

AFGHANISTAN'S FIGHT AGAINST CORRUPTION

Groundwork for Peace and Prosperity



UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN

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Executive summary

In 2018 and early 2019, Afghanistan continued to pursue the implementation of anti-corruption reforms. While implementation challenges remain, the reform efforts have come a long way towards establishing a robust anti-corruption framework and dedicated institutions to implement it. The coordination of anti-corruption reforms at the highest level in the High Council for Rule of Law and Anti-Corruption, the work of a dedicated Anti-Corruption and Justice Centre (ACJC), the codification of all mandatory corruption offences in line with the United Nation's Convention against Corruption (UNCAC) in the new Penal Code, and the adoption of a dedicated Anti-Corruption Strategy and Anti-Corruption Law are evidence of Afghanistan's commitment to counter its rampant corruption problem. While the creation of institutions and adoption of laws and strategies are clear signs of commitment, implementing strategies and operationalizing institutions to consistently produce desired outputs requires persistent effort. The review period saw growing impatience that results from strategies and laws were not materializing quickly enough.

In 2018, Afghanistan moved up Transparency International's Corruption Perception Index from 177 (in 2017) to 172 (in 2018) out of 180, showing some improvement.¹ The reporting period was also marked by major developments, including the 20-21 October parliamentary elections, the 27-28 November Geneva Conference on Afghanistan, and the acceleration of the peace process, which impacted the pace of anti-corruption reforms. Afghanistan continued to improve its anti-corruption legislative framework and adopted a dedicated Anti-Corruption Law on 5 September 2018, which now provides a solid legal basis for the ACJC and creates an Anti-Corruption Commission. The commission, once set up, should function as a corruption-prevention body in line with Article 6 of the UNCAC. The adoption of a dedicated Whistle-Blower Protection Law and an improved Access to Information Law should further boost anti-corruption efforts. The latter was ranked among the best in the world and, remedying past shortcomings, establishes an independent Access to Information Commission to promote citizens' right to know. The 2017 Anti-Corruption Strategy was revised in late 2018 and most of its benchmarks were implemented, in particular the civil service and legislative reforms. The institutional framework of anti-corruption bodies remains to be consolidated.

Implementation of the new Penal Code, which codifies all mandatory and some optional offences of the UNCAC brought challenges and opportunities to investigate, prosecute and adjudicate corruption cases. The Supreme Court supported its implementation by issuing interpretation guidance to judges throughout Afghanistan. The ACJC mastered the transition to the new Penal Code and its indictments and verdicts show a gradual improvement in applying the better-defined crimes. While the ACJC's productivity declined in the second half of 2018, not only in the number of cases processed, but also the level of seniority of the accused, its output increased again in early 2019. Since its inception until mid-May 2019, the ACJC tried 223 defendants in 57 cases before its trial chamber and 173 defendants in 52 cases before its appellate chamber. Thirty-six of its cases against 117 accused have been decided after appeal to the Supreme Court. Difficulties in executing ACJC arrest warrants remained a concern. Out of a list of 127 warrants and summonses pending in September 2018 only 13 warrants and 39 summonses could be executed, while only a single defendant was tried. The number of defendants tried in their absence before the ACJC remained high, at 20%. Rules on appointment, promotion and transfer remain to be improved in the justice sector to ensure tenure and transparency, including in

¹ See: <https://www.transparency.org/research/cpi/overview> (accessed on 2 February 2019).

the ACJC. The challenging security situation contributes to justice sector reforms advancing only slowly.

While the newly envisaged Anti-Corruption Commission with preventive functions was not established during the review period, its eventual creation will bring major opportunities for advancing anti-corruption reforms if it can operate with the required independence. Overlaps with other institutions' mandates will have to be resolved for the effective continuation of these functions without backtracking from gains made. This includes the asset registration and verification functions. The former saw a major increase of a total of 16,943 officials, including about 300 parliamentarians, who have declared their assets.

Civil society continued to play a major role in monitoring, advancing and advising on anti-corruption reforms. On the other hand, the outgoing Wolesi Jirga (National Assembly, Lower House) did not improve its performance on legislative, representative and oversight functions, or remedy deficiencies in its internal integrity. While the new Wolesi Jirga was only inaugurated on 27 April and its performance could not be assessed for this report, the courage and determination shown by the 3.6 million citizens who voted despite personal risks should be rewarded by the Wolesi Jirga's increased attention to work with integrity.

List of Abbreviations

ACJC	Anti-Corruption Justice Centre
AG	Attorney General
AGO	Attorney General's Office
AIBA	Afghanistan Independent Bar Association
AIHRC	Afghanistan Independent Human Rights Commission
ANPDF	Afghanistan National Peace and Development Framework
AOP	Office of Administrative Affairs of the President
APPRO	Afghanistan Public Policy Research Organization
ARAZI	Afghanistan Independent Land Authority
ARTF	Afghanistan Reconstruction Trust Fund
CLRWG	Criminal Law Reform Working Group
CPC	Criminal Procedure Code
CSJWG	Civil Society Joint Working Group
CSO	Civil Society Organization
DAG-AC	Deputy Attorney General for Anti-Corruption Affairs
ECC	Electoral Complaints Commission
EU	European Union
ExPres	Executive Committee on Prevention of Corruption and System Development
FinTRACA	Financial Transactions and Reports Analysis Centre of Afghanistan
FPIP	Fiscal Performance Improvement Plan
GMAF	Geneva Mutual Accountability Framework
HOOAC	High Office of Oversight and Anti-Corruption
IDLG	Independent Directorate of Local Government
IEC	Independent Elections Commission
IMF	International Monetary Fund
IWA	Integrity Watch Afghanistan
LOTFA	Law and Order Trust Fund for Afghanistan
MCTF	Major Crimes Task Force
MEC	Independent Joint Anti-Corruption Monitoring and Evaluation Commission
MoD	Ministry of Defence
MoF	Ministry of Finance
MoI	Ministry of Interior
MoJ	Ministry of Justice
NGO	Non-Governmental Organization
NJSRP	National Justice Sector and Judicial Reform Plan
NPA	National Procurement Authority
OGP	Open Government Partnership
SAO	Supreme Audit Office
SIGAR	United States Special Inspector General for Afghanistan Reconstruction
SMAF	Self-Reliance through Mutual Accountability Framework
SNGP	Subnational Governance Policy
UNAMA	United Nations Assistance Mission to Afghanistan
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime

1. Introduction

1.1 Afghan context

Corruption in its most general definition is the misuse of public trust for private gain and in that regard, it cannot exist without institutions designed to meet public or common interests. Much of the effort of the international community over the past seventeen years, with committed Afghan counterparts, has been to recreate these institutions after decades of war had destroyed them. It was hoped and expected that the creation of public institutions would have gradually diminished corruption by fostering a culture of public service and professionalism. As this report describes, there have been some areas where this theory of change has been demonstrated. The progress made in the past several years to develop an independent and well-trained civil service, for example, is welcome, though it will take some time before its effects are felt. For the most part, however, corruption remains a pervasive part of Afghan life and an impediment to Afghanistan's recovery.

In reality, the development of public institutions absent a culture of building trust in those institutions can create new opportunities for corruption. Every new law is an opportunity for a bribe to circumvent it, and every new bureaucratic process or rule is a potential "toll booth" for those overseeing compliance. Under these conditions, a culture of corruption overwhelms or even co-opts mechanisms created to fight corruption. As the report documents, there are numerous overlapping mechanisms to address corruption that have both created redundancies and gaps. The confusion created by these mechanisms can itself be an opportunity for corruption.

The October 2018 parliamentary elections are an evident and disheartening example of this phenomenon. They were held under a reformed Election Law that had a number of measures intended to reduce corruption. They were to be overseen by an Independent Election Commission (IEC) that had been selected according to a consultative process involving various branches of government and civil society. Previous election commissioners had been selected by the President alone. The evidence of corruption and mismanagement *during the 2018 elections* was so severe that the members of both the IEC and the Electoral Complaints Commission (ECC) were dismissed by the President (as this report describes) and criminal proceedings against members are ongoing.

The stated political will to tackle corruption must be demonstrated in part by closing the institutional gaps that enable impunity. As the report notes, ad hoc legislation prevents a strategic approach and contributes to overlaps and contradictions between laws that frustrate anti-corruption efforts. However, the report also notes that the reformed 2017 Penal Code provides a solid basis for prosecution of corruption offences in line with international standards and norms. The report describes the case of former Herat Governor for whom the ACJC issued an arrest warrant for abuse of authority on the instructions of the Attorney General but who asserted immunity from detention as a member of the Meshrano Jirga. On 5 May 2019, the defendant failed to appear at trial and the ACJC convicted him in absentia. It was the first time the ACJC convicted a member of the National Assembly. There are numerous incidents when arrests are not yet made by the police, or charges are not yet issued by the Attorney General, or suspects are released before trial, or orders not to leave the country are not enforced. The report notes the high number of cases tried *in absentia* of defendants who had been released on their personal guarantees. Technically, there are legal and procedural grounds for each of these decisions. Cumulatively, however, they have led to a situation characterized by low execution of ACJC arrests, lack of actual enforcement of sentences in high-level cases, and fewer

indictments against high-ranking officials. In many instances involving prominent figures, the criminal justice system looks like a system promoting impunity.

The prospect of a peace agreement with the Taliban will complicate anti-corruption efforts if only by putting in doubt the future political order in Afghanistan. This would, however, be the wrong message. Much of the international community's disappointment with the perceived lack of results of its investment in Afghanistan is due to ongoing corruption, including in the security sector (which is not covered in this report). Whether it is through presidential elections or a peace process, Afghanistan faces a major test in 2019 that it will be able to overcome only if public trust prevails over private gain where the public interest is concerned.

1.2 Purpose, scope and methodology of the report

United Nations Security Council Resolution 2405 (2018) mandated the United Nations Assistance Mission in Afghanistan (UNAMA) to support the Government “to improve governance and the rule of law including transitional justice, budget execution and the fight against corruption, throughout the country[...], with a view to helping bring the benefits of peace and the delivery of services in a timely and sustainable manner”.² On 15 March 2019, the UN Security Council extended UNAMA's mandate without substantive changes until 17 September 2019 in a technical roll-over in Resolution 2460 (2019).

On 25 April 2017 and 15 May 2018 respectively, UNAMA issued its first two anti-corruption reports.³ This year's report covers the period between January 2018 and 1 April 2019 (unless explicitly stated otherwise). It retains the structure of the 2018 report, while considering key events impacting on anti-corruption reforms. The aim of the reports is to support Afghanistan's anti-corruption reforms by assessing the impact of anti-corruption measures through the collation and analysis of available data and by providing concrete recommendations. The reports also seek to foster public awareness of areas where progress has been made and where challenges remain.

During the preparation of the report, UNAMA met with high-ranking public officials, including the Chief Justice, the Attorney General, the Chairman of the Independent Administrative Reform and Civil Service Commission, members of parliament, and civil society representatives, who all supported the report by providing data and reviewing the first draft. On 16 February 2019, Second Vice-President Mohammad Sarwar Danesh, while chairing the High Council for Rule of Law and Anti-Corruption (High Council) called upon all High Council members to co-operate with UNAMA and provide information for the report.⁴ The authors are pleased to note the extensive cooperation received from Afghanistan's government institutions. The chapter on investigation, prosecution and adjudication of corruption offences is based on data gathered in UNAMA's structured trial monitoring, according to international best practices,⁵ of all cases processed before the Anti-Corruption and Justice Centre (ACJC) and an

² Resolution 2405 (8 March 2018), para 7 b.

³ 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 2019). (UNAMA Anti-Corruption Report, April 2017); UNAMA, *Afghanistan's Fight against Corruption: From Strategies to Implementation*, May 2018, available at: https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_from_strategies_to_implementation-14_may_2018.pdf (accessed on 22 February 2019). (UNAMA Anti-Corruption Report, May 2018).

⁴ High Council meeting of 16 February 2019. Members of the High Council are listed in Section 2.2.

⁵ 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 2 February 2019).

analysis of all its written decisions during the reporting period. The focus in assessing the ACJC's work is on trends and recurring observations, which are illustrated by individual case examples where appropriate. UNAMA's in-house legal, political and governance experts reviewed and analysed all available material. The United Nations Development Programme (UNDP) and United Nations Office on Drugs and Crime (UNODC) also provided input to the report.

On 27 December 2018, UNAMA shared this report's outline with the government focal point appointed by President Ghani, Mr Ajmal Ahmadi, and the Special Secretariat. Their comments on the outline were submitted on 28 January 2019. On 28 March 2019, the draft report was shared in English and Dari with Minister Ahmadi⁶ and the Special Secretariat who consulted with Afghan Ministries and relevant institutions to verify data and provide comments. The feedback received through this channel from the Ministry of Justice, Ministry of Finance, Ministry of Interior (including the Major Crimes Task Force), Attorney General's Office, the National Procurement Authority, the Supreme Audit Office, the Administrative Office of the President, the Afghanistan National Bank's Financial Transactions and Reports Analysis Centre of Afghanistan, the Independent Directorate of Local Governance, the Supreme Court, the Independent Administrative Reform and Civil Services Commission, the Wolesi Jirga (Lower House), the Meshrano Jirga (Upper House), the Access to Information Commission, the Special Anti-Corruption Secretariat and Minister for Industry and Commerce on 11 April 2019 was taken fully into account and the report was revised as appropriate.

UNAMA is highly appreciative of the strong interest shown by Afghanistan's authorities in this report and grateful for the substantive input provided by all interlocutors.

⁶ On 6 February 2019, Mr Ajmal Ahmadi was appointed acting Minister for Industry and Commerce.

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

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

Afghanistan's international obligations on preventing and prosecuting 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 2008.⁷

The UNCAC's Implementation Review Mechanism consists of an intergovernmental peer review process in which the performance of each State party is assessed every five years by two peers to assist States parties in implementing the Convention. The first review cycle for Afghanistan⁸ (2010-2015) focused on criminalization, law enforcement, and international cooperation. Its recommendations were largely incorporated in the new Penal Code.⁹ The ongoing second review cycle (2016-2020) covers UNCAC's Chapter II, "Preventive measures" and Chapter V, "Asset recovery".¹⁰ Jordan and Dominica are peer reviewers for Afghanistan. The review is based on Afghanistan's comprehensive self-assessment, supplementary information¹¹ and a dialogue with the two peer States. In early 2018, President Ghani tasked the Special Secretariat to compile the answers to the self-assessment questionnaire and appointed its Head as the government's focal point for the review procedure.¹² A working group comprised of relevant governmental institutions, civil society and UNODC completed the self-assessment check list. The peer reviewers provided initial comments on this check-list and are preparing a country visit.

Due to Afghanistan's continued aid-dependence and the recognition that achieving self-reliance will hinge upon its ability to overcome pervasive corruption, Afghanistan's successive commitments to donors regularly include anti-corruption benchmarks. The Geneva Conference on Afghanistan co-hosted by Afghanistan and the UN on 27 and 28 November 2018,¹³ continued this trend. Representatives from 61 countries, 35 international organizations, civil society, the private sector and the media reviewed the progress on the 2017-2018 Self-Reliance through Mutual Accountability Framework (SMAF) deliverables when adopting the new Geneva Mutual Accountability Framework (GMAF).¹⁴

⁷ See UNCAC Signature and Ratification Status, available at:

<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (accessed on 2 February 2019).

⁸ In the first review cycle 2010 - 2015, Afghanistan was reviewed by Brunei and 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.

⁹ UNAMA Anti-Corruption Report, May 2018, p 10; See Afghanistan's Statement of Implementation Measures at the resumed seventh session of the Implementation Review Group of the United Nations Convention against Corruption found at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/14-16November2016/Statements/Afghanistan.pdf>.

¹⁰ See UNCAC country profiles Afghanistan at: <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AFG> (accessed on 10 February 2019).

¹¹ Terms of Reference of the Review Mechanism, paragraph 27.

¹² See UNCAC country profiles Afghanistan at: <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AFG> (accessed on 2 February 2019).

¹³ See <https://unama.unmissions.org/geneva-conference-afghanistan> (accessed on 2 February 2019).

¹⁴ See: https://unama.unmissions.org/sites/default/files/gmaf_final_26_nov_2018.pdf (accessed on 2 February 2019).

Afghanistan had agreed to meet six benchmarks before the conference including: (1) conducting transparent, fair and credible parliamentary elections; (2) carrying out corruption-related outstanding arrest warrants; and (3) reforming the security sector, in particular by completing the biometric registration of police personnel.¹⁵ The review of the anti-corruption benchmark demonstrated major gaps in law enforcement; out of a list of 48 arrest warrants and 79 summonses, only 13 warrants could be executed by the time of the conference and immediately after.¹⁶

The Conference's *Joint Communiqué* acknowledged efforts to fight impunity, achievements in civil service reform and the development of an Anti-Corruption Strategy, while also calling for tangible results in ensuring effective investigation and prosecution of corruption cases, noting that deterrence through concrete results in the fight against corruption was key in building people's trust in Afghan institutions.¹⁷

The 2017/2018 corruption-related SMAF deliverable benchmarked for 2017 was: "(1) the enactment of an Anti-Corruption Strategy and commencement of its implementation and (2) public reporting on implementation of progress of the five revenue generating ministries' anti-corruption action plans."¹⁸ As the May 2018 UNAMA Anti-Corruption Report noted, both benchmarks were formally met, albeit with delay.¹⁹ The United States Special Inspector General for Afghanistan

The GMAF's anti-corruption-related deliverables:

GMAF 2.1: The Government formally approves **new indicators** for the 2017 'Anti-Corruption Strategy' and a concrete and time-bound **action plan by June 2019** to improve prosecution detailing case-flow, timelines, and clear functions and responsibilities of the Attorney General's Office (AGO), Ministry of Justice (MoJ), Ministry of the Interior (Mol), Supreme Court, Anti-Corruption Justice Centre (ACJC) and Anti-Corruption Commission.

GMAF 2.2: The **AGO's Anti-Corruption Units** will effectively and efficiently track, report and increase year on year the percentage of cases that move from: 1) referral to investigation; and 2) investigation to trial. The Government will provide accurate data for the Senior Officials' Meeting (SOM) in 2019 to measure progress and set targets.

GMAF 2.3: The **Asset Declaration** Law is implemented by 2020, demonstrated by: Transferring to the Administration for Asset Declaration from the IEC; verifying asset declarations of successful 2018 parliamentary candidates; verifying high ranking government officials, prosecutors, and judges' asset declarations and enforcing sanctions against those who refuse to declare their assets or those who provide false declarations.

GMAF 2.4: The **Access to Information** Law is implemented in 2019, demonstrated by: Oversight Commission implements policies and procedures for tracking requests, quality and timeliness of responses, maintaining statistics, and providing public quarterly updates; and delivers awareness programs in 15 provinces in 2020."¹

¹⁵ Geneva Conference on Afghanistan: Joint Communiqué, Securing Afghanistan's Future: Peace, Self-Reliance and Connectivity, available at: https://unama.unmissions.org/sites/default/files/geneva_conference_on_afghanistan_-_joint_communique_-_english_0.pdf (accessed on 2 February 2019), at para 5.

¹⁶ See *infra* 3.

¹⁷ *Joint Communiqué*, at para 22. See also: Security Council Press Statement on the Geneva Conference on Afghanistan, available at: <https://unama.unmissions.org/security-council-press-statement-geneva-conference-afghanistan> (accessed on 8 February 2019).

¹⁸ See: <https://www.consilium.europa.eu/media/23645/agreed-smaf-smart-deliverables-final.pdf> (accessed on 2 February 2019).

¹⁹ See, Status Report on Achieving Commitments Self-Reliance through Mutual Accountability Framework (SMAF), at: <http://policymof.gov.af/home/wp-content/uploads/2018/07/SMAF-Report.pdf> (accessed on 2 February 2019); UNAMA Anti-Corruption Report, May 2018, p 14 and 22.

Reconstruction's (SIGAR) May 2018 audit of the SMAF anti-corruption commitments echoed UNAMA's conclusions, determining that the benchmarks were formally met with delay, but also stated that "questions remain regarding its [the Afghan Government's] ability to fully implement the Strategy and demonstrate a lasting commitment to combatting corruption".²⁰ Against this background, donors negotiated the GMAF with the aim of agreeing on a set of reform objectives and commitments that could be measured easily.²¹

As a result, the GMAF's deliverables on corruption are more detailed and clearer. On 9 December 2018, commemorating Anti-Corruption Day, UNAMA, UNDP, and UNODC co-organized high-level discussions with those institutions responsible for implementing the benchmarks and encouraged them to begin their implementation immediately.²²

Legal arguments hindering the publication of full court decisions (*faisalas*): Judges argue that absent their explicit order, a verdict may not be published, because Penal Code, Article 183 (1) states that a court may order the publication of the verdict in mass media as "complementary punishment". Exceptions are only in convictions for bribery (Article 387(1)), money laundering and weapons trafficking offences of legal person (Articles 500(2)(3) and 544(2)(3)), for whom the publication of the decision is mandatory. Considering the underlying reasons for requesting the publications of full court decisions are to increase transparency and public insight into the court's reasoning, publishing the verdicts in anonymized form would meet the benchmark. Clarification of the Penal Code to this end could be considered.

Under the International Monetary Fund (IMF) Structural Benchmarks, Afghanistan was required to "publish ACJC -related data, including quarterly statistics on prosecutions and convictions of corruption offences, and court decisions on an ongoing basis."²³ The publication of full court decisions was also benchmarked in the revised Anti-Corruption Strategy.²⁴ While the Attorney General's Office (AGO) demonstrated a willingness to meet these benchmarks, and published statistics and a chart on ACJC decisions with names of defendants and the sanctions, on the AGO's website,²⁵ the ACJC did not establish a consistently functioning website and its judges argued the publication of full decisions (*faisalas*) was not possible under Afghan law.

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.²⁶ Each month, the Afghan Government reports its progress on pending benchmarks to four bilateral working groups that determine whether reform steps were achieved. While neither the compact's benchmarks nor the result of the compact meetings is public, the U.S. Department of Justice publicly reported that the negotiation framework

²⁰ SIGAR 18-51 Audit Report, Afghanistan's Anti-Corruption Efforts: The Afghan Government Has Begun to Implement an Anti-Corruption Strategy, but Significant Problems Must Be Addressed, 31 May 2018, at: <https://www.sigar.mil/pdf/audits/SIGAR-18-51-AR.pdf> (accessed on 2 February 2019), executive summary.

²¹ E.g. *Joint Communiqué*, para 4 highlights the importance of GMAF being "measurable".

²² See: <http://www.af.undp.org/content/afghanistan/en/home/presscenter/articles/2018/Anti-CorruptionDay.html>; (accessed on 24 February 2019).

²³ IMF Country Report No.18/359, Fourth Review, Extended Credit Facility Arrangement (December 2018).

²⁴ Revised Anti-Corruption Strategy, January 2019, Benchmarks Pillar 4 c and d; see: https://www.sacs.gov.af/uploads/reports/legislation_background/77.pdf (accessed on 1 March 2019); infra 2.3.

²⁵ See: <https://ago.gov.af/en/acjc-reports> (accessed on 10 May 2019).

²⁶ See: <https://af.usembassy.gov/u-s-afghan-statement-bilateral-compact-executive-committee-meeting/> (accessed on 3 March 2018).

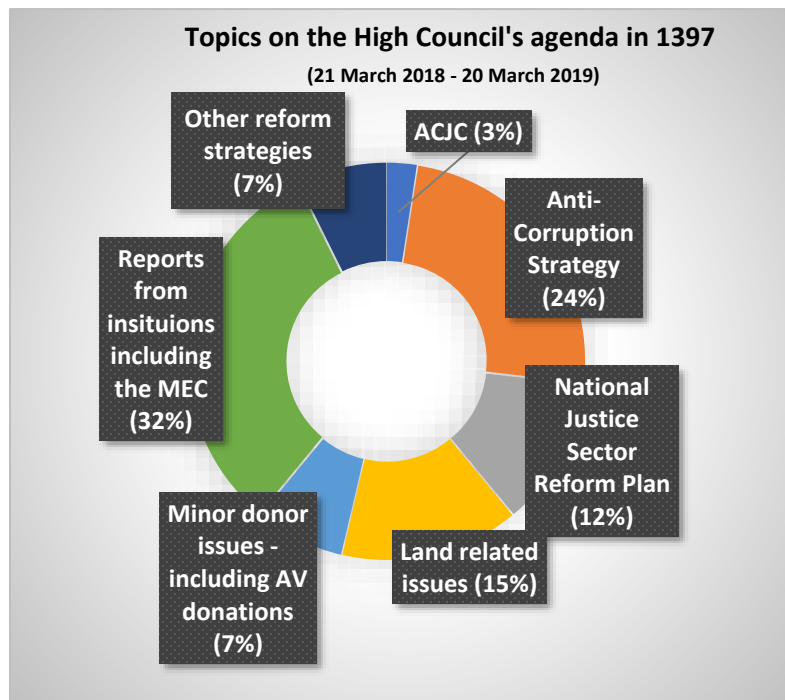
had yielded positive results in relation to the anti-corruption reform agenda.²⁷ In its update of the 2018 Anti-Corruption Audit, SIGAR was tasked to report also on progress regarding anti-corruption- related reform steps under the Compact.²⁸

Observations

The 2018 Geneva Conference on Afghanistan highlighted the importance of advancing Afghanistan's anti-corruption reforms as well the donor's continued commitment to support Afghanistan in these reforms. The new Geneva Mutual Accountability Framework (GMAF) identified key areas where progress in curbing corruption should be achieved over the next two years. It should be used as an effective tool to accelerate reforms.

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

The High Council for Rule of Law and Anti-Corruption (High Council) was established by Presidential



Decree on 17 August 2016.²⁹ It is one of eight development councils listed in the Afghanistan National Peace and Development Framework (ANPDF),³⁰ and is responsible for overseeing two National Priority Programmes, the National Justice Sector Reform Plan (NJSRP) and the Effective Governance Programme.³¹ Unlike the other development councils, the High Council was also codified in the Anti-Corruption Law, which provides that the High Council's main goals are to fight corruption and establish coordination among relevant entities under the chairmanship of the President.³²

²⁷ SIGAR, Quarterly Report to US Congress, of 30 January 2019 <https://www.sigar.mil/pdf/quarterlyreports/2019-01-30qr.pdf> (accessed 10 February 2019) pp 130-131.

²⁸ State Department and Foreign Operations Appropriations; Fiscal Year 2018 Omnibus Joint Explanatory Statement Division K of 22 March 2018.

²⁹ Decree 94 Regarding the High Council for Rule of Law and Anti-Corruption (17 August 2016).

³⁰ Afghanistan National Peace and Development Framework 2017-2021, Article 5.3.b (ANPDF).

³¹ International observers in the High Council are UNAMA, the Embassies of the United States, United Kingdom and Denmark, the European Union and SIGAR.

³² Presidential Decree No. 187, On the Endorsement of the Anti-Corruption Law of 5 September 2018, OG-01314 (Anti-Corruption Law), Article 24. See *infra* 2.4.1.; see also Decree 94 Regarding the High Council for Rule of Law and Anti-Corruption (17 August 2016).

Between September 2018 and February 2019, the President delegated chairing the High Council meetings to the Second-Vice President.

According to its terms of reference, the High Council's goals are to reform and reinforce the justice system, improve the legislative framework and fight corruption.³³ Reform milestones achieved by the High Council in the reporting period included the adoption of a Subnational Governance Policy³⁴ (on 14 May 2018) and the revision of the National Anti-Corruption Strategy (on 24 November 2018 and 26 February 2019). It remained an important forum to ensure implementation of cross-cutting reforms and coordinate policy initiatives on justice and anti-corruption. A review of the High Council's 2018 agenda revealed that it was chiefly concerned with receiving reports from relevant institutions including on the implementation of reform strategies. Supported by the Special Secretariat,³⁵ the High Council effectively oversaw the implementation of the Anti-Corruption Strategy but was not so effective in advancing the realization of the NJSRP. In fact, only four agenda items of all twelve High Council meetings related to the NJSRP.³⁶ Amongst those, the recurring item of reform of the Ministry of Justice's (MoJ) Departments of government cases (*Qaza-e-Dawlat*) and legal services (*Huquq*) was not resolved throughout 2018.³⁷ In 2018, only one legislative project, the development of the Anti-Corruption Law, was on the High Council's agenda.³⁸ The High Council did not support the ACJC consistently enough to address with greater resolution its chronic difficulties in enforcing decisions, most notably its arrest warrants.³⁹

The High Council's Terms of Reference (TORs) require that it convenes once a month.⁴⁰ In 2017 and 2018 respectively, the High Council met twelve times in total with a declining frequency towards the end of 2018.⁴¹ In 2019, the High Council has met three times up until 1 May 2019.⁴² The High Council is supported by sub-committees on legislative issues, justice, and anti-corruption, which met 22 (legislative), eleven (justice) and two (anti-corruption) times respectively.⁴³ On 26 December 2018, the fourth subcommittee of the High Council for "Local Governance" was created and met twice since. Its aim is to oversee the implementation of the subnational governance policy and report on a quarterly basis to the High Council.⁴⁴ None of the sub-committees developed a working routine that was able to

³³ Terms of Reference of the High Council for Rule of Law and Anti-Corruption of 29 June 2016, Article 2; Anti-Corruption Law, Article 24.

