, heavy floods, avalanches, and landslides.

iii) Topographic Slope

One of the new legal framework's innovations is the core requirement that land must have less than a 15 percent slope to be suitable for allocation to displaced persons. This criterion will remove PD 104's requirement that land be located in high altitude and ensures that all allocated land will be relatively flat and contiguous for housing construction, agriculture, and water supply/irrigation system. Land with more than a 15 percent topographic slope is also prohibited from allocation because it carries a greater risk of soil erosion and requires complex and often costly infrastructure and re-grading.



iv) Land Improvement Measures

Another one of the new legal framework's innovations is the introduction of land improvement measures to ensure that the allocated land provides durable housing options for the displaced population. Land that meets all six core criteria is *prima facie* suitable for allocation. However, as explained above, this land will be subsequently assessed against an additional seven recommended criteria.

The purpose of the recommended criteria is to enhance the suitability and quality of the land to ensure that the displaced community can effectively integrate and benefit from sustainable and durable housing. Given the paucity of available and suitable land in Afghanistan, the land improvement measures were specifically designed to ensure the continual "upgrading" of land sites by tying the improvements to existing programming such as National Priority Programmes. Where a land allocation site meets the core criteria but does not meet any of the recommended requirements, the land selection committee shall identify specific land improvement measures which must be completed within the timeframe of three years.

Given the urgent need to allocate suitable land to returnees, the new legal framework will allow eligible family units to occupy allocated land parcels before the completion of land improvement measures necessary to ensure the land is in close proximity to an existing or planned access road, health care centre, school, and local construction materials. Family units will not, however, be permitted to occupy land parcels until the completion of all land improvement measures that involve the removal of contamination, the sufficiency of the soil quality for constructing housing units, and the protection of any areas of cultural, religious, or archaeological significance

To assist the land selection committee to identify the land improvement measures, the Land Group will develop technical guidelines for each recommended criterion. The guidelines will set out which National Priority Programme the measures will be tied to, the different types of measures that could be implemented, as well as timelines, steps, and implementation partners.

v) Removing the Requirement to Return to Place of Origin

Another obstacle that prevented returnees from applying for land was PD 104's requirement that applicants return to their place of origin. This meant that applicants could only apply for and receive a state land parcel in their place of origin. Given the high levels of insecurity in Afghanistan, it could be extremely dangerous and, in some cases, impossible for returnees to return to their place of origin. This



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was particularly the case in Kunduz, Faryab, Ghazni, Nimrooz, and Uruzgan where active conflict is ongoing.

PD 104's requirement to return prevented some of the most vulnerable returnees from applying for and receiving state land. This requirement went to the heart of what was wrong with Afghanistan's state land allocation system and was specifically criticised by H.E. President Ghani who underscored returnees' and IDPs' fundamental right to resettle in the province of their choice. This requirement also violated the right enshrined in Afghanistan's Constitution that "[e]very Afghan has the right to travel or settle in any part of the country ..." (article 39). This right is echoed in Afghanistan's National IDP Policy which states that returnees and IDPs, like all Afghans, have the right to freedom of movement and to choose their place of residence. (articles 7.1.2 and 7.1.3.1). These provisions demonstrate that under Afghan law, returnees have the right to choose whether to return to their place of origin or to integrate and resettle in other parts of the country.

In fact, multiple surveys conducted in Afghanistan in 2017, 2015, and 2014 indicate that returnees' and IDPs' most preferred durable solution was not to return and re-integrate in their place of origin, but to resettle in urban areas (*Samuel Hall, 2018*). This is consistent with previous data from 2014, demonstrating that 91.4 percent of (over 3,032) returnees and IDPs surveyed in Kabul, Herat, Jalalabad, Mazar-e-Sharif, and Kandahar had no intention of returning to their place of origin and preferred to settle elsewhere (*DRC/PIN 2014*). Similarly in 2015, more than 80 percent of surveyed IDPs were not willing to return to their places of origin due to a lack of job opportunities and bad living conditions (*AIHCR, 2015*).

