

AFGHANISTAN'S FIGHT AGAINST CORRUPTION From Strategies to Implementation



Collective exams for civil servants and teachers in Kandahar province. Photo: IARCSC



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Executive summary

In 2017 and early 2018, Afghanistan's National Unity Government under the leadership of President Ashraf Ghani and Chief Executive Abdullah Abdullah continued to place a high priority on its anti-corruption reform agenda. Key developments included the adoption of the Government's Anti-Corruption Strategy on 28 September 2017, the adoption on 4 March 2017 and entry into force on 14 February 2018 of the new Penal Code, the enhancement of the activities and outputs of the High Council for Rule of Law and Anti-Corruption (High Council), the adoption of a reformed budget and the Anti-Corruption and Justice Centre's (ACJC) first full year of operation which saw it take on larger and more complex cases.

The adoption of the Anti-Corruption Strategy is an important signal of the Government's commitment to combatting corruption. It represents a strong and realistic reform agenda built around five priorities: political leadership in anti-corruption reforms; ending corruption in the security sector; replacing patronage with merit; prosecuting the corrupt; and tracking money flows. Due to the Strategy's constrained timeframe, its impact is likely to be limited compared to the scale of the problem it seeks to address. Measures for a seamless transition to a longer-term comprehensive Strategy should be designed as early as possible in parallel with the Strategy's implementation to ensure that the efforts that have begun under the National Unity Government are continued under future administrations. While the High Council and its Special Secretariat should use its review mechanisms to address any identified gaps in the Strategy and adjust its timeframe. President Ghani and the Chief-Executive Abdullah's personal commitment to advance justice and anti-corruption reforms make it more likely that the Strategy will ultimately gain traction in Ministries and institutions that are so far lagging behind with implementation. The Government's key anti-corruption achievements include the introduction of merit-based recruitment in many parts of the civil service through a re-energized and reform-committed Civil Service Commission, stronger oversight of public procurement, and the new and more transparent national budget developed by the Ministry of Finance.

The most notable achievement with respect to the prosecution of corruption offences is the adoption of a new Penal Code, a milestone in the country's criminal justice reform. It codifies all mandatory corruption offences in line with the United Nation's Convention against Corruption (UNCAC). The institutional framework and legal basis of anti-corruption bodies should be codified in a comprehensive anti-corruption law that also clarifies how these bodies work together. The law should, in particular, remedy remaining problems in the current asset declaration system, in particular strengthening a verification mechanism for asset declarations. Key anti-corruption institutions are currently based on executive decrees rather than on laws. The closure of the unsuccessful High Office of Oversight and Anti-Corruption, while welcome, leaves certain legacy issues that need to be addressed. These include the future development of other anti-corruption institutions, such as the Independent Monitoring and Evaluation Committee (MEC) and the newly created Special Secretariat for Anti-Corruption and the High Council, with a view to strengthening their preventive functions. Plans to establish a new Deputy Attorney General for Anti-Corruption, who will also have some preventive functions, remain to be fully realized and again some clarification might be required regarding how it works with other anti-corruption bodies. The Presidential Order of April 2018, to draft an Anti-Corruption Law provided welcome direction to the Ministry of Justice to engage in clarifying the legal framework in line with UNCAC.

The codification of all mandatory UNCAC crimes in the new Penal Code will also facilitate the prosecution and trial of corruption cases. While the implementation of judicial reform was slower than desired, and the improvement of integrity and accountability measures within the judiciary and prosecution is still required, the Attorney General's Office stood out for pursuing internal reforms, while also spearheading national-reforms. Despite continued weaknesses of Afghanistan's justice sector, prosecution of serious anti-corruption cases was possible due to the existence of a specialized ACJC. In its first full year of operation, the ACJC significantly improved its performance in investigating, prosecuting and adjudicating corruption cases. As at end of April 2018, the ACJC had completed 34 cases involving 142 accused persons with the

Appeal Court finalizing 32 cases with 98 accused persons. However, difficulties in enforcing arrest warrants led the centre to try 10% of the accused, half of whom are highest ranked defendants, in absentia. The new Penal Code should also help the ACJC become more consistent in its sentencing, which continued to be challenging for the Trial and Appeal Court alike, with the Supreme Court not exercising a corrective function. Key corruption cases also remain to be prosecuted. A referral mechanism for corruption cases below the ACJC's jurisdictional threshold to other courts should be developed while legislative amendments should be made to ensure that cases beyond the ACJC's jurisdiction are not held up in protracted proceedings before a specialized panel of the Supreme Court. Stronger outreach communicating achievements in corruption trials and prosecutorial strategies is required to ensure citizens of Afghanistan see justice being done and have confidence that fighting corruption is a Government priority.

The National Assembly has taken few steps to strengthen integrity measures, while disciplinary and criminal accountability against Members of the Assembly are hardly ever used. The Anti-Corruption Strategy should trigger the development of an anti-corruption reform plan for the National Assembly. Further measures to provide transparency and demonstrate abidance with the law include full compliance with the asset declaration obligation by Members of Parliament and, when required, approving arrests of Members in criminal proceedings. These measures are crucial to restore trust of Afghans in the Assembly. Difficulties in reaching consensus in the National Assembly prevented the Assembly from becoming a relevant force in balancing state powers, exercising its oversight functions and resulted in the executive acting as the main legislator pursuant to the emergency competence.

Afghanistan's civil society plays an increasing role in policy making. This role is mostly focused in Kabul, as civil society groups face difficulty in reaching out to all provinces. The growing expertise of this sector allowed it to contribute to the development of the national Anti-Corruption Strategy and exercise oversight functions in the National Procurement Commission and in the Civil Service reform. The NUG is to be commended for opening meetings, such as the High Council, to civil society representatives.

Afghanistan's multiple donor commitments, while catalysing reforms, occasionally hindered strategic approaches to anti-corruption matters and led to last minute erratic law making. New donor commitments on anti-corruption should build on the current reforms but be tailored to the actual ability of the NUG to deliver on them.

List of Abbreviations

ACJC	Anti-Corruption Justice Centre
AG	Attorney General
AGO	Attorney General's Office
CSOs	Civil Society Organization(s)
AIBA	Afghanistan Independent Bar Association
AML	Anti-Money Laundering and Proceeds of Crime Law
ANP	Afghanistan National Police
ANPDF	Afghanistan Peace and Development Framework
APPRO	Afghanistan Public Policy Research Organization
AREU	Afghanistan Research and Evaluation Unit
ARTF	Afghanistan Reconstruction Trust Fund
CARD-F	Comprehensive Agriculture and Rural Development Facility
CLRWG	Criminal Law Reform Working Group
CPC	Criminal Procedure Code
CPDS	Continuing Professional Development Support
DAC	Deputy Attorney General for Anti-Corruption Affairs
DANIDA	Danish International Development Agency
EPD	Equality for Peace and Democracy
EU	European Union
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigations
FinTRACA	Financial Transactions and Reports Analysis Centre of Afghanistan
HOOAC	High Office of Oversight and Anti-Corruption
IADC	Italian Agency for International Development
IDLG	Independent Directorate of Local Government
IDLO	International Law Development Organization
IMF	International Monetary Fund
INL	U.S. Bureau of International Narcotics and Law Enforcement Affairs
IWA	Integrity Watch Afghanistan
JCMB	Joint Coordination and Monitoring Board
JSRP	National Justice Sector and Judicial Reform Plan
MCTF	Major Crimes Task Force
MEC	Independent Joint Anti-Corruption Monitoring and Evaluation Commission
MoD	Ministry of Defence
MoE	Ministry of Education
MoF	Ministry of Finance
MoI	Ministry of Interior
MoJ	Ministry of Justice
MoTCA	Ministry of Transport and Civil Aviation
MoWA	Ministry of Women Affairs
MSP	Money Service Provider
MTM	Multi-Tiered Monitoring
MVCA	Ministry-wide Vulnerability to Corruption Assessment
NAP	National Action Plan
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organization(s)
NPP	National Priority Program
NSC	National Security Council
NTA	National Technical Assistance
NUG	National Unity Government
OAA	Office of Administrative Affairs of the President
PACC	Parliamentary Anti-Corruption Caucus
PC	Penal Code
RS	Resolute Support
SIGAR	Special Inspector General for Afghanistan Reconstruction
SMAF	Self-Reliance through Mutual Accountability Framework
StAR	Stolen Asset Recovery Initiative
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
US DoJ	United States Department of Justice
USAID	United States Agency for International Development
VCA	Vulnerability to Corruption Assessment

1. Introduction

1.1 Afghan context

For some years Afghans have been reporting in surveys that corruption is a daily problem.¹ The United Nations Assistance Mission to Afghanistan's previous report on corruption detailed the pervasiveness of the phenomenon.² Corruption has a concrete impact on all citizens of Afghanistan, who are required to pay bribes in nearly every aspect of daily life, and who suffer from inequities in economic and employment opportunities as a result of widespread nepotism and patronage. More fundamentally, the perception of endemic corruption—based, unfortunately, on real experiences as a recent survey³ demonstrated—has undermined public confidence in Government institutions, which has in turn hindered the pursuit of wider objectives, such as domestic political stability, electoral preparations, and a credible peace process with the armed opposition.

As certain emblematic instances have shown, corruption in Afghanistan is massive (the nearly one billion dollars stolen in the Kabul Bank case), inhumane (the treatment of wounded soldiers in the Military Hospital case), and brazen. The degree of corruption, and the apparent lack of concern by those committing it that there will be any consequences—legal, financial, or even in terms of social opprobrium—to their often despicable actions, has surprised even those with the most realistic perspectives on the challenges of post-conflict state-building. Fighting corruption is also a condition for creating an appropriate investment climate.

The question is, therefore, how has it come to this state? While some have argued that low-level corruption was always present in Afghanistan, it is clear that the decades of resistance and civil war created a culture of impunity and left a legacy of political actors who wield informal power, are often disposed to act at the behest of foreign financial backers, and are skilled at resisting formal authorities.

This historical lens should also help us understand what may be unique about Afghanistan's corruption problem. The problem of corruption in Afghanistan can be seen as materially different from that in other countries, even other countries emerging from conflict, in that it is characterized more by a lack of public institutions than the abuse of public institutions by private rent-seekers. The weakness of public institutions is rooted in Afghanistan's pre-conflict legacy of weak statehood, as well as decades of war which, as described above, created a political economy that privileged and preserved informal power-holders who have been able to resist attempts to formalize and legalize the exercise of power. Decades of war also fundamentally transformed society, weakening the traditional norms that once might have prevented the sorts of accumulation of wealth and abuse of power that Afghanistan has witnessed since the new political order was established in 2001, and developing psychologies of scarcity and uncertainty. This, coupled with an international effort that has treated state-building generally and anti-corruption in particular in a haphazard way, has created the seemingly intractable problem we face today. As much as the international community sees itself as a driver of anti-corruption efforts, it cannot overlook that, as Vanda Felbab Brown has recently written, the international community "has oscillated between tolerating corruption for the sake of other goals, battlefield shortcuts, and exigencies (with the justification that Afghans are used to corruption anyway) and confronting it head on but with little effectiveness."⁴

If, as noted above, corruption is so pervasive that it is difficult to be eradicated even by the best-intentioned and most thoughtful strategy, then what is the measure of effectiveness? The Government's new anti-

¹ The Asia Foundation, "Afghanistan in 2015: A Survey of the Afghan People," 2015.

² UNAMA, *Afghanistan's Fight against Corruption: The Other Battlefield*, April 2017, available at: https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_-_the_other_battlefield_-_april_2017_english.pdf (accessed on 22 February 2018). (UNAMA Anti-Corruption Report, April 2017).

³ The Asia Foundation, "Afghanistan in 2015: A Survey of the Afghan People," 2015.

⁴ FELBAB-BROWN, Vanda "Afghanistan Affections: How to Break Political-Criminal Alliances in Contexts of Transition", United Nations University Centre for Policy Research, Crime-Conflict Nexus Series No. 8, April 2017, p. 25.

corruption strategy, discussed in this report, tackles the issue head-on, noting that it is less of a “comprehensive plan” and more a “framework that allows our government to deal with current problems in a way that will let us learn and adapt over time.” Its defenders, reacting to an initial draft of this report, stress its realism, the need to prioritize, and the firm commitment of the Government to implement it. The strategy was developed amid a raft of other anti-corruption programmes of varying effectiveness. These are generally focused on improving processes, such as budgets and merit-based hiring, as well as attempting to establish dissuasive demonstration effects through prosecutions of higher-level officials. A case can be made that these programmes are mutually coherent. They do not, however, even together, significantly address the political economy dimension that underpins the significant degree of impunity that in turn underpins the pervasive corruption.

The two leaders of Afghanistan's post-2014 National Unity Government, President Ashraf Ghani and Chief Executive Abdullah Abdullah, are not only aware and concerned about the problem but separately campaigned on anti-corruption platforms. Afghanistan's slight rise in its Transparency International score from 8 in 2012 to 15 in 2016 and 2017—although the country still ranks as the fourth most corrupt country in the world—is evidence that some of their efforts are bearing fruit. The leaders of the National Unity Government should be congratulated for undertaking in particular the drafting of a national anti-corruption strategy, which is discussed in this report. Furthermore, the Government and its representatives at various levels engaged forthrightly with a draft of this report, seeking to ensure accuracy and context but not trying to hide deficiencies in the anti-corruption effort. The details in this report describe some of these efforts, but also make clear both that much more needs to be done and that the problem cannot be addressed by the executive alone. An insufficiently noted irony is the millions that the international community pays to hold credible and democratic elections for a parliament that, as soon as it is elected, is often ignored. As this report describes, Afghanistan's legislature is part of the corruption problem and has for the most part avoided trying to be part of the solution. Nonetheless, the credibility of the commitment of the Government to see through reforms is an unavoidable pre-requisite for the success of anti-corruption efforts. In this, the current Afghan Government—though it will face re-election next year—is not only far superior to its predecessor, but also to many other countries that are both less corrupt but less committed to dealing with the problem.

For many countries, corruption is manageable if unfortunate, and bribes are seen as an unofficial tax on Government services. If UNAMA is paying such attention to this problem in Afghanistan, it is because the current situation is not manageable; addressing corruption is simply essential for national survival. The issue is not only that corruption “undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism, and other threats to humanity to flourish,” as former UN Secretary-General Kofi Annan wrote in his Forward to the United Nations Convention Against Corruption.⁵ It is also that the deeply entrenched corruption that characterizes Afghanistan today prevents concepts such as the rule of law, human rights, and an organized and regulated economy from becoming meaningful. On a more pragmatic level, a failure to make progress against corruption will discourage already-fatigued donors from financing the Afghan state. If this financing has, as this report details, contributed more than it should have to the problem of corruption, it is also essential for the survival of the State and its efforts to root out corruption.

This report is intended to support the Afghan Government and its backers in its efforts to tackle this vital problem. It cannot be read, however, without a proper understanding of how significant the problem is, entrenched not only in Afghanistan's somewhat perverse political dynamics but also deeply rooted in Afghanistan's recent history. It is intended to be constructively critical: critical, because of the importance of the problem; constructive, through understanding its real nature and approaching solutions with realism. It is, at the very least, a cause for hope that, as the Afghan Government's anti-corruption strategy notes, there is within Afghan society a strong tradition of equality and social justice. This tradition

⁵ ANNAN, Kofi, Foreword, United Nations Convention Against Corruption, 2003.

represents itself every day in the frustrations Afghans feel about corruption. That frustration is the wellspring for the efforts that are described in the following pages.

1.2. Purpose, scope and methodology of the report

UN Security Council Resolution 2344 (2017) mandated the UN Assistance Mission in Afghanistan (UNAMA) to support Afghanistan in consolidating measures to prevent and combat corruption. Resolution 2405 (2018) welcomed anti-corruption commitments and the progress made by the Afghan Government to meet them. It mandated UNAMA to support Afghanistan's reform efforts through donor coordination and normative advice on anti-corruption measures.⁶ UNAMA issued its first comprehensive Anti-Corruption Report on 25 April 2017,⁷ which analysed progress made and challenges encountered until April 2017. The report was also intended to serve as a baseline assessment for follow-up annual reports.

The present report covers the period between January 2017 and late April 2018. Significant developments related to addressing corruption in this period include: the Government's adoption of its Anti-Corruption Strategy; the adoption and entry into force of the new Penal Code; improvements to the budgeting process; enhanced activities and outputs of the High Council for Rule of Law and Anti-Corruption; and the Anti-Corruption and Justice Centre's (ACJC) first full year of operation, during which it demonstrated an increased ability to process corruption cases. The focus of this year's report is on these key achievements. It should, however, be noted that there is still much progress to be made on anti-corruption as illustrated by the fact that Afghanistan is listed 177 out of 180 on Transparency International's 2017 Corruption Perception Index.

Efforts to measure Afghanistan's progress on anti-corruption often centre on the Government's numerous specific commitments to the donor community. UNAMA's report, however, approaches the issue with a wider lens. It looks not only at the performance of the executive branch and the line ministries, but also at the contribution of the legislative and judicial branches, as well as civil society and independent institutions. Whereas the Report aims at describing key developments in curbing corruption, an analysis of the private sector, the media and donor measures are beyond its scope. Also, the current report focuses mainly on the national level due to scarcity of data on the subnational level. Such analysis may be added in a later report or be the subject of a separate publication.

The aim of the Report is to support Afghanistan in its reform process by assessing the impact of anti-corruption measures through the collation and analysis of available data and by providing concrete recommendations. It also seeks to foster public awareness of areas where progress has been made and where challenges remain. The Report complements periodic reports and specific sectorial assessments prepared by other actors and attempts to put reform efforts in context. It relies on material and data collected through UNAMA's engagement with various stakeholders. In preparing this Report UNAMA held more than fifty meetings with national and international partners, including the Chief Judge, the Attorney General, and the Chairman of the Civil Service Commission, Members of Parliament, and Civil Society Representatives. This material has been analysed by UNAMA's in-house legal, political and governance experts. The Report benefited from input provided by members of the United Nations Country Team, in particular UNDP.

The chapter on investigation, prosecution and adjudication of corruption offences is based on data gathered in UNAMA's structured trial monitoring of all cases processed before the ACJC. This monitoring was conducted according to international best practices.⁸ After collecting this information, UNAMA created a database containing all the decisions issued by the ACJC as well as its own observations from attending public hearings. The publication of findings of a trial monitoring program is new for Afghanistan. These

⁶ Resolution 2405 endorses the findings of A/72/312-S/2017/696 Special report on the strategic review of the United Nations Assistance Mission in Afghanistan, 10 August 2017, including para 35.

⁷ UNAMA Anti-Corruption Report, April 2017.

⁸ See for example: OSCE ODIHR, Trial Monitoring: A Reference Manual for Practitioners, Revised edition 2012, available at: <https://www.osce.org/odihr/94216> (accessed on 25 February 2018).

findings allow the analysis of trends and recurring observations. Where case examples are used they serve to illustrate such trends.

On 22 February 2018, following a call by President Ghani upon all High Council members⁹ to support the preparation of the Report, UNAMA circulated an outline for comment to High Council members, independent institutions, and representatives of the judiciary, civil society and international partners. On 12 April, the draft Report was shared in English and Dari with the Head of the Special Secretariat, Dr Yama Torabi, who was appointed as the Report's focal point by President Ghani. Dr Yama Torabi shared it with Afghan Ministries and institutions he selected as relevant to verify data and conveyed the collected input to UNAMA. The feedback received from the Supreme Court, the Attorney General's Office, the Administrative Office of the President, the Monitoring and Evaluation Committee (MEC), the Ministry of Interior, the Open Government Partnership Afghanistan as well as from the President of the ACJC Appellate Court was taken fully into account and the Report was revised as appropriate.

⁹ Members of the High Council are listed in Section 2.2.

2. Anti-Corruption measures and reform framework (focus: executive branch)

During the period covered by this Report the National Unity Government significantly advanced anti-corruption measures. This included the adoption of the Anti-Corruption Strategy, development of amendments to the legal framework, and reforms in public financial management including public procurement and budget preparation. Civil service reform accelerated following the appointment of the new Chairman of the Independent Administrative Reform and Civil Service Commission (Civil Service Commission). However, these clear demonstrations of a commitment to anti-corruption reforms could not be achieved in all institutions and reforms in some sectors remained slow.¹⁰

2.1. The Government's delivery on international commitments to fight corruption

Afghanistan's international obligations regarding prevention and prosecution of corruption are derived primarily from the 2003 United Nations Convention Against Corruption (UNCAC), which Afghanistan signed on 20 February 2004 and ratified on 25 August 2008.¹¹ The UNCAC's Implementation Review Mechanism, an intergovernmental peer review process in which the performance of each State party is assessed by two peers in respective five-year cycles, is designed to assist States in implementing the Convention. Afghanistan's first review cycle¹² (2010-2015) focused on criminalization and law enforcement and on international cooperation. The second review cycle (2016-2020), which is ongoing, covers UNCAC's Chapter II "Preventive measures" and Chapter V "Asset recovery."¹³ Afghanistan will be reviewed in the second cycle by Jordan and Dominica. The review is based on Afghanistan's comprehensive self-assessment, supplementary information,¹⁴ and the outcome of a dialogue between the governmental experts from Brunei, China and Afghanistan (Brunei and China having been the peer reviewers in the first cycle). In February 2018, President Ghani issued a Decree tasking the Special Secretariat monitoring the implementation of the Anti-Corruption Strategy to begin compiling the self-assessment under the Anti-Corruption Committee of the High Council.¹⁵

Afghanistan is additionally bound by donor commitments related to anti-corruption efforts, including those stemming from successive donor conferences in Tokyo (2012), London (2014) and Brussels (2016) as summarized in UNAMA's 2017 Anti-Corruption Report.¹⁶ This year's report focuses on commitments that were to be delivered during the current reporting period.

In 2017, Afghanistan had to meet the 2017/2018 SMART deliverable of the Self-Reliance through Mutual Accountability Framework (SMAF), specifically: "Anti-corruption strategy for the whole of government drafted and endorsed by the High Council on Rule of Law and Anti-corruption in the first half of 2017 and implementation initiated in the second half of 2017. Five revenue-generating ministries publicly report on

¹⁰ President Ghani, Keynote address at the Fourth Annual EU Anti-Corruption Conference, Kabul 24 April 2018; available at: <https://president.gov.af/en/2018/04/24/> (accessed 6 May 2018).

¹¹ See UNCAC Signature and Ratification Status, available at: <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (accessed on 27 February 2018).

¹² In the first review cycle 2010 - 2015, Afghanistan was reviewed by Brunei and the People's Republic of China regarding the implementation of Articles 15 – 42 of Chapter III, "Criminalization and law enforcement" and Articles 44 – 50 of Chapter IV "International cooperation" of the UNCAC.

¹³ See UNCAC country profiles Afghanistan at: <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AFG> (accessed on 27 February 2018).

¹⁴ Paragraph 27 of the Terms of Reference of the Review Mechanism allows to consider additional information

¹⁵ See UNCAC country profiles Afghanistan at: <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AFG> (accessed on 27 February 2018).

¹⁶ UNAMA Anti-Corruption Report, April 2017, pp 2-4; Transparency International (TI), From Promises to Actions: Navigating Afghanistan's Anti-Corruption Commitments, September 2016, available at: https://www.transparency.org/whatwedo/publication/from_promises_to_action_navigating_afghanistans_anti_corrupti_on_commitments (accessed on 27 February 2018).

implementation progress of their anti-corruption action plans in 2017.”¹⁷ The Anti-Corruption Strategy was adopted on 28 September 2017 and its implementation initiated by Presidential Order on 9 December 2017. The Ministry of Finance (MoF) found that the deliverables had been achieved.¹⁸ Compliance with this commitment is under more detailed review by the United States Special Inspector General for Afghanistan Reconstruction (SIGAR), who will report to that country's House and Senate Committees on Appropriations on compliance by 31 May 2018.¹⁹

Under the IMF Structural Benchmarks for 2017, Afghanistan was required to improve its legislation criminalizing corruption offences and reform and implement the legal framework on asset declaration.²⁰ With the enactment of the new Penal Code and the adoption of a new Asset Declaration Law, on 4 March and 5 September 2017 respectively, Afghanistan met these commitments.²¹

In August 2017, the Afghan Government, the U.S. Embassy, and Resolute Support launched the Afghanistan Compact, a reform mechanism comprising time-bound benchmarks related to economic growth, governance, security, and peace and reconciliation.²² Each month, the Afghan Government reports its progress on pending benchmarks to four bilateral working groups that determine whether particular reforms were achieved.

With the advancement of anti-corruption reforms by the Afghanistan Government there have been parallel efforts to ensure that the donor community strengthens its own integrity and oversight measures. Multiple reports were published on this in 2017.²³

Observations:

Benchmarks related to prosecution and prevention of corruption have catalysed Afghanistan's anti-corruption reforms. For the sake of continuity, the donor community should remain engaged in the fight against corruption and strengthen oversight of its own funding wherever and whenever possible

2.2. High Council for Rule of Law and Anti-Corruption

The High Council for Rule of Law and Anti-Corruption was established by Presidential Decree on 17 August 2016.²⁴ The constitutional foundations of the High Council are Articles 64 and 75(3), regarding presidential powers and the Government's obligation to curb administrative corruption. The High Council is a body created by the Government, rather than a body for judicial self-administration, as have been created in some countries in transition.²⁵ The High Council is listed in the Afghanistan National Peace and Development Framework (ANPDF)²⁶ as one of eight Development Councils, responsible for overseeing two

¹⁷ See: 2017/2018 SMART deliverables of the Self-Reliance through Mutual Accountability Framework (SMAF), available at: http://mfa.gov.af/Content/Media/Documents/agreed_smaf_smart_deliverables_final26102016113033613553325325.pdf (accessed on 3 March 2018) (SMAF, Smart Deliverables 2017/2018).

¹⁸ Ministry of Finance, Status Report on Achieving Commitments Self-Reliance through Mutual Accountability Framework (2017-2018), February 2018; see also: The situation in Afghanistan and its implications for international peace and security Report of the Secretary-General, A/72/768*–S/2018/165*, 28 February 2018, para 34; see infra 2.3 and 2.5.

¹⁹ Joint Explanatory Statement to the Consolidated Appropriations Act for 2017, enacted 5 May 2017.

²⁰ IMF Country Report No. 17/377.

²¹ Infra, Section 2.4.

²² See: <https://af.usembassy.gov/u-s-afghan-statement-bilateral-compact-executive-committee-meeting/> (accessed on 3 March 2018).

²³ See for example: DANIDA, Robustness and vulnerabilities to corruption in Denmark's aid funding modalities in Afghanistan, CMI report, number 2, June 2017; or SIGAR Reports available at: <https://www.sigar.mil/>; regarding MEC's reports see infra 5.2.

²⁴ Decree 94 Regarding the High Council for Rule of Law and Anti-Corruption Decree 94 (17 August 2016).

²⁵ See for example: Council of Europe, Eastern Partnership Enhancing Judicial Reform in the Eastern Partnership Countries, Working Group on Independent Judicial Systems, Project Report, Judicial self-governing bodies Judges' Career, 2011 at: <http://www.refworld.org/pdfid/4ee9bec12.pdf> (accessed on 22 February 2018).

²⁶ *Afghanistan National Peace and Development Framework 2017-2021, Article 5.3.b* (ANPDF)

National Priority Programmes (NPP), the Justice Sector Reform Program and Effective Governance Program.²⁷ Following the Senior Officials Meeting on 5 October 2017, the establishment and consolidation of all eight Development Councils triggered enhanced efforts of the Office of the President to improve the High Council's administration and functioning, which UNAMA supported by facilitating meetings between international stakeholders and the administration.

The High Council became increasingly active in 2017 and effectively advanced anti-corruption reforms. It has met 21 times since its establishment, including twelve times in 2017 and four times until the end of April 2018.²⁸ Among the most important achievements of the High Council in 2017 were the adoption of the Anti-Corruption Strategy (on 28 September) and the adoption of institutional reform plans under the overall Justice Sector Reform Plan (on 22 June 2017).

The High Council is chaired by the President and includes most senior members of government, the judiciary and independent institutions. Other speakers are invited on an *ad hoc* basis to address the High Council depending on the agenda.²⁹ Throughout 2017, the High Council meetings became more inclusive and civil society representatives were increasingly invited to present their work.³⁰ This inclusive approach should be codified in the High Council's legal framework by making participation of civil society mandatory. Its meetings bring together decision-makers within the justice sector and those responsible for advancing anti-corruption reforms, making it a suitable tool to ensure implementation of cross-cutting reforms. Its discussions and decisions draw authority from the seniority of its members. In this way the High Council has become an effective mechanism of decision making and consensus building that regularly informs Cabinet decisions, providing an analytical and technical basis for proposed reforms. The High Council's decisions are not explicitly regulated and in most cases require a separate endorsement by the Cabinet or the President. The High Council strives to balance respect for judicial and institutional independence with the need to hold these institutions accountable for meeting reform goals.

The High Council is supported by Sub-Committees on legislative issues, justice and anti-corruption.³¹ The first two are chaired by the Second Vice-President, while the Anti-Corruption Committee is chaired by the Attorney General. With the exception of the President, members of the High Council and the Sub-Committees are the same. Administrative support is provided by its Secretariat. In line with the Anti-Corruption Strategy, an additional Special Secretariat to monitor and report on the strategy's implementation was established,³² which has already demonstrated its value by keeping the High Council focused on the swift implementation of the Anti-Corruption Strategy. There is a need, however, to improve technical preparations for the meetings to ensure that the President's and senior official's time is most effectively used. Some issues currently discussed at the principals' level, for example, could have been

²⁷ The international community is represented in the High Council by UNAMA, the Embassies of the United Kingdom and Denmark, the European Union and representatives of the United States' Department of Justice (US DoJ) and SIGAR.