³⁴ See *infra* 2.10.

³⁵ Afghan National Strategy for Combatting Corruption (hereafter: 2017 Anti-Corruption Strategy), accessible at: http://mof.gov.af/Content/files/AFG_AntiCorruptionStrategy_Eng_.pdf, VII (accessed on 22 February 2018).

³⁶ High Council meetings of 8 April and 24 June 2018.

³⁷ For example, High Council meeting of 24 June 2018; see *infra* 3.1.

³⁸ High Council meeting of 14 May 2018.

³⁹ UNAMA Anti-Corruption Report, May 2018, p 14. ACJC arrest warrant execution was discussed once on 24 November 2018.

⁴⁰ Terms of Reference of the High Council for Rule of Law and Anti-Corruption of 29 June 2016, Article 7.

⁴¹ In 2018 High Council meetings were held on: 3 January, 7 February, 21 February, 8 April, 2 May, 14 May, 24 June, 25 July, 12 September, 13 October, 14 November and 24 November (extraordinary meeting on the revision of the Anti-corruption Strategy). 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 2016, High Council Meetings were held on: 31 August, 10 September, 22 September, 2 October and 26 December. Minutes are published at: www.aop.gov.af (accessed on 15 April 2019).

⁴² In 2019, High Council meetings were held on 16 and 26 February and on 27 March.

⁴³ Terms of Reference of the High Council for Rule of Law and Anti-Corruption of 29 June 2016.

⁴⁴ Order of the President on the Creation of a Local Governance Committee of 26 December 2018, Article 2.

effectively prepare the High Council meetings at the technical level or resolve issues that should not be on the agenda of the High Council such as armored vehicles donation. To maximize the High Council's effectiveness its agenda should be essentially strategic.

The High Council's decisions draw authority from the seniority of its members.⁴⁵ The active participation of high-level representatives in its meetings is required to give its conclusions the necessary weight to base Cabinet decisions or Presidential orders on them. High Council decisions gain a formal legal status only when endorsed by either the President or Cabinet. Throughout 2018, the inclusiveness of High Council meetings increased as civil society organizations and independent institutions, such as the Access to Information Commission, were invited to attend meetings on an *ad hoc* basis or to address the High Council on specific agenda items.

In late 2018, the Executive Committee on Prevention of Corruption and System Development (ExPres) was created. It is chaired by the Chief Executive, the Minister of Justice and Integrity Watch Afghanistan (IWA) and, until May 2019, has met five times to further consolidate itself and define its functions. ExPres may play a vital role in advancing the implementation of decisions of the High Council and strategically follow the implementation of decisions of the Independent Joint Anti-Corruption Monitoring and Evaluation Commission (MEC).

Observations:

In 2018, the High Council's focus was on receiving reports from anti-corruption and justice institutions. Supported by the Anti-Corruption Secretariat, it managed to track the implementation of the Anti-Corruption Strategy and advance its implementation. The High Council's sub-committees' work did not reduce the High Council's technical workload and result in focusing its agenda on strategic items where the High Council's decision is required.

2.3. The Anti-Corruption Strategy's implementation and revision

Afghanistan's National Strategy for Combatting Corruption (Anti-Corruption Strategy)⁴⁶ was adopted by the High Council on 28 September 2017 and its implementation commenced on 9 December 2017.⁴⁷ The original Strategy contained five priority pillars, 66 goals and 38 time-bound benchmarks. On 24 November 2018 and 26 February 2019, the High Council adopted revisions to the Strategy. The revised Strategy contains six pillars, eliminated the difference between goals and time-bound benchmarks, and reduced them to 102. The original priority areas of the Strategy were: (1) political leadership and institutions; (2) ending corruption in the security sector; (3) replacing patronage with merit; (4)

⁴⁵ Decree No. 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; 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. Anti-Corruption Law, Article 24.

⁴⁶ 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).

⁴⁷ Order 2771, *Presidential Decree on the Implementation of the Anti-Corruption Strategy* of 9 December 2017.

prosecuting the corrupt; and (5) tracking money flows. A sixth pillar (6) Improving Economic Institutions was added on 24 November 2018.⁴⁸ Successes within the Strategy's pillars are acknowledged throughout this report and include: a significant increase in registered asset declarations of public officials,⁴⁹ steps towards increasing integrity in human resource management in the security sector, increased recruitment through an open merit-based process in the civil service, and a start of the streamlining of the institutional set-up, in particular through dissolution of the High Office of Oversight and Anti-Corruption (HOOAC) and merger of its functions under the authority of other institutions.

The Government established an unprecedented tracking system to monitor the Strategy. The Special Secretariat, which works under the auspices of the High Council, reports on a quarterly, semi-annual and annual basis.⁵⁰ Along with monitoring, it is also responsible for advancing implementation.⁵¹ Despite developing a meticulous system of reporting, the Secretariat was initially under-resourced and did not receive the political backing necessary to analyse shortcomings and bottlenecks in implementation and then propose solutions to address them.⁵² The first dedicated external assessment of the Strategy and its implementation used the methodology of an audit.⁵³ In an attempt to measure results more accurately, the Special Secretariat adopted a reporting format in which it assigns a percentage to progress on implementing the time-bound benchmarks. The Special Secretariat measures benchmark completion in five stages ranging from 0% (implementation not started) to 100% (implementation complete). In spite of the intent to firmly quantify progress, the Special Secretariat's measurement marked some benchmarks fully complete, even while the substantive report noted the benchmark as still outstanding.⁵⁴ Civil society disagreed with the quantification of most results in its shadow report.⁵⁵ Discussions on the Strategy's implementation turned into more of a box-ticking exercise rather than a process conducive to assessing achievements and identifying areas requiring corrective action. Responding to civil society's criticism about the Special Secretariat's lack of independence, the revised Strategy moved the responsibilities for coordinating the Strategy's implementation to the future Anti-Corruption Commission, into which the Special Secretariat will be integrated.⁵⁶

UNAMA cautioned in its previous anti-corruption report that the limited timeframe (2017-2019/20) of the Strategy would likely reduce its impact.⁵⁷ The scale of the problem was simply too large to be addressed with a three-year plan. However, the Government decided to retain the short timeframe

⁴⁸ Revised Anti-Corruption Strategy, at: https://sacs.gov.af/uploads/strategy_pdf/Strategy_en.pdf (accessed on 13 March 2019).

⁴⁹ See infra 2.6.

⁵⁰ See Reports published by the Special Secretariat available at: <https://sacs.gov.af/en> (accessed on 5 March 2019).

⁵¹ Order 2771, *Presidential Decree on the Implementation of the Anti-Corruption Strategy* of 9 December 2017; 2017 Anti-Corruption Strategy, VII.

⁵² After UNAMA's recommendation in the High Council that the Secretariat be adequately resourced on 21 February 2018, the Secretariat's staffing was increased. UNAMA Anti-Corruption Report, May 2018, p. 16.

⁵³ SIGAR 18-51 Audit Report, *Afghanistan's Anti-Corruption Efforts: The Afghan Government Has Begun to Implement an Anti-Corruption Strategy, but Significant Problems Must Be Addressed*, 31 May 2018, at: <https://www.sigar.mil/pdf/audits/SIGAR-18-51-AR.pdf> (accessed on 5 March 2019).

⁵⁴ E.g. The obligation of senior officials to complete asset declarations is marked as 100% complete, while the report recons, that First Vice-President Dostum has not declared his assets. See infra 2.6.

⁵⁵ See infra 6.

⁵⁶ Revised Anti-Corruption Strategy, VI.

⁵⁷ UNAMA Anti-Corruption Report, May 2018, p. 15.

with actionable targets and revise them based on lessons learned rather than having an overly ambitious Strategy with static benchmarks. The initial Strategy's strength was that it contained a clear prioritization and realistic targets, which – while not comprehensive – could be met during the implementation period. However, while implementation of the Strategy started late,⁵⁸ its scope was gradually extended. The initial Strategy focused on nine priority ministries, identified as vulnerable due to their high expenditures and revenue generation.⁵⁹ The Government did not challenge the position reported by SIGAR that the order to implement the Strategy should be interpreted to require 58 institutions to produce anti-corruption plans and report on them.⁶⁰ In addition, uncertainty on how to measure delivery of 66 goals named in the Strategy further expanded the Secretariat's reporting obligation. The Government ultimately decided that all goals were due by the end of the Strategy's implementation period.⁶¹ A determination that the 66 goals should be gradually achieved based on solidly reaching benchmarks would have been an equally plausible interpretation of the original Strategy and much more feasible. In sum, the expansion from nine to 58 priority institutions, and from 38 time-bound benchmarks to 66 timebound-goals and 38 benchmarks, diluted the Strategy's previously clear prioritization. By overpromising on deliverables, the Government set overambitious targets and made itself vulnerable to overreporting on achievements or taking shortcuts to meet benchmarks.

The revision of the Strategy in the second half of 2018 aimed to address this issue. It focused on streamlining the Strategy's goals and benchmarks, by eliminating the difference between the two and setting the number of goals/benchmarks to 102 (out of which 40 are already completed⁶² and 58 are new).⁶³ It also refined goals and benchmarks to make them clearer and easier to measure. It streamlined ministries' and institutions' anti-corruption plans by requiring them to identify three to five priority actions they would undertake to curb corruption. The revised Strategy incorporates new priorities and the revision added a sixth Pillar aimed at improving economic institutions with eleven new benchmarks/goals related to legal and institutional reforms for some economic sectors and improving access to administrative services.⁶⁴ While integrating changes from the new Anti-Corruption Law, and moving the Special Secretariat and its implementation monitoring function to the new Anti-Corruption Commission,⁶⁵ the Strategy's revision did not further clarify Afghanistan's complicated and sometimes redundant structure of anti-corruption bodies.⁶⁶ For example overlapping mandates of the new Commission and other anti-corruption bodies, including the Independent Joint Monitoring and Evaluation Committee (MEC) and the Deputy Attorney General for Anti-Corruption Affairs (DAG-AC), were not resolved. The High Council adopted the revised Strategy on 24 October 2018, and made additional revisions, including alignment to the anti-corruption related GMAF, on 26 February 2019. During the revision process, donors submitted two sets of comments which were considered and partially incorporated. But national institutions and civil society claimed they were not sufficiently consulted in the revision process.

⁵⁸ Order 2771, *Presidential Decree on the Implementation of the Anti-Corruption Strategy* of 9 December 2017.

⁵⁹ 2017 Anti-Corruption Strategy III.

⁶⁰ SIGAR 18-51 Audit Report, *Afghanistan's Anti-Corruption Efforts*, p. 6 and Government Response p 58 seq.

⁶¹ Ibid, p. 6 unchallenged by the Government's Response on p 58 seq.

⁶² In addition to those fully completed, the Secretariat reported that 3 were partially completed.

⁶³ Revised Anti-Corruption Strategy, Pillar VI.

⁶⁴ Revised Anti-Corruption Strategy, Pillar VI.

⁶⁵ Revised Anti-Corruption Strategy, Pillar I, benchmark 6; and VI.

⁶⁶ UNAMA Anti-Corruption Report, May 2018, 2.3; see *infra* 2.4.1.

The revised Strategy's timeframe spans until December 2019. It retains a mechanism for bridging into a follow-on Strategy, namely: "Several months before the conclusion of the Strategy's first phase, the High Council will commission an independent review to assess its impact. Based on the review, the High Council will make recommendations to an incoming government on approaches to fighting corruption that should be continued; those that need improvement, and those that should be replaced by new measures and innovations."⁶⁷ With the reformed institutional structure, the new Anti-Corruption Commission seems most suited to engage in this bridging process in cooperation with the High Council and should ensure that achievements of the current Strategy are not lost.

Observations:

In 2018, the Anti-Corruption Strategy's implementation brought important achievements. While the Strategy's clear prioritization risked being diluted in the course of the implementation process, the Strategy's revision aimed at correcting course and facilitated measurements of benchmarks. As the end of the implementation period of the current Strategy approaches, its mechanism to develop a follow-on strategy should be activated.

2.4. Legislative reforms

The current legal framework already provides a solid basis for advancing anti-corruption reforms. Future initiatives should focus on strategically finetuning it while preserving gains already made. For example, Afghanistan's new comprehensive Penal Code entered into force on 14 February 2018 and, with it, Afghanistan met UNCAC's obligations to criminalize all mandatory and some optional corruption offences under UNCAC.⁶⁸ Legal reforms in 2018 and early 2019 focused on improvements to procedural norms and institutional structures to increase UNCAC compliance.

As the parliament does not yet effectively partner with the Government in advancing anti-corruption reforms, key legislation, such as a dedicated Anti-Corruption Law and a Whistle-Blower Protection Law, the revised Access to Information Law⁶⁹ as well as the establishment of the post of DAG-AC and the abolishment of the HOOAC through amendments of the Attorney General's Law of 3 March 2018,⁷⁰ was enacted by Presidential legislative decree. The National Assembly repeatedly debated the Assets Declaration Law,⁷¹ indicating some interest in the Assembly to actively engage in anti-corruption reforms. Overall, in 2018, 34 legislative acts were passed by Presidential decree under emergency powers,⁷² while only 14 laws were passed by the National Assembly following approval by both

⁶⁷ Revised Anti-Corruption Strategy), VII.

⁶⁸ UNAMA Anti-Corruption Report, May 2018, p 18.

⁶⁹ The Access to Information Law is described *infra* in 5.2.

⁷⁰ Amendments of and additions to the Law on the Structure and Authorities of Attorney General Office (AGO Law), Presidential Legislative Decree 268 of 6 March 2018, OG 01286, Articles 3 and 4.

⁷¹ Presidential Legislative Decree No. 154, The Law on Declaration and Registration of Assets of State Officials and Employees of 5 September 2017, OG-1271 See *infra* 2.6.

⁷² Constitution of Afghanistan (Afghan Constitution), Article 79 reads: "During the recess of the House of Representatives, the Government shall, in case of an immediate need, issue legislative decrees, except in matters related to budget and financial affairs. Legislative decrees, after endorsement by the President, shall acquire the force of law. Legislative decrees shall be presented to the National Assembly within thirty days of convening its first session, and if rejected by the National Assembly, they become void."

Houses.⁷³ The Constitution states that the President's emergency power to legislate be utilized only "in case of immediate need".⁷⁴

The MoJ could not finalize its reform of the legislative department (*Taqnin*) by June 2018, as envisaged in the 2017 Anti-Corruption Strategy.⁷⁵ The department continues to provide technical assistance in legislative drafting on an *ad hoc* basis, rather than strategically implementing a legislative reform agenda.⁷⁶ With the adoption of a dedicated Anti-Corruption Law and a Whistle Blower Protection Law, the Criminal Law Reform Working Group (CLRWG), an MoJ-led legislative expert group, attended by all government entities working in the justice sector and select international organizations, finalized two long-term projects to reform anti-corruption legislation. UNCAC states: "Each State party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption."⁷⁷ While the MoJ was required by the Anti-Corruption Strategy to conduct a thorough and inclusive review of the anti-corruption legislation by February 2018,⁷⁸ no report on this assessment has been produced yet. The Special Secretariat, which considered this benchmark fully met, re-titled it in its review to "Strengthen anti-corruption laws and regulations," and listed which individual laws were approved in the reporting period.⁷⁹ The revised Anti-Corruption Strategy reaffirmed that the benchmark was met in February 2018, while the donors' suggestion to schedule periodic reviews of anti-corruption legislation, as required by UNCAC, was not incorporated.

2.4.1. The new Anti-Corruption Law

A key reform step in 2018 was the adoption of a dedicated Anti-Corruption Law. The MoJ's expert legislative working group, the CLRWG, had been working on this legislation since September 2016 with varied intensity.⁸⁰ On 5 September 2018, the Anti-Corruption Law was enacted through Presidential legislative decree and entered into force immediately upon adoption. While it was submitted to the National Assembly on 11 October 2018, which may approve, revise or reject it,⁸¹ the National Assembly had not debated the law by May 2019. The law was amended by Presidential legislative decree regarding the selection process of the Anti-Corruption commissioners on 5 March 2019.⁸² The Second Vice-President repeatedly consulted with civil society representatives on the law. Civil society, however, claimed that the consultation was not genuine, and its suggestions were not adopted. Government incorporated some of the international community's comments in the final version. A broader and more structured consultation process on the law with all stakeholders would have been warranted.

⁷³ Counted from the Official Gazettes. The figures provided by the MoJ differ slightly. For comparison: 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, UNAMA Anti-Corruption Report, May 2018, p. 17.

⁷⁴ Afghan Constitution, Article 79.

⁷⁵ 2017 Anti-Corruption Strategy, Annex 1, Implementation Matrix; First Semi-Annual Report of the Fiscal Year 2018 on the Implementation of the Anti-Corruption Strategy, p 66 (First Semi-Annual Report of Fiscal Year 2018).

⁷⁶ High Council Meeting of 21 February 2018

⁷⁷ UNCAC, Article 5 (3).

⁷⁸ 2017 Anti-Corruption Strategy, Annex 1, Implementation Matrix.

⁷⁹ First Semi-Annual Report of the Fiscal Year 2018, p 64.

⁸⁰ UNAMA Anti-Corruption Report, May 2018, p 19.

⁸¹ Afghan Constitution, Article 79.

⁸² Presidential Decree No. 354 of 5 March 2019.

The Anti-Corruption Law brings about the long-awaited codification of the ACJC, which previously was based on an executive decree alone.⁸³ It contains provisions aimed at facilitating investigations by ACJC's prosecutors and strengthening the anti-corruption work of the Major Crimes Task Force (MCTF) by placing it directly under the Minister of Interior.⁸⁴ The law also codifies the High Council as the highest coordination and decision-making body on justice and corruption issues.⁸⁵

In a major reform step, it creates an Anti-Corruption Commission, which according to the wording of the law should be independent.⁸⁶ UNCAC Article 6 recommends that anti-corruption prevention bodies be tasked with: "(a) Implementing the [anti-corruption] policies [...] and, where appropriate, overseeing and coordinating the implementation of those policies; [and] (b) Increasing and disseminating knowledge about the prevention of corruption."⁸⁷ The commission is tasked with taking general corruption prevention measures,⁸⁸ development and oversight of an Anti-Corruption Strategy approved by the High Council,⁸⁹ as well as research, awareness-raising and training activities.⁹⁰ It is also mandated to receive information on corruption offences and refer them to competent authorities,⁹¹ and to propose anti-corruption legislation⁹² as well as measures to counter corrupt practices in institutions.⁹³ The commission will collect and register asset declarations of government authorities and high-ranking officials after this function is transferred to it within twelve months of its establishment.⁹⁴

The mandate of the commission overlaps with those of other institutions, including the DAG-AC, the MEC, the Office for Asset Registration and Verification, and the Special Secretariat under the High Council. This is a result of the drafting history of the law and a somewhat inconsistent approach to anti-corruption reforms. The 2017 National Anti-Corruption Strategy did not provide for a dedicated corruption prevention body but dissolved the unsuccessful HOOAC and moved its functions to other institutions. The Government countered criticisms about the lack of a dedicated independent corruption prevention body by stating that such a body would not work in the Afghan context, arguing instead to streamline existing anti-corruption bodies.⁹⁵ The Anti-Corruption Law created the new Commission, but the legal basis of other institutions has not been amended to reflect this change. The Anti-Corruption Law attempts to resolve overlaps by stating that "Upon establishment of the commission, the parallel anti-corruption entities shall be incorporated into the commission within one year in accordance with an order of the President."⁹⁶ This provision, however, increases legal uncertainties for anti-corruption bodies, underscoring that a comprehensive regulation of all these entities in one law would have been preferable.

⁸³ UNAMA Anti-Corruption Report, May 2018, p 36 seq; Anti-Corruption Law, Articles 25 seq.

⁸⁴ Anti-Corruption Law, Articles 28 and Article 29.

⁸⁵ See supra 2.2.

⁸⁶ Anti-Corruption Law, Article 6 (2) and Article 20.

⁸⁷ UNCAC, Article 6 (1).

⁸⁸ Anti-Corruption Law, Article 17 (1)(2).

⁸⁹ Anti-Corruption Law, Article 17(1)(1), (8),(9). See also Article 34 on reports on implementation.

⁹⁰ Anti-Corruption Law, Article 17 (1) (3), (5), (6), (7), (10), (16).

⁹¹ Anti-Corruption Law, Article 17 (1)(4), (12).

⁹² Anti-Corruption Law, Article 17 (1)(11).

⁹³ Anti-Corruption Law, Article 17 (1)(13), (14).

⁹⁴ Anti-Corruption Law, Article 17 (1)(17).

⁹⁵ SIGAR 18-51 Audit Report, Afghanistan's Anti-Corruption Efforts, 31 May 2018, Government Response pp 63-64.

⁹⁶ Anti-Corruption Law, Article 40(2).

UNCAC Articles 5, 6 and 36 do not require the adoption of such a comprehensive law codifying anti-corruption institutions,⁹⁷ but recommend: “Establishment by law or, as experience shows, constitutional guarantees of independence enhance the likelihood that the body or bodies will have sufficient powers to promote effective policies and ensure implementation, as well as conveying a sense of stability.”⁹⁸ The Jakarta Statement on Principles for Anti-Corruption Agencies recommends that anti-corruption bodies shall be permanent, based on laws or the Constitution and have clear mandates “to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies.”⁹⁹ The notion of “clear mandates” requires that delineation of competencies of anti-corruption bodies should be clearly codified.

The commission will comprise five commissioners, a minimum of two of whom must be female. The members will elect its head from amongst themselves and will be supported by a secretariat.¹⁰⁰ Commissioners will be selected by the President from a short-list proposed by the Civil Service Commission, who compiles this list after review of 25 nominees from civil society and 25 nominees from justice and government institutions.¹⁰¹ Civil society representatives complained that the amended selection process for commissioners, would not ensure the commission’s independence.¹⁰² While UNCAC does not provide detailed guidance on the selection of the commissioners or heads of anti-corruption bodies, its provision that the anti-corruption body must be independent and able to carry out its functions effectively and free from any undue influence¹⁰³ should guide rules governing the appointing process. The Jakarta statement says: “Anti-Corruption Agency heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence.”¹⁰⁴ The commission’s ability to exercise its role effectively will crucially hinge upon whether it is provided with the necessary independence to exercise its functions and on the competence of its commissioners. The application of rules on the selection process must take these requirements into account. In line with international standards and norms¹⁰⁵ the Anti-Corruption Law authorizes the commission to propose its own budget. Effective resourcing of the commission will be necessary for it to exercise its functions. In mid-May 2019, seven months after the adoption of the Anti-Corruption Law, the commission was still not set up.

⁹⁷ UNODC, Legislative Guide for the Implementation of the UNCAC, paras 48, 60. Available at: https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf (accessed on 5 March 2019).

⁹⁸ UNODC, Technical Guide to the Implementation of UNCAC, 2009, p 11. Available at: https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf (accessed on 5 March 2019).

⁹⁹ Jakarta Statement on Principles for Anti-Corruption Agencies, 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).

¹⁰⁰ Anti-Corruption Law, Articles 7 seq and 21.

¹⁰¹ According to Anti-Corruption Law, as amended on 5 March 2019, Article 9, the Supreme Court, the Ministry of Justice, the Ministry of Women's Affairs, the Attorney General's Office and the Afghanistan Independent Human Rights Commission (AIHRC) nominate a candidate. The President is required to consult these institutions prior to selection.

¹⁰² Press release 4 April 2019: <https://integritywatch.org/civil-society-organizations-call-for-the-establishment-of-an-independent-anti-corruption-commission-in-accordance-with-international-standards/> (accessed on 9 April 2018).

¹⁰³ UNCAC, Article 6 (2).

¹⁰⁴ Jakarta Statement on Principles for Anti-Corruption Agencies, 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).

¹⁰⁵ UNCAC, Article 6 (2); Jakarta Statement on Principles for Anti-Corruption Agencies, 26-27 November 2012.

2.4.2. The new Law on Whistle Blower Protection

UNCAC requires States parties¹⁰⁶ to establish whistle-blower protection mechanisms, where possible, as necessary means to encourage persons to come forward and report ethical and criminal violations without fear of retaliation.¹⁰⁷ Since 2016,¹⁰⁸ work on a dedicated legislation for whistle blowers protection has been ongoing and the Anti-Corruption Strategy envisaged its finalization by the end of 2017.¹⁰⁹ While the 2014 Criminal Procedure Code¹¹⁰ and the 2018 Penal Code offer some protection for whistle blowers,¹¹¹ a dedicated law became even more pertinent after the 2008 Law on the HOOAC was repealed in March 2018.¹¹²

On 5 September 2018, a dedicated Whistle-Blower Protection Law was enacted through a Presidential legislative decree and entered into force immediately, while still being reviewed in the National Assembly.¹¹³ The law applies to all institutions, public and private, including civil society and non-governmental organizations, that provide public services.¹¹⁴ Under the law, a whistle blower may report the commission of an act of administrative corruption in anonymity.¹¹⁵ The whistle blower's identity may not be disclosed without their consent,¹¹⁶ which problematically in turn restricts the right of a defendant in a criminal procedure to confront their accusers.¹¹⁷ A whistle blower report and the identity of the whistle blower must be kept confidential. The recipient of a whistle blower report is required to refer it to the relevant prosecution office, if it amounts to a suspected crime.¹¹⁸ A whistle blower is entitled to seek and be provided with information regarding the progress of his whistleblowing report in accordance with the Access to Information Law.¹¹⁹ Consistent with international best practices, the law protects whistle blowers who report in good faith even if, subsequently, all or part of their report is determined to be false or incorrect.¹²⁰ Finally, in line with other provisions in the Anti-Corruption Law, the Whistle Blower Law incentivizes whistleblowing by providing a reward equivalent to 5% of any money recovered following a conviction by a court of law.¹²¹ Violations of the law must be enforced including through criminal prosecutions.

2.4.3. The ongoing revision of the Supreme Audit Office Law

UNCAC requires appropriate measures to promote transparency in management of public finances, including by installing a system of accounting and auditing standards and related oversight, as well as

¹⁰⁶ UNCAC, Article 33.

¹⁰⁷ UNAMA Anti-Corruption Report, April 2017, p 14.

¹⁰⁸ UNAMA Anti-Corruption Report, April 2017, p 14 seq.

¹⁰⁹ 2017 Anti-Corruption Strategy, Implementation Matrix.

¹¹⁰ Criminal Procedure Code, OG No. 1132 of 5 May 2014.

¹¹¹ Penal Code, OG 1260 of 15 May 2017.

¹¹² Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy, OG 936 of 15 January 2008, Article 14.

¹¹³ Whistleblowers Protection Law, Presidential Legislative Decree No. 316, OG No. 1314 of September 2018.

¹¹⁴ Whistleblowers Protection Law, Article 4.

¹¹⁵ Whistleblowers Protection Law, Article 5.

¹¹⁶ Whistleblowers Protection Law, Article 8.

¹¹⁷ Criminal Procedure Code, Article 7(6).

¹¹⁸ Whistleblowers Protection Law, Article 9.

¹¹⁹ Whistleblowers Protection Law, Article 6.

¹²⁰ Whistleblowers Protection Law, Article 11; UNODC, *United Nations Handbook on Practical Anti-Corruption measures for Prosecutors and Investigators*, September 2004, p. 72, available at: <https://www.unodc.org/pdf/crime/corruption/Handbook.pdf> (accessed on 13 March 2019).