To address this challenge, the new legal framework will remove all provisions requiring members of the displaced population to return to their place of origin to apply for and receive state land. Instead, returnees, IDPs, and martyrs' families will be able to apply for state land in any returnee information centre in a province where land is both available and suitable for allocation. Furthermore, the eligibility assessment does not include consideration of whether a family unit's place of origin is the same as where they apply for land. Under the new framework, eligibility to receive state land will be determined, solely, on whether family units meet the basic eligibility criteria. All state land parcels will then allocated to the highest scoring—e.g. most vulnerable—family units, irrespective of their place of origin.



vi) ID Cards (Tazkera)

Under PD 104, members of the displaced population could only apply for land once they had obtained an ID card (*tazkera*) from their place of origin. The majority of returnees, however, were unable to obtain or replace *tazkera* due to loss, damage, or destruction during displacement. As discussed above, security concerns and lack of government institutions in the place of origin frequently made verification of identity difficult and, in some cases, impossible. This also posed an obstacle for women who experienced significantly more difficulties than men in obtaining *tazkera*, particularly given the requirement that they provide proof of identity for all male blood relatives. These difficulties were evidenced by a 2016 study which found that out of the IDPs surveyed 90 percent of men had obtained *tazkera*, while only 38 percent of women had managed to obtain their *tazkera* (NRC and Samuel Hall, 2016).

To expedite and simplify the land application process, the new legal framework will remove all requirements involving the provision of *tazkera*. This reflects the reality that many returnees and IDPs applying for land will not be able to obtain *tazkera*. The new legal framework, therefore, will allow applicants to meet the basic eligibility criteria by providing alternative forms of documentation, such as MORR returnee or IDP certificates, VRF, or IOM beneficiary cards, to demonstrate their return or protracted displacement.

Heads of family units who receive a land parcel and complete the construction of their housing units will be eligible to apply to Arazi for a title deed. As Afghan law requires proof of citizenship from all people who are granted title deeds to state land, at this point in the process, heads of family units will need to provide *tazkera*. Attempts are, however, underway to develop and operationalize an *e-tazkera* system. Since July 2017, the Afghanistan Central Civil Registration Authority, with NRC's support, has started piloting a new registration process through mobile teams and the establishment of the *Motteffareqa* (sundry) registration books. This allows displaced Afghans to obtain *tazkera* after registration in the *Motteffareqa* register, which cuts out the need to return to their place of origin to enter their details in the physical register.

vii) Proof of No Other Landholdings

Under PD 104, returnees could only apply for land if they could prove that they were “landless” and did not have any landholdings in Afghanistan. But absent a centralized land registration system, there was no effective way for officials to verify landholdings in Afghanistan. This was particularly the case when only 35.5 percent of land (including state land) had been surveyed; and only 30 percent of land in urban areas, and less than 10 percent in rural areas had been registered through official deeds.



Under PD 104, the Directorate of Refugees' Affairs delegated its responsibility to determine applicants' landless status to district representative in applicants' places of origin. According to MEC's investigations, this requirement paved the way for corruption and provided opportunities for tribal elders and district representatives to seek illegal income streams (*MEC, 2013*). In addition, the Directorate of Documents and Deeds Registration responsible for maintaining the land title deed repository, was not established in all provinces, and lacked a centralised repository. Therefore, where land is regularly transferred through customary practices or remains registered under the original owner's name it was unclear what data, if any, officials could rely upon to issue such a certificate of landlessness (*UNAMA, 2015*).