²⁸ In 2016, High Council Meetings were held on: 31 August, 10 September, 22 September, 2 October and 26 December; in 2017 High Council meetings were held on: 22 June, 5 July, 2 August, 16 August, 30 August, 4 September (extraordinary meeting on the Strategy), 13 September, 27 September, 18 October, 25 October, 27 November, 21 December; in 2018 the high Council met on 3 January, 7 February, 21 February and 8 April. Minutes of some meetings are published at: www.aop.gov.af (accessed on 10 March 2018).

²⁹ Decree 94 Regarding the High Council for Rule of Law and Anti-Corruption (17 August 2016), Article 2. Permanent Members of the High Council are: Chief Executive Officer; Second Vice President; Chief Justice; National Security Advisor; Director of Administrative Affairs of President's Office; Minister of Finance; Minister of Justice; Minister of Interior Affairs; Attorney General; General Director of NDS; Presidential Advisors on Justice and Transparency affairs; Director of Independent Commission on overseeing on Implementation of Constitution; Director of Independence Human Rights Commission; Director of Independent Directorate of Local Governance; Director of High Office of Oversight and Anti-Corruption.

³⁰ See for example agenda of High Council meeting of 30 August and 21 December 2017 <https://ocs.gov.af/english/4387/High+Council+for+Rule+of+Law+Discusses+SIGAR%2C+IWA+Findings+on+Health+Sector>, (accessed on 10 March 2017).

³¹ Terms of Reference of the High Council for Rule of Law and Anti-Corruption of 29 June 2016.

³² Afghan National Strategy for Combatting Corruption (hereafter: Anti-Corruption Strategy), English version accessible at: http://mof.gov.af/Content/files/AFG_AntiCorruptionStrategy_Eng_.pdf, VII (accessed on 22 February 2018).

resolved at the technical level. In addition, the agenda needs to be streamlined so that the Council does not turn its attention to issues outside its remit. The President's personal dedication to chairing the High Council meetings is commendable. The intensification of the High Council's work was brought about by the adoption of the Anti-Corruption Strategy, a Presidential priority. On the other hand, the High Council was unable to advance the implementation of the National Justice Sector and Judicial Reform Plan (JSRP) at the same pace. The Council approved the institutional reform plans of the Supreme Court, the Attorney General, the Ministry of Justice and the Afghan Independent Bar Association on 22 June 2017. A review of the implementation took place only on 8 April 2018, far beyond the six month period required by the Plan.³³ The High Council, supported by the Cabinet's Justice and Judicial Committee, should pay greater attention to advancing the implementation of the Justice Sector Reform Plan in line with its efforts on the Anti-Corruption Strategy. Despite its mandate to support the "performance and decisions of the ACJC",³⁴ the High Council could have paid more attention to the work of this key body. In particular it should consistently support the ACJC in addressing its chronic difficulties in enforcing decisions, most notably its arrest warrants.³⁵ Notably, the United Kingdom highlighted reform needs regarding ACJC security in one High Council meeting.³⁶

Observations:

In 2017, the High Council became the driving force for advancing anti-corruption reforms, delivering on tasks to develop and coordinate anti-corruption policies. The President's personal dedication to using the High Council for promoting reforms is commendable. The High Council should continue to uphold judicial independence. Lessons learned from the High Council's increased activities should be used to amend and improve.

2.3. The new Anti-Corruption Strategy

On 28 September 2017, the High Council adopted Afghanistan's National Strategy for Combatting Corruption (Anti-Corruption Strategy).³⁷ With some delay³⁸ the adoption of the Strategy met the SMAF deliverable requiring that an "Anti-corruption strategy for the whole of government [is] drafted and endorsed by the High Council on Rule of Law and Anti-corruption in the first half of 2017."³⁹ On 9 December 2017, the President initiated the Strategy's implementation with Order 2771, delivering on the part of the SMAF commitment requiring the initiation of the Strategy by the end of December 2017.⁴⁰

The Strategy was developed under the close supervision of the President. Broader stakeholder consultation began after the first draft of the document was shared in the High Council meeting of 30 August 2017. During this closed drafting process, the scale and focus of the draft Strategy shifted noticeably. At UNAMA's ACJC meeting on 9 August 2017, participants were presented with an outline containing three chapters: Prevention, Prosecution, and Education/Outreach. By contrast, the draft Anti-Corruption Strategy shared with High Council members on 30 August 2017⁴¹ was based on the five-pillar structure that shaped the final

³³ See *infra*, Section 3.1.

³⁴ Terms of Reference of the High Council for Rule of Law and Anti-Corruption of 29 June 2016, Article 3(3).

³⁵ *Infra* 3.2.

³⁶ High Council meeting of 21 December 2017.

³⁷ For Civil Society views on the Anti-Corruption Strategy, see: <https://iwaweb.org/civil-society-organizations-the-national-anti-corruption-strategy-is-imperfect/> (accessed on 21 March 2018).

³⁸ According to interlocutors, the delay in finalizing the Strategy was caused because the Government was absorbed with responding to consequences of the 31 May 2017 attack.

³⁹ Self-Reliance through Mutual Accountability Framework, Smart Deliverables 2017/2018, adopted at the October 2016 Brussels Conference, available at: <http://policymof.gov.af/smaf-smart-deliverables-2017-2018/> (SMAF, Smart Deliverables 2017/2018) (accessed on 1 March 2018).

⁴⁰ Order 2771, *Presidential Decree on the Implementation of the Anti-Corruption Strategy* of 9 December 2017.

⁴¹ High Council Meeting, 30 August 2017.

document. This draft consisted largely of an elaborated version of the 2015 Anti-Corruption Brief⁴² outlining elements of the Government's anti-corruption policies. The Second Vice-President led the process of consulting with international and national stakeholders, including civil society.⁴³ While representatives of civil society met with the President, the Vice-President and repeatedly at the technical level to present their views on the Strategy, they clarified in a press conference after the Strategy's adoption that their most crucial recommendation, the establishment of a new independent preventive anti-corruption body, had not been adopted.⁴⁴ UNAMA delivered comments on the draft Strategy, and collected donor inputs, which were provided to President Ghani on 18 September. The European Union and the United Kingdom also sent separate comments.⁴⁵ The Government expressed appreciation for the suggestions of international partners and incorporated them to some extent.

The Strategy's implementation period is limited to the mandate of the NUG and it applies only to selected institutions. The Strategy itself states: "rather than write the comprehensive anti-corruption plan, the goal of this strategy has been to put in place a framework that allows our government to deal with current problems in a way that will let us learn and adapt over time."⁴⁶ The document further notes that anti-corruption measures require time to take effect,⁴⁷ yet the impact of any anti-corruption strategy covering only a two-to-three-year period with no longer-term goals is likely to be limited. To alleviate this and frame anti-corruption reforms as a long-term process, the High Council adopted UNAMA's suggestion that it conduct an impact review, which will form the basis for the development of a plan for the continuation of successful anti-corruption measures.⁴⁸ As per the SMAF commitment, the Strategy is mainly a reform document aimed at the executive branch, with some reforms concerning the judiciary. Conscious of the constraints imposed by the separation of powers, the Strategy prescribes very limited reform measures for Afghanistan's legislative branch, the National Assembly. These focus on supporting the parliamentary leadership in developing and implementing anti-corruption action plans.⁴⁹ The enactment and amendment of legislation is described as a reform measure for the Ministry of Justice, rather than the National Assembly, which according to the applicable constitutional framework has no corresponding competence.

Despite its limitations in time, the Strategy is particularly strong in its analysis of the roots and drivers of corruption in Afghanistan.⁵⁰ By being realistic in its objectives, it also avoids the trap of the 2006 *Strategy and Policy for Anti-Corruption and Administrative Reform*, developed under President Karzai – a nearly 200-page document – that could not feasibly be implemented.⁵¹ A strength of the new Strategy is that it was developed such that it could be put into practice during the implementation timeframe. The Strategy defines five priority areas: (1) political leadership against corruption and empowering reformers; (2) ending corruption in the security sector; (3) replacing patronage with merit; (4) prosecuting the corrupt; and (5) tracking money flows. Each priority area contains time-bound goals. However, other measures, such as those to be implemented in nine priority ministries,⁵² are left to the discretion of the implementing institutions, and have no benchmarks or timelines.

⁴² Anti-Corruption Brief, circulated on 23 April 2015.

⁴³ According to the Second Vice President's office multiple consultation meetings were conducted including two consultation meetings with representatives of the judiciary and one consultation meeting with civil society representatives. In addition, written submissions were received, including from the MEC.

⁴⁴ See: <https://iwaweb.org/civil-society-organizations-the-national-anti-corruption-strategy-is-imperfect/> (accessed on 5 March 2018).

⁴⁵ Letter from UNAMA to President Ghani of 18 September 2017.

⁴⁶ Anti-Corruption Strategy, VIII.

⁴⁷ Anti-Corruption Strategy, VIII.

⁴⁸ Anti-Corruption Strategy, VIII.

⁴⁹ Anti-Corruption Strategy, II, Pillar 1.

⁵⁰ Anti-Corruption Strategy, I.

⁵¹ Strategy and Policy for Anti-Corruption and Administrative Reform, 2006, available at: http://anti-corruption.gov.af/Content/files/ANTI%20CURAPTION%20STRATIGY_Eng.pdf (accessed on 10 March 2018).

⁵² See infra, Section 2.5. An exception is made for extractive industries which have a reform schedule.

The Strategy's most significant weakness is that it did not fulfil the key expectation of stakeholders, which was to define institutional arrangements that streamline Afghanistan's complicated structure of anti-corruption bodies⁵³. The High Office of Oversight and Anti-corruption (HOOAC) is not mentioned at all, although some measures in the Strategy will effectively reduce its role.⁵⁴ The Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC) is only mentioned briefly. A modest attempt to streamline institutions is in Pillar 4 of the Strategy, "Prosecuting the Corrupt". Here, the Strategy provides for the consolidation of anti-corruption entities under the Attorney General's Office (AGO) and the creation of a dedicated Deputy Attorney General position for anti-corruption (DAG-AC).⁵⁵ However, this proposal leaves many questions unresolved, in particular, whether the consolidation refers only to the investigative bodies covered in Pillar 4, or also to preventive bodies. The latter will be difficult to place under the AGO while ensuring effective delivery on all prevention functions required by Articles 5 and 6 of the UNCAC.⁵⁶ UNAMA's suggestion to further analyse the functions of existing anti-corruption institutions during the streamlining process and to reconsider where to place these functions was adopted only as a review to be conducted after the consolidation.⁵⁷ The measure to draft a dedicated Anti-Corruption Law codifying the institutional set-up was removed from the Strategy and replaced by a general commitment to conduct a review of anti-corruption legislation.⁵⁸

The High Council is responsible for monitoring the implementation of the Anti-Corruption Strategy and approving institutional reform plans of the implementing institutions, supported by the Special Secretariat. According to the Strategy, these plans were to be submitted one month after finalization of the Strategy, on 28 October 2017.⁵⁹ An additional, monitoring body will be created for civil society⁶⁰The *Presidential Decree on the Implementation of the Anti-Corruption Strategy* of 9 December moved this deadline to 9 January 2018.⁶¹ There is no separate budget for the Strategy's implementation. While implementing institutions finance their actions under the Strategy from their regular budget, the lack of a corresponding budget line for the implementation and monitoring structure under the High Council required ad hoc donor support. The Special Secretariat's Head was appointed on 22 November 2017, and his position is funded by Denmark through 2018. Under Presidential Decree 34 of 6 January 2018, the Special Secretariat was moved from the President's Office for Administrative Affairs to the Office of the President's Chief of Staff. This move unfortunately did not foster the independence of the Special Secretariat or increase its operational support.⁶² On 21 February 2018, UNAMA recommended that the Secretariat be adequately resourced. In response, the President's Chief of Staff approved a structure of 37 employees. Only one institution with reporting obligations presented its plan to the High Council by 21 February 2018. The Strategy contains 27 time-bound benchmarks in the individual pillars,⁶³ of which 20 were due in December 2017 (15) or February 2018 (5). However, according to the first Report of the Special Secretariat of 18 February 2018⁶⁴ only 2 benchmarks had been met and one had become void. These timelines should be adjusted by the monitoring mechanism of the strategy. The Special Secretariat reports publicly on implementation every six months, but with multiple Decrees governing the commencement of the Strategy's implementation, it is unclear when the first report is due. Presidential Decree 34 of 6 January 2018, states that the strategy may be amended any time in case of an identified need. Amendments should be made before the Joint

⁵³ UNAMA Anti-Corruption Report, April 2017, p 5.

⁵⁴ See *infra*, Section 2.4.3.

⁵⁵ Anti-Corruption Strategy, II, Pillar 4.

⁵⁶ See also *infra*, Sections 3.1.2 and 5.

⁵⁷ Anti-Corruption Strategy, II, Pillar 4.

⁵⁸ See *infra*, Section 2.4.

⁵⁹ Anti-Corruption Strategy, VII.

⁶⁰ See *infra*, Section 6.2.

⁶¹ Order 2771, *Presidential Decree on the Implementation of the Anti-Corruption Strategy* of 9 December 2017.

⁶² Decree 34, On the Enforcement of the National Anti-Corruption Strategy of 6 January 2018.

⁶³ Eleven additional time bound benchmarks relate to extractive industries and contain deliverables by June and December 2018.

⁶⁴ Special Anti-Corruption Secretariat for Implementation of National Anti-Corruption Strategy, *Special Report Vol. 1*, February 18, 2018.

Coordination and Monitoring Board (JCMB) to facilitate the definition of commitments on anti-corruption for the Ministerial Meeting in November 2018.

Observations:

The adoption of the Anti-Corruption Strategy is an important signal of the Government's commitment to combatting corruption. However, due to the Strategy's constrained timeframe, its impact is likely to be limited compared to the scale of the problem it seeks to address. Measures for a seamless transition to a longer-term comprehensive Strategy should be designed as early as possible in parallel with the Strategy's implementation. Even as the Strategy's implementation timeline was developed with the aim of making it realistic, its implementation has been delayed. Its review mechanisms can be used to address weaknesses in the Strategy, in particular to bring further clarity regarding the institutional framework.

2.4. Legislative Reforms

Throughout 2017, Afghanistan made progress on reforming its laws related to preventing and fighting corruption. As in many policy areas, the President relied heavily on the emergency competence under Article 79 of the Constitution to pass legislative decrees while Parliament was out of session.⁶⁵ In 2017, 36 legislative acts were passed by Presidential decree under the emergency competence while only 16 laws were passed by the National Assembly following approval by both Houses.⁶⁶ The constitutional requirement that the emergency power be utilized only "in case of immediate need" did not prevent the President from using those powers for most comprehensive pieces of legislation such as the Penal Code. The National Assembly's attempt to curb the President's legislative competence by prohibiting amendments to existing laws under Article 79 was unsuccessful.⁶⁷ Upon the Government's request for interpretation, the Supreme Court found the Assembly's draft law unconstitutional.⁶⁸

A strategic and comprehensive approach to reforming the legal framework was not possible in part due to pressure to reform certain individual laws in response to donor commitments. The MoJ's role became that of providing technical assistance rather than focusing on the strategic implementation of reform policies.⁶⁹ The need to reform the MoJ's legislative department (Taqnin) itself was identified in Pillar 4 of the Anti-Corruption Strategy and is expected to take place by June 2018.⁷⁰ The MoJ missed the February 2018 deadline to conduct a comprehensive review of laws requiring revision,⁷¹ which would have provided an opportunity to use the expertise available in its legislative department more efficiently.

Reforms of the legislative framework envisaged under the Anti-Corruption Strategy are in progress. The technical expert group, the Criminal Law Reform Working Group (CLRWG) operating under the MoJ, has been unable to deliver a generally accepted draft Anti-Corruption Law, in part due to difficulties of defining an independent anti-corruption body. On 1 April 2018, the President issued an instruction to finalize the drafting of the Anti-Corruption Law. The Anti-Corruption Strategy also called on the MoJ to draft a whistle blower protection law, amend the Access to Information law, and revise civil and criminal codes by December 2017.⁷² The Access to Information Law was amended on 3 April 2018, while the drafting of the whistle blower law is not finished.

⁶⁵ Article 79 of the Constitution of Afghanistan (Afghan Constitution).

⁶⁶ Counted from the Official Gazettes.

⁶⁷ Law on Issuing Legislative Decree, approved by two third of Lower House of the National Assembly on 11/12/2017.

⁶⁸ The Supreme Court issued a judicial ruling (71) on 3 February 2018 and found the law unconstitutional.

⁶⁹ High Council Meeting of 21 February 2018

⁷⁰ Anti-Corruption Strategy, Annex 1, Implementation Matrix.

⁷¹ Anti-Corruption Strategy, Annex 1, Implementation Matrix.

⁷² Anti-Corruption Strategy, Annex 1, Implementation Matrix.

2.4.1. Penal Code

The most notable achievement with respect to the prosecution of corruption offences is the adoption of a new Penal Code, a milestone in the country's criminal justice reform. The Penal Code is the first single comprehensive codification of Afghanistan's criminal law. Drafting began in 2012 under the leadership of the MoJ with the expert support of the CLRWG. The work was guided by the Presidential Order of 2010, which provided for the compilation of all penal provisions within a single criminal code.⁷³ The Penal Code was endorsed by Presidential Legislative Decree on 4 March 2017,⁷⁴ and entered into force on 14 February 2018. It applies to criminal acts committed after this date. For crimes committed prior to that date, the former criminal laws will apply with the exception of more lenient sentencing provisions in the new Penal Code. As outlined in UNAMA's 2017 Anti-Corruption Report, revision of the Penal Code and its submission to the National Assembly is a commitment of the government under SMAF, ANDPF and IMF benchmarks.⁷⁵

The new Penal Code incorporated criminal provisions of more than seven corruption-related and financial laws. This includes the Anti-Money Laundering Law, and Appendix 4 of the 1976 Penal Code on corruption crimes.⁷⁶ With the incorporation in the Penal Code, the criminal provisions of these laws will no longer apply. Non-criminal parts, procedural regulations and definitions remain in force. Section four of the Penal Code, Articles 370 to 460,⁷⁷ codifies corruption and financial crimes. Section five, Articles 461 to 494,⁷⁸ criminalizes obstruction of justice. Together, the two chapters incorporate all mandatory provisions of the UNCAC, namely bribery, embezzlement, money laundering, and obstruction of justice.⁷⁹

The new Code also includes some offences for which criminalization is optional under the UNCAC.⁸⁰ The specific crimes of usurpation of land and undue discrimination in public administration were newly criminalized.⁸¹ In addition, forgery of employment and recruitment records to misappropriate salaries of inexistent staff ("ghost employees") is explicitly defined as a crime, a necessary measure given the scale of the problem in Afghanistan.⁸² The new Penal Code also narrowed the definition of the crime of insulting public officials to distinguish it from exercising legitimate criticism of the Government, safeguarding media freedom and allowing for investigative journalism. False declarations of assets by officials are also criminalized.⁸³

The Penal Code provides certain immunities for informers on criminal activities. Although this provision is not specific to anti-corruption offences, its effective use could significantly facilitate evidence collection in anti-corruption cases.⁸⁴ Under the Code, perpetrators of corruption-related crimes are not eligible for

⁷³ Order 1439 of the President of 29 May 2010; With the exception of criminal acts under Law on Elimination of Violence Against Women and those in the Military Penal Code all penal provisions have been incorporated in the final Penal Code.

⁷⁴ Presidential Decree 256, 4 March 2017.

⁷⁵ UNAMA Anti-Corruption Report, April 2017, page 48.

⁷⁶ Penal Code, OG 1260 of 15 May 2017. Article 916 lists the laws incorporated into the Penal Code, including Penal Code (OG 347-1355); Da Afghanistan Bank Law (OG 819-1382); Law on Money Laundering and crimes proceeds (OG 1142-1393); Election Law (OG1226-1395); Customs Act (OG1235-1395 6- Annex NO(4) of the Penal Code (OG 1244-1395); Law on Managing Land Affairs (OG 1254-1396).

⁷⁷ The section comprises 12 chapters. Not all of them are corruption-related. They comprise:- (1)- Bribery; (2)- Embezzlement, (3-4)-Misuse of Office or Authority; (5)-Illegal enrichment ; (6)-Election Crimes;-(7)-Forgery; (8)-Extortion and Misconduct Of Public Officials Against People; (9)-Torture; (10)- Plagiarism of Duties and Titles; (11)-Breaking and Destroying a Seal; (12)- Theft and Destruction of Officials Papers and Documents.

⁷⁸ This section criminalized the mandatory UNCAC crime of obstruction of justice and has the following chapters: - (1) - Obstruction of Justice; (2)-Misleading of Justice; (3)-False information or abstention from stating the truth; (4)-False testimony; (5)-Escape of Prisoners and Hiding the Criminals.

⁷⁹ UNCAC, Articles 15, 16, 17, 23 and 25.

⁸⁰ UNCAC, articles 16, 18, 19, 20, 21, 22 and 24.

⁸¹ Penal Code, OG 1260, 15 May 2017, article 715 and article 409.

⁸² Penal Code, OG 1260, 15 May 2017, article 390.

⁸³ Penal Code, OG 1260, 15 May 2017, article 680 and article 421

⁸⁴ Penal Code, article 72:- 1-punishment stated in article 71 of this law shall not be enforced on those who inform the relevant authorities of the conspiracy in a crime, provided that the information is delivered before the occurrence of the

alternative sanctions to imprisonment.⁸⁵ In general, punishments for anti-corruption offences are better defined than previously and give less discretion to judges on sentencing.⁸⁶ For example, the 1976 Penal Code imposed imprisonment from two to eight years for bribery regardless of the amount of the bribe,⁸⁷ while the new Penal Code considers different categories of punishment for bribes of different amounts.⁸⁸ This should help to increase the consistency of sanctions in corruption cases.

On 4 April 2018, the Penal Code was presented to the National Assembly for review. According to Article 79 of the Constitution, even though the Penal Code is already in force, the National Assembly may amend, revise or reject the Code.⁸⁹ It is expected that the milestone achievement of having international conventions incorporated in the Code is not reversed in the Parliamentary review.

With the Penal Code entering into force on 14 February 2018, the focus has shifted to support for its implementation. The Ministry of Justice has printed 5,000 copies and distributed them throughout the country. Work has also begun to train judicial officials on the application of the new Code, in particular with support from the U.S. Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL), the Italian Agency for Development Cooperation, GIZ, the United Kingdom and UNODC. The 26-month Continuing Professional Development Support program funded by INL and implemented by the International Development Law Organization (IDLO) meets a substantial part of the training needs by building on previous INL projects. It focuses on enabling professional training departments to train on the main differences between the new Code and the 1976 Code and delivering tailored training on specialized topics.

2.4.2. Drafts of the Anti-Corruption Law and Law on Whistle Blower Protection

In September 2016, the MoJ started drafting a new and comprehensive Anti-Corruption Law. The High Office of Oversight and Anti-Corruption (HOOAC) and MOJ prepared a first draft and requested the CLRWG to provide technical advice on this initial draft. Until mid-2017, the CLRWG met on a weekly basis to discuss improvements to the draft. However, without a defined timeline and a strategic policy vision, the group advanced slowly, while participants occasionally sought policy guidance.

Although corruption offences were codified in the Penal Code, the CLRWG agreed that a comprehensive Anti-Corruption Law was still needed to clarify the institutional arrangements of anti-corruption bodies.⁹⁰ This need is even more critical given that key Afghan anti-corruption institutions are based on legislative Presidential Decrees not yet approved by the National Assembly (the Administration for Asset Registration and the former HOOAC), on executive Presidential Decrees (MEC and Special Secretariat) or on a simple regulation (ACJC⁹¹ and Major Crimes Task Force (MCTF)), which may be altered any time.⁹² Although UNCAC Articles 5, 6 and 36 do not require the adoption of a dedicated anti-corruption law,⁹³ it recommends that the independence and accountability of anti-corruption institutions be "enshrined in law rather than executive decrees (which can easily create such a body but also abolish it)." It further notes: "Establishment by law or, as experience shows, constitutional guarantees of independence enhance the likelihood that the

crime. 2-Informer, after initiation of search and inspection by relevant authorities, shall be exempted from punishment provided that his/her information results in verification of identity of accused unknown to the authorities.

⁸⁵ Penal Code, Article 151.

⁸⁶ See *infra* Section 3.5.

⁸⁷ The 1976 Penal Code, Official Gazette 347, dated 1355, Article 225.

⁸⁸ Penal Code, OG 1260, Articles 371 and 372.

⁸⁹ Article 79, Afghan Constitution.

⁹⁰ See also *infra* Section 5.

⁹¹ Decree of the President on Establishing the Anti-Corruption Judicial Centre, No. 53, 30 June 2016.

⁹² *Infra* Sections 3 and 4.

⁹³ UNODC, Legislative Guide for the Implementation of the UNCAC, paras 48, 60. Available at: https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf.

body or bodies will have sufficient powers to promote effective policies and ensure implementation, as well as conveying a sense of stability.”⁹⁴

The CLRWG’s draft versions of the anti-corruption law included the establishment of a preventive anti-corruption body and a more solid legal basis for the ACJC. However, none of these drafts were approved by the Cabinet’s Legislative Committee.⁹⁵ While the draft Anti-Corruption Strategy distributed to the High Council on 31 August 2017 had as one of its benchmarks the adoption of an Anti-Corruption Law by February 2018, this benchmark was replaced in the final version with a call for a review of anti-corruption legislation in February 2018. The CLRWG consequently stopped work on the Anti-Corruption Law until 1 April 2018, when the MoJ received a letter from the President’s Office of Administrative Affairs (OAA) instructing it to resume drafting.⁹⁶ In the past, reforms to anti-corruption bodies and changes to their legal foundation have been driven by emerging needs and enacted by individual legislative acts. This piecemeal approach resulted in widespread uncertainty and led to self-censorship by many institutions, which feared that they might be altered or abolished at any time.⁹⁷ The President’s 1 April instruction is expected to lead to a consolidation of individual laws on anti-corruption institutions as well as clarification of the competences of existing anti-corruption bodies, namely the ACJC, the Special Secretariat, the Administration for Asset Declaration, the MEC, the High Council, as well as a possible successor to the HOOAC.

Discussions on the development of comprehensive legislation for guaranteeing whistle blower protection have yet to yield results. As such, the findings in UNAMA’s 2017 Report regarding shortcomings in existing legislation remain valid, as do the related recommendations.⁹⁸ The abolishment of the HOOAC Law, along with its Article 14 on whistle blower protection, will further widen the gap in the legal framework. Some protections, however, exist within the current legal framework. For instance, the Penal Code⁹⁹ and the Criminal Procedure Code provide for some protection for informants in the context of criminal proceedings. However, more comprehensive legislation is required to meet UNCAC’s recommendation “to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning (corruption) offences”.¹⁰⁰ The Anti-Corruption Strategy called on the MoJ to enact a Law on whistle blower protection by the end of December 2017.¹⁰¹ This did not occur, although CLRWG held two meetings on the development of the Law in January 2018.

2.4.3. Law on Declaration and Registration of Assets of State Officials and Employees

The IMF Structural Benchmark required a reform of the asset declaration regime by December 2017.¹⁰² Deeming a revision of the specific article of the HOOAC Law¹⁰³ insufficient, the Ministry of Finance developed a separate draft law. UNAMA provided expert comments during the drafting process. However, UNAMA’s recommendation against moving the asset declaration function and oversight to a structure under direct supervision by the Head of State and Head of Government was rejected.¹⁰⁴

The Law on Declaration and Registration of Assets of State Officials and Employees (Assets Declaration Law), was endorsed by the President on 5 September 2017 and entered into force as Presidential Legislative

⁹⁴ UNODC, Technical Guide to the Implementation of UNCAC, 2009, p 11. Available at: https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

⁹⁵ Meeting of Judicial Committee of 21 July 2016 see <http://www.bakhtarnews.com.af/dari/political-news/item/83604>. (accessed on 3 March 2018).

⁹⁶ Letter of the OAA to MoJ of 1 April 2018.

⁹⁷ See infra 5.

⁹⁸ UNAMA Anti-Corruption Report, April 2017, p.17.

⁹⁹ See infra, Section 2.4.1.

¹⁰⁰ UNCAC, Article 33.

¹⁰¹ Anti-Corruption Strategy, Implementation Matrix.

¹⁰² IMF Country Report No. 17/377, December 2017.

¹⁰³ The Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy (Official Gazette No. 936), 15 January 2008 (25/10/1386)

¹⁰⁴ UNAMA Comments on the *Draft Law on Registration and Declaration of High Ranking Officials and Government Employees*, 25 September 2017.