¹²¹ Whistleblowers Protection Law, Article 30.

measures to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue, and to prevent the falsification of such documents.¹²² In relation to the private sector, UNCAC mandates “effective, proportionate and dissuasive civil, administrative or criminal penalties” for failure to comply with auditing standards.¹²³ The new Penal Code criminalizes mis-conduct of audit officials, and the Supreme Audit Office Law (SAO Law) provides administrative sanctions and or referral for prosecution, for actions that obstruct the work of SAO auditors.¹²⁴

However, the legal and institutional framework continues to lag. The 2017 Anti-Corruption Strategy identified that Afghanistan lacked the “financial controls to adequately monitor and supervise financial flows” and that the Supreme Audit Office (SAO) should be strengthened. It therefore called for the SAO Law to be revised to “align the SAO’s audit and standard setting powers with its functions” by June 2018.¹²⁵ While the revised Strategy considered the benchmark as fully met by December 2018,¹²⁶ based on the 2018 revisions, the MoJ has not yet finished revising the SAO Law’s latest amendments.

In September 2017, the first round of amendments to the 2013 SAO Law did not bring about the required in-depth reforms.¹²⁷ Besides unnecessary changes in the terminology, the 2017 amendments reduced the Auditor General’s term of appointment from six to four years,¹²⁸ while retaining the President’s appointment power. This contravened the recommendation in international standards and norms, which states: “(T)he independence of [State audit institutions’] heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties” should be ensured and they should be “given appointments with sufficiently long and fixed terms, to allow them to carry out their mandates without fear of retaliation”.¹²⁹ On a positive note, the amendments required that accounting and audit of the SAO be conducted as per standards of the International Organization of Supreme Audit Institutions.¹³⁰ UNAMA, the EU and international partners recommended that the final law should incorporate international standards for auditing institutions involved in the public sector, such as principles regarding organizational, functional and financial independence of auditing institutions including tenure of its director.¹³¹ As of May 2019, the draft was

¹²² UNCAC, Article 9(2) (c) and (3).

¹²³ UNCAC, Article 12(1) and (2)(b).

¹²⁴ Penal Code, Article 410; On sanctions for private entities see Article 21, Supreme Audit Office Law, OG. No. 101 of 30 March 2013.

¹²⁵ 2017 Anti-Corruption Strategy, Pillar 5, benchmarks.

¹²⁶ Revised Anti-Corruption Strategy, Annex 1 Pillar 5; First semi-annual report of fiscal year 2018 on implementation of the National Strategy on Combating Corruption, p 40. The Special Secretariat explained that this assessment was based on the amendment made through Presidential Decree No. 157, of 5 September 2017, OG No. 1269 of 25.07.1396.

¹²⁷ Presidential Decree No. 157, dated 5 September 2017 (OG No. 1269 of 25.07.1396).

¹²⁸ Presidential Decree No. 157, Article 4

¹²⁹ ISSAI 10, at: <http://www.issai.org/issai-framework/2-prerequisites-for-the-functioning-of-sais.htm> (accessed on 13 March 2019).

¹³⁰ Ibid. Article 5.

¹³¹ The Lima Declaration of Guidelines on Auditing Precepts (adopted by the Ninth Congress of the International Organization of Supreme Audit Institutions, Lima, 17–26 October 1977) and the Mexico Declaration on Supreme Audit Institutions Independence (adopted by the Nineteenth Congress of the International Organization of Supreme Audit Institutions, Mexico City, 5–10 November 2007). Available at: http://www.intosai.org/fileadmin/downloads/downloads/4_documents/publications/eng_publications/E_Lima_Mexico_2013.pdf (accessed 15 March 2019).

still under the MoJ's consideration.¹³² In the meantime, in February 2019, the President appointed a new SAO Director based on the 2017 revisions to the law.

Observations:

In 2018, anti-corruption related legislative changes such as the Anti-Corruption Law, the Whistle Blower Protection Law and the Attorney General's Law focused on clarifying the institutional framework of anti-corruption bodies to better align to UNCAC. The new Penal Code is compliant with the criminal provisions of UNCAC. Whether the new Anti-Corruption Commission meets UNCAC's Article 6 requirements depends on its independence and resources effectively granted. The establishment of the commission is delayed. While the revision of the Supreme Audit Law remains pending, a new SAO Director was appointed in February 2019 for a shorter term in office. Afghanistan's legal framework provides a good basis for advancing anti-corruption reforms and adjustments should be strategic and conserve gains already made.

2.5. The Civil Service Reform and the Civil Service Commission

According to UNCAC, parties to the Convention shall "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."¹³³ UNCAC 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."¹³⁴ The ANPDF 2017-2021 commits Afghanistan to establishing a civil service that is responsive to national development needs and that promotes the balanced participation of Afghan men and women.¹³⁵

The 2017 Anti-Corruption Strategy dedicated priority pillar three to civil service reform,¹³⁶ with fourteen goals and four benchmarks focused on consolidating a merit-based recruitment and career system. This included the revitalization of the civil service training centre, competitive recruitment procedures, removal of underperforming civil servants in defined ministries and improvements in judicial recruitment.¹³⁷ The Strategy's 2018 revision, consolidated and updated this pillar's benchmarks to eleven.¹³⁸

¹³² The SAO explained that the revision of the law was delayed due to difficulties in finding an international consultant to guide the process (SAO response to the draft UNAMA report).

¹³³ UNCAC, Article 7.

¹³⁴ UNCAC, Article 7.

¹³⁵ ANPDF, p. 15.

¹³⁶ 2017 Anti-Corruption Strategy, Part II Pillar 3.

¹³⁷ 2017 Anti-Corruption Strategy, Annex I, Pillar 3 benchmarks.

¹³⁸ See: https://sacs.gov.af/en/get_pillar_activity/17 (accessed on 14 March 2019). Note, however, that the Special Secretariat evaluates that one benchmark is complete with 4000 public servants having completed training, while the benchmark asks for the training of 5000 public servants. In the revised Strategy the benchmark's goal was reduced to 4000 public servants trained.

The Civil Service Commission¹³⁹ is mandated to lead the civil service reforms.¹⁴⁰ The years 2017 to 2019 were an intense period of internal reforms and restructuring¹⁴¹ after the new Chairman, Nader Nadery, and the new commissioners took up functions and brought a revived commitment to advance reforms, which increased public and senior officials' trust.¹⁴² According to the Chairman the commission's internal reforms are guided by improving access to public services, enhancing the participation of women in public services, installing a citizens-centred approach and curbing corruption.

The Civil Service Commission is mandated to (1) oversee the assessment of lower-grade civil servants; (2) design policies, laws, regulations and procedures and human resources management; (3) conduct competitive recruitments for higher-grade government positions and oversee the recruitment process for lower-grade positions (4) addressing civil servants' complaints; (5) lead, organize, facilitate and monitor the implementation of administrative reforms; (6) conduct capacity building, training and performance appraisal of senior civil servants.¹⁴³ While the Civil Service Commission is formally independent,¹⁴⁴ the commission's 2018 Annual Activity Report shows that in 2018 the President issued 42 written instructions to the commission, covering all aspects of its mandate.¹⁴⁵ The commission also provides expert assessment and data to the Government to form the basis for government decisions.

In 2017 and 2018, the Civil Service Commission developed job descriptions and terms of reference for 9,490 and 11,510 posts respectively, across the public service. Building on this classification and with the aim of making human resource data easier to store and manage, the Civil Service Commission developed a human resource management information system in cooperation with the Ministry of Communications and Information Technology and the Central Statistics Office.¹⁴⁶ This system, once fully populated and operational across the entire public service, will streamline all human resource functions across all civil service sectors and enable institutions to comprehensively manage human resources in a standardized manner. The Civil Service Commission has also stated that this system will enhance control systems and allow for the elimination of ghost employees. It should enable Afghan institutions to keep an overview of the exact human resources figures and assist in monitoring of gender targets to address staffing imbalances. The system will be linked with the Ministry of Finance's (MoF) payroll system to facilitate quick and effective processing of salaries and curb fraud in payrolls.

¹³⁹ The Civil Service Commission was established by Decree No. 257 of 23 May 2002 (03/02/1381); Decree no. 25 of 10 June 2003 increased its function.

¹⁴⁰ Civil Servants Law, O.G. 951 of 8 June 2008.

¹⁴¹ The Civil Service Commission's 1396 (2017/18) Activity Report of 17 July 2018 lists 22 reform steps ranging from revising the job descriptions of its staff to optimizing the commission's work space, see: <https://iarccsc.gov.af/en/wp-content/uploads/sites/4/2018/07/Achievements-Report-for-1396-IARCSC-Email-Version.pdf>, p 7 (accessed on 15 March 2018).

¹⁴² UNAMA Anti-Corruption Report, May 2018, p 61.

¹⁴³ UNAMA Anti-Corruption Report, May 2018, p 61.

¹⁴⁴ UNAMA Anti-Corruption Report, May 2018, p 61.

¹⁴⁵ The Civil Service Commission's 1397 (2018/18) Activity Report of April 2019, p 17 see: <https://iarccsc.gov.af/fa/%da%af%d8%b2%d8%a7%d8%b1%d8%b4%e2%80%8c%d9%87%d8%a7/> (accessed on 11 April 2019).

¹⁴⁶ In December 2018, the Civil Service Commission signed an agreement with the Ministry of Communications and Information Technology and the National Directorate of Statistics and Information/Central Statistics Office to develop a digital human resource management information system for the whole civil service in the centre and in provinces: [https://iarccsc.gov.af/fa/category/news/page/1/\(accessed 14 march 2019\)](https://iarccsc.gov.af/fa/category/news/page/1/(accessed%2014%20march%202019)), (accessed on 15 March 2018).

Working towards gender balance in civil service, is a priority of the Civil Service Commission:

In January 2018, the Civil Service commission introduced a policy to increase the number of women in the civil service. Amendments to the 2008 Civil Servants Law allowed for affirmative action measures for increasing the number of women in the civil service. While progress with the recruitment of civil servants in general slowed down due to the 2018 elections, the Civil Service Commission also reported a low number of female applicants. Hence, at the middle management level among Grades 3 and 4 staff recruited in the ministries during 2018, only 204 of 4,226 or 4.8% were women. The new mass recruitment process for teachers carried out early 2018 led to the appointment of 8,676 new teachers, of whom 2,500 were women. Women were also appointed in various other positions, including 11 as Kabul Deputy Municipal District Chiefs, one as Deputy Minister of Education for Curriculum Development and Teacher Training, and 26 as Heads of Teacher Training Colleges in Badakhshan, Nimroz, Herat, Takhar, and Laghman provinces, among others.

Between December 2017 and 1 April 2019, 30,499 positions have been filled through merit-based recruitment. Among these around 700 are senior Grade 1 & 2 positions that have been directly recruited by the Civil Service Commission. The others are grades 3-8, middle management and junior positions. Mass recruitments for 11,500 teachers' positions are ongoing at the time of writing. In early 2019, the ratio of women in civil service has reached 27.33%, representing an increase of more than 5% from the previous year. In October 2018, the Civil Service Commission used its Examination Centre in Kabul for the first time to conduct written exams for senior level positions. The computer-based exam system employs standardized software to randomly select multiple-choice questions and essay questions from a pool,¹⁴⁷ which reduces opportunities for fraud.

In 2018, the Civil Service Commission carried out eight provincial assessments which identified 2,533 senior Grade 1 and 2 positions in provincial line directorates of which 900 had to be re-announced by the Civil Service Commission. The announcements included positions which were occupied by the same individuals for several years and their qualifications did not match the job requirement. From a batch of 900 provincial line directorates announced for competitive recruitment, applicants could not pass the written test for 114 of these positions. In November 2018, the Civil Service Commission had to re-advertise 50% of the positions and lower recruitment requirements for these provinces.

The availability of legal remedies against recruitment decisions further bolsters the fairness of the public recruitment process. The Civil Service Commission's Appeal Board is the general complaint board for civil servants, ensuring the rights of applicants for civil service appointments, civil servants and contracted employees. A civil servant can lodge a complaint if they have a grievance about shortlisting, a written or oral exam, or are involved in an administrative dispute concerning lack of appointment, dissatisfaction related to dismissal or advertisement of civil service positions. A total of 2,778 complaints were addressed between April and December 2018.¹⁴⁸ The Board regularly held meetings with civil society representatives, media and religious scholars to receive feedback on their working processes. So far, most complaints come from serving civil servants and are related to their rights as employees or poor working conditions rather than the fairness of the recruitment procedures.¹⁴⁹

¹⁴⁷ See: <https://iarcsc.gov.af/fa/category/news/page/6/> (accessed 18 March 2018).

¹⁴⁸ See: <https://iarcsc.gov.af/fa/category/news/page/5/> (accessed 18 March 2018).

¹⁴⁹ See: <https://iarcsc.gov.af/en/category/news/> and GoA presentation in Geneva, November 2018, at: <https://geneva.mof.gov.af/#documents> (accessed 18 March 2018).

Reforms of the civil service institute, the commission's training centre, were completed in June 2018. Since then, the institute was able to train 4,000 newly recruited civil servants.¹⁵⁰ Training included sessions on tools to curb corruption in alignment with the Government's anti-corruption priorities, with 1,634 newly employed civil servants across various ranks receiving the training.

In late 2018, the Civil Service Commission finalized its review to systematically streamline and merge institutions. To that end it signed Memoranda of Understanding with government ministries and agencies to carry out functional reviews to rationalise their administrations. The joint reviews identified 21 overlapping functions between ministries and agencies. Examples of the streamlining included the merger of the Ministry of Counter Narcotics into the Ministry of Interior, and the consolidation of the Afghanistan Independent Land Authority (ARAZI) with the Ministry of Urban Development and Housing.¹⁵¹

Observations:

Civil service reform measures continued to be implemented at an accelerated pace. Bringing about irreversible improvements in the public service including the introduction of a merit-based career system requires persistence. These measures should not be slowed down by ad hoc appointment outside the recruitment frameworks, because they strongly impact on public perceptions of the integrity of public service.

2.6. Successes in registering assets of public officials should lead to the creation of functioning verification systems

According to UNCAC, State parties shall endeavour "to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials" in accordance with fundamental principles of national legislation.¹⁵² Afghanistan's Constitution requires that the highest ranked government officials declare their assets before assuming office and at the end of their terms of office.¹⁵³ On 5 September 2017, the Assets Declaration Law was decreed by the President and

2018 successes in asset declaration

In 2018, assets of 16,943 government officials and employees (including high-ranking officials under Article 154 of the Constitution) were registered. With the single exception of the First Vice-President, all 94 high-ranking officials required to publish their asset declarations under Article 154 of the Constitution declared their assets and the Office for Asset Registration and Verification published them on the AOP's website in 2018. In addition, the Ministry of Finance, for example, was reported to have achieved 100% success in registering assets declarations of its senior officials.

¹⁵⁰ See: https://sacs.gov.af/en/get_pillar_activity/17 (accessed on 15 March 2019).

¹⁵¹ See: <https://areu.org.af/wp-content/uploads/2017/07/Review-of-Functions-of-Government-Agencies-in-Afghanistan.pdf> (accessed on 15 March 2019).

¹⁵² UNCAC, Article 8(5).

¹⁵³ According to Afghan Constitution, Article 154: "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."

approved by parliament on 1 January 2019.¹⁵⁴ This law not only expanded the categories of government officials and employees who were required to declare their assets,¹⁵⁵ it also obligated the publication of asset declarations of Government officials in addition to the high-ranking officials listed in Article 154 of the Constitution.¹⁵⁶ The law transferred the responsibility to register assets of public officials from the unsuccessful HOOAC, which was subsequently dissolved, to a newly established Office for Assets Registration and Verification within the Office of Administrative Affairs of the President (AOP).¹⁵⁷

An effective implementation of UNCAC requires that “appropriate authorities” to whom asset declarations are made are “(o)versight agencies...with...sufficient manpower, expertise, technical capacity and legal authority for meaningful controls”.¹⁵⁸ While UNAMA commended the positive changes brought about by the Assets Declaration Law, it noted that the choice to situate the registration authority within the President’s immediate office in the executive branch of government, while requiring the judiciary and legislature to report to it, was unusual, blurred the separation of powers, and created potential conflicts of interest.¹⁵⁹ This concern was also voiced in the Meshrano Jirga (Upper House of the National Assembly).¹⁶⁰ The Anti-Corruption Law adopted UNAMA’s recommendation and vests the authority to register and assess the declared assets of public officials with the new Anti-Corruption Commission.¹⁶¹ The commission will take up these functions within twelve months from the date it was established.¹⁶² The delays in setting-up the commission and the transfer of functions to its authority must not reverse successes in asset registration or the establishment of a functioning verification system.

Despite concerns regarding its independence, the Office for Assets Registration and Verification was remarkably successful. It informed UNAMA that by April 2019, 16,943 asset registration forms had been received, including 300 forms by members of the National Assembly and 365 from members of Provincial Councils. According to both the Office for Asset Registration and Verification and the Special Secretariat, successes in asset registration were due to the strong direct support provided by the President, as evidenced in multiple Presidential instructions and circulars to ministries and institutions to register assets of State officials and employees.¹⁶³ To enforce compliance, especially of members of the National Assembly, the Government suspended the salaries of those who had not declared their assets, effective October 2018 until their full compliance. The AOP also published a list of non-compliant officials.¹⁶⁴

¹⁵⁴ The Law on Registration and Declaration of Assets of High-Ranking Officials and Government Employees, Presidential Legislative Decree No. 154, OG 1271 of 28 October 2017. The Decree was approved without amendments by the National Assembly and published in OG No. 1329 of 20 February 2019 (Assets Declaration Law).

¹⁵⁵ Assets Declaration Law, Articles 7 and 8.

¹⁵⁶ Assets Declaration Law, Articles 7 and 8.

¹⁵⁷ UNAMA Anti-Corruption Report, May 2018, p. 25.

¹⁵⁸ UNODC, Technical Guide to the Implementation of UNCAC, 2009, p. 26. Available at: https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf (accessed on 5 March 2019).

¹⁵⁹ UNAMA Anti-Corruption Report, May 2018, p. 21.

¹⁶⁰ Meshrano Jirga Proceedings of 31 December 2017.

¹⁶¹ See supra 2.4.1; Anti-Corruption Law, 17(1)(17).

¹⁶² Anti-Corruption Law, Article 17 (2).

¹⁶³ First Semi-Annual Report of Fiscal Year 2018, p.15.

¹⁶⁴ See: http://www.aop.gov.af/?page_id=3632 (accessed on 18 April 2019). The list contains names of 84 Wolesi Jirga Members, 31 Meshrano Jirga Members, as well as Members of Provincial Councils and Mayors of Municipalities.

The Anti-Corruption Strategy set 100% compliance with asset disclosure requirements for senior officials as a goal and benchmark to be completed by February 2018.¹⁶⁵ The Special Secretariat reported that the benchmark was fully met by May 2018, and recorded that all highest-ranking officials, including the President, the Chief Executive and the Second Vice-President had declared their assets. The single exception amongst top officials is that the First Vice-President did not declare his assets.¹⁶⁶

Unfortunately, in the Strategy's revision, UNAMA's recommendation to require periodic checks on the compliance of all high-ranked officials, to account for turnover in government positions, was not adopted.¹⁶⁷ The IMF benchmark for the fourth review states that Afghanistan should "(P)ublish on the dedicated official website for asset declaration, in Dari and in English: sanctions imposed against high-ranking officials and officials covered in the third review benchmark who did not comply with the requirements on asset declarations in the past 12 months in accordance with the Law on Declaration and Registration of Assets of Officials and Government Employees or Article 154 of the Constitution."¹⁶⁸

While the number of public officials who registered their assets significantly increased in 2018, the verification of assets declarations continues to lag. This is in part due to the lack of resources dedicated to this task at the AOP. While the Office for Assets Registration and Verification had only 26 professional staff until November 2018, by April 2019, the number of staff was increased to 54, of whom 21 are dedicated to verifying assets.¹⁶⁹ By the end of March 2019, the Office for Assets Registration and Verification was in the process of verifying 457 assets declaration forms. As a measure to mitigate the lack of in-house resources, the Office for Asset Registration and Verification expanded cooperation with other Government entities. A Memorandum of Understanding with the IEC that asset declaration forms received from candidates in the 2018 Wolesi Jirga elections would be transferred from the IEC to the Office for Asset Registration and Verification was signed.¹⁷⁰ The Financial Intelligence Unit of the Central Bank (FinTRACA) further provided financial analysis on declared assets to the Office. For example, in 2018, the Office for Assets Registration and Verification sent nine requests for the financial information of 241 senior public officials to FinTRACA, out of which 5 requests comprising 64 high-ranking government officials were responded to. To ensure confidentiality during the information exchange process, FinTRACA established an electronic link with the Asset Declaration and Verification Office.¹⁷¹ However, according to the Office for Assets Registration and Verification,

¹⁶⁵ 2017 Afghanistan Anti-Corruption Strategy, Pillar 1 and Implementation Matrix, Pillar 1.

¹⁶⁶ First Semi-Annual Report of Fiscal Year 2018, p.62 available at: https://sacs.gov.af/en/reports/semi_annual (accessed on 15 March 2019).

¹⁶⁷ Revised Strategy, Annex, Revised Benchmarks, Pillar III.

¹⁶⁸ Islamic Republic of Afghanistan: Third Review Under the Extended Credit Facility Arrangement and Request for Modification of Performance Criteria-Press Release; Staff Report p. 36. Available at: <https://www.imf.org/en/Publications/CR/Issues/2018/05/29/Islamic-Republic-of-Afghanistan-Third-Review-Under-the-Extended-Credit-Facility-Arrangement-45897>. (accessed 13 March 2019).

¹⁶⁹ According to the Assets Registration Office, during a meeting with UNAMA on 24 March 2019, the *Tashkil* in its verification section was increased to 25 beginning March 2019 (1/1/1398).

¹⁷⁰ Election Law, OG No. 1226 of 25 September 2016, Article 73(2)(4); *infra* 4.4.

¹⁷¹ Financial Transactions and Reports Analysis Center of Afghanistan, Annual Report 2018, p 22. Available at: https://www.fintraca.gov.af/assets/Annual%20Report/FinTRACA_Annual%20Report_2018.pdf (accessed 13 March 2019).

cooperation with other government entities, including the ARAZI and municipalities, and civil society, remains challenging.

The asset-declaration-related GMAF 2.3.¹⁷² as well as the Geneva Conference Joint Communiqué¹⁷³ focus on developing and strengthening the capacities to verify asset declarations. While it is neither possible, nor even desirable, to verify every declaration form, the competent authority should design a system of prioritization and effective random checks of asset verification.

Observations:

In 2018, the remarkable increase in asset declarations amongst public officials including highest provincial officials and Parliamentarians underlines Afghanistan's potential to advance anti-corruption-related reforms swiftly, when enough political drive exists. The successes in increasing declarations should be transferred to develop also an effective verification system. In the transfer of asset declaration registration functions to the new commission gains must be preserved.

2.7. Public procurement reforms

Afghanistan's legal and institutional framework generally meets the requirements of UNCAC to establish a transparent, fair and effective procurement system.¹⁷⁴ The Procurement Law comprehensively regulates public procurement in Afghanistan and establishes the relevant institutional framework.¹⁷⁵ A National Procurement Commission (NPC) composed of the Ministers of Finance, Economy and Justice has authority to review and approve contracts that are beyond the threshold authority of procuring entities, and to determine the duties and authorities of such entities.¹⁷⁶ In practice, the commission is chaired by the President, is attended by the Chief Executive and the Second Vice-President, and sits on a weekly basis. A National Procurement Commission Secretariat, established under the National Procurement Authority (NPA), manages and coordinates contracts within the authority of the NPC.¹⁷⁷ The NPA, which reports to the NPC, monitors and supervises procurement proceedings for efficiency, transparency and compliance with the law, and monitors progress of contract implementation in accordance with procurement rules and procedures.¹⁷⁸ On 15 March 2018, the President further regulated inter-governmental procurement, as well as procurement contracts with international organizations and the procurement of items used by the public, and created a directorate of Public Goods Procurement standardizing the procurement of these goods for government entities. Public goods are defined as items that every government

¹⁷² Supra 2.1.

¹⁷³ Geneva Conference on Afghanistan: Joint Communiqué, Securing Afghanistan's Future: Peace, Self-Reliance and Connectivity, 22.

¹⁷⁴ UNCAC Article 9 (1) provides: "Each State party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application..."

¹⁷⁵ Procurement Law, OG. No. 1223 of 17 September 2016 (Procurement Law).

¹⁷⁶ Procurement Law, Article 54(1).

¹⁷⁷ Procurement Law, Article 54 (6).

¹⁷⁸ Procurement Law, Articles 56 and 57.

official uses daily. They are classified in to 11 categories ranging from stationery, to technical equipment, motor vehicle spares, fuel, furniture, and medicines.¹⁷⁹

In 2018, the NPC held 45 weekly meetings, which remained open to civil society, representatives of the National Assembly and some international observers. As of early March 2019, the NPC reported having approved a total of 3,072 contracts, saving AFN 60 billion. Furthermore, 154 companies had been debarred,¹⁸⁰ including 25 in the period January 2018 to March 2019.¹⁸¹ The NPA stated that, during the same period, they initiated various reforms including amendments to procurement procedures encouraging women to participate in bidding, requiring all staff members to sign conflict of interest forms, and mandating participants to declare assets in accordance with the Assets Declaration Law. The NPA also prepared a dedicated strategy on anti-corruption in procurement, established three committees on whistle-blower protection, and installed complaint boxes in procurement entities. In October 2018, the NPA introduced an electronic procurement system aimed at speeding up the process, enhancing transparency and preventing corruption. It also required all private companies interested in bidding for government projects to register with the system over the course of three months. The procurement plans of all ministries were also entered into the system.

In November 2018, the President issued Executive Decree No. 100 to “coordinate and expedite the procurement proceedings and better implement the provisions of the Procurement Law as well as make savings in the public resources spending”. According to the Decree, effective from the beginning of fiscal year 2019, the NPA will be responsible for completing the procurement process, from the start to conclusion of contract, for all procurement falling within the jurisdiction of the NPC (i.e. above a certain monetary threshold). In effect, the NPA would conduct the whole procurement process and not just facilitate it. A representative of the procuring entity would be present during the whole process. According to the NPA, the new process reduces bureaucracy and eliminates deliberate delays caused by vested interests in procuring entities. However, it may also result in depriving procurement units in government entities from acquiring relevant skills and experience on procurement matters.

Notwithstanding the strides made in streamlining procurement, a lot remains to be accomplished in procurements conducted by government departments. A vulnerability to corruption assessment conducted by the MEC on the Ministry of Interior found significant deficiencies in the entire procurement process from planning, bidding, evaluation, implementation and monitoring.¹⁸²

Observations:

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

¹⁷⁹ See the Tenth edition of “Procurement Reform at a Glance” found (in Dari): http://www.npa.gov.af/da/OnePagers_3_B_2?fbclid=IwAR1Zy4xovG6Nh384lvnzPtNv1bl3lCkn8uJH-ZKhdpL0cSe2itA98ahTRw (accessed on 9 March 2019).

¹⁸⁰ Debarment entails temporary prevention from bidding for a stated period of time.

¹⁸¹ See: <http://www.npa.gov.af/en/home> and <https://ageops.net/en/companies/debarment/debarred-vendors>. (accessed on 9 March 2019).

¹⁸² The Independent Joint Anti-Corruption Monitoring and Evaluation Commission, Ministry-Wide Vulnerability to Corruption Assessment of the Ministry of Interior, January 2019. Available at: http://www.mec.af/files/2019_02_26_moi_vca_full_report_en.pdf (accessed on 1 May 2019).

2.8. Increased transparency in budget planning, execution and financial management

Afghanistan made significant progress in developing a public finance management system, yet challenges on budget planning, revenue collection and expenditure accounting continue to prompt concerns over transparency and create opportunities for rent-seeking and corruption.