Given the inability to prove whether applicants have other landholdings, the new legal framework will remove the "landless" requirement from the basic assessment of family units' eligibility. The new framework will, however, include consideration of alternative landholdings as one of many factors to determine applicants' level of vulnerability. Applicants with alternative landholdings will, therefore, receive a lower overall score in the vulnerability assessment.

viii) Prioritising Vulnerable Groups

Although PD 104 prioritised the allocation of land to "the disabled, widowed, and families without a head of household" it excluded, for example, the elderly, and chronically ill, and lacked an objective set of conditions. Under the new legal framework, returnees' and IDPs' vulnerability will be assessed based on the dependency ratio (the ratio of dependant family members to productive family members), specific vulnerabilities and proxy indicators of vulnerabilities. These indicators include livelihoods, coping strategies, shelter situation and endogenous capacity and, at the end of the assessment, are combined to form the final vulnerability score. Following the completion of the vulnerability assessment, data and biometrics details will be entered into the beneficiary database and a ranking system will determine the most vulnerable. Those with the highest scores in the vulnerability assessment will be given priority when available parcels of land are allocated.

ix) Transparency and Accountability Measures

Under PD 104, the land allocation process suffered from corruption, fraud, and a lack of accountability measures. According to MEC, under PD 104 the whole land allocation process was full of corruption—from bribery, back-handers, and fraud. In particular, the process lacked transparency, checks and balances, and accountability and oversight measures. Additionally, unsuccessful applicants had no means by which to challenge land allocation commissions' decisions regarding their eligibility (*MEC, 2013*)



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Concerns were also raised that decree 104 commissions were distributing land allocated to displaced persons for their personal gain. MEC's 2014 Land Usurpation Report, for example, stated that land allocation sites in "Lagman, Rabat (Gardiz), the Namgan plain of Kapisa, Khost, Kabul and the Khaja Alwan Plain of Baglan were illegally distributed to ineligible applicants, particularly to government and powerful people, through invalid documentation" (MEC, 2014). UNAMA's 2015 Land Report also documents how a provincial governor, allegedly, sold land allocated to IDPs and returnees for personal profit and how a decree 104 commission had not convened in over four years, ostensibly because no state land had been made available for allocation due to state land grabbing (UNAMA, 2015).

Similar concerns were raised by Afghanistan Analysts Network, who reported that in Herat the municipal land commission distributed 14,000 parcels of land to government officials and only 850 parcels to returnees and IDPs. In its 2013 report, MEC even went as far as to conclude that under PD 104 "...the current probable average amount of bribes being given to employees of this ministry [MORR] and the respective provincial directorates by deserving repatriates for every piece of land is hundreds of dollars. Therefore, an assessment of this process was of high importance..." (MEC, 2013).

To tackle these problems, the new legal framework will introduce transparency and accountability measures, and close down opportunities for corruption. From the outset, the framework clearly states its objective is to establish a fair, transparent, and effective state land allocation system for displaced persons, and to establish a transparent and equitable criteria by which to assess eligibility and prioritise the most vulnerable of the displaced population. It also tracks the elements of land usurpation, which was recently criminalized in the amended Penal Code, and underscores that any person(s) who illegally sell, transfer, lease, or rent state land to returnees, IDPs or martyrs' families shall be held to account.

To ensure that land commissions operate in a transparent and accountable manner, the new legal framework will require the land selection committee and the beneficiary commissions to file public reports, twice yearly, to the High Commission for Migration, and to be monitored by DiREC. To ensure the transparent allocation of land parcels, beneficiary committees will also be required to conduct a final review of the list of applicants selected to receive land parcels to verify that they have the highest scoring assessments in the vulnerability assessment.

To enhance the accountability and transparency of these commissions' operations, written documentation of all decisions will be entered into centralized land and beneficiary databases. The land selection committee's assessment of the suitability of land will also turn on written confirmation provided by the respective entities. This will create a comprehensive paper trail justifying the committee's



decisions. Following the new legal framework's adoption, it is important that guidelines are developed to ensure that all decisions taken by land and beneficiary committees are consistently documented, entered into the respective database and, where there are no confidentiality concerns, made available to the public.