Decree. It was approved by the Wolesi Jirga (the Lower House of the National Assembly) on 27 November 2017. However, the Meshrano Jirga (Upper House) amended the Law and the disagreement between the Upper and the Lower House resulted in its referral to a joint Commission.¹⁰⁵ The Meshrano Jirga is concerned that the Law violates the Constitutional separation of powers because it requires Members of Parliament to declare their assets to the Office of the President.¹⁰⁶

The Law develops and details the general obligation under Article 154 of the Constitution for public officials to declare assets. Whereas the Constitution specifies that “the wealth of the President, Vice-Presidents, Ministers, Members of the Supreme Court as well as the Attorney General, shall be registered, reviewed and published prior to and after their term of office by an organ established by law”,¹⁰⁷ the new law expands the obligation to employees of rank 2 and above,¹⁰⁸ representatives of both Houses of the National Assembly, employees of customs and tax collection agencies, provincial finance departments, commercial and military attachés, and members of district councils and municipality councils. Assets have to be declared prior to and after the term of office of the declarant and on an annual basis.¹⁰⁹ In addition, officials have to declare assets “under their control and under the control of others”.¹¹⁰ The Law envisages a system of sanctions for failure to comply with asset declarations.¹¹¹ The new Penal Code complements the Assets Declaration Law by criminalizing the submission of false or misleading asset declarations, for which fines of 30,000 to 180,000 AFN may be imposed.¹¹²

The new Law controversially moves the asset registration function to a newly-established entity, the Office of Administration on Registration and Assessment of Assets, which is located within the Office of Administrative Affairs of the President.¹¹³ The placement of responsibility for both registration and verification of asset declarations in the OAA is an unusual model. It means that legislative and judicial officials must declare their assets to an office in the executive branch. It should be noted that a variety of other models to implement asset declarations exist in line with UNCAC obligations. States not having asset declaration administration vested with an independent body have regularly chosen a model safeguarding the separation of powers by separating the entities to which the judicial and legislative branches declare assets from those of the executive.¹¹⁴

During the development of a comprehensive Anti-Corruption Law, these alternative models should be considered. Although frequent shifts in the administration of asset declarations risk reducing the effectiveness of the system, the codification of a new anti-corruption law provides an opportunity to rectify identified shortcomings of Afghanistan’s current Asset Declaration Administration model and ensure that effective verification tools are in place.

2.4.4. Amendments to the Access to Information Law

Article 50 of the Constitution guarantees citizens the right to access information. In November 2014, the Law on Access to Information¹¹⁵ was adopted to codify this right and ensure citizens can request

¹⁰⁵ In accordance with Article 100 of the Afghan Constitution.

¹⁰⁶ Proceedings of the Meshrano Jirga, 31 December 2017.

¹⁰⁷ Afghan Constitution, Article 154.

¹⁰⁸ Article 6 of the Civil Servant Law divides public officials into eight grades. Annex 1 of the Civil Servant Law clarifies which employees have which grades depending on their salaries. Grade 1 and 2 are public employees receiving the highest salaries and comprise mainly directors and deputy directors.

¹⁰⁹ Law on Declaration and Registration of Assets of State Officials and Employees, Official Gazette 1271 of 28 October 2017, Articles 5, 7 and 8.

¹¹⁰ Law on Declaration and Registration of Assets of State Officials and Employees, Article 12.

¹¹¹ Law on Declaration and Registration of Assets of State Officials and Employees Article 11.

¹¹² Penal Code, Article 421.

¹¹³ Law on Declaration and Registration of Assets of State Officials and Employees.

¹¹⁴ MESSICK, Richard, Income and assets declarations: Issues to consider in developing a disclosure regime U4 ISSUE 2009:6 page 14. Available at: <https://www.u4.no/publications/income-and-assets-declarations-issues-to-consider-in-developing-a-disclosure-regime/>

¹¹⁵ Law on Access to Information, Official Gazette No. 1156 dated 23 December 2014. (Law on Access to Information, 2014)

information from the three pillars of the State on the grounds that transparency of public administration reduces corruption. The law obliged government offices to provide any information requested by the public if it was not expressly protected by privacy and national security considerations.¹¹⁶ State Agencies were also required to disclose information at least once a year relating to their structure, budgets, operations policies and work plans.¹¹⁷

However, concerns about the independence of the Access to Information Oversight Commission established by the law, its rules on classification of information, and difficulties in its application led to calls for reforming the law.¹¹⁸ On 16 October 2016, the President issued an order to address these concerns.¹¹⁹ It obliged Ministers and national and local officials to categorize sensitive and confidential information to enable relevant entities to provide accurate and timely information when requested.¹²⁰ The order also required that spokespersons be assigned in each entity to provide adequate information to the public and that officials ensure that these focal points were briefed and updated.¹²¹ On 12 March, the civil society organization NAI (Supporting Open Media in Afghanistan) claimed that the Government was blocking the free flow of information, adding that when journalists insisted on their prerogatives under the Access to Information Law they were frequently insulted by Government spokespersons.¹²²

On 3 March 2018,¹²³ the President endorsed a new Access to Information Law through a Decree, bringing significant amendments to the 2014 Law. The new Law establishes an independent commission for access to information whose five members are selected by a committee and approved by the President.¹²⁴ Unlike the current commission,¹²⁵ the new Commission will have an independent budget.¹²⁶ The new Law also protects whistle blowers.¹²⁷

Observations:

The corruption-related legal framework is compliant with the criminal provisions of UNCAC since the adoption of the new Penal Code. The institutional framework of anti-corruption bodies and their cooperation remains to be codified in a comprehensive anti-corruption law providing a solid legal basis for anti-corruption institutions and remedy defects in the current asset system. The law-making process advancing anti-corruption reforms has been erratic rather than strategic.

2.5. Ministerial Anti-Corruption Plans

One commitment under the Self-Reliance through Mutual Accountability Framework (SMAF) is that “Five revenue generating ministries publicly report on implementation progress of their anti-corruption action plans in 2017”.¹²⁸ In its quarterly report of February 2018, the Ministry of Finance (MoF) reported that this

¹¹⁶ Law on Access to Information 2014, Articles 4 and 15.

¹¹⁷ Law on Access to Information 2014, Article 14.

¹¹⁸ Access to information in Afghanistan, a preliminary finding: Integrity Watch Afghanistan, see: <https://iwaweb.org/wp-content/uploads/2016/05/ATI-report-English-for-screen.pdf> (accessed on 5 April 2018).

¹¹⁹ On 21 September 2016, the President met with media representatives and members of the Commission overseeing the Access to Information Law and they raised concerns about the independence of the Commission and the fact that national institutions are reluctant to provide information.

¹²⁰ Article 1 of the President's Order dated 16 October 2016.

¹²¹ Article 3 of the President's Order dated 16 October 2016.

¹²² See: <http://nai.org.af/blog/the-government-of-afghanistan-prevents-the-free-flow-of-information/> (5 April 2018).

¹²³ Access to Information Law, Legislative Decree 256, dated 3 March 2018.

¹²⁴ Access to Information Law, March 2018, Article 20.

¹²⁵ Law on Access to information 2014, Article 16.

¹²⁶ Access to Information Law, March 2018, Article 30.

¹²⁷ Access to information Law, March 2018, Article 7 and 30.

¹²⁸ SMAF, Smart Deliverables, 2017/2018.

deliverable had been achieved.¹²⁹ The five revenue generating ministries are the Ministry of Finance, Ministry of Mines and Petroleum, Ministry of Commerce and Industries, Ministry of Communications and Information Technology, and Ministry of Transport and Civil Aviation. These ministries presented their anti-corruption plans to the MoF before the end of 2015, to the President in July 2015 and to the Joint Coordination Monitoring Board in October 2016.¹³⁰ During the preparation of this report the Special Secretariat provided the links to the Reports of all five Ministries. With this, UNAMA also considers that the benchmark has been achieved.¹³¹

In addition, the MEC reviewed the anti-corruption plans of the Ministry of Finance, the Ministry of Commerce and Industries, the Ministry of Communication Information Technology, the Ministry of Transport, the Ministry of Refugees and Repatriation, the Ministry of Haj and Religious Affairs and the Ministry of Education.¹³² These ad-hoc reviews, however, cannot substitute for a consistent or coordinated review mechanism with a streamlined methodology. It is also unclear how the findings and lessons learned from the MEC reviews were incorporated in the new ministerial anti-corruption plans developed under the Anti-Corruption Strategy.

The Anti-Corruption Strategy reports that nearly all of Afghanistan's 25 ministries have developed some kind of anti-corruption plan. It admits, however, that the quality of the plans vary and many of them have weaknesses that could undermine effective implementation. For example, it cites a "lack of overarching governance structure to provide guidance and quality control" and indicates that many of the attempted reforms were in fact outside the control of the ministries or that ministries lacked ownership and management of the processes due to a strict top-down compliance model.¹³³ The Strategy does not provide any suggestions for how to address these weaknesses, for example by introducing a model action plan or outlining a mechanism for advancing the implementation of the action plans within the respective institutions. On the other hand, it extends the pool of ministries required to comply with the reforms to the four that account for the majority of expenditures: the Ministry of Health, Ministry of Education, the Ministry of Labour, Social Affairs, Martyrs, and Disabled, and Ministry of Rural Rehabilitation and Development.¹³⁴ These nine ministries (the five revenue-generating ministries and the four ministries with the highest expenditures) are required to present their action plans to the High Council for adoption.¹³⁵ The list of Ministries and institutions prioritized and required to present action plans was further extended to fifteen; the last one added was the MoJ.¹³⁶ Ministries were asked to present these plans by 9 January

¹²⁹ Ministry of Finance, Status Report on Achieving Commitments Self-Reliance through Mutual Accountability Framework (2017-2018), February 2018.

¹³⁰ MoF, Progress Report, Self-reliance through Mutual Accountability Framework (SMAF), September 2016, <http://policymof.gov.af/wp-content/uploads/2016/08/SMAF-2015-2016-Progress-Report-September-2016.pdf> (accessed 15 March 2018).

¹³¹ Ministry of Finance: <http://mof.gov.af/Content/files/MoF-Anti-corruption%20Report%20English-2017.pdf>; Ministry of Mines and Petroleum:

[http://mom.gov.af/Content/files/%D9%BE%D9%84%D8%A7%D9%86%20%D9%88%20%DA%AF%D8%B2%D8%A7%D8%B1%D8%B4%20%D8%AF%D9%88%D9%85%20%D8%A7%D8%B2%20%D8%AA%D8%B7%D8%A8%DB%8C%D9%82%20%D9%BE%D9%84%D8%A7%D9%86%20%D9%85%D8%A8%D8%A7%D8%B1%D8%B2%D9%87%20%D8%B9%D9%84%DB%8C%D9%87%20%D9%81%D8%B3%D8%A7%D8%AF%20%D8%A7%D8%AF%D8%A7%D8%B1%DB%8C%20%D9%88%D8%B2%D8%A7%D8%B1%D8%AA%20%D9%85%D8%B9%D8%A7%D8%AF%D9%86%20%D9%86%D9%87%D8%A7%DB%8C%DB%8C%20%D8%A8%D8%B1%D8%A7%DB%8C%20%D9%86%D8%B4%D8%B1\(1\).pdf](http://mom.gov.af/Content/files/%D9%BE%D9%84%D8%A7%D9%86%20%D9%88%20%DA%AF%D8%B2%D8%A7%D8%B1%D8%B4%20%D8%AF%D9%88%D9%85%20%D8%A7%D8%B2%20%D8%AA%D8%B7%D8%A8%DB%8C%D9%82%20%D9%BE%D9%84%D8%A7%D9%86%20%D9%85%D8%A8%D8%A7%D8%B1%D8%B2%D9%87%20%D8%B9%D9%84%DB%8C%D9%87%20%D9%81%D8%B3%D8%A7%D8%AF%20%D8%A7%D8%AF%D8%A7%D8%B1%DB%8C%20%D9%88%D8%B2%D8%A7%D8%B1%D8%AA%20%D9%85%D8%B9%D8%A7%D8%AF%D9%86%20%D9%86%D9%87%D8%A7%DB%8C%DB%8C%20%D8%A8%D8%B1%D8%A7%DB%8C%20%D9%86%D8%B4%D8%B1(1).pdf); Ministry of Commerce and Industries:

<http://moci.gov.af/fa/page/reports>; Ministry of Communications and Information Technology:

<http://mcit.gov.af/fa/page/public-documents/anti-corruption-committee>; and Ministry of Transport and Civil Aviation. <http://mot.gov.af/fa/page/104295> (accessed on 24 April 2018).

¹³² Independent Monitoring and Evaluation Committee, 2017: Anticorruption Plan Reviews - available on MEC website - <http://www.mec.af/index.php/reports/ac-plan-reviews> (accessed on 30 March 2018).

¹³³ Anti-Corruption Strategy, III.

¹³⁴ Anti-Corruption Strategy, III.

¹³⁵ Anti-Corruption Strategy, VII.

¹³⁶ High Council meeting of 21 February 2018.

2018.¹³⁷ The High Council's Special Secretariat has developed reporting templates and worked on streamlining the process.

By 1 April 2018, only the Ministry of Transport had presented its plan to the High Council. The presentation underlined difficulties in prioritizing and identifying clear reform needs.¹³⁸ Although the High Council and its Special Secretariat lack the necessary expertise in the respective sectors, they are tasked with reviewing and approving the plans. Ad hoc expertise in the individual sectors should be made available to the Secretariat when needed.

Observations:

Challenges still remain in developing strategic sectoral action plans on anti-corruption efforts in various ministries. Whereas the SMAF benchmark to develop anti-corruption plans and the follow-on obligation in the Anti-Corruption Strategy catalysed some ministerial reform processes, greater ownership and engagement of certain ministries in anti-corruption reform efforts is required. This is in particular illustrated by the delays in delivering the anti-corruption plans. Without subject matter expertise and the required resources in its Specialized Secretariat, the High Council is not well placed to conduct in-depth reviews of sectoral action plans and help the ministries in correcting or improving them.

2.6. Civil Service reform

Article 7 of the UNCAC requires that States “adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials” based on “efficiency, transparency and objective criteria such as merit, equity and aptitude.” It further requires “adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions” as well as promotion of “adequate remuneration and equitable pay scales” and “education and training programmes.”¹³⁹ The ANPDF 2017-2021 commits Afghanistan to establish a civil service that is responsive to national development needs and that promotes the balanced participation of Afghan men and women.¹⁴⁰ The Anti-Corruption Strategy dedicates one of its five priority pillars to civil service reform.¹⁴¹

The Civil Service Commission leads the implementation of the goal identified in the Anti-Corruption Strategy as the shift from “patronage” to “merit” in Government hiring.¹⁴² In addition to institutional changes in the Commission itself,¹⁴³ it managed to revise organizational structures in public service institutions, gradually improve capacity building tools for public servants and conduct revolutionary reforms in mass recruitments to the public sector.¹⁴⁴ In conducting the recruitments the commission prioritized sensitive areas, in particular staffing in procurement units or recruitments for positions most vulnerable to patronage.¹⁴⁵ Consideration to gender balance was given in all recruitment processes.¹⁴⁶

¹³⁷ Order 2771, *Presidential Decree on the Implementation of the Anti-Corruption Strategy* of 9 December 2017.

¹³⁸ High Council Meeting, 21 February 2018.

¹³⁹ UNCAC, Article 7.

¹⁴⁰ ANPDF, p. 15.

¹⁴¹ Anti-Corruption Strategy, Part II Pillar 3.

¹⁴² Independent Administrative Reform and Civil Service Commission, *About Us in its website*, available at: <https://iarcsc.gov.af/en/about-iarcsc/>, (accessed 18 March 2018).

¹⁴³ *Infra*, Section 5.3.

¹⁴⁴ Independent Administrative Reform and Civil Service Commission, *About Us in its website*, available at: <https://iarcsc.gov.af/en/about-iarcsc/>, (accessed 18 March 2018).

¹⁴⁵ UNAMA's meeting with the Chair of the Civil Service Commission, Nader Nadery.

¹⁴⁶ Independent Administrative Reform and Civil Service Commission, *Website: About us, Structures, Appointment Board*, available at: <https://iarcsc.gov.af/en/appointment-board/>, (accessed 18 March 2018).

In December 2017, the Civil Service Commission announced 17,700 civil service positions across the country, which have reportedly been vacant for the past five years,¹⁴⁷ for competitive mass-recruitment. A total of 225,670 individuals with post-graduate degrees (master or equivalent) had qualified to participate in the written exams. In early February 2018, examinations started in the eastern provinces. In order to reduce opportunities for nepotism and political interference in the administration of the written test, the Civil Service Commission partnered with the Ministry of Higher Education. The written test is supported by a biometric process akin to that used by the ministry for the annual high school (*Concours*) exams. In order to avoid external interference and the opportunity for cheating, applicants are provided with a registration card with a personal examination code. A special software allows multiple choice tests to be graded anonymously.

In early 2018, the Civil Service Commission launched a single e-recruitment public advertising website for the announcement and recruitment of all positions in the civil service.¹⁴⁸ Vacancy announcements and application forms for civil servant positions are now only available online and all applications will have to be submitted through this portal. The shift to IT-supported recruitment in public service also facilitates monitoring and tracking of recruitment processes. The Civil Service Commission increased visibility and transparency of the processes by working closely with media and civil society. Conscious of its important role in significantly improving public perception regarding corruption, the Civil Service Commission and its Chair Nader Nadery increasingly engaged in outreach, including by making much more information available in its website.¹⁴⁹

In March 2018, the President endorsed amendments to the Civil Servants Law,¹⁵⁰ reinstating the authority of the Independent Administrative Reforms and Civil Services Commission's Appointment Board to recruit civil servants in the Rank B Grades 1 and 2 and to monitor recruitment of lower grades by the respective institutions, including civil servants in the Judiciary. In addition to providing for merit-based recruitment, the amendments also set out a performance appraisal system and disciplinary sanctions for civil servants. In particular, civil servants who are terminated from duty or sentenced to a term of imprisonment of more than one year for corruption crimes are barred from serving in the civil service for five years. If a civil servant is sentenced to imprisonment of more than one year, he or she is permanently barred from ever serving in the civil service.¹⁵¹

Observations:

Since the appointment of the Civil Service Commission's new Chair, the civil service reform measures have accelerated. Bringing about irreversible improvements in the public service will require persistence. Reforms in the civil service sector are expected to improve public perceptions regarding fairness in recruitment.

2.7. Compliance with obligation to declare assets

According to UNCAC, States parties are required to establish a legal framework for asset declarations in accordance with the principles of their domestic law.¹⁵² The Afghan Constitution requires a number of the most senior officials to declare their assets prior to assuming office and at the end of their terms.¹⁵³

¹⁴⁷ Independent Administrative Reform and Civil Service Commission, *Various news articles posted in its website*, March 2018, available at: <https://iarcsc.gov.af/en/category/news/> (accessed 18 March 2018).

¹⁴⁸ Government e-Recruitment website: http://www.csjobs.gov.af/job_vacancy/job_list (accessed 18 March 2018).

¹⁴⁹ Independent Administrative Reform and Civil Service Commission (IARCSC), *Websites*: <https://iarcsc.gov.af/en>, <https://iarcsc.gov.af/fa/>; <https://iarcsc.gov.af/pa/> (accessed 18 March 2018).

¹⁵⁰ Legislative Decree of the President on Endorsement of Amendments and Additions to Some Articles of the Civil Servants Law, Decree Number 269 dated 14/12/1396 (5/03/2018) (Presidential Decree No. 269).

¹⁵¹ Article 30, Presidential Decree No. 269.

¹⁵² UNCAC, Article 8(5).

¹⁵³ Afghan Constitution, Article 154, see also supra 2.4.3.

Furthermore, asset declarations of these officials are to be reviewed and published. In 2017, the responsibility for collection, verification and publication of asset declarations was moved from the HOOAC to the new Administration in the OAA.¹⁵⁴ Legal and institutional changes regarding asset declaration obligations in 2017 have been outlined above.

On 25 January 2018, the President ordered the HOOAC to transfer all official records on asset registration in its possession to the Administration on Registration and Assessment of Assets (Administration).¹⁵⁵ It tasked the new Administration to assess its needs and on that basis recruit staff from the assets declaration department of the HOOAC.¹⁵⁶ The new entity currently consists of 28 staff members, including six former staff of the HOOAC.¹⁵⁷ In addition, five MoF contracted staff are assisting the Administration to set up an online system and database for asset registration. Since the Assets Declaration Law does not expressly require the Administration to establish offices in the provinces, the Administration plans to receive asset declarations by local officials through the Independent Directorate of Local Governance (IDLG) or the respective agencies where the officials work. With the expanded mandate to receive declarations of over 20,000 government officials, including those in the provinces, it is not clear how the Administration will execute its verification mandate.¹⁵⁸

The Administration reported that 10,000 physical documents had already been transferred to its custody and confidential documents are stored in a secure location. Over 2,000 documents had been digitised. As a first step, the Administration revised the asset declaration form to capture all elements of the new Law and distributed it to officials not previously covered by the HOOAC.

Prior to its dissolution, the HOOAC reported that it had distributed 16,506 asset declaration forms and had received back 10,061 and registered 7,667 forms in its database. 112 asset declarations had been published pursuant to Article 154 of the Constitution,¹⁵⁹ while 186 forms had been published under Article 12 of the HOOAC Law. The HOOAC informed UNAMA that in the entire 2017 only in one case had its verification of assets resulted in a criminal complaint for false declaration, an indication that there is a need to strengthen verification mechanisms in the new Administration.

Observations:

Compliance with asset declaration obligations has not greatly improved. Whereas moving the Administration for Asset Declaration under the direct authority of the President may have a positive effect on compliance, enforcing compliance of judicial officials and Members of Parliament is sensitive with regard to respecting the separation of powers. The verification mechanisms need to be strengthened.

2.8. Budget Planning

In 2017, the Government significantly improved its fiscal planning. The 2018 budget features greater budget transparency, accountability and stronger protection against corruption.¹⁶⁰ For the first time,

¹⁵⁴ Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy, Official Gazette No. 957 dated 29 July 2008 (HOOAC Law)

¹⁵⁵ Presidential Executive Decree Number 107 dated 25/01/2018, Article 2.

¹⁵⁶ Ibid, Article 4.

¹⁵⁷ UNAMA meeting with HOOAC Director of Finance and Administration on 18 March 2018.

¹⁵⁸ Under the IMF Extended Credit Facility for Afghanistan Benchmarks, Afghanistan is required to publish on a website by end of April 2018, names and positions and asset declarations of officials not listed in Constitution Article 154 who have declared their assets.

¹⁵⁹ Article 154 of the Afghan Constitution states: "The wealth of the President, Vice-Presidents, Ministers, members of the Supreme Court as well as the Attorney General, shall be registered, reviewed and published prior to and after their term of office by an organ established by law."

¹⁶⁰ Equality for Peace and Democracy (EPD), 2017: Independent Review of Afghanistan 1397 Draft National Budget, pp.6 – at: <http://www.epd-afg.org/wp-content/uploads/2018/01/Book-ENG-Final.compressed.pdf> (accessed on 5 March 2018). See also other reports by Integrity Watch Afghanistan, Afghanistan Analysts Network and the United States Institute of

budget entities, including ministries, had to fully disclose sources of revenue and spending at the central and provincial levels. Measures intended to improve the credibility of the government's fiscal policy and the country's international ranking in fiscal management were successful and have facilitated budget control and oversight. Internal audit directorates, the Supreme Audit Office and oversight institutions such as the National Assembly, provincial councils and civil society will be better able to monitor budget implementation. Furthermore, civil society and media will have access to required budget information to exercise their oversight functions and to inform the public on the use of public funds.

In accordance with national commitments and international compacts, the 2018 budget incorporates measures that project the future risks and contingent liabilities relating to routine payments and occasional obligatory spending. These measures provided greater opportunity for realistic and reliable budget planning. Furthermore, consideration of these factors enables the government to address relevant contingent liabilities as they arise, reducing the need to resort to ad-hoc responses to spending, including unplanned spending on liabilities, which often give rise to the use of individual discretion, leading to irregularities and outright corruption. These budget planning measures represent significant improvement in budget transparency compared to previous years.

New budget execution rules¹⁶¹ should minimize fraudulent transactions. Guidelines on payment of staff salaries, including keeping better records on civil service employment, have been devised. The system is intended to improve transparency of salary payments through transferring salaries directly to employees' bank accounts, and minimizing opportunities for payment of ghost workers. Other measures base issuance of procurement contracts on established guidelines for national procurement. These comprise the introduction of guidelines for periodic budget adjustments, which includes tolerance levels in variations and transfer of funds between budget lines. However, if not streamlined and controlled these budget functions provide opportunities for misappropriation of funds with limited chances of any perpetrator being caught through internal auditing and external audits by the Supreme Audit Office.

On 23 November 2017, the Deputy Minister of Finance (Budget) informed the Heads of Donor Agencies meeting that the 2018 budget remedies previous problems such as lack of realism, non-adherence to international standards of accounting and inadequate linkages between the national priorities and budget allocations.¹⁶² However, the MoF has yet to boost the capacities of budget entities to enable them to develop appropriate and realistic budgets. Dedicated capacity building programmes for budget and spending entities are required to ensure the sustainability of budget reforms.

Observations:

Increased transparency, forward estimates and realistic development budgeting are promising features of Afghanistan's 2018 budget.

2.9. Procurement Reforms

UNCAC requires State Parties to "establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption".¹⁶³ Procurement procedures shall be transparent, fair and based on pre-determined award criteria, and shall be open to review and appeals.¹⁶⁴ Throughout 2017, the trend to foster transparency and

Peace, available at: https://iwaweb.org/wp-content/uploads/2017/12/IWA__National-Budget__English_6.pdf; <https://www.afghanistan-analysts.org/the-2018-afghan-national-budget-confronting-hard-realities-by-accelerating-reforms/>; <https://www.usip.org/publications/2018/04/improving-afghanistans-public-finances-2017-2019-raising-revenue-and-reforming>.

¹⁶¹ Ibid pp.26.

¹⁶² *Deputy Minister of Finance for Budget, 2017: Statement made by the Deputy Minister at Heads of Donor Agencies Meeting of 23 September 2017.*

¹⁶³ UNCAC Article 9.

¹⁶⁴ Ibid.

integrity¹⁶⁵ in Afghanistan's public procurement system continued. Reforms in the procurement system included an effective use of the National Procurement Commission (NPC) and the National Procurement Authorities' (NPA) oversight and monitoring functions.¹⁶⁶ According to the NPA, its 2017 priorities included capacity building and developing systems to move towards e-procurement. Throughout the reporting period, President Ghani continued to personally chair the NPC, which awards contracts above AFN 20 million (USD 3 million) and also includes the CEO, the Second Vice President and key line-Ministers.¹⁶⁷ NPC meetings are also open to CSOs and representatives of the National Assembly. As of 15 April 2018, 146 meetings of the NPC have been held, normally on a weekly basis, which has resulted in approval of 2,694 procurement projects worth AFN 462 billion (USD 6.6 billion).

In its quarterly report of February 2018, MoF reported that the SMAF deliverable regarding transparency in procurement was achieved.¹⁶⁸ The deliverable required that: "National Procurement Commission compliance with contract publication (high value/above threshold contracts) should exceed 75 per cent by end of 2017".¹⁶⁹ According to the MoF, 77.2% of contracts had been uploaded in the publically available system and a total of 1,423 contracts are now publically available based on open contracting data standards.¹⁷⁰ The NPA also attempts to foster transparency by regularly publishing its achievements on its website.¹⁷¹

As of 15 April 2018, 136 companies had been debarred (temporarily prevented from bidding), most for a period of 2 years. According to the NPA, all debarment cases are shared with Attorney General's Office. Moreover, a few suspicious cases have been referred to the ACJC's detection or investigation authorities, none of these cases have been tried so far. The NPA and MCTF have an MoU in place to cooperate on detecting and investigating cases of procurement fraud. The NPA has also cooperated with the ACJC's AGO to support strengthening of the ACJC's capacities in procurement law to enable them to better handle referred cases.

Observations:

Integrity in procurement continues to improve and the Government prioritized reforms in this sector. The increased transparency of the sector is welcome.

Recommendations:

to the Government:

- ⇒ Draw on the interim results of the **Anti-Corruption Strategy** and on this basis develop a long-term Strategy based on lessons learned and ensure a seamless transition into the new Strategy through the Special Secretariat;
- ⇒ Use the Strategy's review mechanism to:
 - clarify the institutional framework of anti-corruption bodies in line with Article 6 UNCAC;
 - explain the sequence of legislative reforms;
 - review the institutional responsibilities in the benchmarks and adjust the schedule of the implementation timeframe where realistically required.

¹⁶⁵ UNAMA Anti-Corruption Report, April 2017, p 27 seq.

¹⁶⁶ Procurement Law, O.G. No 1223 of 17 September 2016, Article 56.

¹⁶⁷ Procurement Law, O.G. No 1223 of 17 September 2016, Article 56.

¹⁶⁸ Ministry of Finance, Status Report on Achieving Commitments Self-Reliance through Mutual Accountability Framework (2017-2018), February 2018.

¹⁶⁹ See: 2017/2018 SMART deliverable of the Self-Reliance through Mutual Accountability Framework (SMAF) at: http://mfa.gov.af/Content/Media/Documents/agreed_smaf_smart_deliverables_final26102016113033613553325325.pdf (accessed on 3 March 2018).

¹⁷⁰ Ibid.

¹⁷¹ See: <http://www.npa.gov.af/en/home> (accessed on 16 April 2018).