Reforms to the core public finance management (PFM) structure (Ministry of Finance (MoF), SAO, NPA) as well its functions across government entities have taken place under the framework of the Government's PFM Roadmap and its five-year rolling implementation plan, launched in 2016, the Fiscal Performance Improvement Plan (FPIP), to which donor support is aligned. It is informed by international performance frameworks such as the Public Expenditure and Financial Accountability (PEFA) framework, the Tax Administration Diagnostic Assessment Tool (TADAT), the Open Budget Index (ODI) indicators as well as by national strategies and benchmarks. FPIP reform plans are developed by departmental units ("teams") and involve both team-level self-assessments against performance and an independent assessment on progress.¹⁸³

Several GMAF indicators focus on fiscal management, in alignment with the FPIP. Indicators 7.1 and 7.2 foresee the expansion of FPIP performance management reforms – which was delayed in 2017-2018, reportedly due to a lack of resources—to an additional three government entities by end-2019¹⁸⁴. They also call for validated end-year performance reports and quality-monitored plans to be prepared and published in a timely manner in 2019 and 2020. The Government also reported that it foresees to launch a reform implementation monitoring mechanism and a computerised system for the whole of the Government to support the implementation of reform indicators and incentive programs benchmarks. A web-based system is being implemented to improve performance monitoring¹⁸⁵.

Another two GMAF indicators (indicators 13.2- 13.3) focus on improving tax administration, with the creation and operationalization of one-stop-shops for large, medium and small taxpayers' offices mid-2019 and the approval of the e-governance law by the cabinet by the end of 2020 to allow electronic registration, filings and payments. Finally, four other indicators (15.1-15.4) focus on expanding Public-Private Partnerships, including through the development of a management information system by mid-2020. PFM indicators are also included in other multilateral frameworks like the World Bank's Afghanistan Reconstruction Trust Fund (ARTF) Incentive Programme and the IMF Extended Credit Facility (ECF).

The Government has placed a high priority on reforming the national budget to maximise its contribution to growth and fiscal objectives. UNCAC Section II.2.2 defines key features for the adoption of the national budget, for example the inclusion in the budget proposal of economic assumptions, financial and non-financial assets and liabilities, and contingent funding based on standard practices; consolidated revenue and expenditure programme classified by economic and functional categories;

¹⁸³ MoF communication to UNAMA, 11 April 2019.

¹⁸⁴ The FPIP 2018 annual performance review published in February 2019 reported on progress in five Government entities: the Ministry of Finance, the Supreme Audit Office (SAO), the National Procurement Authority (NPA), Afghanistan Extractive Industries Transparency Initiative (AEITI) and *Asan Khedmat*. GMAF indicator 7.1 (FPIP extension to three additional Government entities) was included after implementation for a prior SMAF indicator on FPIP rollout was assessed to have reached 50 % in July 2018. GMAF background information for indicator 7.1 flags challenges in rolling out the FPIP, including the need to prioritize institutionalization where the FPIP has been roll out and to identify the additional entities for rollout.

¹⁸⁵ MoF communication to UNAMA, 11 April 2019.

non-financial performance data, including performance targets; and a medium-term framework. Budgets should undergo public review and be reconciled with earlier fiscal reports, with significant deviations being clearly justified.

Reforms introduced during the 2017-2018 budgetary cycle aligned Afghanistan's budget better to international standards.¹⁸⁶ The 1397 (2018) budget is based on the Classification of the Functions of Government (COFOG standards), eliminated the automatic carryovers of unspent funds, and consolidated development and operational costs. It also created mechanisms allowing for the reallocation of funds from less performing to more performing development projects and visibility over multiyear programming.¹⁸⁷ These measures not only translated to a significant improvement in budget execution¹⁸⁸ but also increased transparency over resources and expenditure, reducing opportunities for corruption. In this respect, the 2017 Open Budget Index Survey showed an improved ranking, with Afghanistan scoring 49 out of 100, compared to 42 in the 2015 scoring.

Budget reforms were further advanced into the 1398 (2019) budget. In July 2018, the MoF issued a single budget circular with more rigorous instructions to line ministries on project concept notes, including in terms of reflecting operating and capital expenses across each project's life-cycle. The 1398 budget also significantly cut contingency funds from approximately 15% of the total budget in 2017-2018 to approximately 4% in 2018-2019 and provided more accurate forward estimates reflecting contingent liabilities and fiscal risks – all of which constitute significant advances in transparency¹⁸⁹. The MoF invited civil society to budget hearings and organised townhall meetings in several cities, gradually improving transparency and public participation in the process.¹⁹⁰

The Government informed UNAMA that it continues to take steps to improve compliance and internal controls of its taxation collection system, in line with various donor commitments. Further transparency should be achieved by efforts to improve realistic long-term costing, with a focus on addressing weaknesses in public investment management, including effective project appraisal and selection, adequate budgeting of operation and maintenance (O&M) costs and the need for a clear regulatory and institutional framework defining roles and responsibilities at the pre-investment stage. The Government made additional efforts to improve its ability to assess long term projections of assets and liabilities, establishing a Public Investment Management directorate and an infrastructure project preparation facility overseeing both public and public-private investment, while also piloting a new O&M policy and taking steps to improve the governance frameworks of state-owned enterprises and public-private partnerships.¹⁹¹

¹⁸⁶ UNAMA Anti-Corruption Report, May 2018, pp. 25-26.

¹⁸⁷ MoF briefing to Heads of Agencies, 10 September 2018.

¹⁸⁸ Development budget execution reached 93% in 2018, compared to 67% and 54% in the prior two years (MoF, Independent Validation Team, 2018 Performance Report of the Rolling Fiscal Performance Improvement Plan, November 2018, p. xii).

¹⁸⁹ Islamic Republic of Afghanistan, Ministry of Finance, National Budget Fiscal Year 1398, p. 23; World Bank, November 2018.

¹⁹⁰ Equality for Peace and Democracy, "Independent Review of Afghanistan Draft National Budget Fiscal Year 1398", December 2018, pp. 24; Integrity Watch, "An analysis of the national budget 2019", Policy Brief, December 2018, pp. 3-4.

¹⁹¹ World Bank, "Update on Disbursements from the ARTF", ARTF Grant No. TF0A9090, December 2018; Fourth Review of the Extended Credit Facility, IMF Country Report No. 18/359, December 2018, pp. 10, 16-17

Finally, the MoF is seeking to improve accountability on the expenditure side. The MoF's anti-corruption plan has been published and is monitored on a quarterly basis.¹⁹² The internal audit capacity of the Ministry has improved, with 251 audit reports reviewed by a quality assurance committee and a system established in November 2018 to follow up on audit recommendations. A review of security sector expenditures has been initiated and could significantly improve transparency over the largest sector in the national budget. Forthcoming reforms should focus on strengthening the transparency of financial reporting, addressing issues such as publishing justifications of deviations from the approved budget, the lack of a National Accounting Standard and comparability between budget and accounts, as well as weak internal controls.¹⁹³

Observations:

PFM reforms are critical to reinforce systems that foster transparency and accountability. Prioritisation, in light of the ambitious PFM agenda, and reform consolidation are key to ensure sustainability, along with the continued political will to shelter these reforms from possible interference in the context of elections and/or in the event of a political settlement.

2.9. Reforms at the subnational level

Afghanistan has 34 provinces, 387 districts, 163 municipalities, and approximately 45,000 villages.¹⁹⁴ The challenging security environment made the implementation of decentralization with adequate oversight structures challenging and uneven. On 14 May 2018, the High Council approved Afghanistan's Subnational Governance Policy, which aims to balance the provision of security, the provision of the rule of law, and economic expansion.¹⁹⁵ Its underlying purpose was to depoliticise key appointments such as district governors, deputy provincial governors and mayors. The policy left the definition of subnational governance bodies open. The full implementation of the reform is pending the finalization of the law on local administration. The policy calls for establishing eight new regional economic zones using the comparative advantages of each region to generate economic growth and employment. However, it is still unclear how these zones will be established and what level of authority and budget might be allocated for each.

On 5 March, President Ghani approved the Local Councils Law through a legislative decree.¹⁹⁶ The law clarifies the roles and responsibilities of provincial, district and village councils, and is intended to facilitate effective local council oversight and promote public participation in the design and implementation of Government development programmes at the local level.

On 26 December 2018, the fourth subcommittee of the High Council for "Local Governance" was created with the aim of overseeing the results of the implementation of the subnational governance policy and to report to the High Council on a quarterly basis.¹⁹⁷ The sub-committee has since met twice

¹⁹² MoF, February 2019, p. 14.

¹⁹³ MoF, February 2019, pp. xxiii-xxiv; Integrity Watch, December 2018, p.6; MoF, February 2019, pp. 28, 46

¹⁹⁴ Subnational Governance-Policy, p 1: <https://idlg.gov.af/en/departement-policy/> (accessed on 15 March 2019).

¹⁹⁵ Ibid.

¹⁹⁶ Presidential Decree No. 350, Law on Local Councils of 5 March 2019.

¹⁹⁷ Order of the President of Islamic Republic of Afghanistan on the Creation of a Local Governance Committee of 26 December 2018, Article 2.

and the Independent Directorate of Local Government (IDLG) has assigned focussed working groups consisting of 17 ministries and independent institutions, to improve local governance.

Out of the 36 deputy provincial governors who were appointed in 2018, 20 were appointed through merit-based appointment while the remaining 16 are serving in an acting capacity. Similarly, out of 302 District Governors who were appointed in 2018, 246 were recruited through merit-based appointment while 56 remain as political appointees. Temporary merit-based appointment for mayors commenced towards the end of 2018, although only 6 mayors have been confirmed so far. Overall, while traditional networks remain influential, the Government made progress to de-politicise subnational appointments.

On 19 February 2019, the President issued Order No. 2716 titled: *Improving Governance at District Level in the Country* in accordance with the subnational governance policy and further implementing Constitutional provisions. It includes 18 actions to be carried out by 17 relevant institutions. It initiates a process aimed at increased delegation of authority to the district level through the clarification of reporting lines and responsibilities and instructs ministries and independent directorates on the necessary deliverables and deadlines. The order defines the relationship between district governors and tertiary government units, requiring all units to execute their activities under the supervision of, and to report to, the relevant district governor. It directs a feasibility study to be carried out for changing provinces and districts to independent budgetary units, and for public assessments of district governors and of district mayors. Also, the order calls for district governors to have financial authority of AFN 500,000 in ordinary budgets and AFN1,000,000 in development budgets. The order provides leadership in the design of national district level programmes for addressing asset, infrastructure and capacity needs of the districts, for the allocation of funds for building district governance complexes, and for the design of a district stability programme. Finally, it calls for clarification of the status of traditional dispute resolution mechanisms, including *Jirgas* to have a clear legal status in civil dispute resolution and aims to facilitate the implementation of humanitarian and voluntary public work initiatives for increasing social participation.

This order marks significant progress in the delegation of authority to local administrations and is a positive step in implementing the 2018 subnational governance policy. In this regard, it meets some demands of district governors, including the delegation of financial authority. It has potential to improve the flow of resources to the district level and improve the development budget execution rate. Tying financial delegation to accountability mechanisms to limit opportunities for corruption is important.

Recommendations:

to the Government:

- ⇒ Based on lessons learned from the current Anti-Corruption Strategy, develop a long-term Strategy; and ensure a seamless transition to the new Strategy through the Special Secretariat or the new Anti-Corruption Commission.
- ⇒ Improve the process of developing draft laws through better consultation mechanisms, in order to improve the quality of draft laws and increase consensus.
- ⇒ The next revision of the Anti-Corruption Law should further align it with UNCAC to:
 - consolidate the independence and provide a firm legal basis for anti-corruptions institutions (revise Article 40 (2));
 - amendments to the law should be consulted extensively with stakeholders.
- ⇒ Strengthen mechanisms for asset verification and ensure that the transfer of the Office for Asset Declaration and Verification does not delay the process of asset registration and verification.
- ⇒ Create conditions to facilitate the implementation of the new Penal Code.
- ⇒ Build on the experience of the successful use of the High Council to further improve anti-corruption 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 NJSRP.
- ⇒ Continue to support civil service reform and strengthen the independence of the Civil Service Commission.
- ⇒ Use the oversight and control options in Afghanistan's new budget to sustainably advance fiscal reforms and reduce aid dependency.
- ⇒ Establish a framework for public participation in PFM processes, with mechanisms to engage and process inputs from civil society and citizens at various stages of the process (from budget planning to expenditure oversight).
- ⇒ Improve transparency of expenditures, through the progressive implementation of International Public Sector Accounting Standards (IPSAS) for financial reporting, regular disclosures on budget adjustments and the strengthening of internal control mechanisms.

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 donors:

- ⇒ Promote the effective and timely implementation of the Geneva Mutual Accountability Framework including its anti-corruption related provisions.

to civil society:

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

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

Opinion polls taken in 2018 show that experiences with corruption in the judiciary (courts), prosecution and the Afghan National Police have fallen among respondents.¹⁹⁸ While still remaining too high, this improvement credits those who have been driving anti-corruption reforms in the justice sector, in particular Chief Judge Sayed Yousuf Halim and Attorney General (AG) Saranpoh Mohammad Farid Hamidi. Despite a positive change, the survey also showed that the population tends to give preference to informal justice mechanisms (*shuras* and *jirgas*) for dispute resolution (45.4%) over State courts (41.9%), in particular in rural areas and among men.¹⁹⁹

The Anti-Corruption Strategy recognizes the central role of anti-corruption reforms within justice institutions and identified the consolidation and strengthening of the national justice system as a long-term objective.²⁰⁰ Many of its benchmarks are geared towards reforming the justice and law enforcement sector and apply to the Ministry of Interior (MoI), The Ministry of Justice (MoJ), the Attorney General's Office (AGO) and the Supreme Court. The Strategy's 2018 revision retained a focus on justice reforms.

3.1. Justice reform

Following the adoption of the five-year National Justice Sector and Judicial Reform Plan (NJSRP) in December 2016, all institutions in the justice sector prepared their institutional reform plans to be aligned with the six general strategic goals of the NJSRP.²⁰¹ Since then institutions have begun to implement their respective action plans. The Supreme Court, the AGO and the MoJ reported individually on their achievements. Absent a dedicated mechanism to supervise the effective implementation of the NJSRP and make periodic reports on it, similar to the mechanism developed for the Anti-Corruption Strategy by the Special Secretariat, the implementation advanced slowly. Little coordination and insight on the plan's implementation exist. The High Council discussed the NJSRP far less frequently than the Anti-Corruption Strategy.²⁰²

The main challenge to the provision of justice services throughout the country remained general insecurity, security threats and targeted attacks. Protection of judges, prosecutors, judicial staff and premises is the responsibility of the MoI. The Supreme Court recommended that the MoI's unit

¹⁹⁸ See: The Asia Foundation, "Afghanistan in 2018: A Survey of the Afghan People", 4 December 2018, https://asiafoundation.org/wp-content/uploads/2018/12/2018_Afghan-Survey_fullReport-12.4.18.pdf (accessed on 18 March 2019).

¹⁹⁹ Ibid, p 121-122: 47.6% rural residents and 32.5% urban residents reported using *shuras/jirgas*. Of those who used *shuras/jirgas*, 69.2% of women believe that there should be a local women's *shuras*, while 59.4% men agree with this proposition.

²⁰⁰ 2017 Anti-Corruption Strategy, Pillar 4.

²⁰¹ On 22 June 2017, the High Council approved institutional plans for the Supreme Court, the Attorney General's Office, the Ministry of Justice and the Afghanistan Independent Bar Association. The Ministry of Interior and the Independent Commission on Oversight of the Implementation of the Constitution's action plans were later published online without a record of formal approval by the High Council.

²⁰² See supra 2.2.

assigned to the protection of judges be strengthened. Between March 2018 and April 2019, targeted attacks against judicial staff resulted in the killing of five judges,²⁰³ seven prosecutors²⁰⁴ and nine judicial staff. In addition, five judges and one prosecutor sustained injuries from attacks and four were kidnapped (now released), as well as two judicial staff injured. No complex attack against court premises occurred in 2018. Poor security and direct threats to judges contributed to a reluctance by female judges to work in remote districts.

Other challenges noted by the Supreme Court as impeding implementation of reforms included insufficient budget for development, difficulty of procuring land for construction of courts, and the poor enforcement of courts' final decisions due to interference by powerful forces. The Supreme Court also cited lack of funding for many judiciary projects.

3.1.1. Reforms in courts

As of May 2019, a total of 2,083 active judges are working throughout Afghanistan.²⁰⁵ The Supreme Court confirmed that they were recruited in accordance with the structurally assessed needs of the judiciary with due consideration given to qualifications, competence and integrity. Courts are functioning in 232 out of 378²⁰⁶ districts with 24 district primary courts operating in neighbouring districts and 116 primary courts operating in the provincial capitals. Due to the security situation, lack of office space, equipment, residential and transportation facilities, as well as the unavailability of local governmental institutions, e.g. the AGO or the *Huquq* Department, there are no courts in 146 districts.

Despite the sensitive security situation, the Supreme Court reported some progress in the implementation of the 2017-2021 Reform Plan for the Judiciary, which it developed under the NJSRP.²⁰⁷ The Supreme Court reported better coordination in the justice sector due to the establishment and functioning of the Justice and Judiciary High Coordination Committee, under the Chief Justice's chairmanship and including the AG, the Ministers of Justice and Interior, and the heads of the National Directorate of Security, the Afghanistan Independent Bar Association (AIBA) and the Legislative and Judiciary Department of the Administrative Affairs Office of the President. However, the High Coordination Committee met only once in 2018, due to the limited availability of its high-ranking members. The platform is mirrored by justice coordination meetings at the provincial level with a corresponding composition, chaired by the heads of appeal courts.

Reform steps directed more specifically at curbing corruption include the streamlining of legal procedures (for example for issuing deed titles), the establishment of complaints commissions in all provincial courts to address complaints by defendants and other court users. Furthermore, judicial audit teams were given standing instructions to meet with complainants during their audits. Legal

²⁰³ Of Paktia Court; Khushi District of Logar Province; Anti-Corruption Court of Logar Province; Primary Court of Badghis; Primary Court of Dand District, Kandahar Province; Staff member of Financial Affairs of Takhar Appeal Court and a support staff of the Judicial and Monitoring Department of the Supreme Court. Attacks on prosecutors occurred in Kandahar, Logar, Ghazni and Kabul.

²⁰⁴ The latest assassination was that of the investigation prosecutor of internal and external crimes of Kapisa province who was killed on 28 March 2019. On 1 April, the budget manager of the office of Deputy AG for Military Affairs was assassinated in Kabul while returning from duty.

²⁰⁵ Information provided by the Supreme Court to UNAMA.

²⁰⁶ This number differs from the number given in the subnational governance policy, which lists 378 districts out of which 363 are permanent districts; see *supra* 2.9.

²⁰⁷ UNAMA Anti-Corruption Report, May 2018, p 30.

requirements for asset declarations by judges have been increasingly enforced and 2071 judges²⁰⁸ have submitted their asset registration forms in 2018. Administrative positions in the judiciary are recruited through the Civil Service Commission's general recruitment procedures,²⁰⁹ pursuant to which 266 employees were hired through a competitive process up to March 2019. Recruitment for 240 vacant posts in the administration, finance and human resources departments remain pending. An online registration system was also established for applicants of the judicial stage course to ensure transparency and provide equal opportunity to applicants in the provinces and female candidates. This increased the participation of women in exams remarkably. Full transparency and fairness in the recruitment of judges continued to be challenging, though. The revised Anti-Corruption Strategy states that by May 2019, membership of the selection committee for judicial functions (Stage Committee) should be broadened "to include vetted and independent representatives from Legislative, Judiciary, Executive and relevant civil society organizations, including members of academia and foreign experts."²¹⁰

In 2018, the enforcement of the Code of Conduct for judges resulted in the dismissal of six judges and their referral to the AGO for prosecution; deduction of salary for 43 judges; written warnings to 36 judges and written advices to 120 judges. Eleven judges were sanctioned through transfer to another duty station. In addition, the Supreme Court's judicial monitoring department arrested 55 persons, including one judge, five administrative support staff and five defence lawyers for corruption in the same period. The number of judges subjected to disciplinary procedures -warnings, deduction of salaries, transfer, referral to AGO for prosecution and dismissal- compares well with the 2017-2018 period.²¹¹ The Judicial Audit Department conducted 37 normal audits and 145 judicial audits in 2018. Resulting from these audits, courts gave appropriate advice in 462 cases, adjudicated 14 and advised correctional measures in 122 cases.

Following the revision of the Anti-Corruption Strategy in late 2018, three revised benchmarks and seven new benchmarks under the Supreme Court's responsibility were added.²¹² They include strengthening of the case management system and safe archiving by December 2018. The Supreme Court informed UNAMA of significant steps in the implementation of the case management system, including the appointment of two Information Technology personnel within the staffing structure for purposes of maintaining the system and expanding it countrywide. An oversight board and judicial inspectors regularly monitor data-entry into the system. According to the Court, about 5,000 civil and criminal cases had been recorded in the system, and a coordination mechanism was established between entities using it.

3.1.2. Reform measures in the Attorney General's Office

The AG continues to play a leading role in Afghanistan's anti-corruption efforts. In addition to chairing the High Council's Anti-Corruption subcommittee,²¹³ Attorney General Farid Hamidi has put an emphasis on fostering integrity and transparency in the AGO. In addition to the 2017-2021 sub-plan of the NJSRP, which was approved by the High Council on 22 June 2017,²¹⁴ the AG also developed a

²⁰⁸ Figures obtained from the Office for Assets Registration and Verification at a meeting on 24 March 2019.

²⁰⁹ Memorandum of Understanding between the Supreme Court and the Civil Service Commission of June 2018.

²¹⁰ Revised Anti-Corruption Strategy, Pillar 4, benchmarks.

²¹¹ UNAMA Anti-Corruption Report, May 2018, p.31.

²¹² Revised Anti-Corruption Strategy, Pillar 4, benchmarks.

²¹³ See supra 2.2.

²¹⁴ UNAMA Anti-Corruption Report, May 2018, p 30.

strategic plan for the period 2018-2022. The AG personally receives citizens during a weekly open day for the public; the AGO demonstrated a willingness to swiftly address vulnerabilities identified by the MEC;²¹⁵ the AGO improved its capacity for internal inspections with a revamped inspection mechanism in provinces and installed complaint hotlines; and the AGO began to reform its human resource system. Reforms to human resources management, however, operate in the context of the limits of the Civil Servants Law and the recruitment rules contained in the Law on the Structure and Authorities of Attorney General Office (AGO-Law). Its recruitment provisions should be specified to ensure merit-based and transparent processes also for promotions.

The AGO informed UNAMA that, as of April 2019, the number of active prosecutors, civilian and military, was 3503, of which 2061 are based in the provinces and 1442 in the centre. The percentage of women in the AGO was 20.7% of which 10% were attorneys.²¹⁶ The AGO extended its presence to 51 additional districts during the last year, bringing the total number of districts where it is present to 283.

International standards and best practices for recruitment, promotion and conditions of service

Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990:

*6. Reasonable conditions of service of prosecutors ... shall be set out by law or published rules or regulations.
7. Promotion of prosecutors ... shall be based on objective factors ... and decided upon in accordance with fair and impartial procedures.*

Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, International Association of Prosecutors, 23 April 1999:

In general [prosecutors] should be entitled ... to recruitment and promotion based on objective ... and decided upon in accordance with fair and impartial procedures."

According to the AGO, all newly employed staff were recruited in accordance with merit-based recruitment procedures. International standards and best practices for prosecutors favour detailed codification of recruitment, promotion and transfer procedures and conditions of service.²¹⁷ While Articles 28 and 29 of the AGO-Law²¹⁸ lay out responsibilities in the recruitment, transfer and promotion processes, the procedure itself is not described. Recruitments to enter the Afghan prosecutor's service follow a public call for applications and

²¹⁵ January 2019 Implementation of Recommendations of the Special Report on Vulnerabilities to Corruption Assessment in the Attorney General's Office of the Islamic Republic of Afghanistan. Available at: http://www.mec.af/files/2019_01_06_ago_3rd_followup_full_report_en.pdf (accessed on 15 March 2019).

²¹⁶ According to the data given to UNAMA for its 2018 report the total number of prosecutors would have increased by more than 40% from 2082 to 3503 and the number in Kabul by more than 54% from 622 to 1442. The AGO stated that previous numbers would have to be corrected after improvements to data processing in its human resource management. Compare to: UNAMA Anti-Corruption Report, May 2018, p 33.

²¹⁷ For a general overview of the international standards and norms for prosecutors, see United Nations Office on Drugs and Crime and International Association of Prosecutors, *The Status and Role of Prosecutors*, 2014. Available at: https://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf; International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, 23 April 1999. Available at: [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx) (accessed on 15 March 2019); Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Guidelines on the Role of Prosecutors*, 7 September 1990, para 7. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx> (accessed on 15 March 2019).

²¹⁸ Law on the Structure and Authorities of Attorney General Office (AGO-Law), OG 1117 of 7 October 2013. Articles 28, 29 provide for the qualifications required for employment as a civilian or military prosecutor. However, the article does not provide for the procedure of appointment.

include an anonymously graded written exam (in 2018, three examinations were conducted). Promotions into higher positions were not advertised in an open call for applications among serving prosecutors and are therefore less transparent. According to the AGO, security concerns and the traditional understanding of the AG's discretion in promotions cannot be reconciled with public calls for recruitment. For administrative positions, the AGO had accepted grading and salary reforms as well as the public advertisement of vacancies and recruitment through the Civil Service Commission. Publicly advertising vacant positions, including those restricted to internal candidates and senior positions such as the Deputy Attorney General, would be conducive to increasing transparency within the AGO.²¹⁹

The integration of HOOAC Staff into the DAG-AC. Eliminating an unsuccessful institution, while retaining all its staff.

Presidential Decree No. 268 abolished the HOOAC, due to its inefficiency and lack of public trust over corruption allegations. However, Presidential Executive Decree No. 4 of 15 May 2018, mandated that all HOOAC staff, except staff in Grade 2 and above, be integrated into the AGO, which also absorbed some of the HOOAC's functions. The AGO's Human Resource Department pointed at the efficiency with which it integrated HOOAC staff, and the speed with which it assigned those with law or Sharia decrees to prosecutorial posts and others to administrative grades. The AGO also stated that adequate vetting mechanisms for the re-assignment of HOOAC staff were in place, and that while no HOOAC employee was released from duty due to this vetting procedure those with integrity or performance problems were assigned to lower or administrative grades. The AGO had to invest in the training of HOOAC staff to enable them to perform functions in the AGO.

On 4 March 2018, the AGO-Law was amended to create the dedicated Deputy Attorney General for Anti-Corruption Affairs (DAG-AC).²²⁰ The inception phase of the DAG-AC's Office was burdened by the obligation to integrate staff members of the High Office of Oversight and Anti-Corruption (HOOAC),²²¹ an abrupt change in leadership²²² and an unclear mandate. These difficulties are likely to have led to a low output of the DAG-AC over the past year, despite its significant staff size, with 367 professional, 94 administrative and 102 support staff.

The 2017 Anti-Corruption Strategy directed that all anti-corruption bodies, with the exception of the MEC, should be merged under the DAG-AC, which would also take up preventive functions.²²³ As a consequence, the DAG-AC functions which include "analysing and assessing criminal causes and proposing criminal policy initiatives to the Government" and "Recommending precautionary measures on crime commission to competent authorities",²²⁴ go beyond the typical scope of a prosecution office. Since the creation of the Anti-Corruption Commission as a dedicated prevention

body, these functions would be better carried out by the commission rather than the AGO's in-house research department.²²⁵ The DAG-AC's asset recovery function was buttressed in the Anti-Corruption

²¹⁹ See supra 2.5. The AGO is a civil service institution in line with Article 4 of the Civil Servants Law.

²²⁰ Amendments of and additions to the Law on the Structure and Authorities of Attorney General Office, Presidential Decree 268 of 4 March 2018, OG 01286, (2018 Amendments to the AGO Law).

²²¹ Article 3, Presidential Executive Decree No. 4 of 15 May 2018.

²²² On 26 May 2018, the former Chief Prosecutor of the ACJC was appointed as the DAG-AC. On 11 November 2018, he was moved to the post of Chief Appeals prosecutor for the Herat Province swapping places with the then Herat Province Appeals Prosecutor.

²²³ UNAMA Anti-Corruption Report, May 2018, p 33.

²²⁴ AGO Law, Article 3.

²²⁵ AGO Law, Article 16.

Law.²²⁶ While a dedicated Asset Recovery Directorate is needed, it is not clear why it is located under the authority of the DAG-AC, given that its competencies go beyond corruption cases.