To reduce opportunities for the illegal distribution of land parcels to people other than qualifying returnees, IDPs, or martyrs' families, the new legal framework will require all members of eligible family units to provide biometric data. This data is subsequently entered into the centralized beneficiary database and linked to the allocation of any future land parcel. Unlike PD104, the new legal framework will also introduce measures for applicants to challenge beneficiary selection committees' decisions regarding their eligibility to receive land parcels. It is important, however, that clear and accessible guidelines are developed setting out the timelines, grounds, and methods for bringing such appeals.

xx) Strengthening Security of Tenure for Women

The new legal framework takes important steps to uphold women's right to own land. This right is enshrined in the Constitution which provides that everyone in Afghanistan, e.g. men and women, are entitled to own land and prohibits any form of discrimination in the application of this constitutional right.

The new legal framework will take important strides to operationalise this constitutional right for the women of Afghanistan. It will do so by specifically providing the female head of a family unit with the right to apply, either alone, or together with the male head of the family unit, for a title deed after the construction of the housing unit. Arazi will subsequently issue the title deed in the names of both the female and male heads of the family unit. In the case of single female-headed households, the framework provides for the title deed to be issued solely in the name of the single female.

3. Preparatory Steps to Operationalise the New Legal Framework

A. Land Allocation Sites

Pending the finalisation, adoption, and implementation of the new legal framework, Arazi has identified two potential land allocation sites in Nangarhar province. One site, Barikap, which is located at the corner of Kot and Batikot district is not likely to be considered a suitable option for allocation. This is due to ISIS's increasing presence and a recent spate of attacks. The other site, Khanakai Qasmabad, located in Behsud district is more likely to be found suitable for allocation by a future land selection committee. Given the possibility that this site could meet the six core criteria, it will be used to pilot the implementation of the new legal procedure. The site is located 8.5 km northeast of Jalalabad city and totals 310ha of flat land. This means that 300m² land parcels could be allocated to 4000 qualifying



family units. The pilot will be conducted under the joint Arazi, UN-Habitat, and MUDH project on Sustainable Human settlements to support Urban Reintegration in Afghanistan.

B. Land Bank

The new legal framework anticipates the creation of a land bank and specifically assigns responsibility to Arazi to identify, survey, conduct land clearance, and register land that could be allocated to displaced persons in the land bank. In September 2017, H.E. President Ghani officially gave Arazi the mandate to establish a national land bank. The first phase of the land bank's establishment will focus on the clearance and registration of 25 percent of the originally estimated land that would be required e.g. 12,600 jeribs or 2,525 hectares. This land is located in four provinces, Nangarhar, Kabul, Baghlan, and Laghman, and provides access to basic services and possible employment opportunities.

C. Operational Guidelines

PD 104 was widely criticised for its lack of implementing procedures. To ensure that the necessary guidelines are in place to support the swift implementation of the new legal framework, Arazi and the Land Group are in the process of drafting seven detailed guidelines setting out the time frames, options, relevant standards, and best practices. These guidelines will assist the effective implementation of assessments on the suitability of land and eligibility of beneficiaries, site and community planning, land use plans, appellate procedures, codes of conduct, housing standards, and the special housing fund which will be used to operationalise the new legal framework.

4. Recommendations

To address the urgent housing and shelter needs of Afghanistan's existing displaced population as well as those of the 2.4 million anticipated returnees, the new legal framework should be expeditiously finalised, adopted and implemented. The following short and longer term recommendations highlight some of the key areas that would assist the Government, with the support of the international community, to expeditiously operationalise the legal framework and to, ultimately, develop an integrated state land distribution strategy.

Short-term Recommendations:

- **Implementing guidelines:** Develop and finalise all the supporting guidelines and implementing procedures necessary to guide the effective implementation of assessments on the suitability of land and eligibility of beneficiaries, site and community planning, land use plan, appellate procedures, codes of conduct, housing standards, and the special housing fund.