- ⇒ Prepare a **draft Anti-Corruption Law** codifying the institutional framework for anti-corruption efforts and consolidating their independence where required in a transparent and inclusive consultation process, and finalize a whistle-blower protection law;
- ⇒ Strengthen **mechanisms for asset verification** and provide for the independence of the Administration for Asset Declaration;
- ⇒ Create conditions to facilitate the implementation of the new Penal Code, including the strengthened anti-corruption provisions;
- ⇒ Ensure ministries and institutions implement the institutional reform plans under the strategy and strengthen the Special Secretariat to advance the review;
- ⇒ Build on the experience of successful use of the **High Council** to revise the **legal framework** with a view to:
 - turning its sub-committees into technical expert working groups to efficiently prepare High Council meetings;
 - creating a mechanism to advance the implementation of the Justice Reform Plan;
 - codifying the participation of civil society and independent institutions in High Council meetings;
 - clarifying the role of the Special Secretariat for monitoring the implementation of the Anti-Corruption Strategy;
 - clarifying the legal nature of High Council decisions and delineating the role of High Council versus Cabinet meetings.
- ⇒ Continue to support civil service reform and strengthen the independence of the Civil Service Commission.
- ⇒ Use oversight and control options in Afghanistan's new budget to sustainably advance fiscal reforms and reduce aid dependency;

to Donors:

- ⇒ Continue an active dialogue on anti-corruption measures and mutual accountability with due regard to civil society inclusion;
- ⇒ Support the implementation of the new Penal Code and ensure judges, prosecutors and police are equipped to apply it.

to the Government and to donors:

- ⇒ **Benchmarks related to both prevention and prosecution of corruption** should form part of the revised set of government commitments under the Geneva Mutual Accountability Framework to be implemented during 2019/2020. Benchmarks should be specific, measurable, achievable, realistic, and time-bound, and mechanisms measuring compliance should be strengthened.
- ⇒ The 2018 Ministerial Conference is an opportunity to define commitments drawing on interim results from the implementation of the Anti-Corruption Strategy and bridging the short term Strategy's reform step into a longer-term one which includes the elaboration of an Anti-Corruption Law.

to Civil Society:

- ⇒ Continue to engage with the Government in advancing anti-corruption reforms and proactively use options in the Anti-Corruption Strategy.

3. Detection, investigation, prosecution and adjudication of corruption offences and anti-corruption measures in the judicial branch

The ability to successfully investigate, prosecute and adjudicate corruption offences according to international standards hinges on the effectiveness and integrity of a country's justice sector. To overcome capacity gaps of its justice system and allow for trials of serious and complex corruption cases, Afghanistan established the Anti-Corruption and Justice Centre (ACJC) in 2016. The ACJC is a secure work location where specialized divisions of judges and prosecutors, alongside investigative teams of the Major Crimes Task Force (MCTF), address corruption offences of the highest value or involving public officials of senior rank. Following the entry into force of the new Penal Code,¹⁷² which contains better defined corruption offences, corruption-related trials are expected to rise. This increases the importance of the ACJC in leading the interpretation of the relevant legal framework, which should in turn guide the adjudication of corruption offences in other Courts.

Since its establishment, the ACJC has steadily increased its output.¹⁷³ However, its limited jurisdiction and capacity means that it will only be able to complement, rather than substitute, corruption prosecutions in the regular Courts. Re-establishing trust in Afghanistan's judiciary through sustained attention to reforming the general justice system therefore remains of key importance. The Asia Foundation's 2017 Survey showed that the highest average bribe for public services is paid for favours in the justice sector. It also found that courts are the least trusted dispute resolution mechanism in Afghanistan.¹⁷⁴ The Anti-Corruption Strategy acknowledges a need to strengthen the judiciary and regain the trust of Afghanistan's citizens.¹⁷⁵

3.1. Justice Reform

On 27 December 2016, the Cabinet adopted a five-year National Justice Sector and Judicial Reform Plan (JSRP), in line with the SMAF commitment to "develop and implement the Justice Sector Reform Plan to improve access to justice and rule of law all over the country".¹⁷⁶ The JSRP has six strategic goals: (1) effective service delivery, (2) ensuring access to justice, (3) effectively addressing crimes including corruption, (4) enhancing the competence of the judiciary, (5) reform of laws and judicial structures and (6) awareness of citizens. On 22 June 2017, the High Council adopted Institutional Reform Plans for the Supreme Court, the Attorney General's Office (AGO), the MoJ and the Afghan Independent Bar Association (AIBA), which implement the JSRP. In addition, the Ministry of Interior (MoI) and the Independent Commission on Oversight of the Implementation of the Constitution, also covered by the JSRP, developed their plans, though these have not been published or approved by the High Council. Responsibility for reviewing the implementation of the plans is assigned to the Cabinet's Justice and Judicial Committee, which in turn reports to the High Council. However, this review mechanism, has not succeeded in advancing implementation of the plans. Furthermore, the institutions failed to present the required reports on implementation progress six months after their adoption. They were only presented in the High Council meeting of 8 April 2018.¹⁷⁷

¹⁷² See supra, Section 2.4.

¹⁷³ See infra, Section 3.2.

¹⁷⁴ Whereas Afghans state that the average bribe for medical services was 27 USD, they state that bribes for services in the judiciary are on average around 347 USDs, which is more than double of what they estimate to pay to get a public job, the second ranked on the list of bribes; see: Asia Foundation, *Afghanistan in 2017: A Survey of the Afghan People*, p 100-103, at: https://asiafoundation.org/wp-content/uploads/2017/11/2017_AfghanSurvey_report.pdf, (accessed on 1 March 2018).

¹⁷⁵ Anti-Corruption Strategy, II Pillar 4.

¹⁷⁶ Self-Reliance through Mutual Accountability Framework (SMAF), 5 September 2015, Area 2.

¹⁷⁷ National Justice and Judicial Reform Plan, p 11. According to communication from the High Council to UNAMA, Reports were received in January 2018, but could only be presented in the High Council in April 2018 due to scheduling.

The JSRP and the action plans contain elements designed to increase the institutions' ability to address corruption, including measures that strengthen integrity, transparency and accountability and foster merit-based recruitment.¹⁷⁸ If fully implemented, these measures would improve the judiciary. International support for their implementation is increasing. For example, the EU DEVCO Incentive Programme for the AGO aims to improve its integrity through human resource management and paygrade schemes, and vetting and disciplinary measures for prosecutors. It also strengthens the watchdog function of CSOs.¹⁷⁹ UNDP supports aspects of the JSRP concerning the Supreme Court, the MoJ, the AGO and the AIBA and works with the Office of the Second Vice-President on coordinating the JSRP's implementation through its Access to Justice Project.¹⁸⁰

Enhancing transparency in the justice system discourages corruption. To address gaps in the filing, tracking and management of cases, the Afghan judiciary supported by the U.S. INL has developed an electronic Case Management System (CMS). CMS tracks civil and criminal cases from the time of arrest in criminal cases to the final disposition of the case, such as release from prison. At each stage, relevant case data is recorded and becomes available to any person or entity with the authority to view that particular case. While CMS is still undergoing development, it currently contains over 386,000 criminal cases and over 86,000 civil cases from all 34 provinces. It will also provide real time, nationwide data to the leadership of the justice institutions to facilitate more efficient allocation of human and financial resources, monitor cases to ensure procedural due process, and monitor and facilitate timely releases from incarceration and detention. Current utilization of CMS suffers from the failure of the courts to uniformly enter data.

3.1.1. Reforms in Courts

Recognizing the important role of a functioning judiciary in fighting corruption UNCAC obligates its State Parties "to take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary".¹⁸¹ The independence of the judiciary is guaranteed by Article 116 of the Constitution.¹⁸² Appointment procedures and integrity measures are further regulated in laws and feature a strong involvement of the Executive.

All Judges are appointed by the President.¹⁸³ Judges for the Courts other than the Supreme Court are appointed upon Supreme Court recommendation after a nation-wide selection process, upon Supreme Court recommendation. Appointments of all Supreme Court judges including the Chief Justice are at the discretion of the President and subject to approval by the National Assembly's Lower House.¹⁸⁴ The judiciary has taken steps towards a merit-based, fair and transparent recruitment process. Matters of judicial self-administration, including appointment, transfer, promotion, disciplinary issues and retirement of judges fall under the authority of the Supreme Court and are exercised by the Supreme Court's High Council.¹⁸⁵

Increasing integrity measures within the judiciary is a welcome priority since Chief Judge Halim's appointment in 2015. According to its institutional reform plan, the Supreme Court leads anti-corruption and integrity efforts for all Courts. The Care and Control Department is responsible for the detection of duty-related criminal cases against judges.¹⁸⁶ These offences are adjudicated by a panel of all Supreme

¹⁷⁸ National Justice and Judicial Reform Plan, pp 12-29.

¹⁷⁹ Annex of the Commission Implementing Decision on the Annual Action Plan for Afghanistan 2017, Action Document for Incentivising Justice Sector Reform in Afghanistan.

¹⁸⁰ See:

http://www.af.undp.org/content/afghanistan/en/home/operations/projects/crisis_prevention_and_recovery/AA2J.html (accessed on 7 March 2018).

¹⁸¹ UNCAC Article, 11.

¹⁸² Afghan Constitution, Article 116.

¹⁸³ Afghan Constitution, Article 132.

¹⁸⁴ Afghan Constitution, Article 117.

¹⁸⁵ Afghan Constitution, Article 132, Law on Organization/Jurisdiction of Judiciary, O.G. 1109, 30/06/2013, Articles 32, 83.

¹⁸⁶ Law on Organization and Jurisdiction of the Judiciary of the Islamic Republic of Afghanistan, Articles 92-95.

Court judges in the Supreme Court High Council.¹⁸⁷ The approval of the President is required to arrest, detain, prosecute or dismiss a judge,¹⁸⁸ although in practice such approval has never been refused. According to Chief Judge Halim, this approval is not discretionary and must always be granted. The effectiveness and transparency in the process for allowing accountability measures for judicial officials in corruption offences should be enhanced.¹⁸⁹ Despite the existence of specific legal provisions, prosecutions of judicial officials for corruption-related offenses remain low. According to information provided by the Supreme Court for this Report, between March 2017 and March 2018 (1396 in the Islamic calendar) the Supreme Court adjudicated bribery cases against six judges. In one case a Judge was found guilty, sentenced to 2 years' imprisonment and banned from practising law. Five judges were suspended from practising in the Courts pending investigation. Administrative measures taken against judges for corruption-related offences were more frequent. In 1396, the Supreme Court conducted disciplinary proceedings against 143 judges, and as a result issued 109 reprimands, reduced the salaries of 11 judges, and issued formal warnings to 11 others. Transfers are also used as a disciplinary measure. In 1396,¹⁹⁰ twelve Judges were transferred to a different duty station following adverse disciplinary findings.

A code of ethics regulating conduct of judges has been in place since 2007.¹⁹¹ Judges also are subject to many of the probity standards imposed on other civil servants. Judges must declare their assets to the Administrative Office of the President in the same manner as other state employees.¹⁹² In order to disrupt the potential development of local patronage networks, judges are also required to be transferred between duty stations every three years under the authority of the Supreme Court High Council. Earlier transfers are possible based on administrative decisions or upon request of judges.¹⁹³ The mixed use of transfers as disciplinary measures or rewards has, however, diluted the purpose of these transfers.

3.1.2. Reform Measures in the Attorney General's Office

The UNCAC recommends that safeguards regarding independence and integrity are mirrored for the prosecution services even if those services are part of the executive.¹⁹⁴ According to the Constitution of Afghanistan, the Attorney General (AG) is part of the executive branch, but is independent in the performance of his function.¹⁹⁵ The Anti-Corruption Strategy gives the AG a lead role in its implementation across the Government.¹⁹⁶

Since his appointment in April 2016, Attorney General Farid Hamidi has demonstrated a commitment to introducing transparency and integrity measures. He opens his office one day per week to personally receive citizens and hear their complaints and concerns. He is implementing numerous measures aimed at curbing corruption and fostering integrity in the Attorney General's Office (AGO). An example of a genuine engagement in internal reforms is the AGO's request to the MEC to conduct a Vulnerability Assessment to identify areas for improvement within the office. Among the findings of the Special Report, published in July 2017,¹⁹⁷ were that AG Hamidi is committed to advancing reforms. However, the Report also pointed to challenges in recording cases in a unified case management system, and in tracking and managing

¹⁸⁷ Afghan Constitution, Article 133; Law on Organization and Jurisdiction of the Judiciary, Article 91.

¹⁸⁸ Law on Organization and Jurisdiction of the Judiciary, Article 91.

¹⁸⁹ UNODC, Legislative guide for implementation of the United Nations Convention against Corruption, 2d rev. ed. 2012, paras. 106, available at:

https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf (accessed on 11 March 2018).

¹⁹⁰ Between 21 March 2017 and 20 March 2018.

¹⁹¹ Regulation on Judicial Conduct for judges of the Islamic Republic of Afghanistan, adopted on 24th Jawza 1386 (14th June 2007) by the High Council of the Supreme Court.

¹⁹² See supra, Section 2.7.

¹⁹³ Law on Organization and Jurisdiction of the Judiciary of the Islamic Republic of Afghanistan, Article 84.

¹⁹⁴ UNCAC Article, 11 (2).

¹⁹⁵ Afghan Constitution, Article 134.

¹⁹⁶ Anti-Corruption Strategy, II Pillar 4.

¹⁹⁷ MEC, Special Report; Vulnerabilities to Corruption in the Afghan Attorney General's Office, July 2017; http://www.mec.af/files/2017_07_19_ago_special_report_full_report_english.pdf (accessed 5 March 2018).

information from various detection institutions. The assessment also found that action was required to strengthen oversight and reporting mechanisms to prevent abuse in pursuing and closing investigations. The first quarterly follow-up report of the vulnerability assessment found that the recommendations are being gradually implemented.¹⁹⁸ Hamidi has established internal mechanisms to curb corruption within the AGO, and has taken steps to improve its recruitment and performance management processes. The Office has implemented measures conducive to objective merit-based recruitment, and has increased cooperation with donors¹⁹⁹ on projects improving human resource and performance management systems as well as salary schemes. These measures have already begun to increase the operational effectiveness of the Office.

According to information obtained from the AGO, 2,082 Attorneys are currently working with the AGO, of which 622 are working in Kabul province. On average, one attorney processes 65 cases per year. Increased use of integrity measures led to the dismissal of 19 attorneys in 2017, while 127 were retired early. As a result of disciplinary proceedings, 12 attorneys were reprimanded and had their salaries reduced. In 2017, 221 attorneys and 105 administrative staff were hired through a competitive process, and 29 female Staff were recruited. In 2018, another 80 female interns were hired. In line with the Anti-Corruption Strategy the AGO is working on deploying 50 prosecutors to secure districts.²⁰⁰ In total, the AGO reported to have worked on 3,569 cases of administrative corruption throughout the country in 1396.²⁰¹ The vast majority of the cases, 2,295, relate to "misuse of authority", or abuse of office, a widely defined criminal act used as a catch-all for various types of criminal conduct. Whereas a comparatively small number of cases--386 (10.81%)--were worked on in the AGO's specialized anti-corruption department, the majority of corruption cases, 2,385 (66.82%), were processed in the Military Prosecution Anti-Corruption Unit.

On 3 March 2018, amendments to the Attorney General's Law were endorsed by Legislative Presidential Decree which establishes the Office of the Deputy Attorney General for Anti-Corruption Affairs (DAG-AC) whose duties include classical prosecutorial tasks such as investigation, asset recovery, trial and appeals work.²⁰² With these amendments, the Law on Monitoring the Implementation of the Anti-Corruption Strategy was repealed and the HOOAC dissolved.²⁰³ More clarity regarding the preventive functions of the DAG-AC would have been warranted. The AGO plans to have 734 posts under the DAG-AC's Office out of which a maximum of 43 are prevention related, though their specific tasks remain to be defined. In total, 5,837 posts were approved for the AGO, with 403 posts likely to move from the HOOAC to the AGO.²⁰⁴ It is not clear where the HOOAC staff will be placed nor why these posts were retained in the 1397 budget approved for the HOOAC by the National Assembly.

In parallel with these efforts, the AG is actively engaged in anti-corruption reforms and chairs the Anti-Corruption Committee of the High Council on Rule of Law and Anti-Corruption.²⁰⁵ Taking up additional policy and prevention functions may be achievable for the AGO. However, the institution should not be overloaded. A clear definition of preventive functions under the DAG-AC is also needed. International best practices and evidence from research collected by CSOs suggests that the preventive functions envisaged

¹⁹⁸ MEC, following up the implementation of recommendations of the Special Report; Vulnerabilities to Corruption in the Afghan Attorney General's Office, March 2018; http://www.mec.af/files/2018_03_07_ago_1st_followup.en.pdf (accessed 25 March 2018).

¹⁹⁹ Annex of the Commission Implementing Decision on the Annual Action Plan for Afghanistan 2017, Action Document for Incentivising Justice Sector Reform in Afghanistan.

²⁰⁰ Anti-Corruption Strategy, II Pillar 4.

²⁰¹ Between 21 March 2017 and 20 March 2018.

²⁰² Article 3, Presidential Decree No.268

²⁰³ Ibid, Article 4.

²⁰⁴ Independent Administrative Reform and Civil Service Commission, No 4823, Tashkil Approval of the Organization for the Fiscal year of 1397, 3 February 2018.

²⁰⁵ Terms of Reference of the High Council for Rule of Law and Anti-Corruption of 29 June 2016. According to the information of the High Council this committee met four times in 2017.

by Article 6 UNCAC are not ideally placed under the AGO in Afghanistan, even though the UNCAC allows in principal that Article 6 and Article 36 functions may be undertaken by the same body.²⁰⁶

3.1.3. Reform steps in the Ministry of Justice

The MoJ built its reform plan around the JSRP's five key priorities: structural reform, capacity building, service provision, fighting administrative corruption and legislative reforms.²⁰⁷ The MoJ is the only institution which has published its reform plan in English, Dari, and Pashto online.²⁰⁸ It contains a number of important measures, including commitments to transparent, merit-based recruitment, career management based on objective criteria, and improvement of the legislative department. However, it lacks specificity in some areas, and does not lay out how the MoJ will implement the required reforms while retaining its existing staff, some of whom may lack the requisite qualifications. The reform of the Huquq (legal service) and Government cases department has been identified as a priority in the High Council.²⁰⁹ While Huquq offices throughout the country remain important for providing services such as basic legal advice and mediation in land, family and contract dispute cases, concerns remain about its low capacity to enforce court decisions and land titles. Reform measures in the Huquq department's structure will only be effective if the enforcement legislation is also revised.²¹⁰ The revision of this law should be added to the MoJ's reform plan,²¹¹ and a working group should be established to provide technical recommendations. The need to accelerate these efforts also led the High Council to discuss moving the MoJ's Government cases department to the AGO.²¹²

Throughout 2017, the ability of the MoJ to drive legal reforms diminished, as a result of lengthy delays within the legislative department for revising laws and regulations.²¹³ The MoJ's Reform Plan commits to reviewing selected legislation on reform needs. However, as is the case with other institutions, the Reform Plan has not been aligned to the revised timeframes of the Anti-Corruption Strategy (for example the legislative review provided for in the Anti-Corruption Strategy by February 2018 has not been completed.²¹⁴)

3.1.4. Reforms of Police and Major Crimes Task Force

Detection of crimes is the responsibility of the police, which falls under the authority of the Ministry of the Interior (MoI).²¹⁵ The Anti-Corruption Strategy dedicates one of its five pillars to security sector reform. Given the existing cooperation between NATO's Resolute Support Mission and the Afghan National Defence and Security Forces (ANDSF), which contains a significant anti-corruption element, the Strategy focuses on the reform of the MoI and the Afghan National Police.²¹⁶ Key priorities within this pillar include replacements in leadership positions and the introduction of oversight and complaint mechanisms within

²⁰⁶ Jakarta Statement on Principles for Anti-Corruption Agencies, Jakarta, 26-27 November 2012, available at: https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf (accessed on 5 March 2018).

²⁰⁷ Implementation Plan of National Justice and Judicial Sectors Reform Program Related to MoJ for the next Five Years (2017-2021): http://moj.gov.af/Content/files/Implementation%20Plan%20of%20National%20Justice%20and%20Judicial%20Sectors%20Reform_english.pdf (accessed on 14 March 2018).

²⁰⁸ See: http://moj.gov.af/Content/files/Implementation%20Plan%20of%20National%20Justice%20and%20Judicial%20Sectors%20Reform_english.pdf (accessed on 11 March 2018).

²⁰⁹ High Council Meeting, 9 October and 27 November 2017.

²¹⁰ Law on the Procedure for Obtaining Rights (Huqooq), Official Gazette No. 786, 1999.

²¹¹ See: www.moj.gov.af (accessed on 3 March 2018).

²¹² High Council Meeting, 9 October and 27 November 2017.

²¹³ High Council Meeting, 22 February 2018.

²¹⁴ Anti-Corruption Strategy, II Pillar 4; Implementation-Matrix.

²¹⁵ Afghan Constitution, Article 134 and Article 80 of Criminal Procedure Code.

²¹⁶ Anti-Corruption Strategy, II Pillar 2.

the police.²¹⁷ As of late April the Ministry of Interior's reform plan had not been presented before the High Council, although the Special Secretariat confirmed that it had received it.

Reforms of the MoI accelerated following the confirmation of the new Minister of Interior, Wais Ahmad Barmak, by the National Assembly on 4 December 2017. He had been serving as acting Minister since 14 August. To guide its internal reforms, the MoI adopted the new four-year MoI Strategic Plan, which defines outputs, tasks and timeframes for the period 2018 to 2021. The plan is aligned to the overall goals of the Anti-Corruption Strategy, and incorporates the four benchmarks²¹⁸ that the MoI must deliver, either alone or with other institutions. According to the plan, measures to counter corruption will be implemented across all the levels in MoI and ANP, including at zone, province and district levels. These measures include revision of internal procedures, the establishment of internal control programs, as well as reporting and oversight mechanisms. In particular, the MoI has built the capacity of its Inspector General and internal audit organs. Disciplinary measures have been increasingly used as well as prosecutions and trials when criminal conduct was involved. These measures are expected to increase the low public trust in the Afghan National Police.

The Ministry of Defence Fuel Case: Demonstrating Afghanistan's potential detection capacity: The Deputy Head of the Department of Policy in the Office of the Deputy Minister, who was also the Chairman of the Contracts Evaluation Committee, was indicted for bribery for demanding USD150,000 from a bidder to award a tender for supply of fuel to the MoI. The bidder reported the request for a bribe to the MCTFMCTF, following which the suspect's telephone conversations were taped. In the operation, the suspect welcomed the covert officer in his home and received the marked bribe money. He was subsequently arrested as he escorted the officer out and the money was recovered. On 9 January 2017, the Primary Court convicted the accused and sentenced him to eight years' imprisonment as well as to a cash fine equivalent to the bribe money. In addition, the accused was found guilty of other charges relating to forgery of motor vehicle documents. In total, the accused was sentenced to 14 years' imprisonment. On appeal the conviction was confirmed but the sentence reduced to twelve years' imprisonment without explaining why. Furthermore, the Appeal Court ordered the prosecution of other suspects, including a Deputy Minister of the MoI, for "misuse of authority" in relation to another fuel bid. The case, which is being processed. Appeal Court's judgement was upheld on appeal by the Supreme Court.

The Major Crimes Task Force (MCTF), is a specialized agency created in 2009 to address major anti-corruption, kidnapping, and organized crime cases.²¹⁹ The US Federal Bureau of Investigation (FBI) provided support regarding personnel, training, and expertise.²²⁰ Modelled after the FBI, the MCTF is equipped with investigative skills and vested with functional independence, combined with split reporting lines between the MoI and the National Directorate of Security (NDS).²²¹ These structural features made it difficult to fit the MCTF within the existing Afghan institutional framework. During its initial year of operations, the MCTF received significant support, which enabled rapid advances in its capability.²²² However, this critical national and international support was not sustained. The achievements of the MCTF have also been undermined by repeated leadership changes and ongoing allegations of corruption within its own ranks.

In the first year after the appointment of its current Director, Brigadier General Abdul Ghayor Andarabi, in January 2016, the MCTF increased its output and, together with SIGAR, successfully led the investigation in the ACJC's first major corruption case, against Major

²¹⁷ Anti-Corruption Strategy, II Pillar 2 and Annex, Implementation Matrix.

²¹⁸ Anti-Corruption Strategy, Annex Implementation Matrix.

²¹⁹ SIGAR, U.S. Agencies Have Provided Training and Support to Afghanistan's Major Crimes Task Force, but Reporting and Reimbursement Issues Need to be Addressed, Audit Report of 19 July 2011, <https://www.sigar.mil/pdf/audits/2011-07-19audit-11-12.pdf> (accessed 10 March 2018).

²²⁰ SIGAR, U.S. Agencies Have Provided Training and Support to Afghanistan's Major Crimes Task Force, but Reporting and Reimbursement Issues Need to be Addressed, Audit Report of 19 July 2011, <https://www.sigar.mil/pdf/audits/2011-07-19audit-11-12.pdf> (accessed 10 March 2018).

²²¹ STEPHEN, Cyrus, The Major Crimes Task Force- Afghanistan: A Case Study and Examination of Implications for Future FBI Capacity Building Programs, 2014, at: <https://www.hsaj.org/articles/3345> (accessed on 10 March 2018).

²²² SIGAR, U.S. Agencies Have Provided Training and Support to Afghanistan's Major Crimes Task Force, but Reporting and Reimbursement Issues Need to be Addressed, Audit Report of 19 July 2011, <https://www.sigar.mil/pdf/audits/2011-07-19audit-11-12.pdf> (accessed 10 March 2018).

General Abdul Wase Raoufi.²²³ However, in its quarterly reports between January 2017 and 2018, based on Resolute Support data, SIGAR documented mixed results of the MCTF's qualitative and quantitative output, and recorded an overall decrease in corruption cases referred to the AGO.²²⁴ This coincided with ongoing discussions over re-appointments in the MCTF's leadership²²⁵ and failed attempts to reform the MCTF's legal basis.²²⁶ The ACJC's prosecution authorities told UNAMA that only 25 of 450 cases were referred by the MCTF. The Anti-Corruption Strategy states that the MCTF needs to reinforce its independence, authorities and skills,²²⁷ but does not specify measures to achieve this.

Reform discussions and the AGO's draft amendments to the MCTF's legal basis propose streamlining the MCTF's jurisdiction to corruption cases only and to change its reporting line to the AG.²²⁸ Notably, the Mol's structure, which places the MCTF Director under the Crime Directorate rather than directly under the Minister, is not conducive to the MCTF's ability to deliver on the Government's declared priority to detect corrupt practices within the Mol. Ensuring the safety of MCTF personnel continued to be a problem, despite the issuance of the Presidential Decree ordering a reinforcement of security measures for ACJC and MCTF staff on 3 June 2017.²²⁹ In 2017, the ACJC found two accused guilty of attempted bribing of MCTF staff and one guilty of attempted murder of MCTF staff.²³⁰ No MCTF staff have been convicted so far by the ACJC for any involvement in criminal activities.

Observations:

Reforms in the justice and law enforcement sectors have been implemented at a slower pace than anticipated. Integrity and accountability measures of judiciary and law enforcement officials remain to be improved and strengthened. The implementation of the National Justice Sector and Judicial Reform Plan has not been pursued in a coordinated manner. The Attorney General's Office currently processes a vast number of corruption cases. Its capacity to process these cases must not be diluted by the integration of corruption prevention functions in its mandate.

The law enforcement's capacity to detect and investigate corruption cases needs to be strengthened. With the aim of the MCTF focusing on detection of corruption cases, including within the police, the reporting structure should guarantee a degree of independence. Confining the police capacity to detection or pre-investigation tasks alone will make it difficult to address more complex cases. Closer cooperation between prosecution and police is required.

3.2. Anti-Corruption Justice Centre (ACJC)

On 30 June 2016, delivering on corruption-related international commitments repeatedly made in international fora,²³¹ President Ghani established the Anti-Corruption Justice Centre (ACJC) through an Executive Decree. The purpose of the ACJC is to investigate, prosecute and adjudicate major corruption

²²³ SIGAR, Quarterly Report to US Congress, of 30 January 2017, <https://www.sigar.mil/pdf/quarterlyreports/2017-01-30qr.pdf> (accessed 10 March 2018) p 44.

²²⁴ SIGAR, Quarterly Report to US Congress, of 30 January 2017, 30 April 2017, 30 July 2017, 30 January 2018, all available at: <https://www.sigar.mil/quarterlyreports/index.aspx?SSR=6>, (accessed 10 March 2018).

²²⁵ High Council Meeting of 22 June 2017.

²²⁶ High Council Meeting of 28 September 2017 and 21 January 2018.

²²⁷ Anti-Corruption Strategy, Pillar 4: Prosecuting the Corrupt.

²²⁸ High Council Meeting of 28 September 2017.

²²⁹ Decree 948 to improve the affairs and ensure physical safety and security of Anti-Corruption Justice Centre (ACJC) personnel and headquarters, 3 June 2017. See also *infra*, 3.7.

²³⁰ See: Case no 15 - 10/08/2017 (01 Nov 2017) and Case no 4 - 19/02/96 (09 May 2017).