The DAG-AC's key functions related to corruption prosecutions are: monitoring the process of investigation and implementation of final verdicts in anti-corruption cases, leading anti-corruption prosecutions before the Supreme Court, study causes of corruption, and recovery of illicitly acquired properties.²²⁷ The DAG-AC was not, however, assigned administrative oversight over the Anti-Corruption and Justice Centre (ACJC) Chief Prosecutor, who continues to report directly to the AG.²²⁸ This prosecutorial role as well as the DAG-AC's role in prosecution before provincial courts should be clarified and strengthened. Otherwise, in light of the creation of the Anti-Corruption Commission, which will absorb some preventive functions of the office, the large staff supporting the DAG-AC's Office cannot be justified. In either case, the Office should be required to report on its output.

3.1.3. Reform steps in the Ministry of Justice

The MoJ built its 2017-2021 reform plan around the NJSRP's five key priorities: structural reform, capacity building, service provision, fighting administrative corruption and legislative reforms.²²⁹ In 2018, significant reforms in the MoJ's key departments, the *Huquq* (legal service), *Taqnin* (legislation) and *Qaza-e-Dawlat* (Government Cases) were expected,²³⁰ but only delivered to a limited extent.²³¹ In the Strategy's 2018 revision process, completion of the relevant benchmarks was changed to require the preparation of reform plans of the three key departments only and the deadlines were delayed to February 2019 (*Taqnin*), March 2019 (*Huquq*) and June 2019 (*Qaza-e-Dawlat*).²³² In December 2018, the MoJ presented a new and preliminary "Draft National Strategy of the Ministry of Justice (1398 - 1402)" to UNAMA with a request to collect donor comments. The Draft Strategy's relationship to the previous reform plan, as well as the NJSRP, was not evident. On 20 December 2018, UNAMA provided the MoJ with consolidated donor comments which urged the start of reforms in the three departments and also recommended reforming the MoJ's Legal Aid Department, coordinating it with other legal aid providers, and establishing an oversight mechanism for alternative sanctions.

The MoJ's Legal Services (*Huquq*) Department was functional in 336 districts throughout the country with a total of 849 staff (590 professional and 259 support staff) in 2018. The MoJ's Legal Aid Department has 150 legal aid lawyers, out of whom 28 are based in its Kabul headquarters. Juvenile Rehabilitation Centres function in all 34 provinces, out of which ten²³³ are housed in a government building while the other 24 operate in rented premises. The MoJ assessed the professional capacity of

²²⁶ Anti-Corruption Law, Article 35(1).

²²⁷ Decree No. 268, Article 3 and Anti-Corruption Law, Article 35(1).

²²⁸ According to the AGO, the AGO Internal Audit is the authorized organ for purposes of inspection activities over all parts of the AGO including the ACJC and the said organ will inspect ACJC's professional and administrative performance according to its plan.

²²⁹ UNAMA Anti-Corruption Report, May 2018, p 34; 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 2019).

²³⁰ The 2017 Anti-Corruption Strategy's benchmark for reform of the *Huquq*, *Taqnin* and *Qaza-e-Dawlat* (Case Law Department) was June 2018, Pillar 4, Annex, Benchmarks.

²³¹ While the Special Secretariat lists certain reform steps, it also acknowledged that the benchmark was only 50% completed: https://sacs.gov.af/en/get_pillar_activity/24 (accessed on 16 March 2019).

²³² Revised Anti-Corruption Strategy, Pillar 4, benchmarks.

²³³ Kabul, Herat, Helmand, Maidan Wardak, Khost, Kandahar, Nangarhar, Balkh, Farah and Samangan.

522 staff in the Legal, Government Cases and Legal Aid Departments of the MoJ in cooperation with the Civil Service Commission in order to strategically build their capacity.²³⁴

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 effectiveness and its low capacity to enforce court decisions and land titles. Addressing the problem comprehensively will require revision of enforcement legislation, in addition to structural reforms in the department. Further clarity is also needed regarding the *Huquq*'s ability to register decisions of informal justice mechanisms, and its relationship to the Land Office of the Ministry for Urban Development and Land, which recently absorbed the ARAZI.²³⁵ While the *Huquq*'s reform was identified as a priority by the High Council,²³⁶ implementation continues to lag. No decision was reached on whether to implement the High Council's suggestions to move the MoJ's Government Cases Department to the AGO.²³⁷

The MoJ's *Taqnin* Department did not present a report on a comprehensive review of the anti-corruption legislation foreseen in the 2017 Anti-Corruption Strategy, but the benchmark was deemed completed by the Special Secretariat because key anti-corruption legislation was passed.²³⁸ Ad hoc legislative acts continued to hinder a strategic approach to law-making and resulted in overlaps and contradictions in laws.²³⁹ Key anti-corruption legislation developed by the *Taqnin*, including an amendment of the AGO-Law, the Anti-Corruption Law, a Whistle-blower Law, and a revised and improved Access to Information Law, were approved by Cabinet and adopted through Presidential legislative decrees.²⁴⁰ The *Taqnin* continued assisting the National Assembly in its review of the 2018 Penal Code. The adoption of the Law on the Procedure of Publication and Enforcement of Legislative Documents²⁴¹ on 5 September 2018 improved the MoJ's publication and dissemination of legislation.

The Ministry informed UNAMA that its key achievements in curbing corruption internally in the past year included conducting audits of its offices in 20 provinces and nine central directorates and carrying out audits on 39 extra-ordinary issues. Better application of staff rules resulted in the referral of five MoJ officials to the AGO for prosecution, deduction of salary for one staff, warnings issued to ten staff and administrative notices to 94 others.

3.1.4. Reforms of police and the Major Crimes Task Force

Under the 2017 Anti-Corruption Strategy, reform of the Security, Sector including the MoJ, is a key priority under Pillar 2. The Strategy states that "(T)he Government's assessment has identified ghost police, sale of positions, illegal sales of weapons and equipment, the use of police for private purposes, and smuggling, as issues that must be addressed in the fight against corruption and racketeering".²⁴²

²³⁴ Report of the Special Secretariat, at: https://sacs.gov.af/en/get_pillar_activity/24 (accessed on 16 March 2019).

²³⁵ ARAZI was merged with the Ministry of Urban Development and Housing as per Decree 107 of 1 December 2018, under the new name of Ministry of Urban Development and Land (MUDL).

²³⁶ High Council Meetings of 9 October and 27 November 2017 and 24 June 2018.

²³⁷ High Council Meetings of 9 October and 27 November 2017.

²³⁸ 2017 Anti-Corruption Strategy, Annex 1, Implementation Matrix; First Semi-Annual Report of the Fiscal Year 2018 on the Implementation of the Anti-Corruption Strategy, pp 66.

²³⁹ Supra 2.4.

²⁴⁰ Supra 2.4.

²⁴¹ Presidential Decree of 5 September 2018 on the Law on the Procedure of Publication and Enforcement of Legislative Documents, OG-1313.

²⁴² 2017 Anti-Corruption Strategy, Pillar 2: Ending Corruption in the Security Sector, p.8.

The Pillar's focus areas include change in leadership and the introduction of oversight and complaint mechanisms within the police force.²⁴³ The MoI adopted a four year Strategic Plan in 2018 incorporating the Strategy's benchmarks. The Plan states that measures to counter corruption were to be implemented across all levels of the MoI and the Afghan National Police (ANP). Following the confirmation of Minister of Interior Wais Ahmad Barmak by the National Assembly on 4 December 2017, numerous reform measures were identified.²⁴⁴ However, the frequent turnover in the Ministry's top leadership was not conducive to accelerating reforms.

The Special Secretariat²⁴⁵ highlighted the following achievements within the MoI's reforms: (i) expansion of payroll to all accessible districts with 91% of ANP receiving salaries through the banking system; 2.5% were paid through mobile money and 6.5% still paid via Hawalas. The Afghan Local Police were paid 56%, 30% and 14% respectively through the banking system, mobile money and Hawalas; while Prisons Police were 100% paid through the banking system;²⁴⁶ (ii) transfer of the Afghan National Civil Order Police and the Afghan Border Police to the Ministry of Defence (MoD); (iii) identification of ghost policemen in a number of provincial police headquarters and recording of biometrics profiles of 112,599 police personnel; and (iv) expansion of mechanisms for cooperation with civil society. The report also acknowledged that changes in leadership slowed down reforms. In its assessment of implementation of the three Anti-Corruption Strategy goals i.e. (i) to provide guidelines and audit senior security-related appointments and promotions, (ii) to review and replace all MoI deputy ministers, director generals, and police chiefs as warranted, and (iii) to clarify the mandates of defence and policing, the Special Secretariat found that the goals had only partially been implemented.²⁴⁷ Goals where implementation had not yet started included the establishment of a functioning police ombudsman and completion of a security sector fiduciary assessment.²⁴⁸ These were dropped during the revision of the Strategy.

The revised Anti-Corruption Strategy sets new benchmarks to be implemented by the MoI with deadlines ranging between March and December 2019, including a requirement to provide the National Security Council with internal audit reports every six months, to record 95% of police personnel in the biometric registration system and to have them paid through the banking system or mobile money to a 90% confidence level.²⁴⁹ Notwithstanding the findings of the Special Secretariat and the final review of the Strategy, a Vulnerability to Corruption Assessment prepared by the MEC²⁵⁰ found that there were serious deficiencies in the procurement, logistics and human resource management in the MoI that made it susceptible to corruption and provided 56 recommendations to address these shortcomings.²⁵¹

²⁴³ 2017 Anti-Corruption, Pillar 2 and Annex, Implementation Matrix.

²⁴⁴ UNAMA Anti-Corruption Report, May 2018, p 34.

²⁴⁵ First Semiannual Report of Fiscal Year 2018, p.24.

²⁴⁶ See: https://sacs.gov.af/en/get_pillar_activity/11 (accessed on 16 March 2019).

²⁴⁷ Ibid pp. 21-23

²⁴⁸ Ibid, p. 23.

²⁴⁹ Revised Anti-Corruption Strategy, Annex 1.

²⁵⁰ Vulnerability to Corruption Assessment of the Ministry of Interior, 2019 http://www.mec.af/files/2019_02_26_moi_vca_full_report_en.pdf. MEC stated the purpose of the Assessment "was not to measure, examine or ascertain the scale of corruption within the MoI. It was, rather, to put the spotlight on key areas which are susceptible to corruption and to find out some of the reasons for this." Report at p. 51.

²⁵¹ Ibid, pp 50-64.

The Major Crimes Task Force (MCTF) was established through an Executive Decree in 2009 as a functionally independent unit of the Mol intended to investigate major anti-corruption, kidnapping and organized crime cases. Over the years, the MCTF has received significant support of donors in personnel, training and expertise, but its performance has fluctuated considerably.²⁵² Throughout its existence but especially in 2018 the MCTF has experienced instability in leadership. This culminated in the removal of its director in April 2018. Despite allegations of unethical and corrupt behaviour, the director was never formally charged. Between April and September 2018, two acting directors served in the MCTF before the current director, Col Mohammad Hamed, was appointed.²⁵³ In its 2017/2018 reports, SIGAR noted a decline, qualitative and quantitative, in the MCTF's output.²⁵⁴ In its quarterly report of 30 April 2018, SIGAR reported that the MCTF was "committed to and has made significant progress in building its technical and administrative capacity"²⁵⁵, but in October 2018 reported that the MCTF did "not appear to be the lead Afghan government investigative agency for high profile corruption crimes, as intended" and that its investigators were "not the best qualified, with some investigators possibly being assigned to the MCTF as a form of patronage".²⁵⁶

As of December 2018, the MCTF reported to have a total of 291 staff, out of whom 57 investigators were working on corruption cases. Four MCTF officers were co-located at the ACJC as liaison officers. Of these 57, 33 failed polygraph tests that were carried out with the assistance of the U.S Government, and thus were removed. This mass failure of the polygraph test highlighted a need for a clear, Afghan national-led pre-recruitment vetting procedure, as well as a system for continuous random integrity testing.

The Anti-Corruption Law²⁵⁷ incorporates two of UNAMA's recommendations, both of which present critical opportunities for the MCTF: (1) that the MCTF be provided with a solid legal basis and (2) that the reporting lines of the MCTF Director are elevated.²⁵⁸ To ensure a measure of autonomy and to reduce bureaucracy, the Anti-Corruption Law clarifies that the MCTF Director reports directly to the Minister of Interior.²⁵⁹ Responding to its new mandate, the MCTF proposed a new structure that would focus its entire complement of 291 staff members on anti-corruption cases, including money laundering and proceeds-of-crime cases, loss and theft of historical relics, illegal extraction of mines, and usurpation of State properties. These sub-directorates reflect the jurisdiction of the ACJC. The other functions of the MCTF—organized crime, murder and kidnappings—are in the process of being moved back to the Mol.²⁶⁰ In addition to detecting crimes, the MCTF has the duty to ensure the security

²⁵² UNAMA Anti-Corruption Report, May 2018, p 34.

²⁵³ Col. Qais Sargant and General Kambiz Yama. Current director, Col Mohammad Hamid Zahir was appointed in September 2018.

²⁵⁴ Special Inspector General for Afghanistan Reconstruction, Quarterly Report to US Congress, 30 January 2017, 30 April 2017, 30 July 2017 and 30 January 2018; In its 2018 Anti-Corruption Report, UNAMA reported that the MCTF had only referred 25 out of the 450 cases received by the ACJC prosecutor (see UNAMA Anti-Corruption Report, May 2018, p 35).

²⁵⁵ See: SIGAR, Quarterly Report to US Congress, April 2018; at: <https://www.sigar.mil/pdf/quarterlyreports/2018-04-30qr.pdf> (accessed on 15 March 2019) at p 143.

²⁵⁶ See: SIGAR, Quarterly Report to US Congress, October 2018; <https://www.sigar.mil/pdf/quarterlyreports/2018-10-30qr.pdf> (accessed on 15 March 2019) at p 127.

²⁵⁷ See *supra*, 2.4.1.

²⁵⁸ UNAMA Anti-Corruption Report, May 2018, p 35.

²⁵⁹ Anti-Corruption Law, Article 28(4).

²⁶⁰ Information provided by the MCTF to UNAMA on 12 December 2018.

of ACJC staff and facilities and to enforce ACJC orders. In 2018,²⁶¹ the MCTF detected a total of 190 cases, out of which 87 cases with 108 suspects were referred to various prosecution offices. Thirty-one cases with 19 suspects, out of the 87 referred to prosecutors, were sent to the ACJC prosecution office for investigation and prosecution. One hundred and three of the 190 investigations were closed without being forwarded to the prosecutor. The total number of cases, 31, referred to the ACJC Chief Prosecutor by the MCTF does not compare favourably with the overall figures of 395 cases received by the ACJC Chief Prosecutor from all agencies charged with detection, and is only a slight increase from the MCTF's 2017 figures (25 cases).²⁶²

Observations:

Reforms in the justice and law enforcement sectors continued to be implemented at a slower pace than anticipated. Recruitment, accountability and vetting measures of officials in courts, prosecution, Ministry of Justice and police remain to be further improved and strengthened. The Attorney General's continues to drive anti-corruption reforms, but his office's key reform step to appoint a dedicated Deputy Attorney General for Anti-Corruption Affairs has not yet led to tangible outputs.

The law enforcement's capacity to detect and its role in investigating corruption cases in cooperation with prosecutors needs to be strengthened. Reforms of the Anti-Corruption Law remain to be implemented in the Major Crimes Task Force. Confining the police capacity to detection or pre-investigation tasks alone will make it difficult to address more complex cases.

3.2. The new Penal Code providing an improved basis for corruption prosecutions

The new Penal Code was decreed in 2017 and entered into force on 14 February 2018 as Afghanistan's first comprehensive criminal codification containing almost all crimes in one law.²⁶³ It is an important milestone in Afghanistan's criminal justice reform because, among other things, it incorporated all the mandatory provisions of UNCAC in its codification of corruption and financial crimes.²⁶⁴ The new Penal Code compiles criminal provisions of more than seven corruption-related laws, including the Anti-Money Laundering and Proceeds of Crime Law, and sharpens the definition of the offences.²⁶⁵ The new Code was presented to the National Assembly in 2017 for review and is still pending before it. As the National Assembly has no deadline when reviewing legislative decrees, the Code could be pending before it for a long time.

During the reporting period, revisions were adopted to rectify some identified lacunas. The Supreme Court, in addition, issued several instructions to facilitate the Code's application.²⁶⁶ For example, on

²⁶¹ Figures for the period March 2018 to Mid-February 2019 as provided by the MCTF.

²⁶² UNAMA Anti-Corruption Report, May 2018, p 35.

²⁶³ Penal Code, Official Gazette No. 1260 published on 15 May 2017.

²⁶⁴ See UNAMA Anti-Corruption Report, May 2018, chapter 2.4.1 for a fuller analysis of the Penal Code.

²⁶⁵ UNAMA Anti-Corruption Report, May 2018 p 17.

²⁶⁶ For example Presidential Legislative Decree No. 262 of 3 March 2019 amending Article 916 of the new Penal Code; Presidential Decree No. 267 of 4 March 2018, OG No 1286; Article 157 of the new Penal Code provides "Other issues related to method and form of implementation and enforcement of alternatives to imprisonment and the conditions

19 February 2018, the Supreme Court issued a circular clarifying how the Code should be applied in the transitional phase, namely, that the law in place at the time the criminal act occurred should apply unless the new law was more favourable to the accused. This guided the judges' interpretation of Article 17 of the new Penal Code and Article 15 of the International Covenant on Civil and Political Rights.²⁶⁷ On 6 March 2019, the Supreme Court High Council issued a circular directing judges to mention the basis and reasoning for their sentencing decisions in an evidence-based manner especially where the judges decided on mitigation or aggravation or on the use of minimum or maximum punishments anticipated in the law.²⁶⁸ The circular followed UNAMA's recommendations based on a country-wide survey on the implementation of the improved sentencing regime under the new Penal Code, that sentencing decisions be sufficiently sustained by arguments and reference the Code's sentencing factors.²⁶⁹

ACJC Judges and prosecutors continued to receive training on the Penal Code either jointly or separately through their respective institution's training programs and supported by donors. With clearer definitions of crimes, the new Penal Code should be easier to apply and bring about a move from the widely defined criminal act "misuse of authority" (abuse of office), used as a catch-all for various types of criminal conduct to more narrowly defined offences. During the reporting period, for example, the prosecutor's application of the charge of "misuse of authority" declined considerably. Furthermore, indictments for newly legislated crimes, for instance, "illegal transfer of money" increased.²⁷⁰ Another example of this trend is the ACJC Primary Court's substitution of charges in two cases related to misuse of authority: in the case of the Provincial Council Member of Ghor it convicted for treachery, substituting "misuse of authority" charged by the prosecutor; to the contrary, in the case relating to the Ministry of Refugees and Repatriation, the accused was convicted for misuse of authority where he had been charged with treachery. These decisions should help prosecutors to increase their command of elements of the respective crimes. Charges on the crimes of embezzlement, bribery and exceeding authority declined. Other common offences charged included, forgery,²⁷¹ illegal transfer of money, use of forged documents and treachery.

for observation and monitoring of the convict shall be regulated by a separate legislation."; Presidential Legislative Decree No. 325 and 305 of 5 September 2018.

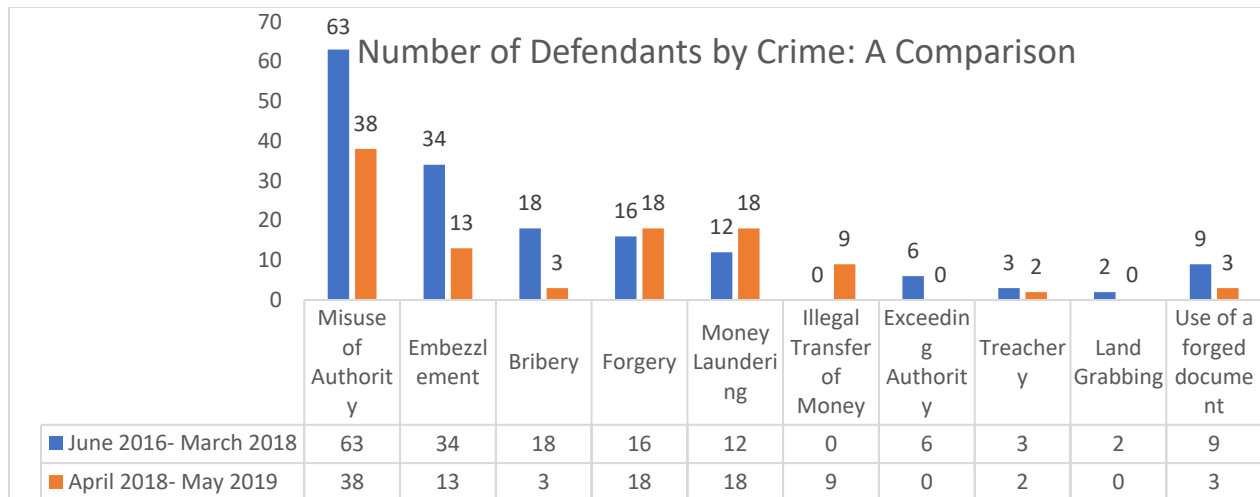
²⁶⁷ Supreme Court Information Circular No. 1756-1683.

²⁶⁸ Office of the Chief Justice Circular Letter# 2206-2275 Dated 1397/12/15 (March 6, 2019) issued pursuant to Supreme Court High Council Approval Number (1002) dated 1397/12/07 (February 26, 2019):

²⁶⁹ UNAMA, Survey on the Application of Sentencing Provisions in the New Penal Code in Afghanistan, December 2018.

²⁷⁰ For example, as shown on the graph, nine indictments for illegal transfer of money under new Penal Code Article 505 were filed.

²⁷¹ Eighteen defendants in four cases (including Border Police of Kandahar case, Cooperative Society of Ministry of Interior case, AIB-ADF Case and the Case Number 17 of 8/1397).



A review of the ACJC's sentencing decisions on both trial and appeal following the entry in to force of the new Penal Code showed that judges routinely applied the correct law and used Article 17, as well as the explanatory Supreme Court circular to find the correct sentencing frame.²⁷² But apart from noting the relevance of Article 17 in sentencing, most of the sentencing decisions did not explicitly compare the sentencing regimes in the old criminal laws with the new Code, for the specific offence. The Supreme Court circular of 6 March 2019 requiring that sentencing decisions be argued should remedy this shortcoming and lead judges to not merely list mitigating and aggravating factors in general terms, for example, "considering the personality and civil status of the accused", but also provide an explanation of how these are grounded in the facts.

3.3. Adjudication of corruption cases in provinces

Corruption cases not meeting the ACJC's jurisdictional threshold continue to be investigated and prosecuted by provincial AGOs before ordinary provincial courts.²⁷³

The AGO's anti-corruption directorate is responsible for overseeing the investigation and prosecution of corruption cases tried in the provinces. It informed UNAMA that, in 1397,²⁷⁴ a total of 1,911 administrative corruption cases had been processed by the AGO countrywide. Compared to the number provided in the previous year (3,569), this represents a decline by nearly half.²⁷⁵ The Supreme Court reported that provincial courts had adjudicated 1,506 corruption cases in 2018, with 906 at the Primary court level and 600 at the Appeal court level. In addition to prosecution, the AGO reported having organized various meetings with community groups to highlight and sensitize them on the priority of fighting corruption. One such meeting was a conference, Voice of the Pulpit Against Corruption, held in July 2018 with the participation of the highest levels of government leadership, prominent Islamic scholars and officials of the Ministry of Guidance, Hajj and Endowment.

A significant corruption case tried by courts other than the ACJC was that of a former Afghan National Civil Order Police commander in the Northern Region. On 17 March 2019, the Primary Military Court

²⁷² In Case No. 17 08/11/1397 the Primary Court cited the Supreme Court Circular when applying Article 17.

²⁷³ UNAMA Anti-Corruption Report, April 2017, p 49.

²⁷⁴ Timeframe: March 2018-March 2019.

²⁷⁵ UNAMA Anti-Corruption Report, April 2017, p 37. However, the AGO explained that upon his appointment in February 2016, the Attorney General ordered that the backlog of pending anti-corruption cases be cleared, explaining the spike in cases finalized in 2016/2017.

in Kabul tried the Commander, *in absentia*, on charges of illegally possessing a military vehicle, forgery of documents and misuse of authority, and sentenced him to 10 years in prison in addition to heavy fines. He was removed from his position in 2018. Although the defendant had himself demanded transfer of his case from Mazar-e-Sharif, he did not attend the hearing in Kabul. It is not clear why this case was not tried before the ACJC even though it meets its jurisdictional threshold.

3.4. The Anti-Corruption Justice Centre

In 2018, a major achievement in boosting legal base and security of the ACJC was its codification in the new Anti-Corruption Law,²⁷⁶ following a recommendation in UNAMA's 2018 Anti-Corruption Report.²⁷⁷ Having a legal foundation in a comprehensive Presidential legislative decree is an upgrade from its previous legal basis in a Presidential executive decree²⁷⁸. The law defines the duties and authorities of the ACJC and expressly asserts the Centre's independence by prohibiting outside interference in the ACJC's initiation of a criminal action, prosecution and judicial decisions.²⁷⁹ The law also states that the MCTF should cooperate with the ACJC,²⁸⁰ and clarifies the duties of the ACJC prosecution office.²⁸¹ Moreover, the law retains the concept of the ACJC as a secure location in which specialized components of the Ministry of Interior (MCTF), the AGO and the judiciary operate to detect, investigate, prosecute and adjudicate serious and complex corruption offences.²⁸²

The Anti-Corruption Law, like Supreme Court directive number 385,²⁸³ also defined the jurisdiction of the ACJC by seniority of the perpetrator and the financial threshold.²⁸⁴ In accordance with Article 27 (1) of the law, the ACJC has jurisdiction to adjudicate on corruption crimes listed in Article 5 of the law when committed by government high-ranking officials,²⁸⁵ government officials, military Generals or military officers functioning in the capacity of Generals, Heads of Administrations and Ministries in Grade 1 posts and legal persons, irrespective of the amounts involved. Furthermore, the Court has jurisdiction to try cases of Article 5 crimes committed by persons other than those stated in Article 27 (1), if the benefit obtained from the commission of the crime exceeds AFN 10 million or its equivalent

²⁷⁶ See supra 2.4.1.

²⁷⁷ UNAMA Anti-Corruption Report, May 2018, p 37.

²⁷⁸ Presidential Decree on the Establishment of the Anti-Corruption Justice Centre (Decree No. 53), 30 June 2016 (10/04/1395).

²⁷⁹ Anti-Corruption Law, Article 26.

²⁸⁰ Anti-Corruption Law, Article 28.

²⁸¹ Anti-Corruption Law, Article 30.

²⁸² UNAMA Anti-Corruption Report, May 2018, p 37.

²⁸³ Approval Number 385 dated 29/4/1395 (19th July 2016) of the High Council of the Supreme Court on the jurisdiction of the ACJC.

²⁸⁴ Anti-Corruption Law, Article 27(2): "1.If the funds obtained by commission of the crimes listed in chapters two, three, four, five, seven, eight, ten eleven and twelve of section four, chapter one of section five, chapters two and six of section nine and chapter four of section ten of book two of the Penal Code, exceed ten (10) million AFN or its equivalent in foreign currencies. 2. If the funds obtained by commission of the crimes listed in chapter one of section four and chapter two of section six of book two of the Penal Code exceed five (5) million AFN or its equivalent in foreign currencies."

²⁸⁵ Although per Article 3 of the Law on Regulating Salaries of High-ranking Government Officials, "high-ranking officials" include the President, Ministers, Judges and Members of the National Assembly, the Constitution provides for the procedure for trial of the President(Article 69) while the Special Courts Law (OG No. 1130-12, April 2014) provides for the establishment and procedures of Special Courts to try Ministers (including former Ministers) and Supreme Court Judges.

in foreign currencies.²⁸⁶ For the crimes of bribery²⁸⁷ and money laundering,²⁸⁸ the ACJC's monetary jurisdictional threshold is lower, starting from AFN 5 million.²⁸⁹ In a judicial ruling delivered on 6 May 2019, the ACJC Primary Court found that it had no jurisdiction to try election crimes, specified in part four, chapter six of the Penal Code, as these crimes were not mentioned under Articles 5 and 27 of the Anti-Corruption Law. The Supreme Court may delegate a case to the ACJC based on a request from the AG or a party to the dispute "in the presence of justifiable reasons and a dire need in accordance with provisions of law".²⁹⁰

After the Supreme Court established Special Courts for investigation of cases on the grabbing of State lands and other defined properties, the Supreme Court's High Council designated the ACJC as the special court to adjudicate on such cases in the Central Zone (comprising Kabul, Maidan Wardak, Parwan, Logar, Kapisa and Ghazni provinces).²⁹¹ The decision was based on the assessment that considering the low number of cases before the ACJC trial and appeals chamber, both would have capacity to adjudicate in land cases. As of March 2019, the ACJC had heard and finalized 139 land cases referred to it by the Supreme Court -83 cases by the Primary Court and 58 cases by the Appeal court.