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- **Forms and templates:** Develop all necessary forms to request and confirm the suitability of land for allocation, templates for standard form decisions on the suitability of land and eligibility of beneficiaries, and forms assisting applicants to appeal decisions regarding their eligibility.
- **Site and community planning:** Develop and adopt effective site, community, and land use planning standards to ensure the avoidance of slum-like conditions and ethnic and tribal segregation within land allocation sites.
- **Outreach and public awareness campaigns:** Once the new legal framework is adopted, use community outreach and national media, radio, and television to ensure public awareness of the new legal framework, procedure, and application process. Conduct public meetings in communities of high return to explain programme conditions, the type and amount of land available for allocation, and the process.
- **Factsheet and video on applicants' rights:** These awareness-raising tools should be developed and made available at transit and resettlement centres and should include information on how to apply for land, challenge eligibility decisions, the nature of the assessments, and the type and amount of available land.
- **Beneficiary committees:** Members of beneficiary committees should be recruited and trained on how to conduct eligibility and vulnerability assessments and provide the necessary guidance to applicants.
- **Recruitment guidelines:** Recruitment guidelines for the employment of all staff involved in implementing the new legal framework should be developed and operationalised to ensure the consistent application of transparent, fair, and meritocratic hiring procedures.
- **Anti-corruption initiatives:** Measures should be adopted to ensure that all employees hired to operationalise the new legal framework undergo anti-corruption training and that clear reporting obligations, oversight mechanisms, and, where necessary, declarations of conflicts of interest are adhered to.
- **Land selection committee:** Appoint focal points from each representing organisation and hold preliminary meetings on how to swiftly operationalise the legal framework and commence the assessment of suitable land.



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- **National Priority Programmes:** Identify all national priority programmes and other programming opportunities that can tie into and support the new legal framework's implementation, particularly regarding options for possible land improvement measures.
- **Reporting mechanisms:** Establish reporting mechanisms to ensure that the land selection committee and the beneficiary committees report to DiREC on a regular basis.
- **Public lottery system:** Develop and implement a fair and transparent public lottery process to determine the allocation of land parcels where family units receive the same scores in the vulnerability assessment.
- **Funding streams:** Encourage the donor community to coordinate funding streams to bridge the humanitarian and development nexus and provide a coordinated approach to funding the necessary components of the new land allocation system.

Long-term Recommendations:

- **Alternative solutions for durable housing:** Given the growing numbers of the displaced population, it is unlikely that the state land allocation system will be able to cater for all landless returnees/IDPs. Other short and medium term alternatives should be explored in order to complement the new legal framework including:
 - formalisation of customary land rights to ensure that returnees and IDPs who purchased land have security of tenure;
 - regularisation and upgrading of informal settlements through incremental regularisation and basic service provision to move people along the continuum of tenure security from adverse possession, to *de-facto* tenure, occupancy certificate/usufruct rights, and ultimately *de-jure* ownership (land title); and
 - affordable low cost land and housing schemes including social/rental housing and community-level initiatives to lend, rent, or sell land in areas of particularly high return.
- **Land distribution policy:** Balancing the state's and displaced community's needs against the limited amount of suitable state land is challenging and requires the development of an overarching integrated state land distribution strategy to addresses the distribution of the full range of state land according to priorities.



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- **Development and humanitarian nexus:** The Government and humanitarian and development actors should together develop a dedicated strategy to address the increasing urbanization of displacement. In particular, Afghan authorities should enhance coordination regarding returnees' housing needs and new housing projects.
- **Include Returnees/IDPs in community decision making structures:** The Government and all international actors should include returnees/IDPs in decision-making structures at the community level in the formation of CDCs and *Gozar* Assemblies and increase transparency regarding all resource allocation.

5. Conclusion

With such high levels of displacement, the new legal framework is a crucial and important way for the Government to provide state land and improve security of tenure for its most vulnerable returnees and IDPs. Once finalised and, hopefully adopted, the challenge for the Government will be how to swiftly operationalise the new legal framework and ensure that the Land Group's carefully crafted provisions on the page translate into actual assessments of suitable land and the allocation of land parcels to Afghanistan's most vulnerable returnees and IDPs.

Ultimately, the Government of Afghanistan's new legal framework would provide returnees who lost their homes and livelihoods in Pakistan, and IDPs who fled their houses to escape conflict, with hope and with the promise of once more finding a home, a livelihood, and a new beginning in their own country; in a place that they really can call home.



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