²³¹ Article 5.3.b of the ANPDF; European Union Anti-Conference, Kabul 2016; Afghanistan's Country Statement at London Summit 2016.

cases.²³² Rather than create a new institution, the Decree designates the ACJC as a secure work location where dedicated detection, prosecution and judicial institutions are able to cooperate on corruption cases. The founding Decree states that “All governmental offices, including Ministry of Defence, Ministry of Interior, National Directorate of Security and Attorney General’s Office are bound to support the ACJC in all stages of judicial prosecution of corruption cases.”²³³

The ACJC has jurisdiction on (1) corruption cases involving more than AFN 10 million; (2) bribery, money laundering, destruction or selling of cultural and historical relics, crimes against internal or external security, illegal extraction of mines, and land usurpation involving more than AFN 5 million; and (3) cases involving high-ranking government officials, such as deputy-ministers, generals, governors, and Provincial Council members regardless of the amount of money involved.²³⁴ Currently officials for whom the Constitution demands the establishment of a Special Court, such as the President, Ministers and Supreme Court Judges, cannot be tried before the ACJC, as laws do not qualify it as a special court according to the Constitution.²³⁵ In addition, the High Council on Rule of Law and Anti-Corruption may refer cases to the ACJC even if they do not meet the criteria mentioned above,²³⁶ though this referral option has never been used.²³⁷ Cases that do not meet the jurisdictional threshold of the ACJC continue to be investigated and prosecuted before ordinary provincial courts.²³⁸ The AGO reported that in total 3,569 cases of administrative corruption were prosecuted around the country in 2017.²³⁹

The current 14 ACJC judges were selected by the Supreme Court based on each individual judge’s reputation for integrity and competence.²⁴⁰ Transparent and competitive selection criteria for all judges and prosecutors should be codified and published. For the initial group of prosecutors and police investigators appointed to the ACJC, the international community provided technical support by conducting polygraph tests.²⁴¹ The results were used as a baseline and the consequences for failing polygraphs will be enforced in the next round. The development of guidelines for vetting or polygraphing for the AGO and the Mol would be timely and helpful.²⁴² Currently, 71 prosecutors are assigned to the ACJC. That numbers is expected to rise to 122 in 1397. These numbers are high compared to the judiciary and are expected to boost the court’s investigative capacities. Judge, prosecutors and investigators are to be commended for their courage in paving the way in prosecuting and adjudicating sensitive corruption cases despite an adverse security climate. Particular credit goes to Presiding Judges Munib and Rasouli as well as ACJC lead prosecutor Orfani who are specifically exposed.

²³² Presidential Decree on the Establishment of the Anti-Corruption Justice Centre (Decree No. 53), 30 June 2016 (10/04/1395).

²³³ Decree No. 53, Article 8 paragraph 2.

²³⁴ High Council of the Supreme Court, Directive No. 385, 19 July 2016 (29/04/1395) (High Council of the Supreme Court Directive).

²³⁵ Articles 69, 78, and 127 of the Afghan Constitution provide expressly that Ministers, Supreme Court Judges and the President can only be tried by a Special Court according to the law.

²³⁶ Decree No. 53, Article 5.

²³⁷ See, however, *supra*, footnote 97.

²³⁸ UNAMA Anti-Corruption Report, April 2017, p.49.

²³⁹ Table of Administrative Corruption Crimes for the Year 1396.

²⁴⁰ UNAMA Anti-Corruption Report, April 2017, p. 49.

²⁴¹ UNAMA Anti-Corruption Report, April 2017, p. 49.

²⁴² The Monitoring and Evaluation Committee, Special Report: Vulnerabilities to Corruption in the Afghan Attorney General’s Office, July 2017, p. 8. Available at: http://www.mec.af/files/2017_07_19_ago_special_report_full_report_english.pdf (accessed on 1 April 2018).

In 2017, and in particular after its move to its permanent premises on 4 July, the output of the ACJC increased significantly, completing 21 cases at the primary level and 22 cases at the appeal level. This compares impressively with the four cases²⁴³ and one case,²⁴⁴ respectively, in the second half of 2016, the first months of the Court's existence. As of end of April 2018, the Primary Court had completed 34 cases involving 142 accused persons²⁴⁵ with the Appeals Court finalizing 32 cases with 98 accused.

Observations:

The ACJC was formed with a commendable pace and should continue to further build its capacity. Appointment and vetting procedures for judges and prosecutors remain to be strengthened and standardized. The increase in prosecutors is expected to lead to increased output. The resilience of the ACJC principals, and their ability to steadily increase output should be commended and the Centre supported to deal with the challenges it faces. The legal basis of the ACJC should be codified in the new Anti-Corruption Law.

3.3. Types of cases prosecuted

The Helmand 215 Maywand Corps case: Demonstrating the ACJC's ability to hold Senior MoD officers accountable: The 215 Maywand Corps case involved two senior Ministry of Defence Generals and four of their juniors. Investigations built on a US Army commander's report to the MoD. The ACJC Primary Court found the Commander of the Helmand 215 Maywand Corps guilty of "misuse of authority" for having (i) assigned 30 soldiers from the battalion in Helmand to guard his private residence in Kabul (ii) provided six government vehicles to his family members, (iii) appropriated 11,850 litres of fuel for his family's use, and (iv) authorised the return of cash instead of supply of food from a contractor. The Commander of Brigade No.2 of the 215 Maywand Corps, a co-defendant in the case, was also convicted of "misuse of authority" for having collected AFN 3 million in cash from a contractor who had been contracted to supply food to the Corps and subsequently failing to purchase the food. The four junior co-defendants, charged as accomplices, were acquitted. The Primary Court sentenced the Corps Commander to a total of five years and three months imprisonment and ordered him to pay a sum of AFN 699,150 (around USD 10,000) in compensation. The Brigade Commander was sentenced to three years and two months imprisonment and ordered to compensate AFN 3, 280,734 (around USD 46,000). Despite appeals by both parties, the Appeal Court and the Supreme Court upheld the decision in full.

The ACJC has jurisdiction to try a wide range of corruption offences under the 1976 Penal Code, money laundering offences under the former Anti-Money Laundering and Proceeds of Crime Law, destruction or selling of cultural and historical relics, crimes against internal and external security, illegal extraction of mines, and land usurpation.²⁴⁶ All crimes and punishments within the ACJC's jurisdiction have now been codified in the new Penal Code²⁴⁷

and an amendment to clarify the ACJC's jurisdictional link is urgently needed.

Of the 142 indicted in the Primary Court, the majority were charged with the offence of misuse of authority (63 accused) followed by embezzlement (34 accused), bribery (18 accused), forgery of documents (16 accused), and money laundering (12 accused). Other offences included use of a forged document (9 accused), exceeding authority (6 accused), treachery (3 accused) and smuggling (2 accused). Two cases of land grabbing²⁴⁸ were indicted while four persons were charged with damaging cultural property. No one was indicted for illegal extraction of mines or for crimes against internal and external security. A number

²⁴³ *Aziz Bank Kandahar Case No. 1 of 12.11.16; AGO Military Prosecutor Case No. 4 of 19.11.16; Baghlan Money Laundering Case No. 8 of 10.12.16 and National Bank of Kunduz and Baghlan Case No. 5 of 21.12.2016.*

²⁴⁴ *Aziz Bank Kandahar Case No. 1 of 27.12.2016.*

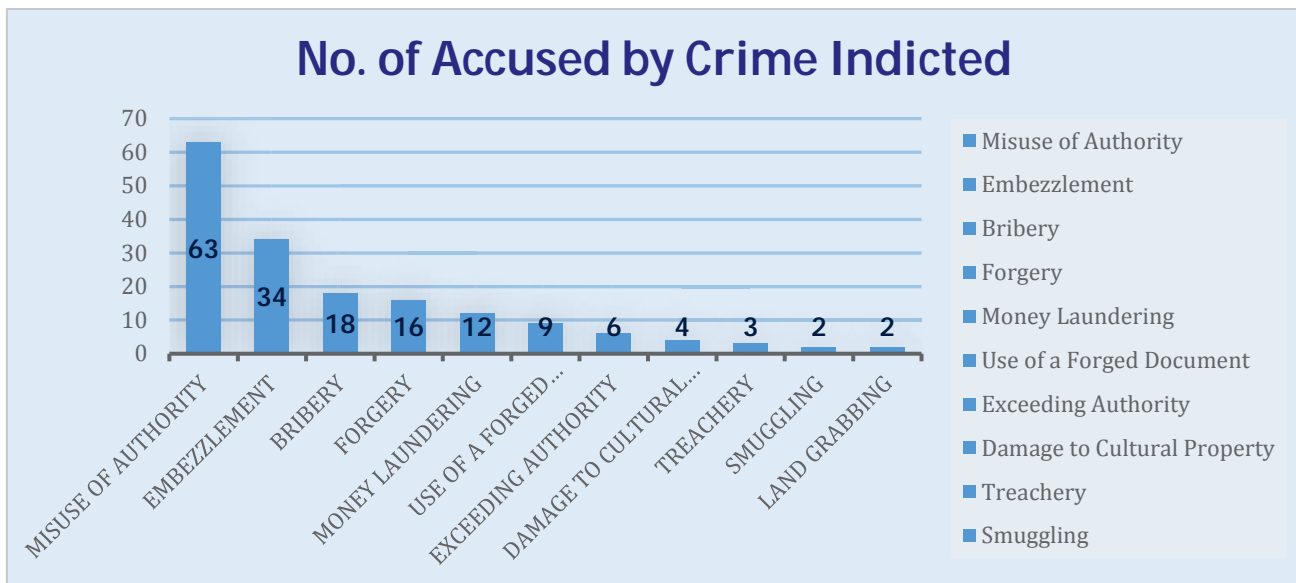
²⁴⁵ Indictments against two deceased suspects were dropped.

²⁴⁶ High Council of the Supreme Court, Directive No. 385, 19 July 2016 (29/04/1395); Afghanistan's Fight Against Corruption: The Other Battlefield, UNAMA, March 2017, p. 49. Following the coming into force of the revised Penal Code, which codifies all crimes and punishments (with a few exceptions), all corruption crimes can now be found in the new Code.

²⁴⁷ See supra, Section 2.4.1.

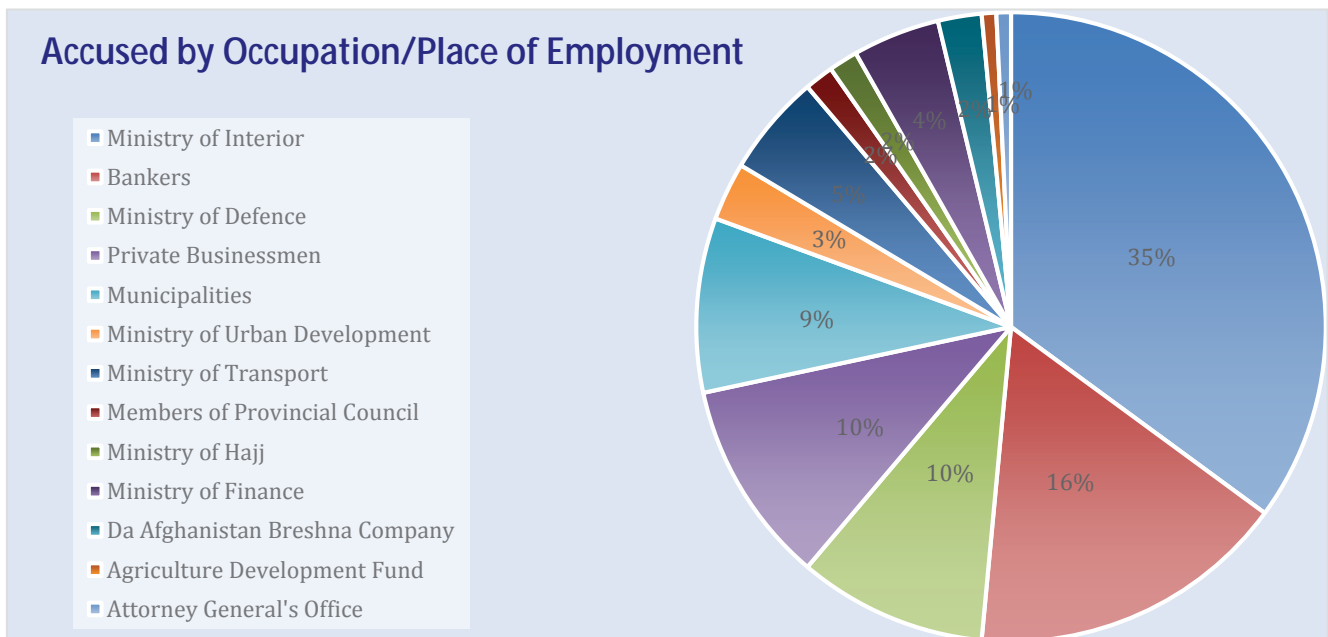
²⁴⁸ The Lego Global Case, Primary Court Case No. 6.

of crimes not within ACJC jurisdiction but which occurred as part of the corrupt transactions adjudicated by the ACJC were also charged.²⁴⁹



The majority of those indicted were employees or former employees of the Ministry of Interior, with 47 persons indicted resulting in 43 convictions. The rest are distributed as follows: Bankers (22), Ministry of Defence (13), Municipalities (12), Ministry of Transport (7), Ministry of Education (6), Ministry of Finance (6), Ministry of Urban Development (4), Ministry of Hajj (2), Members of Provincial Councils (2)²⁵⁰, Attorney General's Office (1), Da Afghanistan Breshna Company (3), Agriculture Development Fund (1) and fourteen private businessmen. Two of the accused were former Deputy Ministers, while one was in office at the time of his trial.²⁵¹ Of the three, only one appeared in court while the other two, including the sitting Deputy Minister, were tried in absentia. Fourteen (14) accused persons held the rank of General.

All cases but one brought before the ACJC met the minimum monetary and rank requirements set by the Supreme Court jurisdiction order. Twelve cases involved high ranking officials while the rest met the



²⁴⁹ For example, in the Police District 13 Case, the main suspect-Commander of PD13, was also charged with the attempted murder of an MCTF officer who was shot in the course of carrying out arrest of the suspects, as well as with the offence of drinking alcohol.

²⁵⁰The Herat Provincial Council Chairperson and a Balkh Provincial Council Member.

²⁵¹The Deputy Minister of Hajj, former Deputy Minister of Education and former Deputy Minister of Interior for Supplies. The former Deputy Minister for Education was convicted and sentenced to a cash fine of AFN 12000.

required monetary criteria. The case of Kabul Police District 13²⁵² was the only exception. The highest ranking official in that case held the rank of colonel and the money involved, USD 45,000 (around AF 310,000) was below the minimum AFN 5 million threshold for bribery.²⁵³

Observations:

The crime of misuse of authority was charged in the vast majority of cases. The new Penal Code, with clearer definitions of crimes, will facilitate the charging policy. The overwhelming majority of cases related to defendants from the Ministry of Interior.

3.4. Gaps in prosecuting corruption allegations

The Constitution stipulates that highest ranking officials such as Ministers who are accused of crimes are to be tried before a special court.²⁵⁴ Throughout 2017, no corruption case was tried at such a special court. UNAMA has been informed by the AGO and the Supreme Court that four cases where the defendants' status required establishment of a special court are currently being processed. On 24 April 2018, President Ghani, in his key-note address at the fourth annual European Union Anti-Corruption Conference announced that the Chief Justice had told him of the receipt of two of these cases at the Supreme Court.²⁵⁵ A special trial panel under the ACJC would be better placed to try such cases. Given that the ACJC does not currently qualify as a special court, corresponding amendments to the law in accordance with the prosecutions should be introduced.

Another gap in the prosecution of corruption cases is that findings of the MEC Reports have not been consistently followed up with investigations and or prosecutions.²⁵⁶ For example, the Ministry-wide Vulnerability to Corruption Assessment of the Ministry of Education (MoE)²⁵⁷ of October 2017 provides an opportunity for the AGO to take up the backlog of alleged corruption cases in the education sector,²⁵⁸ including those resulting from MEC findings on widespread malpractice in the appointment of teachers.²⁵⁹ Despite similar findings prior to the latest MEC assessment report,²⁶⁰ only one case of corruption from the MoE has been prosecuted at the ACJC.²⁶¹

Another reported case was that of allegations of corruption at the Ministry of Defence (MoD) involving the rigging of fuel bids worth about one billion US dollars. Following investigations by SIGAR in 2015, President Ghani cancelled the contract, re-started the procurement process and removed some senior personnel from the MoD.²⁶² Subsequently, the President ordered an investigation into the contract and formed an investigative committee headed by Kabul University Dean and former Minister of Economy, Hamidullah Farooqi. However, the committee's investigative report findings have never been officially announced and

²⁵² Primary Court Case No 5 of 13/01/1396.

²⁵³ Jurisdiction to try this case was delegated to the ACJC by the High Council of the Supreme Court through its Resolution No. 1104 dated 28 February 2017 in accordance with the Law on the Organization and Jurisdiction of the Courts.

²⁵⁴ Articles 69, 78, and 127 of the Afghan Constitution provide expressively that Ministers, Supreme Court Judges and the President can only be tried by a Special Court according to the law; see also The Law on Special Courts, OG No. 1130 dated 23/01/1393 (12/04/2014).

²⁵⁵ The Fourth Annual EU Anti-Corruption Conference "Corruption in recess, Peace in Progress, Kabul, 24 April 2018.

²⁵⁶ The AGO stated to UNAMA in reply that in 2017, "around 300 cases from the previous years in civilian and military anti-corruption prosecutions were dismissed due to lack of incriminating evidences...".

²⁵⁷ MEC, Ministry-wide Vulnerability to Corruption Assessment of the Ministry of Education Available at: http://www.mec.af/files/2017_23_10_moe_english.pdf (accessed on 6 March 2018).

²⁵⁸ Ibid, page 5.

²⁵⁹ Ibid, page 3.

²⁶⁰ See Vulnerability to Corruption Assessment of Teacher Recruitment in the Ministry of Education, July 2015: [http://www.mec.af/files/2015_08_22_MOE_Teacher_Recruitment_VCA_\(English\).pdf](http://www.mec.af/files/2015_08_22_MOE_Teacher_Recruitment_VCA_(English).pdf) (accessed on 6 March 2018).

²⁶¹ The case against a former Deputy Minister of the Ministry of Education and 6 others.

²⁶² Special Inspector General for Afghanistan Reconstruction Quarterly Report to the United States Congress, 30 January 2017, p. 3-5. Available at: <https://www.sigar.mil/pdf/quarterlyreports/2017-01-30qr.pdf>, (accessed on 15 March 2018).

so far only the former Head of the MoI Contracts Evaluation Committee and a former Deputy Minister in the MoD have been prosecuted. Suspicions arising from findings in procurement processes leading to being barred from bidding in public tenders (debarment), which the NPA referred to the AGO or the MCTF, also remain to be followed up.

It is not clear what happened to the many cases of suspected corruption referred to the AGO by relevant State institutions for investigation and prosecution.²⁶³ For example, in its 2017 Annual Report, the Financial Transactions and Reports Analysis Centre of Afghanistan (FinTRACA)²⁶⁴ reported that in 2016 it had “approved 26 analytical products”, i.e. “cases”, on money laundering, terrorist financing, drug trafficking, corruption and other predicate offences and shared its findings with the Attorney General’s Office. In 2017, it approved 28 additional products.²⁶⁵ Nevertheless, cases of financial crime are often complex and may take considerable time to investigate. In 2018, there was an upsurge in the number of cases of money laundering prosecuted by the ACJC.²⁶⁶ The ACJC Courts, while delivering judgements in a number of cases,²⁶⁷ have directed the AGO to investigate and prosecute co-perpetrators whom the court identified in the course of its hearings. In most cases, no information is available regarding the progress of these cases following their referral to the AGO. FinTRACA also alerted UNAMA to the problem that in multiple cases the prosecution leaves out more complicated charges with the result that a conviction for a significant part of the damage caused was not entered and those funds were not recovered.

The ACJC has not published its case selection criteria or defined a prosecutorial strategy. Therefore, it risks facing difficulties in defending itself against criticism regarding its case selection. This is particularly true in the context of Afghanistan where there are allegations of corruption at all levels of government, and where it is easy to construe (or misconstrue) political intentions behind case selections. While the jurisdictional threshold of the ACJC bars investigations against the most senior government officials (e.g. Ministers), the ACJC also lacks a mechanism to refer simple cases to Courts in the provinces. A clear prosecutorial policy is required to minimize prosecutorial gaps. This policy should be communicated through the AG’s spokesperson.

Observations:

Further efforts in prosecuting anti-corruption cases need to be made. Revising the legal basis to allow for prosecution of the highest ranked in line with the Constitution could facilitate the prosecution of these cases. The AGO should define and publish a case selection and prosecution policy to avert criticism regarding case prioritization. The ACJC must ensure that it builds capacity to address also more complex parts of money-laundering cases.

3.5. Observations from conduct of ACJC proceedings

3.5.1. Observations ACJC hearings

Since the ACJC was established, UNAMA together with other observers, and in particular Integrity Watch Afghanistan (IWA), monitored its court proceedings.²⁶⁸ UNAMA observed that the ACJC works towards upholding fair trial rights of the accused and that judges are in control of the proceedings. Oral testimony

²⁶³ See, for example, art. 13 of Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy (HOOAC); arts 10-11, 16, 21 of Audit Law (Supreme Audit Office); arts. 36-37 of Anti-Money Laundering Law (FinTRACA).

²⁶⁴ FinTRACA is a financial intelligence unit established under Article 25 of the AML, implementing UNCAC Article 58, with the responsibility to enforce compliance with the AML. Though established within the Afghanistan Central Bank, FinTRACA is independent in its operations (see AML Art. 25 (1,3,4)).

²⁶⁵ Da Afghanistan Bank Financial Intelligence Unit, Annual Report 2017 (FIU Annual Report), p. 24, at: https://www.fintraca.gov.af/assets/Annual%20Report/FinTRACA_Annual%20Report_2017.pdf (accessed on 5 April 2018).

²⁶⁶ At least nine persons have been indicted for money laundering offences since January 2018.

²⁶⁷ In the Ministry of Defence Fuel Case, the Primary Court ordered the investigation and prosecution of five other suspects.

²⁶⁸ The United Nations Development Programme (UNDP) provided interpretation services.

of witnesses is, however, extremely rare, and if witnesses testify in court they do so from the public gallery, as no witness box is available in the courtroom. A public analysis of anti-corruption cases and proceedings is new for the Afghan judiciary. These observations and evaluations are intended to improve proceedings.

In adherence to the right to a public hearing, and despite security threats, all, except one²⁶⁹ of the ACJC trial sessions²⁷⁰ were held in open court²⁷¹ in the presence of the public and media. The ACJC was able to attract media attention despite its location on the outskirts of the city. While ACJC proceedings are generally covered in the media, there is no strategic outreach. The appointment of a dedicated spokesperson in the AGO and the Courts to communicate strides in corruption prosecutions would help to promote the ACJC's work and inspire greater trust in the Government's commitment to fight corruption through the courts. Outreach should include better communication on cases successfully tried. Final decisions, including their reasoning, should be made publically available.

Judges regularly advised the accused of the right to an attorney at the beginning of the hearings. All accused²⁷² persons tried at the ACJC, including those tried *in absentia*, had access to a defence attorney, whether privately hired or a legal aid attorney provided by the Ministry of Justice. Defence attorneys occasionally noted that the ACJC Primary Court had not given them sufficient notice of the hearing to enable them to adequately prepare for trial. In several cases,²⁷³ the defence stated that the suspects were not assisted by a lawyer during investigations.

With respect to control of court proceedings, overall, the presiding judges of both the Primary and Appeal courts have exhibited dexterity in ensuring order and decorum in court. In a few cases the hearing started with delays due to the defence attorneys arriving late.²⁷⁴ Most defendants filed their written memoranda in court in advance. Unfortunately, when given the floor to address the court, a number of defence lawyers read verbatim from written memoranda rather than highlighting salient arguments. Occasionally, the judges appeared to be openly dismissive of defence arguments and oral motions to present documentary evidence in court were not ruled upon.²⁷⁵ In particular, the judges consistently failed to directly address, both in court and in written decisions, defence protests that their clients' right to an attorney during the investigation, as required by the law,²⁷⁶ had been violated. In practise the accused's right to make a statement during proceedings, according to the CPC²⁷⁷ has been exercised such that considerable time was spent listening to accused persons repeating what had already been said by their attorneys.

In some cases, proceedings were marked by anomalous interventions. On one occasion²⁷⁸, the Presiding judge in the Appeal Court requested judges not sitting on the panel, but present in court, to offer their opinion in the case. In other cases, persons from the public gallery were allowed to give what appeared to be testimony, and to tender documents. During the Appeal Court hearing in the *Kabul Police District 13 case*, for example, the wife of one of the accused persons and an elder were allowed to testify from the public gallery with no opportunity afforded to either the co-accused or the prosecutor to respond. It was not clear whether these persons had previously been formally interviewed or were now formally accepted as witnesses, or if the documents they presented in court were admitted in evidence and what value or

²⁶⁹ In the Pashtany Bank case, the Appeals Court conducted an in camera trial on 10 September 2017.

²⁷⁰ 34 before the Primary Court and 22 in the Appeals Court as of end of April 2018.

²⁷¹ Per CPC Article 213 "the Judicial Trial shall be open and anyone can attend the session, unless the judge holds a closed trial in part or in general due to ethical reasons, family secrets, or preservation of public order."

²⁷² The only exception being the case of the former Deputy Minister of Education *and 6 others* where, despite being informed of their right to attorney, the accused chose to represent themselves and designated the former Deputy Minister as representative.

²⁷³ For example, the Dawi Group Case, the MoD Operations Case and the former Commander of Pul-i-Charkhi Prison Case.

²⁷⁴ For example, the Da Afghanistan Breshna Company case before the Primary Court on 14 February 2018; the MoD Operations Case before the Appeal Court on 9 October 2017.

²⁷⁵ During the Appeal Court hearing in the Pashtany Bank case.

²⁷⁶ Under Article 152 of the CPC, the Prosecutor is duty bound to provide an attorney for the accused in felony crimes. Failure to comply with this provision results in the nullification of the basic proceedings (CPC Article 289).

²⁷⁷ CPC Article 228 (2).

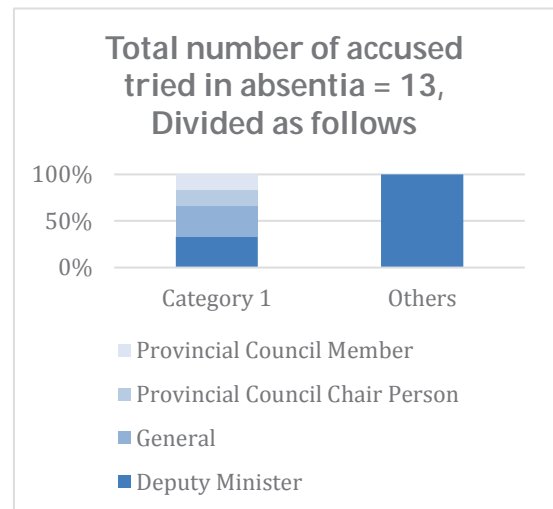
²⁷⁸ During the Appeals Court hearing in the *Dawi Group Case*.

weight their testimony was accorded. The Presiding Judge's intervention during this exchange between the "witnesses" and the accused left an impression that the Court was inclined to convict, even before conclusion of the trial.

The Herat Provincial Council Chairperson Case: Failure to execute arrests and a perception of justice not being done: The Herat PC case exemplifies difficulties of the law legal system in enforcing decisions against powerful individuals, including in corruption cases. The publicity given to the case from the beginning increased the requirement for seeing justice being done: the Herat PC Chairperson was filmed while approaching and entering the Herat Provincial Prosecution office with his 13 personal guards, on 17 August 2016, to pull out a suspect during his interrogation. The recording was published online. The AG ordered the Chairperson's suspension from office, issued a foreign travel ban and instructed the MoI to arrest him for investigation. The arrest warrant was not executed and the Chairperson remained in office.

On 6 February 2017, the AG filed an indictment before the ACJC and issued several summonses. However, the suspect did not appear before the Primary Court and, on 27 March 2017, after publication of the warrant, he was tried in absentia, although he was represented by a legal aid defence lawyer. The Primary Court found him guilty of "misuse of authority" for extracting a suspect undergoing investigation from the Prosecution's office and it sentenced him to imprisonment of 2.5 years.

The AG did not appeal the Primary Court's decision. However, upon the accused's appeal and, after a hearing in which he was present and represented by a private defence lawyer, the Appeal Court reduced the sentence to eight months' imprisonment. The reduced sentence resulted from a slightly changed conviction. Such change would have required thorough argumentation in the verdict which was missing. Without application from the defendant, the Appeal Court suspended the enforcement of its sentence by granting the defendant bail pending determination of his expected appeal to the Supreme Court. The Supreme Court, upon appeal by the defendant only, affirmed the guilty verdict but reduced the sentence to a cash fine of AFN 12,000. The Supreme Court, again, did not provide the thorough reasons for reducing the sentence from imprisonment to a fine in its written decision. The PC Chairperson remains in office.



The CPC provides that the presiding judge and members of the panel have equal voting rights on the decisions.²⁷⁹ If one of the members of the judicial panel does not agree with the other members, he or she is required to record their vote and reasons after the decision is written.²⁸⁰ Despite these provisions, all judgements issued by the ACJC appear to have been unanimous. No dissenting opinion or vote, either on the verdict or the sentence, was included in any written judgement.

3.4.2. *In absentia* cases

UNCAC Article 30 requires States parties to take appropriate measures in accordance with domestic laws to ensure that the accused is present during trial.²⁸¹ The CPC recognizes the presence of the accused or a defence attorney in criminal cases of misdemeanour or felony as a fundamental condition for conducting a fair trial.²⁸² However, it also allows for the holding of a judicial session in the absence of the accused, provided the accused has been notified in accordance with the relevant procedure.²⁸³ The same conditions regarding the presence of the accused at their trial apply at the primary and the appeals stage.²⁸⁴ However,

²⁷⁹ CPC, Article 230(3).