In 2018, there was a considerable turn-over in both senior and junior positions in the MCTF and ACJC prosecution office. In June 2018, a new ACJC Chief Prosecutor, Fazel Sultan Safi, was appointed following former Chief prosecutor Mohammad Alef Erfani's promotion to the position of DAG-AC. The appointment did not follow a public call.²⁹² The MCTF also experienced changes at its helm, culminating in the appointment of the current director in August 2018. During the same year, 17 prosecutors and 33 MCTF officers who failed polygraph tests were removed from the AGO and MCTF respectively. The two Chief Judges as well as the other judges remained unchanged. In total, the ACJC has 84 prosecutors, 14 judges and 291 MCTF officers, the latter of whom are now all working for the ACJC, according to the MCTF Director.

Overall, since its establishment in 2016, until mid-May the ACJC Primary Court has tried a total of 57 cases²⁹³ involving 223 defendants; it has convicted 177 and acquitted 43. Most of the defendants tried by the ACJC primary court have been employees of the MoI and private businessmen with sizeable numbers from municipalities, the Ministries of Finance and Refugees and Repatriation. In the reporting period, not a single defendant affiliated with the MoD was tried at the primary, though the AGO indicated that several of them had been indicted, but the indictments had been returned, through judicial rulings, for the prosecutor to cover gaps in the investigation. On 12 May 2019, the Appeal Court heard an appeal in a case involving ten former Ministry of Defence officials.²⁹⁴ There was also an

²⁸⁶ Anti-Corruption Law, Article 27(2)(1).

²⁸⁷ Penal Code, Chapter One Part Four, starting with Article 370.

²⁸⁸ Penal Code, Chapter Two Part Six, starting with Article 498.

²⁸⁹ Anti-Corruption Law, Article 27(2)(2).

²⁹⁰ Law on Organization and Jurisdiction of the Judiciary of Islamic Republic of Afghanistan, OG No. 01109 dated 30 June 2013, Article 31 (3). For example, through its approval No. 82 of 1 January 2018, the Supreme Court designated the ACJC court as the special court for investigation of cases of State's land grabbing and other properties, for the Central zone comprising Kabul, Maidan Wardak, Parwan, Logar, Kapisa and Ghazni provinces.

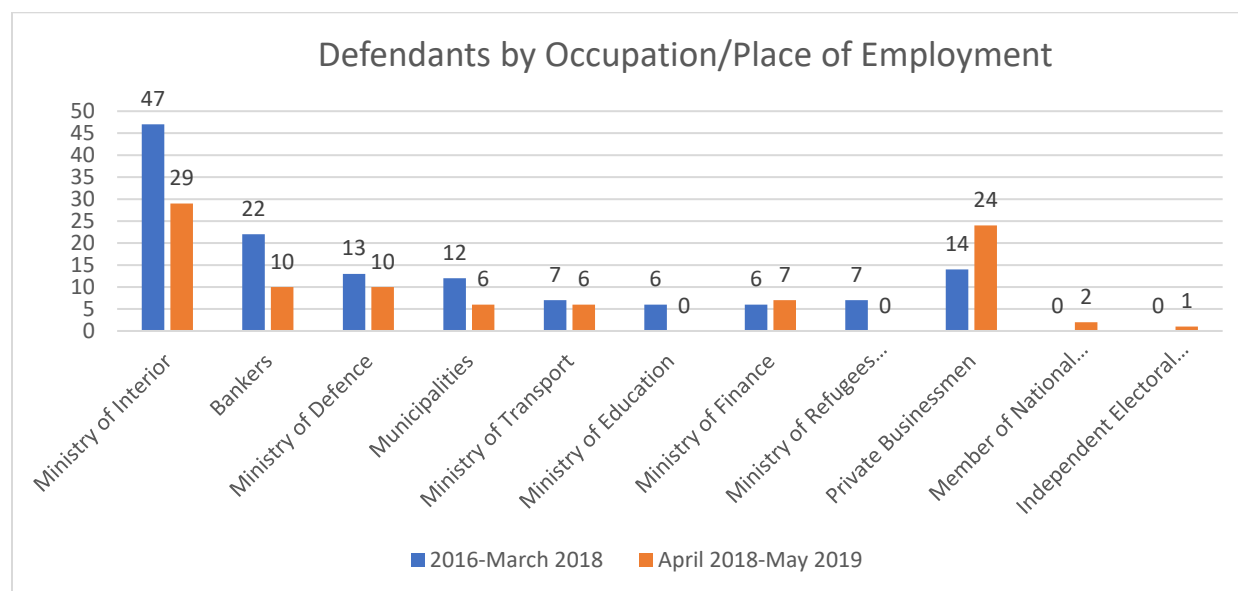
²⁹¹ Supreme Court High Council Approval No. (82), dated 1 January 2018 (11/10/1396).

²⁹² See supra 3.1.2.

²⁹³ Figures as at 16 May 2019.

²⁹⁴ At the primary court level, this case was not tried at the ACJC.

increase in the number of private businessmen indicted and tried, mostly for money laundering or illegal transfer of cash. Of the 223 defendants tried by 16 May 2019, only one defendant was female.²⁹⁵



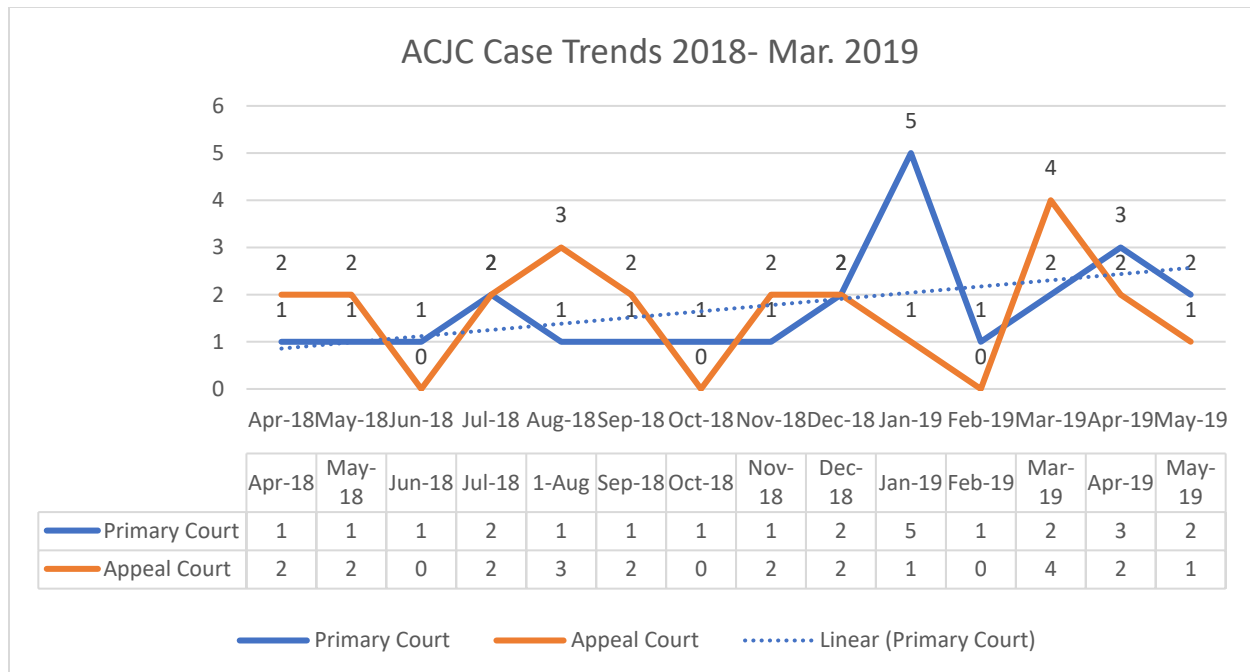
3.4.1. The ACJC's fluctuating output

During the period under review,²⁹⁶ the output of the ACJC fluctuated considerably. There was a noticeable decline in the number of cases tried in the second half of 2018.²⁹⁷ However, the number of trials in both the Primary and Appeal Courts increased in early 2019. From 1 April 2018 to 31 December 2018, 11 cases were tried at the Primary Court level while the Appeal Court conducted fifteen trials. Three of the cases decided by the Appeal Court during the period were appeals from Primary Courts other than the ACJC Primary Court. According to the AGO, in the second half of 2018, the ACJC Chief Prosecutor submitted 35 indictments to the ACJC Primary Court out of which the court referred 21 cases for the prosecution to cover identified gaps. Between 1 January 2019 and mid-May 2019, the Primary Court heard thirteen cases while the Appeal Court heard nine cases.

²⁹⁵ She was charged with money laundering, tried and acquitted on 10 April 2019. The Primary Court found that, considering the evidence and the time the alleged offence occurred (before the new Penal Code), the Prosecution had indicted for the wrong offence.

²⁹⁶ April 2018 to mid-May 2019.

²⁹⁷ Between 1 April and 31 December 2018, the Primary Court heard 11 cases compared to thirteen cases in the first five and a half months of 2019. In 2017, the Primary Court heard 21 cases while the Appeal Court 22 cases.



While the quality of cases being tried by the ACJC generally declined, in terms of the rank of the accused, there was a marginal increase in the amounts ordered by the court in compensation, restitution and confiscation.²⁹⁸ At least 16 persons in four of the 19 cases tried by the Primary Court were charged with money laundering and six others charged with illegal transfer of money. Most of these cases were arrests at border points while attempting to bring in or take out money. However, one significant case of money laundering in which two businessmen were indicted for money laundering involved a sum of USD 103,177,625. The Primary Court found both defendants guilty and sentenced them to four years' imprisonment plus a cash fine of AFN 50,000 and confiscation of the laundered sum of USD 102,144,996. The appeal in the case is pending hearing, after the defence requested time to gather additional evidence.²⁹⁹ Although the evidence demonstrated that the sums in question were transacted through the accounts of various

Two Businessmen convicted of laundering millions in United States dollars

In Case Number 17 of 8/1397, two businessmen were indicted for money laundering involving a sum of USD 103,177,625. According to FinTRACA, several companies associated with the two defendants and their relatives were found to have transferred an amount of USD 265,525,331 to sixteen countries through regular banking channels over a period of seven years. Some identified suspects never responded to summons to appear for investigation. Although, the defendants argued that they were involved in the import and export business and that all transactions were done through the proper banking channels, evidence showed that the companies directly associated with the two defendants had only imported goods worth USD 1,032,629 in the relevant period. The sum of USD 102,144,996 therefore never returned to Afghanistan. The Primary court found both defendants guilty of money laundering and sentenced them pursuant to the provisions of the Anti-Money Laundering Law in consideration of Art. 17 of the Penal Code.

²⁹⁸ However, a primary contributor to the increase was the amount involved, USD 102, 144,996, in a single case.

²⁹⁹ Appeal Court hearing of 19 March 2019.

companies, only the two officials of the companies, and not the companies themselves, or in addition, were indicted. Earlier, in the course of investigating the money laundering case, the two defendants had attempted to bribe MCTF detectives for which they were indicted, in 2018, found guilty and sentenced to two years and six months' imprisonment.³⁰⁰

Another significant case tried in the reporting period was that of a former Deputy Minister of Finance and seven others,³⁰¹ in which the former deputy Minister and his co-defendants were indicted for treachery contrary to Articles 270, 273, 156 and 39 of the Penal Code in relation to printing contracts awarded, in 2010 and 2014, allegedly, against procurement laws. Only two defendants were present for the Primary Court hearing, and the others were thus tried in absentia. The Primary Court, by a majority, convicted all the defendants, except one, of misuse of authority. The court, substituting the treachery charge with a charge of misuse of authority under article 285(2) of the old Penal Code, sentenced the defendants to terms of imprisonment ranging between 2 years and 4.5 years. On appeal by the defendant,³⁰² the Appeal Court, while upholding the conviction, instead applied Article 403 of the new Penal Code and imposed a cash fine of AFN 240,000. The case highlights some significant legal issues, namely, the Appeal Court's application of Article 403 of the Penal Code in sentencing³⁰³ and the criminal liability of legal entities under Afghan law, in particular, how it is applied in practice.³⁰⁴ Furthermore, it is notable that this is the only ACJC case where a decision was entered by a majority rather than in unanimity.³⁰⁵ In accordance with Afghan law, which obliges a dissenting judge to record their vote and reasons after the decision is written,³⁰⁶ a dissenting opinion was appended to the decision (*faisala*).

In terms of rank of the accused, out of 87 defendants, 24 were private businessmen, 13 senior civilian and military officials and 50 lower level officials. Three officers of the rank of General, four Deputy Ministers,³⁰⁷ two members of the National Assembly, two Provincial Council Heads³⁰⁸ and one Mayor³⁰⁹ were the highest-ranking officials tried by the ACJC in the period under review.³¹⁰ However, according to the AGO, the ACJC Chief Prosecutor also submitted 24 indictments against military Generals (including 14 MoD Generals) and three against provincial governors which the Primary court

³⁰⁰ Supreme Court Case No. 1682 of 18/10/1396 (8 January 2018).

³⁰¹ Primary Court Case No. 16 of 2/11/1397 (22/01/2019); Appeal Court Case No. 23 of 26/12/1397 (17 March 2019).

³⁰² Only one defendant who appeared before the Primary Court, and was convicted, appealed. Per CPC Article 263(3), When a defendant is sentenced to imprisonment by the lower court, he/she may not appeal the sentence until after surrendering themselves for enforcement of the said sentence.

³⁰³ Application of Penal Code Article 403, instead of Article 407, allowed the Appeal Court to sentence the defendant to a cash fine.

³⁰⁴ Penal Code Article 85 provides thus: "Legal persons, except governmental organizations, offices and enterprises, shall be held responsible for the crimes committed by its representatives, directors or lawyers during performance of their duties using the name or account of the legal person."

³⁰⁵ See observation in the UNAMA Anti-Corruption Report, May 2018, p. 42 which noted that all decisions appeared to have been unanimous.

³⁰⁶ Criminal Procedure Code, Article 231: (1) If one of the members of the judicial panel does not agree with the other members, he/she is obligated to record their vote and reasons after the decision is written. (2) The judge cannot abstain from voting.

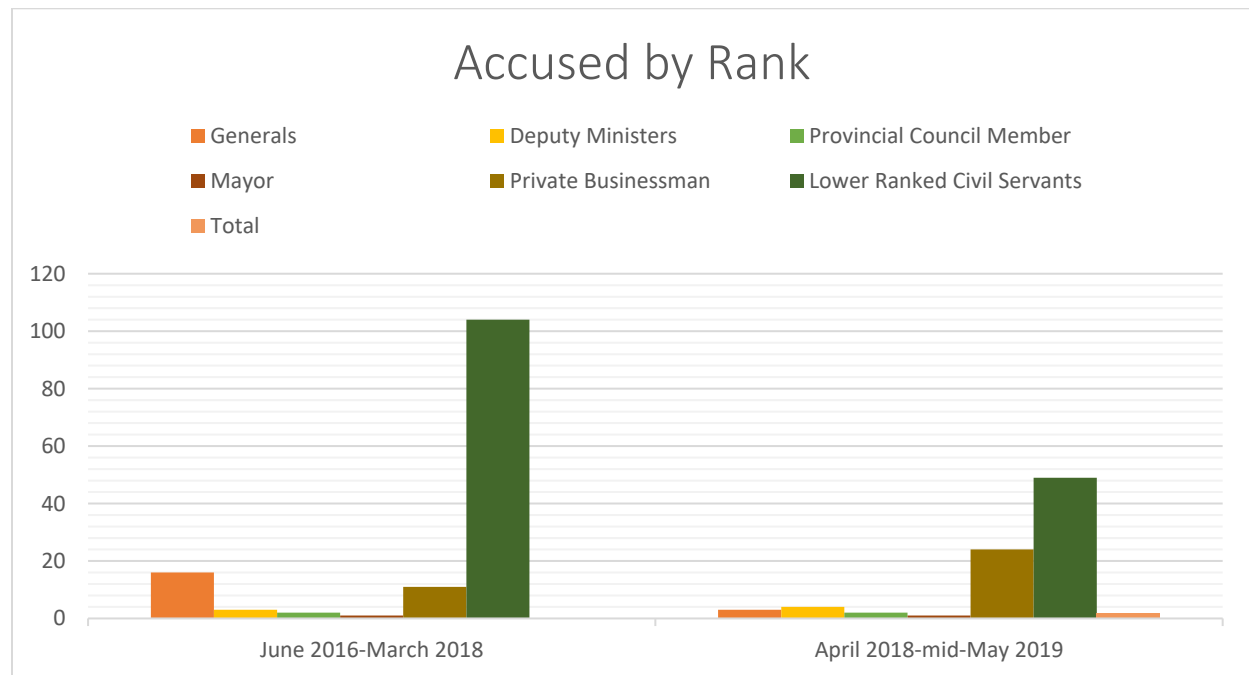
³⁰⁷ Ministry of Finance (1), Ministry of Interior (2) and Ministry of Commerce (1)

³⁰⁸ Of Nimroz and Ghor provinces.

³⁰⁹ Of the Municipality of Zabul.

³¹⁰ April 2018 to mid-May 2019.

returned to the Chief Prosecutor through judicial rulings. The Chief Prosecutor plans to re-submit the cases after covering investigatory gaps as directed by the court.



Unlike in 2017, not a single MoD official was tried in 2018.³¹¹ In May 2019, an appeal involving ten former MoD officers previously acquitted by a Kabul provincial primary court was heard by the ACJC Appeal Court.³¹² In general, the seniority and ranks of defendants tried by the ACJC in the period April 2018 to May 2019 does not compare favourably with those tried in the June 2016- March 2018 period and may suggest, among other possible explanations, a reduced appetite to indict high-profile figures.

³¹¹ Thirteen senior Ministry of Defence employees had been tried by the ACJC as of May 2018. However, according to the AGO, seven Ministry of Defence Generals were investigated and indicted by the ACJC Chief Prosecutor, but the Primary Court returned the cases to the prosecutor to cover identified gaps.

³¹² The MoD Health Department Case. The defendants were indicted for misuse of authority and or negligence of duty and all were convicted and sentenced to six months' imprisonment and restitution of AFN 17, 220,000.

3.4.2. Enforcement of warrants and summonses and difficulties to ensure defendants' attendance

The high number of *in absentia* trials was highlighted in the May 2018 UNAMA Anti-Corruption Report as having the potential to undermine the credibility of the ACJC in the eyes of the Afghan public. In addition to drawing the attention of the High Council to the problem, UNAMA recommended that law enforcement authorities build their capacities to execute summonses and arrest warrants.³¹³ Enforcement of prosecutor summonses and court orders and decisions continued to be a challenge for the ACJC in 2018.³¹⁴ Several arrest warrants for defendants who were convicted *in absentia* in 2017 and early 2018 remained unexecuted. Of concern was the protracted failure to arrest the former Commander of the Afghan National Community Order Police who was tried *in absentia* and convicted by the Primary Court and who, despite his presence in the country, has never been arrested.

Between April 2018 and March 2019, a total of twelve defendants were tried *in absentia* by the Primary Court compared to 11 in absentia trials between 2016 and April 2018. The most prominent of them was the former Minister of Communications and Information Technology who was convicted³¹⁵ twice by the Primary Court for crimes allegedly committed during his tenure as Deputy Minister of Finance.³¹⁶ Others included a former Deputy Minister of Commerce, a sitting Member of the Meshrano Jirga and officials of the Ministry of Finance as well as former officials of the Ministry of Refugees and Repatriation. The ACJC Chief Prosecutor and the Judges partly attributed this decline in cases in 2018 to the slow enforcement of summonses and arrest warrants. It is notable that many of the defendants who were tried *in absentia* had been released on guarantee pending trial. Under Afghan law, enforcement of prosecutor and court issued orders and summonses is the responsibility of the Police.³¹⁷

Deputy Ministers absconded trial despite their appearance before the ACJC days before their trial

Although the former Deputy Minister for Commerce, appeared at ACJC on 7 November 2018 to discuss his presence at the Court and signed a personal guarantee to attend court on 14 November, he did not appear on the day of the trial. Instead, on the hearing date, his defence lawyer presented a letter informing the court that the defendant had departed the country to seek medical attention for his ailing mother. His trial, therefore, proceeded in absentia pursuant to Article 212 (6) of the Criminal Procedure Code (CPC). It is not clear whether the defendant has returned to the jurisdiction but, by law, the Appeal Court cannot hear an appeal in his case until the Primary Court decision has been enforced. The same tactic appears to have been adopted by the former Deputy Minister for Finance who, a day before his trial, presented himself at the ACJC, documenting it on social media. His trial proceeded in absentia pursuant to article 209 of the CPC and, to date, there is no word on his apprehension. A second case against a former Deputy Minister of Finance, on 7 April 2019, also proceeded in absentia. He was arrested on 8 April 2019.

³¹³ UNAMA Anti-Corruption Report 2018, p 43. The report noted that thirteen very senior officials had been tried in absentia by the Primary Court, including some of them who were in the country. Furthermore, the Appeal Court had heard two appeals of accused previously tried by the Primary Court in absentia, notwithstanding that they had not submitted to the Court for enforcement of the Primary Court's decision and contrary to the provisions of Article 263(3).

³¹⁴ According to the Criminal Procedure Code Article 303, enforcement of summonses and arrest warrants is a function of the Police and other detection organs.

³¹⁵ On 22 January 2019 and 7 April 2019.

³¹⁶ The Former Minister was sentenced to three years' imprisonment in one case and to a cash fine of AFN12000 in the other. He was arrested on 8 April 2019 in enforcement of the three-year sentence.

³¹⁷ Criminal Procedure Code, Articles 92-97.

On 24 November 2018, shortly before the Geneva Conference, where the enforcement of 127 ACJC warrants and summonses was one of the benchmarks to be delivered prior to the conference³¹⁸ and following persistent probing by the international community, the High Council for Rule of Law and Anti-Corruption discussed the question of enforcement of ACJC decisions.³¹⁹ However, enforcement of ACJC orders by law enforcement units continues to lag. As of end of April 2019, a list of another 128 new warrants (46) and summonses (82) had been added to the original list of 127 warrants (48) and summonses (79). Out of both lists 44 summonses and 17 warrants had been resolved. Notably out of the 17 only six individuals were apprehended, while the rest surrendered voluntarily. Only one defendant on the list has been convicted by final decision and is serving his sentence. This shows that the practice of releasing defendants on guarantees including bail defeats collective efforts invested in bringing suspects to trial. A serious discussion on changing judicial practise or legislation to ensure presence of defendants at trial is required.

Observations:

After a decline in the ACJC's output in late 2018, its output increased remarkably in 2019 and included trials of senior officials. The ACJC mastered the transition to the new Penal Code and is increasingly effective in using its better-defined crimes. The Anti-Corruption Law's codification of the ACJC should boost its ability to tackle sensitive cases by providing it with more legal stability. However, further efforts in prosecuting anti-corruption cases need to be made. The close monitoring of the enforcement of ACJC arrest warrants and summonses demonstrated significant gaps in the ability of the law enforcement authorities to execute arrest warrants.

3.5. The Supreme Court's jurisprudence in corruption cases

Appeals to the Supreme Court in criminal cases may be brought under the following conditions: (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.³²⁰ The Supreme Court has exclusive jurisdiction to try cases of serving or former Ministers for crimes associated with the performance of their functions under a special panel in accordance with the Constitution³²¹ and the Law on the Structure and Authority of Special Courts.³²² In all criminal cases, the Supreme Court, like other Courts, is required by law to pronounce sentences publicly.³²³ The trend not to publicly announce decisions/sentences³²⁴ in any of the appeals from ACJC cases continued, despite the Supreme Court's pledge to increase transparency in its work.³²⁵

³¹⁸ See supra 2.1.

³¹⁹ High Council meeting of 24 November 2018.

³²⁰ Criminal Procedure Code Article 270 (1) Paras 1, 2 and 3.

³²¹ Afghan Constitution, Article 78 and 127.

³²² Law on the Structure and Authority of Special Courts, OG 1130 of 12 April 2014 (Special Courts Law).

³²³ Criminal Procedure Code, Article 234 (1) states "(1) The sentence shall be announced openly in any case even if the trial was a closed session".

³²⁴ This position was rationalized by referring to Penal Code, Article 183.

³²⁵ UNAMA Anti-Corruption Report, May 2018, p 45.

During 2018, the Supreme Court considered and issued decisions in twelve appeal cases from ACJC judgements bringing the total to 35 cases decided since the ACJC started operating. Like in the previous reporting period,³²⁶ the Supreme Court confirmed most verdicts and sentences entered by the ACJC Appeal Court. An exception was the case of Police Commander of Wardak Province, whom the Supreme Court acquitted, and the case of the Deputy Minister in charge of Information Technology in the Ministry of Telecommunications and Information Technology, in which the ACJC Appeal court sentenced the accused to six months' imprisonment and the Supreme Court substituted it with a cash fine.³²⁷

As stated above, the Constitution stipulates that highest-ranking officials such as Ministers who are accused of crimes are to be tried by a special court.³²⁸ According to the Supreme Court four such cases remain pending as of May 2019. In mid-2018, the Supreme Court, in an historic move³²⁹, constituted a special panel in accordance with the Special Courts Law,³³⁰ to hear the case of the former Minister for Telecommunications and Information Technology. The former Minister was indicted for misuse of authority, under Article 285(2) of the 1976 Penal Code for allegedly profiting from the recruitment of 37 staff members and from the installation of a real-time telecommunications tax accounting system. The trial was conducted in public, with court appearances on 2 and 21 July 2018. At the trial, the defendant attempted to shift the blame to the then-Minister of Finance. On 25 December 2018, the Special Court acquitted the defendant on all charges for lack of evidence, despite having repeatedly returned the case to the prosecution for further investigation. Regrettably, the Supreme Court has so far not published its decision in the case and its legal analysis and reasoning therefore remain unknown.³³¹

Observations:

The Supreme Court continued to actively adjudicate corruption cases. The first case against a former Minister was tried before a special panel composed at the Supreme Court. 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.

3.6. Asset recovery tools

The Anti-Corruption Strategy stated that civil and criminal substantive and procedural laws to “foster the prosecution of corrupt individuals and to promote the recovery of illegally acquired assets” would be revised by December 2017.³³² The coming into force, in February 2018, of the new Penal Code and

³²⁶ UNAMA Anti-Corruption Report, May 2018, p 47.

³²⁷ Appeal Court Decision No. 12 of 8 August 2018; Supreme Court Decision of 12 November 2018.

³²⁸ 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; see also The Law on Special Courts.

³²⁹ This was the first ever case of a special court being empaneled to try a Minister or former Minister.

³³⁰ Special Courts Law, Article 11.

³³¹ On 15 January 2019, Justice Mohammad Zaman Sangari, who chaired the Special Court panel, informed UNAMA that the decision in the Minister case would be published in the monthly report of the Supreme Court.

³³² Anti-Corruption Strategy, Pillar 1: Political Leadership and Empowering Reformers.

the amendment, in March 2018, of the Attorney General Office Law³³³ to create the DAG-AC's Office were steps to achieve this goal.³³⁴ The law's provisions on confiscation, forfeiture and redistribution of recovered assets, particularly rewards to individuals, require further development. The Special Secretariat of the High Council for Rule of Law and Anti-Corruption and DAG-AC Office produced a draft regulation on asset recovery and shared it with the Asset Recovery Working Group for further review and comments.³³⁵ The MoJ is expected to further develop the regulation to fill this gap³³⁶ and operationalize other laws relating to asset recovery.³³⁷

The 2015 Kabul Bank case, in which several defendants were tried and convicted for the collapse of the bank resulting in loss of over USD 982 million is an illustration of the Government's efforts to recover public resources plundered by private individuals and the challenges these efforts face. The two main masterminds in the case were sentenced to imprisonment, restitution of stolen monies and payment of fines running into hundreds of thousands of dollars. Properties of 18 groups of large debtors were also frozen, travel bans issued on 152 debtors and requests for mutual legal assistance sent to several countries, including the UAE, USA and Turkey for return of identified assets.³³⁸ The AGO informed UNAMA that as of February 2019, a total of USD 89 million had been deposited with the Kabul Bank Receivership Office. Payment arrangements with other debtors, worth USD 45million, had also been signed with the debtors.

The ACJC continued to play an important role in enforcing laws on recovery of stolen or illegally obtained public assets. Out of the 17 cases heard by the ACJC Appeal Court between March 2018 and March 2019, eight cases charged embezzlement and or money laundering. As of the end of March 2019, the ACJC had ordered restitution, confiscation, compensation and or cash fines equivalent to hundreds of millions of Afghanis.³³⁹ However, since the establishment of the ACJC, only a small fraction of the restitution, compensation, confiscation and fines had been successfully recovered.³⁴⁰

According to its 2018 annual report, FinTRACA, the Financial Intelligence Unit of the Central Bank of Afghanistan, whose mandate of tracking money flows contributes to preventing money laundering and terrorism financing, was instrumental in the administration of the country's asset recovery regime. FinTRACA transferred 56 cases to relevant Government agencies for investigation and prosecution which included 8 to the AGO, 16 to the MoI and 20 to the National Directorate of Security, among others.³⁴¹ It also shared 47 analytical reports, based on red flags, in relation to money laundering,

³³³ Article 3 of the Decree amended Article 12 (2) of the Law on Structure and Authorities of Attorney General's Office, vesting the duty and authority to take actions and make decisions on recovery of illegally acquired properties on the newly created office of Deputy Attorney General for Anti-Corruption.

³³⁴ See 2.4.1.

³³⁵ Meeting of the Asset Recovery Working Group, 6 March 2019.

³³⁶ In accordance with Anti-Corruption Law, Article 35.

³³⁷ For example, the Penal Code, Anti-Money Laundering and Proceeds of Crime Law and the Criminal Procedure Code, among others.

³³⁸ Requests were sent to the United State, United Arab Emirates, France, United Kingdom, Germany, China, India, Lithuania and Turkey, among others.

³³⁹ Cash fines of AFN 78,159,000 and USD 466,880; restitution in the amount of AFN 373,955,016 and USD 987,997; compensation amounting to AFN 720,677,785 and confiscation in the sum of USD 102,204,996 and SAR 6,701,000, IRT 309,000,000, UAED 100,000, and EUR 15,000 were ordered.

³⁴⁰ The AGO provided figures were: AFN 7,172,429, PKR 299,500 and USD 281,200 in the combined recoveries form fines, restitution, compensation and confiscations.

³⁴¹ Financial Transactions and Reports Analysis Center of Afghanistan, Annual report 2018, p. 7. Available at: https://www.fintraca.gov.af/assets/Annual%20Report/FinTRACA_Annual%20Report_2018.pdf

terrorist financing, tax evasion, smuggling and drug trafficking.³⁴² These reports formed the basis for further investigation in ACJC cases which, according to the Annual report, convicted 85 persons and recovery of AFN 87,157,000,³⁴³ USD 386,880 and confiscations of IRT 309,000,000 and SAR 5,874,200.³⁴⁴ The Anti-Terrorism department confiscated AFN 314,000 and PKR 363,000 and imposed AFN 905,080 in penalties.³⁴⁵ The number of suspicious transactions reports increased by 59.1%, from 482 in 2017 to 767 in 2018, a large majority of which were reports from commercial banks.³⁴⁶ Whether this increase was as a result of an increase in suspicious transactions or due financial monitoring and reporting cannot be assessed based on data available to UNAMA. Various amounts of cash, including USD 282,205, EUR 845,550 and INR 1,720,000, were seized at two exit points resulting in AFN 839,167 in imposed penalties in two cases while investigations were instituted in five cases.³⁴⁷

In addition, FinTRACA responded to 251 requests for analytical reports from State agencies, including the AGO, representing an increase of 39.4%.³⁴⁸ FinTRACA also signed two memorandums of understanding, with the MoI and the NPA, based on Article 28 of the Anti-Money Laundering and Proceeds of Crime Law to facilitate exchange of intelligence on money laundering and terrorist financing.³⁴⁹ FinTRACA also supported the Office for Assets Registration and Verification by providing financial analysis of high-ranking government officials to verify their asset declarations.³⁵⁰ Memorandums of understanding were signed with Kazakhstan and Australia to provide grounds for cooperation, bringing the total of such agreements to 18. In this framework, 53 outbound and inbound requests were completed.³⁵¹ Finally, FinTRACA delivered critical and much needed training to relevant institutions, including MoI, MCTF, AGO, Counter Narcotics Justice Centre, National Directorate for Security, and ACJC on the investigation of financial crimes.³⁵²

In February 2019, the European Commission adopted a blacklist of 23 third countries, including Afghanistan, for having strategic deficiencies in their anti-money laundering and counter-terrorist

³⁴² Ibid, p 7.

³⁴³ USD Exchange rates as of 15 May 2019: 1 AFN=013 USD; 1 IRT= 0.00024 USD; 1 SAR=027 USD; 1 PKR=0071 USD; 1EUR=1.12 USD; 1 INR=014 USD.

³⁴⁴ Ibid, p 8.

³⁴⁵ Ibid, p 8.

³⁴⁶ Ibid, p 10-11.

³⁴⁷ Ibid, p 13.

³⁴⁸ Ibid, p 20.

³⁴⁹ Ibid, p 21.

Article 28(5) of the Anti-Money Laundering and Proceeds of Crime Law provides: Article 28– Collection, keeping and exchange of data: (5) The financial intelligence unit, and other competent authorities may exchange information for purposes of compliance with this law and the CFT law.

³⁵⁰ Ibid, p 22. In 2018, FinTRACA received 9 requests involving 241 senior public officials, including politically exposed persons, and responded to five (with 64 persons).

³⁵¹ Ibid, p 23.

³⁵² Ibid, p 31. A total of 7 programs compose of 23 trainings involving 17 entities and resulting in 422 participants trained.

financing frameworks.³⁵³ Although the list was rejected by some European Union Member States,³⁵⁴ Afghanistan's appearance on it is a sign that it needs to continue to further strengthen its efforts to counter money-laundering and terrorism financing.

Observations:

While the ability of dedicated institutions to recover assets steadily increased, the overall amount of recovered assets remains low. Finalization and approval of asset recovery regulations foreseen in the Anti-Corruption Law, and others, in a timely manner will clarify the procedures for asset recovery and ease the work of the Attorney General's asset recovery unit. The Attorney General and relevant government agencies, especially FinTRACA, should continue to deepen their cooperation.

³⁵³See: European Commission - Press release. European Commission adopts new list of third countries with weak anti-money laundering and terrorist financing regimes Strasbourg, 13 February 2019 accessible at: https://ec.europa.eu/commission/commissioners/2014-2019/jourova/announcements/press-speaking-points-commissioner-jourova-adoption-commissions-list-high-risk-third-countries_en; <https://af.reuters.com/article/worldNews/idAFKCN1Q215T> (accessed on 15 march 2019).

³⁵⁴ See a report by The Washington Post at: https://www.washingtonpost.com/politics/2019/03/14/eu-tried-blacklist-countries-high-risk-money-laundering-it-backfired-heres-hy/?noredirect=on&utm_term=.70191d72e1b3 (accessed on 15 April 2019).

Recommendations:

to the Government:

- ⇒ Increase attention to the implementation of the NJSRP applying lessons learned from the implementation of the Anti-Corruption Strategy:
 - ensure that the NJSP's implementation is effectively monitored under the auspices of the High Council;
 - conduct a review of the NJSRP to identify areas requiring strengthening;
 - report publicly on the results of its implementation.
- ⇒ Revise legislation to strengthen judicial independence and accountability:
 - review provisions on recruitment, transfer and promotion and enhance merit-based elements as well as openness and transparency in the procedures;
 - review laws on criminal responsibility for judges to foster accountability in line with fair trial guarantees.
- ⇒ Clarify the role of the Deputy Attorney General for Anti-Corruption and assess whether the office's massive *tashkil* is still required after the creation of the Anti-Corruption Commission and if so, its prosecutorial functions should be strengthened.
- ⇒ Continue to support the effective application of the new Penal Code including its corruption related provisions through allocation of necessary budgets, and additional distribution of hard copies.
- ⇒ Strengthen police capacities to enable effective detection and investigation of corruption cases
 - reflect the reforms of the Anti-Corruption Law in the MCTF's structure and continue to strengthen the MCTF's cooperation with the ACJC prosecution;
 - continue 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 with special measures for exposed personnel working on sensitive cases.
- ⇒ Further strengthen asset recovery tools:
 - clarify the Anti-Corruption Law's asset recovery provisions in a regulation;
 - negotiate agreements on mutual legal assistance with other States.

to the Judiciary and the Attorney General's Office:

- ⇒ Strengthen internal integrity and accountability measures while upholding judicial independence and reform the disciplinary system for judges.
- ⇒ Ensure adequate application of the new Penal Code, especially its anti-corruption provisions and new sentencing regime.
- ⇒ Ensure strategic outreach regarding trials of corruption offences to communicate successes to the public and publish all final decisions with judicial reasoning, including ACJC cases.
- ⇒ Establish standard national vetting and appointment procedure for judges, prosecutors and MCTF police working at the ACJC.
- ⇒ Work to increase the amount of recovered assets.

4. Anti-Corruption measures in the Legislative Branch

Afghanistan's National Assembly is widely seen as lacking credibility and accountability due to widespread allegations of corruption against its individual members, protracted internal stalemates, and difficulties in effectively discharging its mandated functions.³⁵⁵ While in 2018 public confidence in the National Assembly appears to have slightly risen to reach 39.7 percent and in individual members to 42.3 percent, the Assembly and its members still ranked among the lowest of all institutions included in the survey.³⁵⁶

Among the Assembly's biggest challenges have been difficulties to strengthen its legislative, oversight and popular representation functions. Its tense working relationship with the Executive continued to limit its ability to conduct effective and credible institutional checks on other branches of government through its constitutional oversight functions. The National Assembly continued to play a minor role in producing legislation. In 2018, 34 laws were issued by the President under the emergency competence of Article 79 of the Constitution, while only 14 laws and 13 international treaties were passed by the National Assembly following approval by both Houses.³⁵⁷ Except for the Asset Declaration Law, which directly concerned integrity measures for Assembly members, the Upper and the Lower House debated no anti-corruption related legislation and the Penal Code remained pending review in the Lower House's legislative committee.³⁵⁸

In 2018, several external entities produced reports on the National Assembly that included recommendations to implement anti-corruption measures to improve its performance. In addition to UNAMA's Report, the MEC conducted a Vulnerability to Corruption Assessment on the Assembly³⁵⁹ and the Afghan Research and Evaluation Unit found that the Assembly, after nearly fifteen years of existence, was still unable to exercise its core functions.³⁶⁰

The Wolesi Jirga's (Lower House) Judicial Committee highlighted steps towards curbing corruption over the past year, including initiating a dialogue within the National Assembly on enhancing integrity measures. There was also a rapid increase in asset declarations by Assembly Members,³⁶¹ which the Judicial Committee said demonstrated an increased sense of accountability. The inauguration of a new Wolesi Jirga in 2019, after parliamentary elections in October 2018, presents an opportunity for

³⁵⁵ UNAMA, Anti-Corruption Report May 2018, pp 53 seq.

³⁵⁶ Asia Foundation, *Afghanistan in 2018: A Survey of the Afghan People*, 2018, p 7. Compare this with the Asia Foundation's 2017 public perceptions survey, which showed that 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. Asia Foundation, *Afghanistan in 2017: A Survey of the Afghan People*, 2017, p 98.

³⁵⁷ Counted from the Official Gazettes. The figures provided by the MOJ differ slightly. According to the MOJ, in 2017, 36 Presidential decrees were adopted under the emergency competence, while only 14 laws were passed by the National Assembly following approval by both Houses. See UNAMA 2018 Report, p. 17. See supra, 2.3.

³⁵⁸ See supra 2.4. In its comments to an earlier draft of this Report, the Wolesi Jirga noted that the Penal Code is a large text containing 916 articles and requires time to review.

³⁵⁹ The Assessment has not been published by 20 May 2019.

³⁶⁰ Afghan Research and Evaluation Unit, "The Afghan Parliament: Constitutional Mandate versus the Practice in the Post 2001 Context", Dr. Shamshad Pasarlay and Zalmay Mallyar (January 2019), at: <https://areu.org.af/archives/publication/1901> (accessed on 15 March 2019).

³⁶¹ Supra 2.6.

institutional regeneration. Some new Wolesi Jirga members campaigned explicitly on a platform of anti-corruption and pledged to improve the internal functioning of the Assembly.

On 20 and 21 October 2018, after a three-year delay, Afghanistan held Wolesi Jirga elections for the first time since 2010.³⁶² Because elections in Afghanistan pose exceptional logistical and security challenges, the immense effort and resources devoted to organizing them could be seized as an opportunity to bring about real change and increase integrity in Afghanistan's democratic institutions. What the UN Secretary-General described as the "courage and determination shown by the millions of Afghan women and men who turned out to vote across the country, often overcoming significant obstacles and defying serious security threats to elect their representatives"³⁶³ should be perceived by the elected Wolesi Jirga members as a responsibility to exercise their mandates with the utmost diligence. The personal risks taken by individual voters³⁶⁴ should be answered by the new National Assembly, with enhanced transparency measures, improved compliance by individual members with ethical standards, and increased collaboration with other branches of government and civil society. However, the massive delay in publishing election results and re-opening the National Assembly after its winter recess in 2019 only on 27 April 2019, are not encouraging. The significant allegations of corruption by candidates and the electoral institutions during the election itself suggest that not all incoming members will embrace this sense of responsibility and regeneration.

4.1. Anti-corruption measures in the Legislature

While the 2017 Anti-Corruption Strategy focused on the executive and the judicial branch,³⁶⁵ it also contained provisions related to the National Assembly. These provisions included urging the National Assembly to adopt a code of conduct and to commit the Government to support the development and implementation of an Anti-Corruption Plan.³⁶⁶ At the recommendation of donors the 2018 revision of the Strategy included a benchmark to "Pass a parliamentary anti-corruption action plan". For the first time, the revised benchmark set a time-bound target for the National Assembly, stating that the action plan was to be passed by December 2019.³⁶⁷

The Wolesi Jirga's Judicial Commission repeatedly cited that it was not consulted in the 2018 revision of the Anti-Corruption Strategy, when noting its members' lack of interest in supporting the Strategy's implementation. On the other hand, the Assembly did not seize opportunities to work with the Executive branch on advancing anti-corruption-reforms. For example, while the National Assembly stated that it would engage in the Government's anti-corruption efforts if a comprehensive Anti-Corruption Law was developed and presented to it, the Assembly did not yet schedule a debate on the law since its introduction on 11 October 2018.³⁶⁸

³⁶² Infra 4.4. Elections could not be held in Ghazni province due to disputes over constituencies and security concerns. Elections in Kandahar were held on 27 October due to the assassination of the police chief on 18 October and the need to take additional security measures.

³⁶³ The situation in Afghanistan and its implications for international peace and security Report of the Secretary General, 7 December 2018, A/73/624-S/2018/1092.

³⁶⁴ Afghanistan Protection of Civilians Special Report: 2018 Elections Violence, November 2018, at: https://unama.unmissions.org/sites/default/files/special_report_on_2018_elections_violence_november_2018.pdf (accessed on 15 March 2019).

³⁶⁵ UNAMA, Anti-Corruption Report May 2018, p 54.

³⁶⁶ 2017 Anti-Corruption Strategy, II Pillar 1.

³⁶⁷ Revised Anti-Corruption Strategy, Annex, Pillar 1.

³⁶⁸ See supra 2.4.1.

International standards and best practices for parliaments recommend the adoption of integrity instruments regulating participatory decision-making processes, transparency regarding conflicts of interest, disciplinary rules and procedures, and access to information.³⁶⁹ While the Wolesi Jirga³⁷⁰ and the Meshrano Jirga (Upper House)³⁷¹ have established Rules of Procedure for certain disciplinary measures, they have not adopted an overarching code of conduct for their members.³⁷² In 2018, nine Members of the Wolesi Jirga had their salaries suspended as a result of disciplinary proceedings. There was no report of similar proceedings by the Meshrano Jirga.

A major step in the fight against corruption was the adoption of the Law on Declaration and Registration of Assets of State Officials and Employees,³⁷³ which also obliges Members of the National Assembly to declare their assets. While compliance with asset declaration requirements has traditionally been low,³⁷⁴ the Office for Asset Registration noted that a record of 226 members of the Wolesi Jirga and 74 of the Meshrano Jirga had declared their assets April 2019. The Office for Asset Declaration and members of the Wolesi Jirga stated that this was due to the President's drive to advance asset declarations and the Palace's persistent engagement with parliamentarians.³⁷⁵

Prompted by the Palace's Special Secretariat, in late 2018 the Wolesi and Meshrano Jirgas' Secretariats developed an internal anti-corruption plan. While regulating relevant areas such as recruitment and procurement, the plans' temporal scope (1397 only) and limited jurisdiction over the secretariats alone diminished their impact.

In 2018, the MEC conducted its Vulnerability to Corruption Assessment of the Wolesi Jirga and the Meshrano Jirga, the first comprehensive anti-corruption assessment of the National Assembly. It was designed to focus on the legislative framework, institutional ethos and capacities of the Assembly. The assessment should have been published in 2018. On 16 February 2019, the draft assessment was presented to the High Council for Rule of Law and Anti-Corruption and the request of representatives of the National Assembly to review the assessment further and provide comments caused additional delays.

4.2. Criminal accountability and the National Assembly

The Afghan Constitution provides absolute immunity from prosecution for members of the National Assembly for the purposes of exercising their voting rights or expressing opinions in discharging their duties.³⁷⁶ 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. This was confirmed by the conviction of a Meshrano Jirga member by the ACJC's Primary Court on 5 May 2019 and a Wolesi Jirga member on 12 May 2019.

³⁶⁹ 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).

³⁷⁰ Rules of Procedure of the Wolesi Jirga, Chapter 12, Article 70.

³⁷¹ Rules of Procedure of the Meshrano Jirga, Chapter 12.

³⁷² UNAMA, Anti-Corruption Report May 2018, p. 55.

³⁷³ Asset Declaration Law; See also *supra*, 2.6.

³⁷⁴ UNAMA, Anti-Corruption Report May 2018, pp. 54 seq.

³⁷⁵ See *supra*, 2.6.

³⁷⁶ Afghan Constitution, Article 101.

An approval of the House is not required to start an investigation or prosecution, but it is required for the execution of detention or other measures of restraint.³⁷⁷ During an investigation, the Attorney General must request such approval when a suspect does not answer to summonses voluntarily and must be brought to an interrogation by force. According to the Attorney General he has requested the approval to detain Members of the Lower House three times, and three times for Members of the Upper House. Like in previous years, authorization to waive immunity was never granted by either House.³⁷⁸ 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 the Assembly has created a culture of de facto impunity. Notably, 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 including for past crimes. The delay in holding the Assembly elections since 2015 perpetuated this culture of impunity, as all Lower House members stayed in their offices three years beyond when their terms should have ended, benefitting from the immunity clause. Pending warrants and summonses will become enforceable against former Wolesi Jirga Members who were not re-elected in the October 2018 election, after the inauguration of the new National Assembly.

The immunities of parliamentarians have at times impeded the application of judicial procedures to senior officials. One high-profile example of this was the case of a former Herat Governor. In 2018, he was the subject of an investigation by the Attorney General for alleged misuse of authority. The AGO requested in five letters to the MOI/MCTF, starting on 14 May 2017, that he be arrested.³⁷⁹ His name and case number appeared on the list of ACJC arrest warrants to be executed prior to the Geneva Conference on 28 November 2018. However, as a Member of the Meshrano he asserted immunity from arrest. On 5 May 2019, he was found guilty by the ACJC Primary Court in his absence and sentenced to a prison term of more than one year.

The UNCAC suggests a restrictive interpretation of national immunity regulations. It 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."³⁸⁰ This provision is designed to ensure that officials are subject to a measure of accountability for corruption offences.³⁸¹ Afghan authorities have acknowledged the importance of this principle, stating in the framework of the periodic review of the UNCAC that complete immunity from prosecution "is not possible under the fundamental principles of the criminal law of Afghanistan."³⁸²

³⁷⁷ Afghan Constitution, Article 102.

³⁷⁸ Information provided by the Ministry for Parliamentary Affairs.

³⁷⁹ Letters number 3562 (27/12/2017), 633 (14/05/2017), 926 (12/06/2017), 1417 (23/07/2017), and 1786 (21/08/2017).

³⁸⁰ UNCAC, Article 30 (2).

³⁸¹ UNODC, Legislative guide for implementation of the UNCAC, 2012, paras. 386-387.

³⁸² 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).

4.3. Parliamentary oversight

The National Assembly has not yet developed a practice of exercising its oversight functions to effectively contribute to Afghanistan's anti-corruption efforts. The Constitution provides the Assembly with the authority to oversee the work of the Executive through its authority to approve the budget,³⁸³ and the Wolesi Jirga with the authority to question ministers, decide on development programmes, and approve or reject the appointment of ministers.³⁸⁴

In the legislative term since 6 March 2018, the Wolesi Jirga summoned eleven ministers and seven government officials for questioning, while the Meshrano Jirga summoned seventeen Ministers. The procedure for the approval of the 2019 national budget turned an antagonistic approach to a collaborative one. Namely, the Ministry of Finance and the competent Lower House Commission prepared the debate in close cooperation. This resulted in the National Assembly's approval of the budget on the Government's first attempt, without any amendments or delays, for the first time since 2005. The practice of close cooperation and consultation prior to voting on a sensitive matter should be continued by the Wolesi Jirga. The Ministry for Parliamentary Affairs should increasingly engage in improving the relationship. This, however, should not deprive the legislature of any genuine exercise of its representative functions or undermine the legitimate purpose of the separation of powers.

4.4. The 2018 Wolesi Jirga elections

Elections in Afghanistan are governed by an extensive legal framework. The Constitution contains basic rights such as the right to vote and stand for elections for all Afghan citizens³⁸⁵ and states that the President, Members of the Wolesi Jirga, and members of provincial and district councils should be elected through "free, general, secret and direct" voting.³⁸⁶ The Independent Election Commission (IEC) is responsible according to the Constitution for administering and supervising all elections.³⁸⁷ More detailed provisions are established by legislation, the most recent of which is the 2016 Election Law and its 2019 amendments.³⁸⁸ This Law, enacted following a lengthy consultation process led by the ad hoc Special Electoral Reform Commission, contained reforms aimed at reducing electoral fraud and improving the credibility of Afghanistan's electoral management bodies, the IEC and the Electoral Complaints Commission (ECC).

The October 2018 Wolesi Jirga elections were the first elections conducted under the 2016 Election Law, which required the IEC to introduce several reforms designed to curb electoral fraud. Prior to the elections, a nation-wide voter registration campaign was conducted using national identity cards, which replaced the widely duplicated voter cards that had been blamed for widespread fraud in past elections. This exercise enabled the creation of a nationwide voter registry, with some 8.8 million voters registered. The new voter registry also allowed for the creation of polling centre-based voter lists as a control against ballot-stuffing and multiple voting.

These measures appear to have had some effect in reducing electoral fraud. However, the October 2018 Wolesi Jirga elections were marred by technical difficulties and numerous irregularities. On election day, confusion over voter lists and the late introduction of biometric voter verification

³⁸³ Afghan Constitution, Articles 90(3), 98-99.

³⁸⁴ Afghan Constitution, Articles 91-93.

³⁸⁵ Afghan Constitution, Article 33.

³⁸⁶ Afghan Constitution, Articles 138 and 140.

³⁸⁷ Afghan Constitution, Article 156.

³⁸⁸ Election Law, Official Gazette No. 1226 of 25 September 2016.

technology caused lengthy delays in many polling centres, in some cases causing voters to return home in frustration without casting their ballot. The subsequent counting process was lengthy and contentious, and characterized by confusion, disputes between the IEC and ECC, and widespread allegations of fraud. At the time of publication, the election results from a number of provinces, including Kabul, have not yet been finalized.

The perceived mismanagement of the Wolesi Jirga elections and allegations of fraud and corruption generated calls for the removal of electoral commissioners and reinvigorated demands from political parties and civil society organizations for reforms to the electoral system. On 16 January 2019, the Government began consultations with political actors and civil society over changes to the IEC and ECC, and the mechanisms for replacing commissioners. On 11 February 2019, an ad hoc technical committee led by Second Vice-President Danesh, comprising Government officials, political parties and civil society organizations, agreed to proposed amendments to the 2016 Election Law, including a new selection process for members of both electoral commissions, new provisions for integrating technology into all phases of the electoral process, and for changing the electoral system to a multi-dimensional representation model. The draft amendments to the Election Law were approved by the Cabinet on 12 February.

On 12 February 2019, President Ghani issued a decree removing seven IEC commissioners and the five ECC commissioners. The move was generally welcomed by political parties and presidential candidates, although the outgoing IEC and ECC commissioners released a joint statement criticising their dismissal as “political”, and some civil society organizations expressed concern that the changes to the 2016 Election Law would cause delays in the electoral timeline for the upcoming President and other elections. On 3 March 2019, following consultations with political parties and civil society, President Ghani issued a decree appointing new commissioners to both the IEC and the ECC, as well as new Heads of Secretariat for both bodies. On 20 March 2019, the IEC announced a new date of 28 September 2019 for presidential and provincial council elections.

In parallel, the AG began investigating the criminal responsibility of the former commissioners and staff of the electoral management bodies. On 13 February 2019, in an official letter to the MoI, the Deputy Head of Investigations of the AGO stated that the AGO had placed travel bans on all former IEC and ECC commissioners, and that it had instructed the Afghan Border Police and airport officials to prevent them from leaving the country. This was followed on 12 March 2019 by temporary travel bans on five senior officials of the IEC Secretariat, which the AGO characterized as a precautionary measure. In a press release issued on 12 March 2019, the AGO stated that 187 cases had been investigated, involving 386 suspects from 24 provinces, and that 130 cases involving commission staff, Government officials, security forces and tribal elders, had been decided by the courts. The other 52 cases remain under investigation. On 6 May, the AGO announced that it requested the Supreme Court to clarify which court is competent in the criminal cases against the former election commissioners and other electoral officials.

Under the 2016 Election Law, candidates for parliamentary elections are required to make financial disclosures to the IEC prior to standing for election.³⁸⁹ This includes providing the IEC with information on any “movable and immovable properties”.³⁹⁰ To fulfil this requirement, the IEC developed a template for asset declarations of candidates to be completed during the candidate registration

³⁸⁹ Election Law, Article 73.

³⁹⁰ Election Law, Article 73(2)(4).

process. However, some candidates have noted that the IEC's asset declaration forms lack the level of detail found in equivalent forms completed by other public officials. In addition, although the IEC collects asset declarations, it has not developed procedures for processing or verifying them. As a consequence of their lack of detail, the forms are difficult to verify, and their submission has had little impact on the transparency of Afghanistan's electoral processes.

In 2018, UNAMA recommended that the IEC collaborate with the Office for Asset Registration and Verification, ensure that candidate financial disclosure forms are transferred to the Office for verification, and that financial disclosures be updated annually by successful candidates.³⁹¹ Amid increasing concerns that procedural loopholes were hindering asset verification, the Government made efforts to strengthen the asset declaration regime for sitting and future parliamentarians. Under GMAF benchmark 2.3,³⁹² UNAMA's recommendation was taken up and the Government committed to transferring responsibility for verifying the asset declarations of successful Wolesi Jirga candidates from the IEC to the Office for Asset Registration and Verification by 2020. The GMAF benchmark also requires that individuals who provide false declarations be sanctioned. The new Penal Code complements the Asset Declaration Law by criminalizing the submission of false or misleading asset declarations, and imposes fines between 30,000 to 180,000 AFN.³⁹³

Observations:

In 2018 and early 2019, attention to the need for anti-corruption measures in parliament increased. By including a benchmark for the National Assembly in the Anti-Corruption Strategy and by actively advancing compliance of parliamentarians with asset declaration obligation, the Executive demonstrated its intention to implement anti-corruption measures for the National Assembly where feasible. However, the development of integrity, transparency and accountability rules for both Houses of the National Assembly, as well as enforcement of internal disciplinary rules, remain relevant. The incoming Wolesi Jirga has an opportunity to improve institutional performance and compliance with integrity measures. The first ACJC convictions of Parliamentarian on corruption charges may pave the way to further accountability. Lessons learned from difficulties in the 2018 Parliamentary elections should be used to ensure the integrity of the Presidential elections.