²⁸⁰ CPC, Article 231 (1).

²⁸¹ UNCAC, Article 30 para 4: In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

²⁸² The Criminal Procedure Code (CPC), Official Gazette No. 1132, 5 May 2014 (15 Sawr 1393), Article 212 (1). In petty crimes, if accused does not appear despite being notified, the court can issue a decision in his absence (Article 209(1)).

²⁸³ CPC Article 209 provides as follows: (2) for misdemeanour and felony crimes, if the accused person does not appear for the judicial session on the due date in spite having been notified, the court shall suspend the case proceedings and issue a summon or arrest warrant. If the accused person does not appear for a second time, he/she is notified by an announcement. If he/she still does not appear within the period of time announced, the court shall appoint a legal aid provider to him and issue a decision. The CPC Articles 212 (5) and (6) specify other circumstances where a judicial session may be conducted in the absence of the accused person.

²⁸⁴ CPC, Article 256.

where an accused person was sentenced to imprisonment by the Primary Court and the sentence has not been enforced, the Appeal Court may not proceed with the appeal until the appellant surrenders themselves for the enforcement of the punishment.²⁸⁵

The ACJC has conducted trials of thirteen accused persons in absentia at the Primary Court. Six of the thirteen were among the most senior government officials indicted before the court: two were Deputy Ministers²⁸⁶, two Members of Provincial Councils²⁸⁷ and two Generals.²⁸⁸ The high number of senior officials tried *in absentia*, despite their presence²⁸⁹ in the country reduces the credibility of the ACJC and its ability to demonstrate that it delivers justice equally to all accused. The absence of the accused occasionally compounded procedural law violations. For example, against procedural norms²⁹⁰ the Appeal Court heard two senior officials' appeals, those of Commander of Wardak Province Police²⁹¹ and his co-defendant, before enforcing the Primary Court decision. This practice contradicts the ACJC's own holding in the earlier Ministry of Urban Development case where it stated that "Since the verdict of the Primary Court on the accused ... has been rendered in absentia, so in accordance with paragraph 3 of the Article 263 of the CPC there is no room for the appeal before the enforcement of the verdict."²⁹² To its credit, the Appeal Court has so far declined to admit appeals by the Deputy Minister of the Ministry of Hajj, the Balkh Provincial Council Member and a former Deputy Minister of Interior, until they have submitted to enforcement of the Primary Court verdict.

While the accused Deputy Minister in the Ministry of Hajj was said to have travelled outside the jurisdiction, having been released on bail, it was not clear why other accused persons had failed to appear in court in defiance of court summons or in breach of their own promise, through bail, to attend trial. Similarly, no justification was offered by either the MCTF or the MoI for their failure to enforce court summonses and arrest warrants. At the UNAMA-convened ACJC meetings the problem of enforcement of court summonses and decisions was repeatedly discussed.²⁹³ The High Council's attention to this particular issue would be welcomed. Law enforcement authorities must build their capacities to execute warrants.

3.4.3. Sentencing and enforcement

Procedural norms require the AGO to argue mitigating and aggravating sentencing factors in the charge sheet.²⁹⁴ Grounds for sentences must also be argued in written decisions.²⁹⁵ The sentencing decision should reference articles of the law upon which the sentence is issued.²⁹⁶ However, practice shows that little attention is paid to sentencing and these norms are often disregarded.

As of the end of April 2018, the ACJC Primary Court had convicted 117 accused persons. A total of 24 persons were acquitted. In at least three cases²⁹⁷, the Appeal Court has reversed the Primary Court's finding of not guilty and substituted it with a guilty verdict. Whereas some convictions on individual counts were reversed on appeal, none of the accused convicted at trial was fully acquitted on appeal.

²⁸⁵ CPC, Article 263(3).

²⁸⁶ Former Deputy Minister of the Ministry of Interior and a serving Deputy Minister in the Ministry of Hajj.

²⁸⁷ Chairperson of Provincial Council of Herat Province and a Member of the Provincial Council of Balkh Province.

²⁸⁸ Former Commander of Police of Wardak Province and former Commander of the Afghan National Civil Order Police (ANCOP).

²⁸⁹ Of the 13 accused, the Deputy Minister of the Ministry of Hajj was said to be out of the country on official duties while one accused could not be traced and was mentioned to have fled the country.

²⁹⁰ CPC Article 263(3).

²⁹¹ On 23 October 2017, the ACJC Primary Court sentenced the Wardak Police Commander to 3 years' imprisonment for misuse of authority.

²⁹² Ministry of Urban Development Case, Appeal Court Judgement No.7.

²⁹³ Minutes of UNAMA Anti-Corruption Justice Centre meetings of 22 November 2017 and 6 December 2017.

²⁹⁴ Article 165(5), CPC.

²⁹⁵ Article 239 of the CPC.

²⁹⁶ CPC Article 239(2).

²⁹⁷ Maroof Police District Case, Appeal Court Decision No. 17 of 25/10/2017; Appeal Court Decision No. 727 of 3/03/2018 and Appeal Court Decision No.26 of 8/03/2018.

Sentencing patterns emanating from the ACJC are difficult to identify because they are rarely substantiated in the decisions. In almost half of the cases, the Appeal Court reduced the punishments set by the Primary Court. However, such sentence reductions were marginal in most cases.²⁹⁸ The Herat PC Chairperson case and that of the Wardak Province Police Commander, in which sentences were reduced by more than half (from two years to eight months for the PC Chairperson and three years to one year for the Wardak Province Police Commander) were notable exceptions. These exceptions, however, left the impression that justice was not done for some of the most powerful defendants.

The highest punishment meted by the ACJC was a term of imprisonment of 20 years in the Maroof Police District officials' case²⁹⁹ and in the MoD Operations case.³⁰⁰ In both cases, the defendants were indicted for embezzlement of AFN 22 million in the former case and of USD 982,157 in the latter. In contrast, in the Pashtany Bank case, where the accused were similarly indicted for embezzlement of AFN 50 million, a much lower punishment of five years' imprisonment was imposed.³⁰¹ The Supreme Court has, in most cases,³⁰² refrained from interfering with the finding of the Appeal Court both on the verdict and the sentence.

Sentences are enforceable when they become final.³⁰³ Prosecutors and police are responsible for enforcing court decisions in criminal cases, with police obligated to enforce prosecutors' orders related to court decisions.³⁰⁴ Weak enforcement of court summonses and arrest warrants resulted not only in trials in the absence of the accused but also in the non-implementation of sentences. A sitting Deputy Minister who was absent during his trial at the Primary Court because he had travelled abroad on official duty, has so far refused to surrender to enforcement of the court's decision, even after returning to the country. The Mol also failed to enforce the court attendance of one of its former Generals, the former Commander of ANCOP and the former Commander of Wardak Province Police. Consistent enforcement of court orders on all suspects and accused persons irrespective of their power or standing in society is necessary to generate the public perception that justice is delivered equally for all. Disregard for enforcing orders undermines the authority of the Court in the public's eye.

The UNCAC requires that the gravity of the crime be taken into account when considering early release or parole for corruption offences.³⁰⁵ Afghanistan's Constitution and laws authorize the President to pardon or commute punishment by executive decree.³⁰⁶ However, imprisonment for defendants convicted of administrative corruption, among others, may not be pardoned.³⁰⁷ A term of imprisonment for administrative corruption may be commuted (i.e. reduced) provided that such commutation does not exceed three quarters of the punishment.³⁰⁸ Accordingly, while ACJC imprisonment sentences for corruption crimes may not be pardoned, they may be commuted by a certain margin.

²⁹⁸ Reductions ranged from a few months to three years. In the GCPSU case, the cash fine was reduced from USD 80,000 to USD 16,000.

²⁹⁹ The Appeal Court reversed the Primary Court's verdict of acquittal for one of the accused and imposed a sentence of 20 years imprisonment. The Supreme Court affirmed the Appeal court's finding and verdict.

³⁰⁰ The MoD Operations Case.

³⁰¹ The Appeal Court explained that in the MoD Operations case, there were a multiplicity of embezzlements and thus there were cumulative sentences. This, however, does not explain the high sentence in the Maroof Police District case.

³⁰² The Supreme Court modified the sentences of 17 out of 61 defendants. See: *infra* 3.5.

³⁰³ CPC Article 301(2).

³⁰⁴ CPC Article 303 (1 and 2).

³⁰⁵ UNCAC, Article 30 paragraph 5.

³⁰⁶ Constitution Article 64 (18); CPC Article 348 (1).

³⁰⁷ CPC Article 350 (2) paragraph 4.

³⁰⁸ CPC Article 350 (4)

Sentences other than imprisonment may be either pardoned or commuted. The President may, at his discretion, issue a commutation or pardon decree anytime, or on specific days as specified in the law.³⁰⁹ In 2017, the President issued six pardon and commutation decrees.³¹⁰ Commutation of imprisonment sentences for corruption offences is restricted to convicts who have returned the benefit earned from the act of corruption for which the defendant was convicted.³¹¹ In some instances prisoners who benefitted from commutations of sentence or were released after serving their sentences also had their fines pardoned.³¹²

Observations:

ACJC jurisprudence has so far not established any discernible sentencing pattern, with judicial decisions generally omitting to thoroughly discuss relevant sentencing considerations. With the coming into force of the new Penal Code, which curtails judicial discretion on punishments, it is hoped that more consistency will be attained. A track-record of successfully enforcing ACJC arrests needs to be established in order not to harm the ACJC's credibility in the public's eye. Six of the most senior ACJC indictees were tried in absentia notwithstanding their presence within the jurisdiction. In this regard, the Mol should raise its profile in enforcing AGO and Court decisions and orders.

3.6. The Supreme Court's jurisprudence in corruption cases

Both parties may appeal ACJC decisions to the Supreme Court.³¹³ The Supreme Court only considers written representations from the parties and no further hearings of their pleadings are held.³¹⁴ However, Article 234 of the CPC requires that sentences shall be announced publically. Notwithstanding this express provision in the law, the Supreme Court has not announced a single decision in an ACJC appeal publically. During one of UNAMA's ACJC meetings, a Judge of the Supreme Court High Council's Criminal Division pledged to increase transparency in the Court's work to remedy this shortcoming.³¹⁵ However, the Supreme Court has continued to limit access to its jurisprudence in corruption cases. While cooperating closely with UNAMA during the drafting of this report, it responded to a UNAMA request to provide written copies of judgements in anti-corruption cases that "court adjudication on corruption case (sic) are most sensitive documents, Supreme Court can share numbers but not the copies."³¹⁶ Supreme Court decisions referenced in the Report were obtained from the parties.

Appeals from the ACJC to the Supreme Court can only be brought under the following conditions:³¹⁷ (1) when the appealable decision contradicts the law or there is an error in implementation or interpretation of the laws; (2) when the lower court decision is void; and (3) when there are factors rendering the decision void in the proceedings that may affect the court decision.³¹⁸ As of 5 March 2018, the Supreme Court had

³⁰⁹ CPC Article 354.

³¹⁰ Decree No. 259 on the occasion of International Women's Day; Decree No. 64 on Victory of Jihad Day; Decree No. 82 on the occasion of Eid-ul-Fitr; Decree No. 124 on the occasion of Eid-ul-Adha; Decree No. 110 on Independence Day and Decree No. 168 on the occasion of the Prophet's (PBUH) Birthday.

³¹¹ See for example, Article 6 (2) para 3 of Decree No. 168.

³¹² See for example, Article of Decree No. 110.

³¹³ CPC Article 270 (1) and Article 278.

³¹⁴ CPC Article 277.

³¹⁵ UNAMA ACJC meeting of 6 December 2017.

³¹⁶ Supreme Court email replying to a UNAMA request for court decisions of 18 March 2018. In its official comments to an initial draft of this report the Supreme Court further clarified that providing copies of rulings and disclosing identities of accused persons was against the principle of confidentiality and requested that "in order to respect their human rights, the names (even if convict) should be removed from the report".

³¹⁷ Per Article 270 (4), where the death penalty is imposed, the prosecutor shall submit the case to the Supreme Court even if the decision is not appealable under Article 270 (1) paras 1-3.

³¹⁸ CPC Article 270 (1) Paras 1, 2 and 3.

issued 21 final decisions. So far, the only ACJC case that has not been appealed either to the ACJC Appeal Court or to the Supreme Court is that against the Deputy Minister of Education.³¹⁹

In the majority of its decisions, the Supreme Court has refrained from interfering with the judgement of the ACJC Appeal Court and has affirmed both the finding of guilt and the sentence. In those instances, the court's decision has tended to be brief, stating merely that the appeal did not meet any of the requirements of Article 270(1) of the CPC. There is virtually no single decision of the Supreme Court where it has reversed the conviction or acquittal of an accused.

Nevertheless, the Supreme Court has not refrained from remanding cases back to the Appeals Court where it found it warranted by the law. In the Ministry of Urban Development case,³²⁰ the Appeals Court had affirmed the Primary Court's conviction of the appellants, all former senior officials in the Ministry of Urban Development, for embezzlement of over AFN 86 million and for misuse of authority related to the award of contracts for construction of seven townships in Kabul. However, the Appeals Court had overturned the Primary Court's sentence of compensation of the embezzled sums. The Supreme Court, while upholding the Appeals Court decision on conviction, found that the lower court had erred in failing to order the defendants to compensate for the losses incurred and remanded the case back to the Appeal Court for re-hearing, pursuant to Article 275 of the CPC.³²¹ Since, after re-hearing, the ACJC Appeal Court still refused to implement the Supreme Court's direction, the Supreme Court transferred the case to the Kabul Provincial Appeal Court upon second appeal.³²²

Although CPC Article 275³²³ directs the Supreme Court to refer the case back to the authorised court for re-consideration of the sentence where it overrules the verdict, the Court has on several occasions itself decided on the punishment. In the Herat PC Chairperson case, the Primary Court had found the defendant guilty, in absentia, of misuse of authority under Article 285(2) of the Penal Code³²⁴ and sentenced him to 2.5 years' imprisonment.³²⁵ On appeal by the defendant,³²⁶ the Appeal Court affirmed the conviction, applying Penal Code Article 285(1), and reduced the sentence to imprisonment of eight months. The Appeal Court's decision did not contain a "determination of the extent of the punishment considering the aggravating and mitigating circumstances of the crime" as required by CPC Article 243(10). The Supreme Court, on final appeal by the defendant, affirmed the conviction under Penal Code Article 285(1) but further reduced the sentence to a cash fine of AFN 12,000.³²⁷ In its analysis, the court simply observed that there was a "non-observance of the principle of the proportionality of the punishment to the volume and gravity of the crime committed ... by the lower court."³²⁸ The court did not state the factual elements that informed its finding, especially its holding that Article 285(1) and not 285(2) applied to the facts.

³¹⁹ Case No. 24 dated 29/3/1396 (19/06/2017).

³²⁰ Appeal Court Judicial Decision No. 7 of 30/3/1396(20/06/2017).

³²¹ Supreme Court Judicial Ruling No. 780 dated 7/5/1396(29/07/2017).

³²² Supreme Court Judicial Ruling No. 1233 dated 1/8/1396(23/10/2017).

³²³ Overruling a Verdict, Article 275: If the Supreme Court found the reasons for objection justifiable and overrules the verdict, it shall refer the case back to the authorized court for re-judgment along with the reasons for overruling. The competent court shall review the case with the participation of members who did not participate in the previous decision and issue a decision. If once again, in accordance with the law the Supreme Court overrules the decision, the Supreme Court refers it to a similar court for re-adjudication.

³²⁴ PC Article 285: (1) If the official of public services, making use of his official authority, deliberately and without legal grounds stops the implementation of provisions of laws, regulations, verdict and decision of the court, or orders issued by competent authorities of the government, and/or collection of goods and taxes stipulated by the law, the official shall be sentenced in the light of circumstances to short imprisonment of not less than three months of cash fine of not less than three thousand and not more than twelve thousand Afghanis. (2) If as a result of stoppage mentioned in the above paragraph the execution of State plans are delayed or interrupted or a loss is inflicted upon public property, the offender shall be sentenced in the light of circumstances to long or medium imprisonment.

³²⁵ Primary Court Decision No. 18 dated 6/2/2017(26/04/2017).

³²⁶ Appeal Court Decision No. 2 dated 30/1/1396(19/04/2017).

³²⁷ Supreme Court Decision No. 791 dated 11/7/2017.

³²⁸ *Ibid*, (informal translation).

In contrast to the Herat PC Chairperson Case where the court lowered the punishment, in the case of, the Commander of Kabul Police District 13³²⁹ and that of Chief of Logistics, Uruzgan Police Headquarters case (Uruzgan Police case),³³⁰ the punishment was enhanced. In the Chief of PD 13 case, the Appeal Court had sentenced the defendant to four years' imprisonment for misuse of authority and for resisting lawful arrest. The Supreme Court raised this sentence to six years' imprisonment--the highest punishment--but did not state the aggravating factors that it had considered in making this determination. In the Uruzgan police case, the defendant was convicted for money laundering and sentenced to three years' imprisonment by both the Primary and Appeal Courts. On appeal to the Supreme Court, the prosecutor argued that the lower courts had erred in implementing the law as the sentence imposed was less than half the maximum punishment specified for the offence. The Supreme Court, while enhancing the term of imprisonment to four years and six months and increasing the cash fine from AFN 100,000 to AFN 300,000, omitted to articulate the reasoning behind its interference with the sentencing discretion of the lower court.

Observations:

The Supreme Court was increasingly active in adjudicating corruption cases. Transparency in these cases, in particular announcement of decisions in open court as required by the law and publication of final decisions and reasoning is crucial.

3.7. Asset recovery tools

The UNCAC recognizes asset recovery as a fundamental principle³³¹ of the Convention and obligates States Parties to implement various measures to facilitate the recovery of stolen assets and proceeds of crime.³³² The 2014 Anti-Money Laundering and Proceeds of Crime law³³³ provides a comprehensive legal framework for asset recovery efforts in Afghanistan. This framework was further buttressed by the entry into force of the revised Penal Code³³⁴ which better defines crimes and punishments covered by the Anti-Money Laundering Law (AML). The revised Penal Code does not, however, repeal the preventive provisions of the AML, which remain in force. In June 2017, the Financial Action Task Force (FATF) welcomed "Afghanistan's significant progress in improving its AML/CFT regime and noted "that Afghanistan has established the legal and regulatory framework to meet its commitments in its action plan regarding the strategic deficiencies that the FATF had identified in June 2012."³³⁵ Consequently, FATF removed Afghanistan from its monitoring under its on-going global AML/CFT compliance process.

The Anti-Corruption Strategy recognises the importance of diligent financial management, and prioritizes reforms in procurement, customs and financial tracking in its Pillar 5.³³⁶ The Strategy calls for use of "anti-money laundering tools to detect, trace and confiscate the proceeds of corruption."³³⁷ In addition, it calls for the revision of both civil and criminal substantive and procedural laws to "foster the prosecution of corrupt individuals and to promote the recovery of illegally acquired assets"³³⁸ and sets a deadline for implementation of this target by December 2017.³³⁹ While the revised Penal Code partly fulfils this target, review of civil asset forfeiture provisions in the legislative framework has not yet taken place. The transfer

³²⁹ Supreme Court Judicial Ruling No. 1025 dated 14/8/2017.

³³⁰ Supreme Court Judicial Ruling No. 513 dated 14/8/2017.

³³¹ UNCAC, Article 51.

³³² UNCAC, Articles 52-59.

³³³ Amendments to the Anti-Money Laundering and Proceeds of Crime Law (AML), Official Gazette No.1142, 23 July 2014.

³³⁴ Supra 2.4.1.

³³⁵ FATF Public Statement, 23 June 2017 found at: <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatf-compliance-june-2017.html> (accessed on 1 March 2018).

³³⁶ Anti-Corruption Strategy, Pillar 5: Follow the Money.

³³⁷ Anti-Corruption Strategy, Pillar 5: Follow the Money.

³³⁸ Anti-Corruption Strategy, Pillar 1: Political Leadership and Empowering Reformers.

³³⁹ Ibid, Annex 1: Afghanistan Anti-Corruption Implementation Matrix, p.23.

of authority for recovery of illegally acquired properties to the new office of DAG-AC³⁴⁰ and creation of an Asset Recovery Office within the DAG-AC Office is another step towards implementing the Strategy.

The Anti-Corruption Strategy also provides for the advancement of negotiations and agreements on extradition, cross-border crime and recovery of assets, with a target implementation date of June 2018.³⁴¹ The Strategy also suggests that funds gained from asset seizures be used to provide financial rewards to reformers.³⁴² In this regard, it provides³⁴³ for the development of measures on the administration of frozen, seized or forfeited assets as required by UNCAC Article 66, implementing recommendations by the UNCAC Implementation Review Group.³⁴⁴

Over the last two years, the ACJC and FinTRACA have become the most instrumental State institutions in the enforcement of criminal and civil laws on asset recovery and proceeds of corruption.

The establishment of the Anti-Corruption Justice Centre in 2016 brought fresh impetus into the discussion on recovery of proceeds of crime. As of 5 March 2018, the ACJC had ordered restitution in the amount of AFN 270,449,317 and USD 21,376,008. The Court had also imposed cash fines AFN 849,002,743 and USD 7,176,097. Compensation in the sum of AFN 40,832,180 and USD 21,350,402 and confiscation of AFN 7,063,000, USD 352,200 and PKR 299,500 was also ordered. Out of the restitutions, compensation and fines ordered, the ACJC has successfully recovered AFN 6,762,429.61, \$281,200, and 299,500 Pakistan Rupees. While the percentage of successful recoveries is still extremely low, it represents welcome progress. Nevertheless, the AGO, which is responsible for the strict and timely enforcement of court decisions and judgements, should prioritize enforcement of decisions and court orders in anti-corruption cases.³⁴⁵

For its part, FinTRACA, which is mandated to enforce compliance with the AML and related regulations,³⁴⁶ reported some successes in its work in 2017.³⁴⁷ FinTRACA reported an increase in recovery of financial penalties imposed on banks and Money Service Providers (MSPs) in 2016 by 238% and 17% respectively, to a total of AFN 7.391 million in 2017 for both banks and MSPs.³⁴⁸ In addition, according to FinTRACA's reports, 34 MSP's business licences were either revoked or suspended³⁴⁹ and 91 bank accounts with balances of over USD 792,970 and AFN 6.79 million were frozen.³⁵⁰ Furthermore, during 2017, FinTRACA reported an improvement in the quality and quantity of suspicious transaction reports by commercial banks, which increased to 459 from 289 in 2016.³⁵¹ Out of the 459 reports, FinTRACA prioritized and analysed 59 reports in accordance with its internal risk matrix and disseminated 28 of them to law enforcement agencies for investigation.³⁵²

The Customs Department reported 2,384 declarations of cash and Bearer Negotiable Instruments, with a total declared value of USD 43,484,822.³⁵³ However, the FinTRACA report showed a decline in both the

³⁴⁰ Amendments of and additions to some articles of the Law on Structure and Authorities of Attorney General Office, Article 12 (2).

Anti-Corruption Strategy, Annex 1: Afghanistan Anti-Corruption Implementation Matrix.

³⁴² Anti-Corruption Strategy, Pillar 3: Replacing Patronage with Merits

³⁴³ Anti-Corruption Strategy, Annex 2.

³⁴⁴ An open-ended intergovernmental group of State parties.

³⁴⁵ CPC Article 303.

³⁴⁶ Anti-Money Laundering and Proceeds of Crime Law, Article 24.

³⁴⁷ FIU Annual Report, 2017

³⁴⁸ FIU Annual Report, 2017, p. 5.

³⁴⁹ FIU Annual Report, 2017, p. 18.

³⁵⁰ FIU Annual Report, 2017, p.5.

³⁵¹ FIU Annual Report, 2017 p.12.

³⁵² FIU Annual Report, 2017 p. 17.

³⁵³ Article 5 (3) of The Regulation Governing the Reporting and Control of Physical Transfers of Currency, Bearer Negotiable Instruments, Gold, Other Precious Metals or Precious Stones through the Borders of Islamic Republic of Afghanistan requires that any person who leaves or enters the Islamic Republic of Afghanistan in possession of currency, bearer negotiable instruments, gold, other precious metals or precious stones which are of a value exceeding USD 10,000 or its equivalents in other currencies or arranges for the transportation of such items into or out of the Islamic Republic of

number of forms and amounts of money declared at Afghanistan's international airports in 2017.³⁵⁴ In addition, the report did not capture currency declarations at the key land customs points. In 2017, FinTRACA signed three Memorandums of Understanding with counterpart financial intelligence units to facilitate collection, analysis and exchange of financial intelligence, bringing the total number to 16.³⁵⁵ It was notable³⁵⁶ that the United Arab Emirates, despite the importance of its financial transactions with Afghanistan, has not signed a memorandum of understanding.

Other asset recovery initiatives with the potential to further solidify Afghanistan's asset recovery regime were not vigorously pursued. For instance, despite an official request for assistance in May 2016,³⁵⁷ Afghanistan has not finalized discussions with the World Bank and UNODC's Stolen Asset Recovery Initiative (StAR) which would provide technical assistance for current and future asset recovery efforts.

Observations:

In 2017, FATF noted that Afghanistan had established the legal and regulatory framework to meet its AML commitments. Both FinTRACA and the ACJC became instrumental in the enforcement of laws on recovery of stolen assets and other proceeds of crime, including corruption. The percentage of recoveries of ACJC ordered fines, compensation and restitution was encouraging. Afghanistan should explore other avenues of prevention and recovery of stolen assets, including through bilateral agreements.

3.8. Security of judges, prosecutors, investigators specialized in corruption cases

Guaranteeing the security of the judiciary and detection authorities, particularly those with exposure to sensitive cases, continues to be a challenge in Afghanistan's generally difficult security environment. In 2017, three judges, five prosecutors and three judicial staff members were killed, and two judges and four judicial staff members injured in targeted attacks.³⁵⁸ In 2017, four attacks on judges, prosecutor and judicial staff were claimed by the Taliban.³⁵⁹ On 20 June, a judge of Jalalabad's local Anti-Corruption Trial Court was assassinated on his way to work by a magnetic improvised explosive device attached to his private car.³⁶⁰ By late October 2017, the investigation into the incident had not yielded any results.³⁶¹ Also in Jalalabad on 30 October, a senior official of the Ministry of Justice Department in Laghman province was shot while returning home from his evening prayer; investigation in the murder was started but not completed.³⁶²

The need to provide security for officials addressing serious crimes, including corruption, was part of the rationale for the establishment of the ACJC, which was designed to allow specialized judicial, prosecutorial and law enforcement authorities to pursue politically sensitive cases within a secure working environment. On 4 July 2017, the ACJC moved to its modern, permanent premises in Camp Heath, which were adapted for the ACJC with international expert and, financial support led by the United Kingdom.³⁶³ The transfer to a more secure working location coincided with an increase in indictments and trials in the period

Afghanistan through a person cargo, postal service or through any other means must complete the relevant declaration form and submit that to the Custom's Officer.

³⁵⁴ FIU Annual Report, 2017, CASH AND BNI CONTROL_AF_INTERNATIONAL AIRPORTS, p. 14.

³⁵⁵ FIU Annual Report, 2017, p.2.

³⁵⁶ The Director of FinTRACA acknowledged that the United Arab Emirates was reputed to be a favourite destination for illegally obtained wealth from Afghanistan.

³⁵⁷ UNAMA Anti-Corruption Report, April 2017, p.49.

³⁵⁸ Data from monitoring of UNAMA Field Offices; cross checked with the Courts and Attorney Generals' Offices.

³⁵⁹ UNAMA, Afghanistan Protection of Civilians in Armed Conflict, 2017 Report, available at: <http://unama.unmissions.org/protection-of-civilians-reports> (accessed on 5 March 2018).

³⁶⁰ Information from UNAMA Field Office Jalalabad.

³⁶¹ Meeting UNAMA Head of Rule of Law with Jalalabad Head of Appellate Court on 24 October 2017.

³⁶² Information from UNAMA Field Office Jalalabad.

³⁶³ The adaptation of the ACJC's premises was funded by the United Kingdom implemented by Resolute Support and supported by INL, UNODC, and UNDP.

immediately after the move. Donor support to increase the functionality and security of the premises continued throughout the reporting period. Starting in mid-2017, Resolute Support dispatched a security specialist to the ACJC to advise on increasing the security of the premises and on the personal protection of ACJC personnel.

On 3 June 2017, President Ghani issued Decree 948, ordering specific security measures for the ACJC.³⁶⁴ These included the assignment of close protection officers for ACJC senior officials and security guards for ACJC premises, designation of secure residences for ACJC staff, and assignment of armoured vehicles from the MoI to the ACJC. The international community followed up on the implementation of the Decree through UNAMA's monthly ACJC meetings.³⁶⁵ ACJC representatives indicated that the implementation of the Decree was proceeding slowly and attributed this to insufficient support from the Ministries, particularly the MoI.³⁶⁶ The MoI informed the ACJC of its inability to provide armoured vehicles, which had to be supplemented by donations from the international community. However, progress was made on other provisions of the Decree. Article 2, calling for close protection for ACJC staff, was met with the reassignment of security officers from other institutions, including from the Presidential Guard Corps. In addition, the signing of a Memorandum of Understanding by the Attorney General, the Minister of Urban Development and the Minister of Finance on 21 February 2018 marked steps towards the implementation of provisions assigning safe housing for ACJC officials.³⁶⁷

In 2017, three deliberate attacks on MCTF and ACJC personnel occurred, resulting in the death of three MCTF officers. On 10 April 2017, two MCTF employees were killed in front of their houses while returning from work. On 15 October 2017, another MCTF officer was wounded in front of his house in Kabul under similar circumstances, and died three days later. On 3 November, a group of unidentified gunmen attacked the Executive Director of the ACJC outside his home in Kabul. None of the cases were fully investigated and no one has been arrested for these attacks. Despite the apparent similarity, and therefore predictability, in the crime patterns, neither the ACJC nor the MCTF responded by introducing security measures to prevent such incidents.³⁶⁸

Furthermore, international and equipment and expert support such as that provided by the United Kingdom, INL, and Resolute Support to the MCTF and the ACJC should be efficiently used.

Observations:

Afghanistan's fragile security situation had a significant impact on the ability of the justice system to investigate, prosecute and try serious crimes, including corruption cases. Judges, prosecutors and investigators working on sensitive corruption cases have been disproportionately affected. Special attention to security concerns for the ACJC has allowed the court to operate so far, but further enhanced security measures are required to ensure the safety of ACJC and MCTF personnel.

³⁶⁴ Decree 948 to improve the affairs and ensure physical safety and security of Anti-Corruption Justice Centre (ACJC) personnel and headquarters, 3 June 2017.

³⁶⁵ UNAMA, ACJC meeting of 14 June, 5 July, 9 August, 30 August, 13 September, 11 October, 22 November 2017.

³⁶⁶ On 30 August, ACJC Executive Director informed in UNAMA's ACJC meeting that the MoI responded to the ACJC in writing that it would not provide armoured vehicles.

³⁶⁷ Memorandum of Understanding (MoU) among Ministry of Finance (MoF), Attorney General Office (AGO), and Ministry of Urban Development and Housing (MUDH) on the provision of residential housing for ACJC employees, 21 February 2018.

³⁶⁸ Meeting, UNAMA Head of Rule of Law with MCTF Chief General Andarabi on 3 November 2017.

Recommendations:

to the Government:

- ⇒ increase attention to the implementation of the National Justice Sector and Judicial Reform Plan and ensure that a functioning monitoring mechanism under the auspices of the High Council for Rule of Law and Anti-Corruption is in place;
- ⇒ revise legislation to **strengthen judicial independence and accountability** and laws on criminal responsibility for judges to foster accountability in line with fair trial guarantees;
- ⇒ analyse the feasibility of consolidating corruption prevention functions under the AGO and clarify the roles of each institution in a comprehensive Anti-Corruption Law;
- ⇒ strengthen police capacities to enable effective detection and investigation of corruption cases, including a reform of the legal basis of the MCTF with a view to strengthening the institution;
- ⇒ take measures to **improve the ability of law enforcement institutions to execute arrest warrants and summonses**;
- ⇒ strengthen internal integrity and accountability measures within the Mol;
- ⇒ develop a strategy to ensure **security of the judiciary, prosecutors and law enforcement officials**, including of exposed personnel working on sensitive cases;
- ⇒ ensure full implementation of Decree 948 on ACJC security, while enabling the ACJC to progressively take over responsibility for its own security and rely less on the donor community for technical expertise and financial support;
- ⇒ strengthen institutions for asset recovery and finalize discussions and agreements with Stolen Asset Recovery Initiative (StAR) and other relevant parties on extradition, cross-border crimes and recovery of assets.
- ⇒ negotiate agreements on mutual legal assistance with other States and or sign Memorandums of Understanding in this regard.

to Judiciary/ Prosecution:

- ⇒ strengthen internal integrity and accountability measures while upholding judicial independence and reform the disciplinary system for judges;
- ⇒ ensure adequate training for judges, in particular in relation to the new Penal Code and other anti-corruption legislation;
- ⇒ ensure strategic outreach regarding trials of corruption offences to communicate successes to the public and publish all final decision with reasoning including those in ACJC cases;
- ⇒ establish standard vetting and appointment procedure for judges, prosecutors and MCTF police working at the ACJC;
- ⇒ work to increase the total of assets recovered.

4. Anti-Corruption Measures in the Legislative Branch

The Afghan Constitution states that Members of its National Assembly should vote “according to the general interests as well as the supreme benefits of the people of Afghanistan”.³⁶⁹ In practice, repeated protracted stalemates in finding consensus on central legislative and approval functions cast doubts on whether Assembly Members exercise their mandate as prescribed in the Constitution. Major pieces of legislation have not yet been approved by the National Assembly. Interlocutors in the National Assembly highlighted the lack of technical support capacities to committees reviewing legislation as one of the main reasons for these delays. Besides these technical grounds, fundamental disagreements between the Executive and the Legislature have also caused stalemates. It should also be noted that lower house (Wolesi Jirga) elections that were supposed to take place in 2015 have still not been held. The extension of the lower house beyond its elected term has led to questions regarding its legitimacy. (Elections are currently scheduled for October 2018.) The unpredictability in legislative activities led the executive branch to routinely exercise legislative powers under its formal emergency competences pursuant to Article 79 of the Constitution³⁷⁰ in order to pursue its reform program and meet donors’ aid conditionality requirements. In 2017, 36 legislative acts were passed based on a Legislative Decree endorsed by the President under his emergency competence, while only 14 laws were adopted by the National Assembly.³⁷¹

The reputation of Afghanistan’s National Assembly has also suffered from allegations of corrupt practices, both within the National Assembly itself as well as by its individual members more generally. In 2017, these allegations were publicly discussed on several occasions, most notably during the process of parliamentary confirmations for ministerial candidates.³⁷² In relation to allegations that Assembly Members were seeking bribes in exchange for confirmation votes, a presidential spokesperson stated that the President had warned Cabinet that any ministerial nominee attempting to bribe lawmakers would have their nomination nullified.³⁷³ Allegations of bribery also circulated during internal elections for the parliamentary administrative boards³⁷⁴ and during the approval process of the national budget.³⁷⁵ According to 2017 Public Perceptions indices,³⁷⁶ confidence in National Assembly Members was 35.4 percent, while confidence in the Assembly as a whole was 36.8 per cent, the lowest for all institutions included in the survey. This lack of confidence in the National Assembly limited its ability to exercise institutional checks on other branches of government through its oversight functions.

The Global Organization of Parliamentarians against Corruption promotes the role of parliaments and parliamentarians in implementing the UNCAC. It stresses that all parliamentarian functions, from budget approval to legislative review, are to be exercised diligently to combat corruption.³⁷⁷ It suggests active engagement in the design of anti-corruption policies, strengthening of anti-corruption bodies, exercising oversight, collaboration with CSOs and promoting the implementation of UNCAC in legislative processes.³⁷⁸ This Report looks mainly into anti-corruption measures in the National Assembly and at the National Assembly’s role in exercising oversight functions.

³⁶⁹ Afghan Constitution, Article 81.

³⁷⁰ Afghan Constitution, Article 79.

³⁷¹ Numbers are based on a surveys in the Official Gazette.

³⁷² Center for Strategic and Regional Studies (CSRS), *Selling Government Posts; the untold stories of corruption*, 15 July 2017, <http://csrskabul.com/en/blog/selling-government-posts-untold-stories-corruption/> (accessed 28 March 2018).

³⁷³ Radio Free Afghanistan, 12 October 2017, <https://gandhara.rferl.org/a/afghanistan-parliament-president-bribes/28790076.html> (accessed 28 March 2018).

³⁷⁴ Wolesi Jirga Website, Summary of 17 March 2018 Session.

³⁷⁵ Integrity Watch Afghanistan, *The Game of Numbers: Analysis of the National Budget 2018*, December 2017, https://iwaweb.org/wp-content/uploads/2017/12/IWA_National-Budget_English_6.pdf.

³⁷⁶ Asia Foundation, *Afghanistan in 2017: A Survey of the Afghan People*, 2017, page 98.

³⁷⁷ Global Organization of Parliamentarians against Corruption, Anti-Corruption Assessment Tool for Parliamentarians User guide, http://gopacnetwork.org/Docs/AntiCorruptionAssessmentTool_EN.pdf (accessed on 13 March 2017).

³⁷⁸ Ibid, p. 4.

4.1. Anti-Corruption Measures in the Legislature

Despite consensus that curbing corruption should extend to all branches of the State, anti-corruption benchmarks in donor commitments are mostly limited to the Executive. The 2017/2018 smart SMAF deliverables require that an anti-corruption strategy for “the whole of government” be developed.³⁷⁹ The Anti-Corruption Strategy in its Pillar I contains several provisions directly impacting the National Assembly and commits the Government to supporting the leadership of the National Assembly in developing and implementing an Anti-Corruption Plan, although no timeline is specified.³⁸⁰ Under the Strategy, this plan should include measures such as adoption of a code of conduct, verified asset declarations, and report cards released to the public.³⁸¹ In a meeting with UNAMA, a Member of the Wolesi Jirga’s Judicial Commission stated that the lack of involvement of the National Assembly in developing the Strategy resulted in limited interest of its members to engage in its implementation. He noted that a comprehensive Anti-Corruption Law was warranted. Developing a law would, unlike the Strategy, require the National Assembly’s engagement and could help to re-engage its Members in a concrete dialogue on anti-corruption measures.

In light of opinion polls revealing low confidence in the legislature, the Assembly has a strong interest in demonstrating a commitment to integrity measures. The NUG’s commitment to curb corruption provides the ideal background for the Assembly to strengthen its anti-corruption measures during the remainder of its term and leave a lasting legacy. The Assembly should aim to increase transparency and accountability in its own working processes, which would increasingly improve its ability to exercise its constitutional oversight functions. Recognized international standards and best practices for parliaments recommend that integrity instruments such as rules on participatory decision-making processes, transparent procedures regarding conflicts of interest, disciplinary rules and procedures, and regulations on access to information be in place.³⁸²

The Rules of Procedure of the Lower House³⁸³ and of the Upper House³⁸⁴ provide for enforcement of disciplinary measures in case of contravention or acts contrary to the Constitution. The rules prohibit Members of the National Assembly from engaging in other jobs³⁸⁵ during their terms in office and contain provisions for the criminal prosecution of Members.³⁸⁶ The Upper House’s Rules of Procedure³⁸⁷ contemplate the dismissal of a Member through proposal and a vote of acceptance of the House in case of acts contrary to the Constitution. The recent example of enforcing attendance of Lower House members demonstrated the potential of using disciplinary procedures. In April 2017, the Lower House decided to apply disciplinary measures³⁸⁸ against nine Members of Parliament who were consistently absent from plenary sessions and committee meetings without justification. This led to a rapid improvement in attendance at plenary sessions. While this demonstration effect was welcome, a more rigorous enforcement of the rules was not applied because it would have led to the suspension of the majority of Members, preventing the House from reaching a quorum to adopt the national budget or pass legislation. A formal Code of Conduct or internal control mechanisms fostering integrity and ensuring

³⁷⁹ See: <http://policymof.gov.af/smaf-smart-deliverables-2017-2018/> Para 2, (accessed 28 March 2018).

³⁸⁰ Anti-Corruption Strategy, II Pillar 1.

³⁸¹ Anti-Corruption Strategy, II Pillar 1.

³⁸² IFES Parliamentary Tool Kit, Model State of Parliament Report: Framework, *Global Best Practices: A Model Annual State of the Parliament Report, A Strategic Monitoring and Reporting Tool for Promoting Democratic Parliaments Worldwide* (2005), https://www.ifes.org/sites/default/files/final_sop_framework_0607.pdf, (accessed 28 March 2018).

³⁸³ Rules of Procedure of the Wolesi Jirga, Chapter 12, Article 70.

³⁸⁴ Rules of Procedure of the Meshrano Jirga, Chapter 12.

³⁸⁵ Afghan Constitution, Article 152

³⁸⁶ Afghan Constitution, Article 102

³⁸⁷ Rules of Procedure of the Meshrano Jirga, Chapter 3, Article 12.

³⁸⁸ Rules of Procedure of Wolesi Jirga, Chapter 22.

institutionalized oversight to curb corruption has not yet been put in place. Work on the Parliamentary Service Act, commenced in Inter-Parliamentary Union in 2016, has not yet been finished.

The new Law on Declaration and Registration of Assets of State Officials and Employees obliges Members of the National Assembly to declare their assets. Decreed by the President on 5 September 2017 and approved by the Lower House on 27 November 2017, the joint commission of Upper and Lower House has yet to resolve the disagreement over amendments suggested by the Upper House.³⁸⁹ Compliance among Members of Parliament with Asset Declarations has been low: so far, UNAMA has been informed that only two Members of Parliament have lodged asset declarations. The upcoming parliamentary elections, scheduled to take place on 20 October 2018, should increase compliance. Under the 2016 Election Law, candidates for parliamentary elections are required to make financial disclosures prior to standing for election to the Independent Election Commission.³⁹⁰ The National Assembly in cooperation with the Administration for Asset Declaration should develop a mechanism ensuring that the declarations are transferred to the Administration and updated on an annual basis as required.

Visible progress regarding enhancing the Assembly's transparency has been achieved over the last few years. Since 2016, the Lower House has published attendance records online, and both Houses have broadcast plenary hearings nationwide. Since early 2017, both Houses have published the agenda for plenary and committee meetings and related summary reports on their websites. As of December 2017, both Houses publish online bills under consideration, legislation adopted, and international agreements, conventions and treaties ratified. The Rules of Procedure of the two Houses are also available on their respective websites.³⁹¹ Members of both Houses regularly present reports of their field visits, which are reflected in the summaries of plenary proceedings. These would provide a sound basis for a much needed dialogue with citizens, civil society and media.

Another encouraging step is the commitment of the Parliamentary Anti-Corruption Caucus to increasingly engage with the Executive on anti-corruption matters. The Caucus was established in March 2013,³⁹² includes a large majority of women members³⁹³ and pursues the aim of reducing corruption.

In 2017, the MEC began its work on a Vulnerability Corruption Assessment (VCA) of both houses, which would be the first comprehensive assessment of Assembly. The assessment will analyse legal provisions, internal procedures, conflicts of interest, human resources and procurement practices, integrity rules and standards, and immunity and independence of Members of Parliament. The objective of the assessment is to examine the vulnerable areas with potential or apparent corruption risks; assess the legal system of the National Assembly and practice of implementation of its powers, as well as the conduct of its members; identify the gaps, flaws and loopholes in legislative practices; and provide recommendations and benchmarks. The assessment is expected to be concluded and published in 2018.

4.2. Criminal Accountability and the National Assembly

The UNCAC requires State Parties to take necessary measures "to establish or maintain [...] an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention."³⁹⁴ This provision is designed to ensure that officials are subject to a measure of accountability for corruption offences.³⁹⁵ Afghan authorities have acknowledged the importance of this principle, stating in the framework of the periodic

³⁸⁹ Law on Declaration and Registration of Assets of State Officials and Employees, Official Gazette 1271, 28 October 2017; See also supra, 2.4.

³⁹⁰ Election Law, Official Gazette No. 1226 of 25 September 2016, Article 73.

³⁹¹ See: <http://www.wolesi.website/pvd/document.aspx?Cat=103> (accessed 13 March 2018).

³⁹² PACC charter in http://pdf.usaid.gov/pdf_docs/PA00K1SK.pdf, (accessed 28 March 2018).

³⁹³ PACC charter in http://pdf.usaid.gov/pdf_docs/PA00K1SK.pdf, (accessed 28 March 2018).

³⁹⁴ UNCAC, Article 30 (2).

³⁹⁵ UNODC, Legislative guide for implementation of the UNCAC, 2012, paras. 386-387.

review of the UNCAC that complete immunity from prosecution “is not possible under the fundamental principles of the criminal law of Afghanistan.”³⁹⁶

The Constitution provides absolute immunity from prosecution for members of the National Assembly for exercising their voting rights or expressing opinions in discharging their duties.³⁹⁷ Apart from this functional immunity, Article 102 of the Constitution provides that Members of Parliament shall be accused and prosecuted for other crimes and the respective House shall be informed about the prosecution. The approval of the House is only required for detention or other measures of restraint.³⁹⁸ During an investigation, the Attorney General has to request such approval when a suspect does not answer to summonses and must be brought to an interrogation by force. According to the AGO, the AG has twice requested the approval to detain Members of the Lower, and twice Members the Upper House, but authorization to remove immunity was never granted. The protection of Article 102 of the Constitution is temporary, and once the Members’ mandate expires they are no longer afforded any special protection in criminal cases. The Houses’ unwillingness to enforce the appearance of their Members before judicial and law enforcement authorities or grant approval for restraining measures against Members of Parliament, has created a culture of de facto impunity. Aside from these provisions in the Constitution, there are no further rules governing immunities of Members of Parliament. However, there are internal mechanisms in both Houses to govern the immunities of parliamentarians.

In mid-2017, the First Deputy Speaker of the Lower House levelled accusations of corruption against the Speaker and the Secretary General of the House, including allegations that the Speaker had benefited from inappropriate payments for his housing costs.³⁹⁹ Following heated deliberations within the Lower House, in September 2017 it established a five-member fact finding commission chaired by the House’s Assistant Secretary and including members of four Lower House’s Commissions: Internal Audit; Finance and Budget; Immunities and Privileges; Justice, Administrative Reforms and Fight Against Administrative Corruption. On 4 November 2017 the commission presented its findings and recommendations to the Lower House⁴⁰⁰ but declined to make the full report public on the grounds that the dignity of the National Assembly should be protected. The case was then passed to the Attorney General for investigation, but this decision was reversed⁴⁰¹ in a contested vote of the House. The case, which constituted the first time a Member of Parliament had publicly accused another of corruption, caused divisions within the House and triggered a broader debate over standards of conduct in the National Assembly. The event took place during the finalization of the October 2017 National Anti-Corruption Strategy, which eventually included the Government’s commitment to support the parliamentary leadership to develop an anti-corruption action plan and support its implementation.

4.3. Parliamentary oversight within Anti-Corruption measures

In any democratic State, the National Assembly plays an important role in overseeing the actions of the executive branch as well as independent institutions and, in doing so, fosters integrity.⁴⁰² The Afghan Constitution gives the National Assembly powers to ratify laws and legislative decrees, approve plans for economic, social, cultural and technological development, approve the state budget, create and modify

³⁹⁶ Implementation Review Group, Executive summary: The Islamic Republic of Afghanistan, 22 June 2016, CAC/COSP/IRG/2016/CRP.20, p. 4, available at:

<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/20-24June2016/V1603822e.pdf> (accessed 10 March 2018).

³⁹⁷ Afghan Constitution, Article 101.

³⁹⁸ Afghan Constitution, Article 102.

³⁹⁹ Wolesi Jirga Website, Summary of 23 September 2017 Session, <http://www.wolesi.website/pvd/showdoc.aspx?Id=5848>; (accessed 28 March 2018).

⁴⁰⁰ Wolesi Jirga, Summary of 4 November 2017 Session, <http://www.wolesi.website/pvd/showdoc.aspx?Id=8636>, (accessed 28 March 2018).

⁴⁰¹ Wolesi Jirga Website, Summary of 11 November 2017 Session, <http://www.wolesi.website/pvd/showdoc.aspx?Id=8638>, (accessed 28 March 2018).

⁴⁰² Global Organization of Parliamentarians Against Corruption (GOPAC), *Controlling Corruption: A Parliamentarian's Handbook*. August 2005, http://www.gopacnetwork.org/Docs/CCH_Final_EN.pdf, (accessed 28 March 2018).

administrative units, and ratify international treaties.⁴⁰³ The Constitution also gives specifically to the Wolesi Jirga the authority to ratify ministerial appointments, as well as to interpolate ministers and dismiss them through votes of no confidence.⁴⁰⁴ The Anti-Corruption Strategy includes several provisions explicitly incorporating the National Assembly into its proposed accountability mechanisms. However, the Assembly has so far displayed limited engagement with these provisions of the Strategy.

For its part, the executive branch has also demonstrated some reluctance to engage with the legislature to facilitate its oversight function. In the section covering Reforming the Security Sector, the Afghanistan Anti-Corruption Implementation Matrix⁴⁰⁵ includes a benchmark related to Oversight on Secret Procurement, requesting the National Security Council (NSC) to provide Parliament with detailed audit reports related to the defence and security sectors. The Matrix indicates the deadline of December 2017 for providing these reports, but so far the NSC has not complied with this commitment, nor has the issue been raised in any session of Parliament. Sources from the NSC were reluctant to share confidential reports, including financial reports, with entities beyond the Presidency. Separately, the Matrix⁴⁰⁶ includes a benchmark requesting the Ministry of Justice and the Supreme Court to broaden the membership of the State Examinations committee with vetted and independent representatives, including from the legislative sector. The deadline for this provision is June 2018, but so far the Assembly has not been approached to participate in this mechanism.

Observations:

Further development of integrity, transparency and accountability rules for both Houses of the National Assembly as well as enforcement of disciplinary rules and increased compliance with obligations such as asset declarations have the potential to increase the National Assembly's contribution to fighting corruption. Delays in adopting legislation in the National Assembly have derailed the democratic process, because the Executive has to resort to its emergency competence to pass laws in order advance reforms in Afghanistan. Lack of accountability of Parliamentarians has led to a negative public perception of the Parliament and its members.

Recommendations:

to the National Assembly:

- ⇒ Engage in advancing anti-corruption reforms in cooperation with the Executive, including in implementing the Anti-Corruption Strategy;
- ⇒ strengthen internal accountability, transparency and integrity measures and enforce compliance with these rules;
- ⇒ set up internal Mechanisms fostering compliance with asset declaration obligations;
- ⇒ Improve the effectiveness of legislative review and approval processes, including for corruption related legislation;
- ⇒ engage with civil society in anti-corruption work.

to the Attorney General:

- ⇒ Pursue criminal allegations against members and staff of the National Assembly in line with the Afghan legislative framework in a committed and transparent manner.

to the Government and Civil Society:

- ⇒ Support the National Assembly in implementing anti-corruption measures.

⁴⁰³ Afghan Constitution, Article 90.

⁴⁰⁴ Afghan Constitution, Articles 91 and 92.

⁴⁰⁵ Anti-Corruption Strategy, Annex I, Pillar 2, page 24.

⁴⁰⁶ Anti-Corruption Strategy, Annex I, Pillar 3, page 24.

5. Independent Institutions' Anti-Corruption Work

In 2017, Afghanistan moved from the model of having one dedicated preventive anti-corruption agency, which was registered with UNODC as its UNCAC Article 6 body, to distributing these functions amongst several institutions. Whereas the closure of the HOOAC brings the welcome opportunity to increase the effectiveness and independence of preventive anti-corruption work, the suitability of existing governmental or independent bodies to carry out these functions has not been sufficiently assessed. In 2017, Transparency International evaluated Afghanistan's independent anti-corruption institutions according to six features recommended for Article 6 UNCAC bodies: (1) prevention-focused; (2) permanently established; (3) secure government funding; (4) accountable to parliament or the executive; (5) tasked to collect information regarding corruption; and (6) recognised and accessible to the general public.⁴⁰⁷ None of Afghanistan's independent institutions meet all these criteria.⁴⁰⁸

5.1. High Office of Oversight's gradual closure

In 2008, the High Office of Oversight and Anti-Corruption (HOOAC) was established with significant donor support⁴⁰⁹ to oversee and advance the implementation of the 2008 Anti-Corruption Strategy and carry out other tasks related to preventing corruption.⁴¹⁰ The effectiveness of the HOOAC was compromised from the outset by the ambiguous descriptions of its duties, the inability of its staff to assert the office's role, and structural flaws limiting its independence, including presidential control over the appointment of its director and its functions.⁴¹¹ The conviction of the HOOAC's former deputy, Abdul Razeq Zalali, by the ACJC in 2017, for abuse of authority in a previous role and his sentence to imprisonment of two and a half years further decreased the reputation of the institution.⁴¹²

Due to its limited output and credibility, the importance of the HOOAC was gradually reduced, and its key functions were assigned to other bodies. Whereas the MEC was initially created within the HOOAC as a means of improving the HOOAC's performance, it was separated from the office in 2016, taking with it HOOAC's monitoring and reporting functions.⁴¹³ The creation of the High Council for Rule of Law and Anti-Corruption in 2016, with responsibility for policy development and coordination functions, compounded the marginalization of HOOAC within Afghanistan's anti-corruption architecture.⁴¹⁴ The Anti-Corruption Strategy does not mention the HOOAC at all but assigns some of HOOAC's remaining functions to other bodies,⁴¹⁵ for example oversight of the Strategy's implementation is now a function of the Special Secretariat.⁴¹⁶ It also states that corruption combatting institutions are to be streamlined and merged under the DAC.⁴¹⁷ The new Assets Declaration Law, enacted through a Presidential Decree on 5 September 2017, repealed Article 12 of the HOOAC Law⁴¹⁸ and transferred the responsibility for collecting asset

⁴⁰⁷ Transparency International, *Bridging the Gaps: Enhancing the Effectiveness Of Afghanistan's Anti-Corruption Agencies*, 13 April 2017, page 7

https://www.transparency.org/whatwedo/publication/bridging_the_gaps_enhancing_the_effectiveness_of_afghanistans_anti_corrupti (accessed on 5 March 2018).

⁴⁰⁸ UNAMA, *Afghanistan's Fight against Corruption: The Other Battlefield*, April 2017, p 5-6.

⁴⁰⁹ Through its Assistance for Afghanistan's Anticorruption Authority (4A), the US Agency for International Development (USAID) committed significant funds in support of the HOOAC. See <https://www.usaid.gov/news-information/factsheets/assistance-afghanistan%E2%80%99s-anticorruption-authority-4a>.

⁴¹⁰ Articles 6 and 9 of the Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy (Official Gazette No. 957), 29 July 2008 (HOOAC-Law).

⁴¹¹ UNAMA, *Anti-corruption Report*, April 2017, 2017, p 6.

⁴¹² *Supra*, Section 3.

⁴¹³ See *infra*, Section 5.2. Presidential Decree on the amendment of legal personality, duties, functioning and authorities of The Independent Joint Anti-Corruption Monitoring and Evaluation Committee (Decree No. 115), 18 September 2016.

⁴¹⁴ *Supra*, Section 2.2.

⁴¹⁵ *Supra*, Section 2.3.

⁴¹⁶ Anti-Corruption Strategy VII.

⁴¹⁷ *Supra*, Section 3.

⁴¹⁸ Assets Declarations Law, Article 16.

declarations to the OAA.⁴¹⁹ The Strategy endorsed this move and further specified that the OAA is responsible for ensuring full compliance with asset disclosure requirements of senior officials.⁴²⁰ The law-making process dissolving the HOOAC lacked transparency and stakeholder consultation. After existing HOOAC positions were approved in the 2018 budget, Presidential Decree 863 of 17 February 2018 transferred all HOOAC positions to the DAC. Amendments to the Attorney General's Law of 3 March 2018, finally abolished the HOOAC,⁴²¹ while not outlining sufficiently the preventive functions of the DAC. The AG will need to ensure smooth management of the process of transferring important functions.

Whereas civil society and the international community have long recommended a reform of the HOOAC, and the Strategy's attempt to consolidate institutions aligns with previous recommendations to streamline Afghanistan's many anti-corruption bodies,⁴²² a review of functions consolidated under the DAC should be implemented to ensure the institutional framework is fully aligned to the UNCAC.⁴²³ Pursuant to UNCAC Articles 6 and 36, preventive and law enforcement functions, may be entrusted to a single body.⁴²⁴ However, in order to carry out both functions, this institution must be adequately resourced and staffed and have the "independence" to ensure it can do its job without "undue influence".⁴²⁵ A comprehensive Anti-Corruption Law should clarify the functions of all anti-corruption institutions. An inclusive drafting process should ensure consultation of stakeholders.⁴²⁶

5.2. Independent Joint Anti-Corruption Monitoring and Evaluation Committee/ MEC

The Independent Joint Monitoring and Evaluation Committee (MEC) plays a pivotal role in monitoring, evaluating and reporting on anti-corruption issues in Afghanistan.⁴²⁷ It was established through a Presidential Executive Decree in 2010 as part of the HOOAC.⁴²⁸ It is funded by the United Kingdom, the Danish, the Norwegians, the Canadian Embassy, and USAID. Its legal personality, functions and composition were further developed in another Executive Decree in September 2016⁴²⁹, separating it from the HOOAC and re-orienting its focus to five identified areas⁴³⁰: (1) monitoring and evaluating the anti-corruption efforts of the Government and the international community; (2) issuing recommendations for introducing reforms; (3) monitoring and evaluating the effectiveness, transparency and accountability of international community aid; (4) monitoring the implementation of its recommendations; and (5) reporting on the status of implementation of the Committee's recommendations and overall situation of corruption in the country to the President, Parliament and the international community.⁴³¹ The MEC's legal foundation, an Executive Decree that can be changed at any time, it is vulnerable to political influence.

⁴¹⁹ Assets Declarations Law, Article 16.

⁴²⁰ Anti-Corruption Strategy, II, Pillar 4; Implementation Matrix.

⁴²¹ Article 3, Presidential Decree No.268.

⁴²² UNAMA, Anti-Corruption Report, April 2017, p 5, counts 18 separate bodies tasked with anti-corruption functions.

⁴²³ Anti-Corruption Strategy, II, Pillar 4.

⁴²⁴ UNODC, Legislative Guide for the Implementation of the United Nations Convention against Corruption, p. 22.

⁴²⁵ UNODC, Legislative Guide for the Implementation of the United Nations Convention against Corruption, p. 20.

⁴²⁶ *Supra*, Section 2.4.2.