³⁹¹ UNAMA, Anti-Corruption Report May 2018, pp. 54.

³⁹² See supra 2.1.

³⁹³ Penal Code, Article 421.

Recommendations:

to the National Assembly:

- ⇒ Use the inauguration of the new Wolesi Jirga as a starting point for delivering effectively on the oversight, legislative and representation functions:
 - establish a public accounts committee and effectively engage in the Supreme Audit Office's Work;
 - enhance the ability to review draft laws legislative review and approval processes, including for corruption-related legislation and the Penal Code.
- ⇒ Use the inauguration of the new Wolesi Jirga as a starting point for fostering National Assembly's integrity, accountability and transparency:
 - for example, all members of the Meshrano Jirga and the Wolesi Jirga should comply with their asset declaration obligations.
- ⇒ Cooperate with the executive and the judicial branch as well as with independent institutions and civil society in anti-corruption reforms:
 - work with the MEC in following-up on its recommendations;
 - work with the Access to Information Commission in promoting the right to access to information;
 - cooperate with the office for asset registration in the verification asset declarations;
 - cooperate with the Attorney General in ensuring accountability for members of the national Assembly.

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.
- ⇒ Effectively pursue criminal charges against former Wolesi Jirga members who are no longer covered by immunity from arrest.

to the Office for Registration and Verification of Assets:

- ⇒ ensure full asset registration of all Members of the National Assembly and verify the declarations taking into account the asset declarations of successful candidates of the 2018 election transferred by the IEC in accordance with the GMAF.

to the Government, civil society and donors:

- ⇒ Support the National Assembly in implementing anti-corruption measures.
- ⇒ Use the inauguration of the new Wolesi Jirga as a starting point for effectively engaging with the National Assembly in anti-corruption reforms.

5. Independent institutions' anti-corruption work

The Anti-Corruption Law changed the institutional set-up of Afghanistan's anti-corruption bodies yet again by creating a formally independent Anti-Corruption Commission, which is expected to fulfil functions of the UNCAC Article 6 body. The new commission is not yet established; its proposed features were therefore discussed in the section on anti-corruption legislation.³⁹⁴ The adoption of a dedicated Anti-Corruption Law to further comply with UNCAC delivers on a recommendation of UNAMA's 2018 Anti-Corruption Report. The Anti-Corruption Law should be extended gradually to codify anti-corruption institutions as comprehensively as possible. Further streamlining of mandates to avoid overlaps is also required, as UNAMA has recommended in previous reports. While intended to better codify anti-corruption bodies, the Anti-Corruption Law's provision allowing for the merger of anti-corruption bodies under the new Commission upon Presidential Order is a major detractor from the legal security and required independence of anti-corruption institutions.

The Access to Information Law prompted the establishment of a new Access to Information Commission, which took up its work in early 2019. Enhancing transparency and promoting the right to information of every citizen, the commission can play a key role in the fight against corruption.

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

The Independent Joint Monitoring and Evaluation Committee (MEC)'s future remains undetermined.³⁹⁵ The MEC was initially established within the High Office of Oversight and Anti-Corruption (HOOAC),³⁹⁶ in an attempt to improve the HOOAC's performance, but was later strengthened and separated from the HOOAC in 2016.³⁹⁷ The MEC is a hybrid institution with three national and three international commissioners and envisaged to be temporary in nature. Its design was intended to insulate the Committee from partisan domestic and special international interests, but as it is based on an Executive Decree that can be amended at any time and as it is exclusively donor-funded³⁹⁸ it remains vulnerable.

Changes to the institutional arrangements of anti-corruption bodies in 2018 brought an unprecedented opportunity for the MEC to increase its role and *de facto* substitute for the lack of an independent preventive anti-corruption body, which was necessary as the HOOAC was abolished in

³⁹⁴ See supra 2.4.1.

³⁹⁵ See also: UNAMA, Anti-Corruption Report May 2018, pp 59-61.

³⁹⁶ Presidential Decree on Effective Combat Against Corruption (Decree No. 61), 18 March 2010. In Article 8, the High Office of Oversight and Anti-Corruption (HOOAC) 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."

³⁹⁷ 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.

³⁹⁸ Department for International Development (DFID, UK), Danish International Development Agency (DANIDA, Denmark), Norway, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ, Germany), and United States Agency for International Development (USAID, United States), see: <http://www.mec.af/index.php/about-us/donors> (accessed 30 March 2019).

March 2018,³⁹⁹ no new Anti-Corruption Commission was in sight, and the work of the Deputy Attorney General for Anti-Corruption Affairs (DAG-AC), in particular its preventive functions, had not yet begun. In fact, the 2017 Anti-Corruption Strategy boosted this opportunity by making it the only anti-corruption institution exempt from consolidation under the DAG-AC⁴⁰⁰ and calling for it to be strengthened.⁴⁰¹ However, the Anti-Corruption Law⁴⁰² vests the new Anti-Corruption Commission with the authority to “Identify shortcomings and weaknesses of anti-corruption activities of the ministries and government organizations and publish them and issue directives and advice to remove them,”⁴⁰³ which is currently a key function of the MEC. The law’s provision that parallel anti-corruption institutions may be consolidated under the new Commission upon a Presidential Order⁴⁰⁴ leaves open whether the MEC would be considered such a parallel institution. Unlike the original Strategy, the 2018 revisions to the Strategy do not explicitly exempt the MEC from a merger.⁴⁰⁵ The Anti-Corruption Law entered into force on 5 September 2018 and the new Commission is not yet composed and will need time to take up its functions and issue internal rules and regulations on these issues.⁴⁰⁶

A possible merger of the MEC into the commission would only be desirable once the new Commission has proven its effectiveness. In fact, rushing a consolidation of the MEC under the commission would exacerbate gaps in preventive functions. Instead, if the merger has to take place, a sequenced approach, which considers the MEC’s recommendations for which institutions Vulnerability to Corruption Assessments should still be completed, would be advisable. Internal reform plans for the MEC remain under discussion at the time of writing. Ideally, the MEC should adopt a follow on-plan to its three-year Strategic Plan, which expired in November 2018. New international MEC commissioners were appointed in 2017, but one of them resigned in late 2018 and has not been replaced.

Since the last UNAMA Anti-Corruption Report, the MEC has published two Ministry-wide Vulnerability to Corruption Assessments⁴⁰⁷ and seven quarterly monitoring reports.⁴⁰⁸ Two other assessments that were planned for 2018—one on the National Assembly and the other on the Law and Order Trust Fund for Afghanistan (LOTFA)—have not been issued. In its quarterly monitoring reports issued in 2018 on the Attorney General’s Office and the Ministry of Public Health, the MEC noted improvements and high compliance with its recommendations regarding both institutions, but expressed concerns about the uneven implementation of the recommendations by the Ministry of Health.⁴⁰⁹

³⁹⁹ Law on Monitoring the Implementation of Anti-Corruption Strategy published in the OG No 957 dated 1387/5/8 was repealed through Presidential Legislative Decree No. 268 (4 March 2018), Amendments and Additions to Law on Structure and Duties of AGO contained in OG 1286.

⁴⁰⁰ Anti-Corruption Strategy, Pillar 1: Political Institutions and Leadership.

⁴⁰¹ Anti-Corruption Strategy, IV.

⁴⁰² Presidential Legislative Decree No. 327 of 5 September 2018 published in Official Gazette No. 1314.

⁴⁰³ Anti-Corruption Law, Article 17.

⁴⁰⁴ Anti-Corruption Law, Article 40 (2).

⁴⁰⁵ See *supra* 2.3.

⁴⁰⁶ Anti-Corruption Law, Article 17(2).

⁴⁰⁷ The Assessment for the Ministry of Mines and Petroleum published in December 2018 and that of the Ministry of Interior published in February 2019 available at: http://www.mec.af/files/2018_12_10_momp_full_report_en.pdf (accessed no 10 March 2019).

⁴⁰⁸ The first and second quarterly monitoring reports for the Ministry of Education (24 June and 6 November 2018), the National Bank, Quarterly Monitoring Report (9 August 2018), the second and third AGO Quarterly Monitoring Reports (14 August 2018 and 6 January 2019), and the Sixth and Seventh Ministry of Public Health Quarterly follow-up reports (February and June 2018).

⁴⁰⁹ Seventh Quarterly Monitoring Report June 2018, p.1. Available at:

Throughout 2018, the MEC continued its practice of presenting its reports to the High Council for Rule of Law and Anti-Corruption prior to publication after having obtained the High Council's explicit permission to do so.⁴¹⁰ The presentation to the High Council⁴¹¹ of draft assessments regarding the Ministry of Interior and the National Assembly highlighted the serious problems the MEC encountered in obtaining cooperation from both institutions, which in turn reduced the MEC's effectiveness and the thoroughness of its reports. High Council's support for the MEC in obtaining the cooperation of institutions prior to the finalization of its reports would increase the MEC's effectiveness.

5.2. The new independent Access to Information Commission

On 3 March 2018, the President revised the Access to Information Law by Presidential Decree⁴¹² significantly improving the 2014 version of the law.⁴¹³ Based on Article 50 of the Afghan Constitution, the law provides citizens with the right to access information from public services, if such access does not infringe upon the rights of others or public security.⁴¹⁴ The law extends the Constitutional rights of non-citizens and legal persons, and provides basic protections for whistle blowers.⁴¹⁵ The law was assessed to be among the best such laws in the world by civil society and Afghan authorities alike.⁴¹⁶

While the law is a remarkable legislative achievement, only its effective use and implementation will bring about a culture of transparency reducing corruption. Ensuring that the law is widely used and effectively implemented hinges upon the public administration and other entities, such as State-owned enterprises, providing information, as well as public outreach by the commission.⁴¹⁷ Unlike its predecessor,⁴¹⁸ the commission is organizationally independent from the Ministry for Information and Culture, and as such is mandated to conduct its activities independently from government institutions. It is an independent budget user.⁴¹⁹

The five commissioners were selected in a public and competitive process by the President, who appointed the candidates from a shortlist compiled by the dedicated selection committee, which was chaired by the Minister for Information and Culture and included the participation of civil society organizations.⁴²⁰ The commissioners' term is five years and non-renewable.⁴²¹ The current commissioners were appointed by the President on 22 November 2018⁴²² and formally assumed their functions on 30 December 2018.

http://www.mec.af/files/2018_09_10_moph_7th_quarterly_report_en.pdf (accessed no 10 March 2019).

⁴¹⁰ High Council meeting of 16 February 2019, and 25 July 2018.

⁴¹¹ High Council meeting of 16 February 2019.

⁴¹² Access to Information Law (Access to Information Law), Legislative Decree 256, dated 3 March 2018.

⁴¹³ Law on Access to Information, Official Gazette No. 1156 dated 23 December 2014. (Law on Access to Information, 2014)

⁴¹⁴ Afghan Constitution, Article 50.

⁴¹⁵ Access to information Law, March 2018, Article 7 and 30.

⁴¹⁶ Global Right to Information Rating: at: <https://www.rti-rating.org/country-detail/?country=Afghanistan> (accessed on 10 March 2019); see also: IWA, Shadow Report p. 33; Statement Afghanistan, Security Council Meeting of 11 March 2019, at: <http://afghanistan-un.org/2019/03/the-situation-in-afghanistan-5/> (accessed on 20 March 2019).

⁴¹⁷ Access to Information Law, March 2018, Article 3 (6).

⁴¹⁸ Law on Access to information 2014, Article 16.

⁴¹⁹ Access to Information Law, March 2018, Articles 20 and 30.

⁴²⁰ Access to Information Law, Articles 18-20.

⁴²¹ Access to Information Law, Articles 20 (5)-(7); the terms of two initial members are only three years.

⁴²² Presidential Executive Decree 106 of 22 November 2018.

The commission's responsibilities include: oversight of the process of requesting information and the implementation of the Access to Information Law,⁴²³ as well as assessing reports by authorities on information sharing.⁴²⁴ The commission has an important outreach function to enhance knowledge about its work and the rights enshrined in the Access to Information Law through the promotion of a culture of transparency and information sharing.⁴²⁵ Finally, the commission is competent to address complaints arising from denial of the right to access to information, advise citizens on how to exercise their right to information and issue direct requests to authorities to provide information on the citizens' behalf.⁴²⁶

In its inception phase, the commission focused on developing an annual plan, informing Afghan authorities, donors and international organizations about its activities, and addressing its resource needs. By mid-March 2019, the commission had not yet adopted its rules or procedures. As it was created in November 2018, the commission was not included in the budget for the fiscal year 2019 as an independent budget user and had to operate on the remaining budget of the former Access to Information commission.⁴²⁷ The commission requested that the Ministry of Finance consider it as an independent budget user in the 2019 mid-year budget revision. The commission stated that once its start-up phase is completed it will focus on outreach functions aimed at informing citizens about their right of access to information. While currently partnering with civil society to extend its geographical reach to all provinces, the commission will consider establishing regional offices⁴²⁸ once its work at headquarters in Kabul is consolidated and widely known.

According to the commission, by mid-March 2019 it had decided eight cases about violations of the right to access to information. In all cases its decision was enforced. Absent a website or a bulletin, the work of the commission itself is not yet accessible to citizens.

Observation:

The creation of a new Anti-Corruption Commission, designed to fulfill preventive functions under Article 6 of the UNCAC, in a new Anti-Corruption Law was an opportunity for Afghanistan to reorganize its anti-corruption institutions. As the law did not fully deliver on these demands, gradual amendments should complete the work that has started. Meanwhile, the independence of institutions such as the Access to Information Commission and the MEC should be upheld and strengthened.

⁴²³ Access to Information Law, Article 22 (1) and (10),

⁴²⁴ Access to Information Law, Article 22 (5),

⁴²⁵ Access to Information Law, Article 22 (7) and (8).

⁴²⁶ Access to Information Law, Article 22 (2), (3) and (4).

⁴²⁷ According to information from the commission this is 14 Mio Afghanis (less than 200.000USD).

⁴²⁸ Access to Information Law, Article 25.

Recommendations:

to the Government:

- ⇒ Create a political culture favourable to the work of independent institutions, by providing them with adequate financial resources and political support to their independence.
- ⇒ Respect the independence of the new Anti-Corruption Commission and resource it adequately in line with Article 6 of the UNCAC in order to avoid failures of the HOOAC.
- ⇒ Strengthen the independence of the MEC and foster engagement of concerned institutions with the MEC in their Vulnerability to Corruption Assessments.
- ⇒ Support the Access to Information Commission's work by providing it with adequate resources and cooperate with the commission in promoting the right to information.
- ⇒ Develop regulations in the Anti-Corruption Law further with a view to provide anti-corruption bodies with a solid legal bases in line with the UNCAC.

to the MEC:

- ⇒ Propose a development plan for the MEC with options of reducing international support and/or evolving into a strengthened anti-corruption institution.
- ⇒ Ensure transparent working procedures based on objective criteria regarding the selection of assessment areas.
- ⇒ Devise a strategy on how to increase cooperation of institutions subject to Assessments.

to the new Anti-Corruption Commission:

- ⇒ Exercise preventive anti-corruption functions independently in accordance with Article 6 UNCAC;
- ⇒ Activate the review mechanism of the Anti-Corruption Strategy and on this basis contribute to develop a long-term Strategy based on lessons learned and ensure a seamless transition into the new Strategy.

to the Access to Information Commission:

- ⇒ Build a culture of transparency by effectively promoting the right to access to information, in cooperation with media, civil society, and institutions.
- ⇒ Effectively seek to prevent corruption in exercising the access to information right.
- ⇒ Publicize and enforce criteria for civil servants' evaluation. These criteria could include human resource management, budget execution, and achievement of strategic objectives.

6. Civil Society initiatives on anti-corruption

Key components of civil society in Afghanistan are non-governmental organizations (NGOs), which are regulated by the 2005 Law of Non-Governmental Organizations, and Social Associations (SAs), which are regulated by the 2013 Law on Associations.⁴²⁹ Under these laws, such civil society organizations must register with the Ministry of Economy or the Ministry of Justice (MoJ), respectively, and develop charters outlining their internal working structure, which must include at a minimum directors and a general assembly. NGOs — often funded by international donors — typically focus on service delivery, promotion of individual rights, and oversight and monitoring of government. SAs include, but are not limited to, professional unions, rights associations (mostly with a focus on women and human rights), literary associations, religious councils and ethnic councils.⁴³⁰ Amendments of the legal frameworks should foster integrity and accountability among the civil society community. Some civil society organizations have developed internal integrity policies, which are however not regularly updated.⁴³¹

The UNCAC requires State parties to take “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.”⁴³² The provision is based on the idea that anti-corruption measures are more effective the more inclusive they are, and that enhanced transparency and civil society participation provide safeguards against corruption.⁴³³

In 2018 and early 2019, the leading civil society groups with a focus on anti-corruption reforms in Afghanistan included Integrity Watch Afghanistan (IWA),⁴³⁴ Afghanistan Public Policy Research Organization (APPRO), Equality for Peace and Democracy, and Afghanistan Research and Evaluation Unit (AREU). These groups contribute to anti-corruption reforms by monitoring the implementation of the Government’s anti-corruption strategies and commitments to the international donor community, advocating for and monitoring service delivery by the Government and partners at national and provincial levels, and working with provincial councils to hold provincial administrations to account.

While the capacity of Afghanistan’s civil society organisations has increased steadily since 2001, the landscape would benefit from greater diversity and increased presence in rural areas. Unfortunately, the unstable security situation, resistance of some public institutions to cooperate with civil society organizations, and a strong dependence on donor funding continue to hinder the development of a diverse and vibrant civil society sector. Civil society organizations have faced challenges in moving from project-based activities to strategic and sustainable long-term programmes. Heavy dependence on

⁴²⁹ Law on Associations of 1 September 2013, O.G.1114, Article 2; Presidential Decree 28 on the Law on Non-Governmental Organizations (NGOs) of 15 June 2005, OG, Article 5.

⁴³⁰ IWA, transparency International, 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 2 March 2019); WINTER, Elizabeth, Civil Society Development in Afghanistan http://www.lse.ac.uk/internationalDevelopment/research/NGPA/publications/winter_afghanistan_report_final.pdf (accessed on 2 March 2019).

⁴³¹ For example see IWA’s policy form 2015, at: <https://iwaweb.org/wp-content/uploads/2019/01/Anti-corruption-and-Anti-Bribery-policy.pdf> (accessed on 2 March 2019).

⁴³² UNCAC, Article 13.

⁴³³ See also, 2017 Anti-Corruption Strategy, Chapter IV, Restoring Citizens’ Trust.

⁴³⁴ See <https://iwaweb.org/> (accessed 22 March 2019).

donor funding has resulted in civil society organizations having a strong orientation towards donors, who often work with civil society organizations to compensate for their lack of access to much of the country for security reasons. The unequal distribution of donor funding has led to the dominance of certain civil society groups based on donor priorities, possibly crowding out more local initiatives. Democratic processes and internal governance within civil society organizations must be enhanced. Commitment to diversify civil society actors should be an aim for donors and established civil society actors alike. This requires engagement and flexibility of donors to provide funding also to smaller and less developed organizations in the regions and work of established organizations to reach out to smaller partners with the aim to transfer skills.

6.1. Enhanced civil society engagement, Open Government Partnership

On 15 November 2017, the Cabinet approved the two-year Open Government Partnership's (OGP)⁴³⁵ National Action Plan,⁴³⁶ which included the establishment of a joint committee of government agencies and civil society organizations to monitor the implementation of the Anti-Corruption Strategy and ministerial reform plans. The National Action Plan provided civil society organizations with a formal role in monitoring anti-corruption policies, public accountability and preventive measures.

Until March 2019, the OGP stakeholders were very active, as demonstrated by the fact that the OGP held four general meetings, fourteen working group meetings, and 34 consultation meetings with civil society organizations on the implementation of the National Action Plan. At the OGP general meeting on 18 September 2018, participants discussed the self-assessment reporting format, which clarified the overall objectives of the self-assessment, government perceptions of open governance partnership, and the results of the implementation of the National Action Plan over the previous year.

On 25 February 2019, the Civil Society Joint Working Group (CSJWG) Secretariat, which represents more than seven hundred civil society organizations across the country, established the Civil Society Anti-Corruption Coordination Centre.⁴³⁷ The Centre will bring together and coordinate anti-corruption efforts by civil society organisations, with a dedicated funding mechanism. Although the Centre's operations have not been clarified, it may be organized into several committees covering advocacy, monitoring, awareness raising and coordination.

6.2. Enhanced Civil Society Engagement in Policy Making and Monitoring

Throughout 2018, civil society organizations continued to increase their engagement in anti-corruption related policy making. Civil society continued its *ad hoc* participation in High Council meetings and regular participation in the National Procurement Commission. As a part of this engagement, civil society organizations closely monitored the implementation of the Anti-Corruption Strategy, and provided expert advice to the Anti-Corruption Secretariat, who stayed in contact with civil society representatives throughout the reporting period. IWA continued to be the most prominent and vocal civil society organizations on anti-corruption issues, producing a shadow report on the implementation of the Anti-Corruption Strategy. IWA's ability to produce such a comprehensive document demonstrates its capacity to conduct cross-sectoral research and that it possesses the expertise to produce complex qualitative reports. This report was widely shared with donors and, while never published, fed into national and international reporting on the Anti-Corruption Strategy.

⁴³⁵ The compact is the Global Agreement on OGP among members.

⁴³⁶ National Action Plan-1 2018-2019; Open Government Partnership Afghanistan.

⁴³⁷ Note to File of 25 February 2019 Civil Society Joint Working Group meeting.

The revision of the new Access to Information Law was among civil society's successes in the legislative arena.⁴³⁸ The law provides civil society with multiple avenues to promote access to information and collaborate with the new Access to Information Commission. Civil society actively contributed to the selection procedure of the commissioners and to raising awareness about citizens' rights under the law. Civil society's involvement in the drafting of the Anti-Corruption Law, however, was less smooth: the manner in which civil society lobbied for its positions impacted its working relationship with authorities and led to the perception that its policy recommendations were not strictly based on international best practises alone. On a positive note, Civil society organizations achieved their goal to be part of the selection of commissioners of the new Anti-Corruption Commission. While they stated to be still not fully satisfied with the compromise solution, it is crucial for the commission's credibility that civil society organizations exercise due diligence and transparency in the selection process and actively engage with the commission once established.⁴³⁹

Civil society representatives continued their engagement in donor conferences. On 27-28 November 2018, many participated in the Geneva Conference and used the event as a platform to highlight key findings and policy recommendations, as well as to advocate for increased transparency and accountability in all national developments.⁴⁴⁰ The anti-corruption side-event at the Geneva Conference highlighted the frank and open discourse that has developed between government officials and civil society on these issues.

On 24 January 2019, the CSJWG Secretariat conducted elections of civil society representatives in five provinces in the Northern Region (Balkh, Samangan, Faryab, Sar-i-Pul, and Jawzjan) to its regional CSJWG structure. As a result, 27 civil society organizations members were elected for the North Regional CSJWG, of whom 11 were women. This structure will allow northern provincial civil society organizations to have a more unified voice when speaking with provincial officials and, through the national CSJWG Secretariat, with national policy makers.⁴⁴¹ This election is an important component of the CSJWG's role in promoting government transparency, accountability and responsiveness at the provincial level, and to coordinate advocacy and monitoring of provincial governments.

Civil society, in particular IWA engages with local communities in community-based monitoring to increase transparency in various State-funded projects, including in construction projects and public services.

Observations:

Civil society continues to be actively engaged in Afghanistan's anti-corruption efforts. Their focus is on advocacy, policy advice, monitoring and supporting transparency in the Government's anti-corruption efforts. Increasing the organizational capacity and reach to all areas of Afghanistan, as well as diversification and increasing independence from donor funding, would benefit civil society.

⁴³⁸ See supra 5.

⁴³⁹ See supra 2.4.1.

⁴⁴⁰ Note to the file from civil society joint working group meeting.

⁴⁴¹ Note to the file from civil society joint working group meeting.

Recommendations

to the Government:

- ⇒ Continue to engage with civil society in anti-corruption reforms and proactively foster an enabling environment for civil society organization activities.
- ⇒ Support the watchdog function of civil society through proactive disclosure of information according to the new Access to Information Law.
- ⇒ Open decision making and consultation bodies at the national and the subnational level to civil society participation to the largest possible extent to build trust in civil society.
- ⇒ Lessons learned from successful civil society engagement at the national level should be used to boost civil society engagement at the local level.
- ⇒ 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 foster inclusion of civil society in anti-corruption work.
- ⇒ Work towards diversifying civil society community at national and subnational level.
- ⇒ Continue to support civil society 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 civil society engagement at the national level should be mirrored at the local level.
- ⇒ Increase coordination among civil society working on anti-corruption issues and ensure adequate support and capacity building for smaller civil society organizations.
- ⇒ Aim at facilitating and fostering citizens' engagement in political and economic decision-making processes leveraging transparency and accountability, including by promoting the right to know under the new Access to Information Law.

7. Conclusion

Throughout 2018 and in the first months of 2019, Afghanistan continued to steadily implement anti-corruption measures. These efforts were mainly driven by the Executive. Corruption reform measures require time to develop their expected results, which is why long-term and strategic planning is required. But 2018 and 2019 demonstrated that stakeholders did not always have this necessary patience and *ad hoc* interventions to change course or changes in personnel too frequently led to effectively reversing reform steps. The implementation of the Anti-Corruption Strategy is one example of a plan not being consistently followed; frequent changes in legislation without prior impact assessments is another. While Afghanistan has a solid legal framework which – while requiring some fine tuning – is a good basis to advance corruption reforms, a follow-on anti-corruption strategy to continue the current efforts seamlessly is required. The current Strategy's review mechanism should be used for this objective. Areas in which the reform Strategy was particularly successful such as civil service reform and increasing asset registrations of public officials, demonstrated the potential of Afghan institutions to yield effective results when persistently pushed. These efforts should be replicated in other areas.

The preparation, administration and counting of the results of the October 2018 elections absorbed resources and slowed down certain reform processes. Additional corruption risks materialized due to the lack of integrity of the electoral institutions. Lessons learned should be applied in the upcoming presidential elections. Nevertheless, the incoming Wolesi Jirga brings a fresh opportunity to build the National Assembly's legitimacy and introduce habits of effective exercise of parliamentary functions, including oversight and legislative functions. The new Wolesi Jirga should become a driver for anti-corruption reforms and consolidate anti-corruption measures. In the upcoming elections, Afghanistan faces a major test that it will be able to overcome only if public trust prevails over private gain where the public interest is concerned. Lessons learned from the 2018 elections should be applied to successfully prevail in this test.

Like anti-corruption-reforms, justice reforms also require persistence. Independence, integrity and accountability measures in courts and prosecution remain to be revised and strengthened, including clearer rules for transfer, promotion and vetting. While Afghanistan overall improved its ability to investigate, prosecute and adjudicate anti-corruption cases, its law enforcement and justice systems are not yet sufficiently strong to project a deterrent effect. This was painfully demonstrated by the inability to execute a list of 127 summonses and arrest warrants over longer periods. The ACJC's output fluctuated throughout 2018 and increased again in early 2019. Having emerged from difficulties in its inception phase, the ACJC should now be able to deliver on consistently prosecuting high-ranking or high-value corruption cases. Its increasing command of the new Penal Code should also enable a full use the new legislation's advantages and authorities, including the benefits of better-defined corruption offences.

The 2018 Anti-Corruption Law established a new Anti-Corruption Commission to exercise anti-corruption prevention functions. The new Commission should be granted the necessary independence to effectively carry out its work. For its success, a credible selection process of commissioners and a clear definition of its functions is required. Further fine tuning of the Anti-Corruption-Law should aim at giving institutions a firm legal basis rather than allowing that they be dissolved or consolidated by an executive order alone. Civil society and donors should continue to support anti-corruption reforms.

The revised commitments to donors, including those of the Geneva Mutual Accountability Framework provide a good basis to advance reforms.

The UN will continue to support Afghanistan's anti-corruption reforms and plans to issue its next annual anti-corruption report in May 2020.