⁴²⁷ UNCAC Article 5 (5); Article 10 and Article 62 (3).

⁴²⁸ Presidential Decree on Effective Combat Against Corruption (Decree No. 61), 18 March 2010. In Article 8, the High Office of Oversight and Anti-Corruption (HOO) was directed to "...establish a Monitoring and Evaluation Committee, within the framework of this office, consisting of national and international experts in the field of anti-corruption." The Committee was mandated to "assist governmental organs in determining effective development benchmarks and, with the necessary monitoring and evaluations, provide six-month report to the president, national assembly, international community and the public regarding activities on fighting against corruption at the national level as well as on assistance of the international community and donors".

⁴²⁹ Presidential Decree on the amendment of legal personality, duties, functioning and authorities of The Independent Joint Anti-Corruption Monitoring and Evaluation Committee (Decree No. 115), 18 September 2016.

⁴³⁰ *Ibid.* Articles 1 and 2.

⁴³¹ Article 5, Terms of reference, authorities, functioning and organizational structure of the Independent Joint Monitoring and Evaluation Committee annexed to Presidential Decree on the amendment of legal personality, duties, functioning and authorities of The Independent Joint Anti-Corruption Monitoring and Evaluation Committee (Decree No. 115), 18 September 2016. (MEC TORs).

The MEC is composed of three national and three international members who are expected to be impervious to both partisan domestic or special international interests. Under the MEC's TORs, its international members are appointed by the President upon recommendation of the international community.⁴³² In practice, a Standing Nomination Committee composed of the three main MEC donors and UNAMA advertises the vacancies, selects suitable candidates and recommends them to the President. The TORs specify that national members are selected by the President alone, presenting another potential political vulnerability.⁴³³ All six Committee members should be chosen in a transparent, competitive and merit-based recruitment process eliminating options of political influence, while ideally increasing civil society involvement.⁴³⁴ The MEC is assisted by a technical Secretariat with national and international staff. Whereas the hybrid composition of the MEC and its international expertise had been its strongest asset, security concerns increasingly limit the MEC's ability to attract qualified experts. The practice of hiring consultants for individual assessments led to a lack of consistency in quality of the MEC's assessments.

The MEC applies three criteria⁴³⁵ in choosing and prioritizing the areas and institutions it selects for review: (1) the commitment to advance reforms expressed by the sponsoring minister, senior staff members and organization; (2) the potential impact on the ministry or organization, especially whether the MEC's findings are likely to leverage donor funding and whether the ministry or organization itself is likely to have resources to implement recommendations, and (3) a deliberate prioritization of government work in public service delivery organizations, revenue generating ministries, security sector, and systemic cross-government processes. In addition, the MEC may receive ad-hoc requests from the President to conduct assessments and evaluates them on their anti-corruption dimension before accepting to conduct the assessment.⁴³⁶

The MEC contributed to anti-corruption reforms by commenting on legislation and policies, but mostly by producing numerous reports on vulnerabilities in key institutions. Since its establishment, and up to 5 March 2018, the MEC has issued a total of 789 recommendations. In 2017, it published one⁴³⁷ ministry-wide Vulnerability to Corruption Assessment (MVCA) report, two⁴³⁸ Vulnerability to Corruption (VCA) reports, one special report⁴³⁹ and five⁴⁴⁰ follow-up reports. The MEC also reviewed six Ministries' anti-corruption plans. In some cases, MEC reports attracted significant political buy-in, leading to increased reform commitments on the part of the Government. For example, its MVCA on the Ministry of Education was presented and discussed at the High Council for Rule of Law and Anti-Corruption,⁴⁴¹ after which the President re-emphasized the Government's commitment to implement MEC reports. However, MEC's recommendations have not been systematically incorporated in institutional reform plans or anti-corruption plans of the relevant institutions. Neither have these Reports had the intended impact on triggering systematic prosecutorial actions that result in convictions in corruption cases.⁴⁴²

⁴³² MEC TORs, Article 2 (2).

⁴³³ MEC TORs, Article 2(1).

⁴³⁴ This is recommended as a general safeguard without suggesting malpractice in the appointment of current MEC Commissioners.

⁴³⁵ The Independent Joint Anti-Corruption Monitoring and Evaluation Committee, Strategic Plan (July 2016-November 2018) found at: http://www.mec.af/files/MEC_Strategy_vr2017.pdf accessed on 4 March 2018.

⁴³⁶ In its Quarterly Report in April 2017, for example, MEC reported being tasked by the President to be part of three ad-hoc assessment teams. See Quarterly Report-April 2017 found at: http://www.mec.af/files/1_st_quarterly_report_2017_english.pdf, accessed on 3 March 2018. Communication from the MEC on 21 April 2018.

⁴³⁷ Ministry-wide Vulnerability to Corruption Assessment of the Ministry of Education, October 2017 found at: http://www.mec.af/files/2017_23_10_moe_english.pdf.

⁴³⁸ On Da Afghanistan Breshna Sherkhata and CARD-F

⁴³⁹ Special Report: Vulnerabilities to Corruption in the Afghan Attorney General's Office, found at: http://www.mec.af/files/2017_07_19_ago_special_report_full_report_english.pdf

⁴⁴⁰ See MEC website at: <http://www.mec.af/index.php/reports/follow-up-reports>.

⁴⁴¹ High Council for Rule of Law and Anti-Corruption meeting of 25 October 2017.-

⁴⁴² UNAMA, Anti-Corruption Report, April 2017, p 9; supra 3.

The MEC has monitored and issued two reports on corruption related to aid provided by the international community⁴⁴³ and is in the process of evaluating the Law and Order Trust Fund for Afghanistan (LOTFA).⁴⁴⁴ The MEC's October 2017 report⁴⁴⁵ on the Comprehensive Agriculture and Rural Development Facility (CARD-F) Program, a project funded off-budget by United Kingdom and Denmark,⁴⁴⁶ showed that while the MEC is mandated under Presidential Decree 115 to make independent assessments of all parties, including donors, it faces significant challenges when reporting on the latter. The MEC's plan to carry out a VCA on the National Assembly, as set out in its 2018 Workplan, is timely and, if supported by the Assembly itself, could trigger serious anti-corruption reforms in the Legislature.⁴⁴⁷

The MEC has clearly contributed to Afghanistan's anti-corruption reforms. However, concerns about its reports' inconsistent quality and the closure of the HOOAC should initiate a debate on the MEC's future. Whereas its temporary establishment suggests that it should have an exit strategy, or at a minimum a plan to gradually reduce its dependence on international funding and expertise, the need for an independent preventive body under Article 6 of the UNCAC could also argue for strengthening the MEC to take on additional prevention functions, and to be fully nationalized and based on a solid legal foundation. The Anti-Corruption Strategy does not provide detailed guidance about the envisaged role of the MEC, while calling for its revitalization to "support civil society contributions and engagement."⁴⁴⁸ Indeed, the MEC's enhanced civil society engagement coupled with CSOs' strategic capacity development may lead to gradually transferring some of its functions and expertise to civil society. The appointment of three new international MEC Commissioners should help to start a discussion on these options. With other institutional reforms underway, it may however be more cautious to maintain the MEC in some form until reliable anti-corruption and judicial institutions are consolidated.

5.3 Independent Administrative Reform and Civil Service Commission

The Independent Administrative Reform and Civil Service Commission (Civil Service Commission) was established through the 2008 Civil Service Law.⁴⁴⁹ It is mandated to lead the process of administrative reforms in Afghanistan. UNAMA's 2017 Report highlighted difficulties in restoring institutional integrity and consolidating a merit-based recruitment system. Significant reforms have been implemented in the Civil Service Commission under the leadership of Nader Nadery, who was appointed as chair of the Commission on 11 March 2017. On 22 May, UNAMA's recommendation⁴⁵⁰ to move back all recruitments to the Civil Service Commission was followed⁴⁵¹ and the Civil Service Commission's Appointment Board took the responsibility to recruit Grade 1 and 2 senior officials. With this transfer, the Civil Service Commission reassumed the lead recruitment and monitoring role of individual and collective competitive recruitment processes. This development reversed the 2015⁴⁵² transfer of responsibilities for recruitments of higher

⁴⁴³ A Review of Selected Foreign-Assistance Programs Implemented in Afghanistan available at: [http://www.mec.af/files/2015_11_08_Review_of_Selected_Aid_Programs_\(English_Full_Report\).pdf](http://www.mec.af/files/2015_11_08_Review_of_Selected_Aid_Programs_(English_Full_Report).pdf) and Inquiry into the Comprehensive Agriculture and Rural Development Facility (CARD-F) Program available at: http://www.mec.af/files/2017_29_10_cardf_report_en.pdf (accessed on 4 March 2018).

⁴⁴⁴ MEC Annual Workplan (2018), provided by the MEC Executive Director at a meeting with UNAMA on 26 February 2018. LOTFA, administered by UNDP and implemented by the Mol, was established in 2002 at the request of the Afghan Interim Government to enable the national police to resume operations (see <http://moi.gov.af/en/faq/lotfa>).

⁴⁴⁵ Inquiry into the Comprehensive Agriculture and Rural Development Facility (CARD-F) Program, October 2017 found at: http://www.mec.af/files/2017_29_10_cardf_report_en.pdf (accessed on 3 March 2018).

⁴⁴⁶ Ibid. p. 3.

⁴⁴⁷ Anti-Corruption Strategy, Chapter II Pillar 1. See also Chapter 4.

⁴⁴⁸ Anti-Corruption Strategy.

⁴⁴⁹ Civil Service Law, O.G. 951 of 8 June 2008.

⁴⁵⁰ UNAMA, Anti-Corruption Report, April 2017, p 12 seq.

⁴⁵¹ Independent Administrative Reform and Civil Service Commission (IARCSC), *English language website*: <https://iarcsc.gov.af/en/appointment-board/> (accessed 18 March 2018).

⁴⁵² Presidential Decree on Recruitment of Civil Servants (Decree No. 82), 6 September 2015 (17/06/1394).

level Grades 1 and 2 civil servants to ministries and agencies,⁴⁵³ by which the President reduced the Civil Service Commission's role in recruitment processes to mere monitoring.⁴⁵⁴

The Anti-Corruption Strategy correctly identifies merit-based recruitment as a central pillar of anti-corruption reforms.⁴⁵⁵ Throughout 2017, the Civil Service Commission demonstrated its capacities in managing recruitment processes⁴⁵⁶ with increased transparency, including through regularly updating information on its website.⁴⁵⁷ The Civil Service Commission is responsible for rolling out the annual countrywide entry-level mass exams for Grades 5 and 6. In addition, the Commission drafted procedures preventing interference and influence of individuals on these processes. These procedures are intended to improve the structures of ministries and independent Government agencies by enhancing the transparency of recruitment processes and therefore the quality of those recruited. The strong commitment of the commission's chair and the successes achieved so far under his leadership, such as the merit based recruitment of new staff in all procurement functions and significant progress in introducing merit-based recruitment in the Ministry of Education, may help the Commission consolidate its independence. In a meeting with UNAMA Nader Nadery pledged to introduce institutional changes in the Commission to bring about irreversible change and make the commission less dependent on his personal leadership.⁴⁵⁸

Observations:

The independence of Afghanistan's institutions working on anti-corruption issues from the executive is weak overall and not well protected against possible political influence. The President is regularly involved in appointments of Senior Officials and some institutions are based on executive decrees rather than on laws. However, even dedicated laws did not protect the institutions from the repeated revision of their functions. The closure of the unsuccessful HOOAC increases the need for reforming the MEC potentially with a view to turning it into a stronger national preventive body. Difficulties in assigning the asset declaration function to an independent body further demonstrate the existing gaps.

Recommendations:

to the government:

- ⇒ Develop a comprehensive Anti-Corruption Law outlining the institutional framework in line with Article 6 of the UNCAC as the legal basis for dedicated anti-corruption institutions.
- ⇒ Assess which preventive functions cannot be carried out by the DAC and for which other institutions must be found or created. Continuation of important HOOAC functions must be ensured through adequate transfer arrangements.
- ⇒ Undertake a systematic analysis of the failures of the HOOAC, as well as their causes, to ensure that mistakes are not repeated in the new institutional arrangements.
- ⇒ Strengthen the independence of the Civil Service Commission and the MEC.

⁴⁵³ HASHIMI, Hashmatullah Sayed and LAUTH, Gerhard, *Civil Service Reform in Afghanistan: Roles and Functions of the Civil Service Sector*, Afghanistan Research and Evaluation Unit, August 2016, pp. 10-11, available at: <https://areu.org.af/wp-content/uploads/2017/01/1616E-Civil-Service-Reform-in-Afghanistan-Roles-and-Functions-of-the-Civil-Service-Sector.pdf> (accessed 18 March 2018).

⁴⁵⁴ Independent Administrative Reform and Civil Service Commission, *Structure*, available at: <https://iarcsc.gov.af/en/appointment-board/> (accessed 18 March 2018).

⁴⁵⁵ Anti-Corruption Strategy, IV.

⁴⁵⁶ Special Anti-Corruption Secretariat for Implementation of National Anti-Corruption Strategy, *Special Report Vol. 1*, February 18, 2018.

⁴⁵⁷ See: <https://iarcsc.gov.af/en/legal-documents/> (accessed on 5 March 2018).

⁴⁵⁸ UNAMA meeting with IARCSC on 18 April 2018.

to the MEC:

- ⇒ Propose amendments to the hiring procedure to ensure transparent, competitive and merit-based recruitment for all Commission members and staff;
- ⇒ Propose a development plan for the MEC with options of reducing international support and/or evolving into a stronger anti-corruption institution;
- ⇒ Ensure transparent working procedures based on objective criteria in particular regarding the selection of assessment areas.

to the Civil Service Commission:

- ⇒ Propose safeguards against risks of political and other influence in the functioning of the commission.
- ⇒ Publicize and enforce criteria for civil servants' evaluation. These criteria could include human resource management, budget execution, and achievement of strategic objectives.
- ⇒ Support and actively engage in the functional review of the Commission and of its Institute.

6. Civil Society Initiatives on Anti-Corruption

The UNCAC requires “appropriate measures [...] to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of the threat posed by corruption.”⁴⁵⁹ In Afghanistan, the most important components of civil society are non-governmental organisations (NGOs), which are regulated by the 2005 Law of Non-Governmental Organisations, and Social Associations (SAs), which are regulated by the 2013 Law on Associations.⁴⁶⁰ Under these laws, organizations must register with the Ministry of Economy or MoJ respectively and develop charters outlining their internal working structure, comprising at a minimum Directors and a general assembly. NGOs focus on service delivery, promotion of human rights and oversight and monitoring of government activities. SAs include, but are not limited to, professional unions, human rights associations, women’s rights associations, literary associations, religious councils and ethnic councils.⁴⁶¹ Allegations of lacking integrity within the CSO community should be addressed through improvements in the normative framework.

The leading civil society groups focused on anti-corruption reforms in Afghanistan are Integrity Watch Afghanistan (IWA),⁴⁶² Afghanistan Public Policy Research Organization (APPRO), Equality for Peace and Democracy (EPD), and Afghanistan Research and Evaluation Unit (AREU). Their activities include monitoring the implementation of the Government’s anti-corruption commitments to the international donor community; advocacy and monitoring of service delivery by the Government and partners at national and provincial levels; and working with provincial councils to hold provincial administrations to account in their exercise of governance functions. Civil society is active in the substantive focus areas of access to information, whistle blower protection, social accountability, community monitoring, integrity of anti-corruption agencies, political processes, procurement and the justice sector, transparency of elections, municipal administration, public finances, and the construction, extractives, prison and health sectors. They conduct more limited activities regarding customs, revenues and taxes, aid effectiveness, import and export, and legislative integrity. Occasionally, they are also engaged in carrying out activities for international organizations and diplomatic missions, in particular to assist international stakeholders in overcoming movement restrictions.

The capacity of Afghanistan’s civil society organisations has increased steadily since 2001, but most organisations continue to be challenged by the unstable security situation, institutional resistance to their role, and precarious financial viability that still greatly depends on donor funds. Civil society organisations occasionally struggle to ensure integrity within their organization and maintaining coordination between organizations. Many have faced challenges in moving from project-based activities to strategic and sustainable long-term programs.

6.1. Enhanced Civil Society Engagement, Open Government Partnership (OGP)

Afghanistan is a participant in the global Open Government Partnership (OGP),⁴⁶³ under which States cooperate with non-state actors in pursuit of accountable governance. This currently represents the most comprehensive effort to institutionalise cooperation between civil society, the Government and the private sector. On 2 October 2017, President Ghani established the OGP Forum to operationalize the OGP

⁴⁵⁹ UNCAC, Article 13.

⁴⁶⁰ Law on Associations, Official Gazette 1114 (1392AH [2013]), Article 2; Law on Non-Governmental Organizations (NGOs), Official Gazette 857 (1384AH [2005]), Article 5.

⁴⁶¹ IWA, TI, National Integrity System Assessment, 16 February 2016, p 145, available at:

https://www.transparency.org/whatwedo/publication/afghanistan_2015_national_integrity_system_assessment (accessed on 20 March 2018); WINTER, Elizabeth, Civil Society Development in Afghanistan

http://www.lse.ac.uk/internationalDevelopment/research/NGPA/publications/winter_afghanistan_report_final.pdf

⁴⁶² See <https://iwaweb.org/> (accessed 20 March 2018).

⁴⁶³ The compact is the Global Agreement on OGP among members.

compact.⁴⁶⁴ The Forum comprises 34 members, including 17 government representatives at the deputy minister level, 15 civil society members, one representative from the private sector and one representative from academia. On 3 October, the Forum was inaugurated by the President, in the presence of Members of the Cabinet, the National Assembly and representatives of the diplomatic community including the UN's SRSG.

On 15 November 2017, as provided in the OGP Global Compact, the Cabinet approved the OGP's National Action Plan (NAP)⁴⁶⁵, which includes the establishment of a joint committee of government agencies and civil society to monitor the implementation of the Anti-Corruption Strategy. Once approved by the High Council, this Committee will be chaired by the Head of the Special Secretariat and consists of representatives of civil society organizations belonging to the OGP, the anti-corruption adviser to the CEO and the DAG-AC. It meets on a monthly basis to monitor the implementation of the Anti-Corruption Strategy and ministerial reform plans. The NAP also provides for the establishment of a mechanism for civil society monitoring of the asset verification process, and a plan of action for strengthening communication channels to foster better public access to information in at least 60 governmental agencies. The NAP gives civil society a formal role in monitoring anti-corruption policies, public accountability and preventive measures. It thus represents a significant step to improve transparency and civil society engagement in line with Article 13 of the UNCAC.

6.2. Enhanced Civil Society Engagement in Policy Making and Monitoring

In 2017, civil society engaged constructively in the development of the Anti-Corruption Strategy,⁴⁶⁶ including through ad hoc participation in the High Council,⁴⁶⁷ and meetings with the Second Vice-President, and the provision of expert advice.⁴⁶⁸ Whereas, IWA's central recommendation for the Anti-Corruption Strategy, the establishment of an empowered and independent anti-corruption authority in line with Article 6 of UNCAC and the Jakarta Principles,⁴⁶⁹ was not adopted,⁴⁷⁰ other important civil society recommendations were. These included the establishment of an independent Judicial Services Commission, revision of the Access to Information Law to meet international standards, the strengthening of the Oversight Commission on Access to Information, and the appointment of a High Oversight Board to oversee the appointments and promotions in the security sector.⁴⁷¹ The Strategy provides additional opportunities for civil society involvement in implementing reforms, including enhanced engagement in security sector reform, oversight in merit based recruitment in the public service, and the conduct of awareness campaigns.⁴⁷² CSOs must use these opportunities strategically and increase their relevance to the reform process. In particular they should clarify coordination and representation within the group.

Over the past year, CSOs have taken advantage of increasingly transparent decision-making processes to augment their cooperation with government institutions. In 2017, civil society engaged actively with bodies such as the National Procurement Commission, the Oversight Commission on Access to Information, and the Electoral Complaints Commission. Through these activities, civil society organisations have

⁴⁶⁴ Presidential Decree No. 171 of 2 October 2017.

⁴⁶⁵ National Action Plan-1 2018-2019; Open Government Partnership Afghanistan.

⁴⁶⁶ See supra, Section 2.3.

⁴⁶⁷ Whereas civil society representatives were increasingly invited to participate in the High Council's meeting, its participation in the High Council remains to be formalized. See supra 2.2.

⁴⁶⁸ High Council meeting of 4 September 2017.

⁴⁶⁹ Jakarta Statement on Principles for Anti-Corruption Agencies, 26-27 November 2012, at https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf (accessed on 20 March 2018).

⁴⁷⁰ See: <https://iwaweb.org/civil-society-organizations-the-national-anti-corruption-strategy-is-imperfect/> (accessed on 5 March 2018).

⁴⁷¹ *Civil society key messages to the Joint Coordination and Monitoring Board meeting held on 9 July 2017.*

⁴⁷² Anti-Corruption Strategy, II Pillar 2, 3, 4; IV.

demonstrated an increasing willingness and capacity to provide concrete recommendations to improve institutional effectiveness.⁴⁷³

Civil society also participated regularly in high-level conferences between the Government and international donors and used these events as platforms to highlight key findings and policy recommendations, as well as to advocate increased transparency and accountability in all national development undertakings. On 5 October 2017, at the Senior Officials Meeting, civil society presented its overall assessment of the Anti-Corruption Strategy, at which it highlighted the Government's failure to establish an independent anti-corruption commission.⁴⁷⁴ On 9 October 2017, at the Joint Coordination and Monitoring Board meeting, civil society underlined the ACJC's lack of successes in prosecuting high-profile corruption cases.

Despite these events, civil society organisations continue to encounter challenges in their efforts to hold public institutions to account. On 24 September, at the third Afghanistan Annual Partnering for Public Good Summit in Kabul,⁴⁷⁵ civil society leaders and senior government representatives identified low level of inclusivity and transparency in service delivery as major challenges in the fight against corruption. The ability of CSOs to contribute effectively to overseeing public service delivery is also hindered by a lack of transparency and outright corruption in the regulation of the work and funding modalities for civil society organizations.⁴⁷⁶

6.3. Enhanced Civil Society Engagement in Advocacy and Reporting

The expertise of civil society organizations has been instrumental in identifying reform needs and mobilizing support behind reform efforts. In 2017, CSOs issued a wide variety of reports including an analysis of service delivery in the health sector,⁴⁷⁷ abuse in the career and appointment system of the police, corrupt practises of security officers on highways, and corruption in the passport and *tazkera* offices. Reports issued by civil society also highlighted the deleterious effects of corruption, such as its role in accelerating the increase in violent crime in major cities. More broadly, civil society organisations argue that the Government's failure to effectively address these issues represents a violation of the social contract with its citizens, and therefore diminishes public trust in the Government.

Cumulatively, these efforts have led to the adoption of some important policy reforms. One example was a successful CSO campaign advocating reforms regarding access to information, which resulted in the adoption of the Access to Information Law in 2014 and the establishment of the Oversight Commission in 2015. Civil society remained actively engaged on the issue, and amendments proposed by CSOs to the Access to Information Law were approved by Cabinet on 3 March 2018.⁴⁷⁸ Similarly, in August 2017, a civil society organisation issued a report titled "Caring for the Country's Most Precious Resource",⁴⁷⁹ on public health service delivery in Afghanistan. Several of the study's recommendations were incorporated into subsequent reforms implemented by the Government. The Government welcomed the civil society plan presented in 2017 on the education sector.

While civil society initiatives continue to be centred in Kabul, some attempts to increase activities mainly in provincial capitals have succeeded. On 18 September 2017, in Mazar-e Sharif, civil society participated in a public hearing session where media called on local authorities to increase transparency and

⁴⁷³ *Civil society key messages to the Joint Coordination and Monitoring Board meeting held on 9 July 2017 in Kabul, Afghanistan.*

⁴⁷⁴ *Civil society position paper presented at the Senior Officials Meeting held on 5 October 2017 in Kabul, Afghanistan.*

⁴⁷⁵ Afghan Institute for Civil Society. (September 27 2017): *The state of Enabling Environment for CSOs in Afghanistan (SEECA) 2017*. Available at <http://www.acbar.org/upload/1509511098944.pdf> (accessed on 21 March 2018).

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Survey based study on status of service delivery in Afghanistan by Integrity Watch Afghanistan, August 2017.

⁴⁷⁸ Legislative decree 256, date 03 March 2018.

⁴⁷⁹ Integrity Watch Afghanistan. (31 Aug 2017): *Life Matters: Caring for the Country's Most Precious Resource - A Survey based study of the state of public health care delivery in Afghanistan*. Available at <<https://reliefweb.int/report/afghanistan/life-matters-caring-country-s-most-precious-resource-survey-based-study-state>> (Accessed on 21 March 2018).

accountability in service delivery. A similar message was delivered by civil society groups at two fora on strengthening partnerships with local authorities for good governance in Daikundi city between 12 and 26 October 2017. On 23 and 25 October 2017, at round table conferences on social media for good governance in Kabul and Kapisa cities respectively, civil society agreed with provincial line departments to use social media to strengthen transparency and accountability in service delivery. These initiatives should be extended to have more solid civil society engagement also at the subnational level.

Observations:

Despite continuing challenges to achieve sustainability, Afghanistan's civil society is able to constructively contribute to the Government's anti-corruption efforts due to its expertise and solid organization. Throughout 2017, the Government reached out to benefit from the civil society's expertise and took steps to formalize the civil society's role.

Recommendations

to the Government:

- ⇒ Continue to engage with civil society in anti-corruption reforms and create an enabling environment for CSO activities.
- ⇒ Participation of civil society in processes such as the High Council should be formalized through amendments of its legislation.
- ⇒ The Government should establish a joint committee of state agencies and CSOs for overseeing the implementation of anti-corruption measures, as provided in the OGP National Action Plan.
- ⇒ Lessons learned from successful CSOs engagement at the national level should be used to boost CSO engagement at the local level.
- ⇒ The government should take measures encouraging all the CSOs to pay their taxes in time, recourse to penalties can however seriously impact on the CSOs' ability to conduct their work.
- ⇒ Barriers for NGO work – in particular at the local level – such as excessive approval procedures for initiating, continuing, and closing projects should be reduced or removed. These processes should be revised to increase transparency and efficiency.

to the donors:

- ⇒ Continue to include CSOs in anti-corruption work.
- ⇒ Continue to support CSOs with the aim of allowing them to move from project based funding to program funding and help them extend their activities at the subnational level.

to CSOs:

- ⇒ Strengthen accountability and integrity, including by developing a code of conduct and increasing transparency.
- ⇒ Lessons learned from successful CSOs engagement at the national level should be mirrored at the local level.
- ⇒ Increase coordination, in particular among CSOs working on anti-corruption issues.
- ⇒ Take measures to increase the ability to monitor and report and engage increasingly with the MEC to carry on some its functions.

7. Conclusion

Throughout 2017 and in the first months of 2018, Afghanistan continued to steadily implement anti-corruption measures. These efforts are mainly driven by the executive, and particularly by the personal commitment of President Ghani. The development of new legislation, the adoption of a new anti-corruption strategy, and reforms in public financial management including public procurement and budgeting processes, provide a solid foundation for implementing reform strategies. If the President is able to ensure these reforms are realized in all sectors and at the national and sub-national level alike, Afghanistan's pervasive level of corruption could be significantly decreased. However, not all Ministries and institutions proved able to implement reforms at the expected pace. Restoring integrity in the public service through advancing civil service reforms and ensuring strict adherence to obligations such as asset declarations continue to be challenging.

Based on an improved legal framework, the judiciary increasingly demonstrated its ability to prosecute and try corruption cases before the ACJC. Other courts have yet to demonstrate their ability to successfully try corruption cases. However, the slow pace of implementing the justice sector reform, outdated integrity measures of the justice sector and weak law enforcement capacity minimized the deterrent effect of corruption prosecutions. The codification of corruption offences in the Penal Code in line with the UNCAC will facilitate prosecutions if the ACJC, judiciary and law enforcement authorities continue to improve their performance. With the exception of the Civil Service Commission, independent institutions thus far have not functioned as a motor for anti-corruption reforms as hoped. This is in part due to their weak legal foundation and to structural weaknesses. The recent appointment of new international MEC Commissioner has the potential to bring about internal reforms in the MEC and strengthen the overall impact of the commission on anti-corruption work. At the same time, Civil society has demonstrated its improving capacity to contribute to policy making and discharge oversight functions. While improvements of integrity measures in civil society remain necessary the government and donors should continue to actively engage civil society representatives in anti-corruption work in new and innovative ways.

In the reporting period, the legislative branch could neither improve internal accountability and integrity measures nor its ability to exercise oversight functions. While some reforms of internal integrity systems may be possible during the remainder of the current Lower House's mandate, changes after this year's parliamentary election will provide another opportunity for reforms to help the National Assembly overcome protracted blockages and improve the public perception of the Assembly.

In the years to come Afghanistan's international supporters should continue to pay significant attention to anti-corruption efforts to achieve sustainable development and lasting stability. This is particularly important at a time when donor funding is being increasingly stretched across numerous conflicts and priorities across the globe. Revised accountability frameworks between the government and donors should continue to include effective anti-corruption commitments, building on the progress made so far, as well as learning from what has and has not worked. Given that corruption is considered to be a major cause of Afghans dissatisfaction with the Government and as such is a driver of conflict, making real progress on corruption is not only a governance issue, it would also greatly contribute to the effort to bring peace to Afghanistan.

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