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AFGHANISTAN'S FIGHT AGAINST CORRUPTION

Crucial for Peace and Prosperity



UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN

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List of Abbreviations

ACJC	Anti-Corruption Justice Centre
AFN	Afghan Afghani
AG	Attorney General
AGO	Attorney General's Office
AML-PC	Anti-Money Laundering and Proceeds of Crime Law
ANCOP	Afghan National Civil Order Police
ANPDF	Afghanistan National Peace and Development Framework
ARTF	Afghanistan Reconstruction Trust Fund
ASYCUDA	Automated System for Customs Data
CMS	Case Management System
COVID-19	Corona Virus Disease
CPC	Criminal Procedure Code
CPSA	Certified Public Sector Auditors
CSTC-A	Combined Transition Command-Afghanistan
DAG-AC	Deputy Attorney General for Anti-Corruption Affairs
DANIDA	Danish International Development Agency
DfID	Department for International Development
DGICC	Directorate General for Intelligence and Combating Crime
ECC	Electoral Complaints Commission
ExPres	Executive Committee on Prevention of Corruption and System Development
FinTRACA	Financial Transactions and Reports Analysis Centre of Afghanistan
GCPSU	General Command Police Special Units
GIZ	<i>Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH</i>
GMAF	Geneva Mutual Accountability Framework
HOOAC	High Office of Oversight and Anti-Corruption
IARCSC	Independent Administrative Reform and Civil Service Commission
ICCPR	International Covenant on Civil and Political Rights
ICSPA	Institutional and Capacity Support to the Parliament of Afghanistan
IDLG	Independent Directorate of Local Government
IEC	Independent Election Commission
IMF	International Monetary Fund
Interpol	International Criminal Police Organization
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
MoE	Ministry of Education
MoEC	Ministry of Economy
MoF	Ministry of Finance
MoI	Ministry of Interior
MoJ	Ministry of Justice
MoMP	Ministry of Mines and Petroleum
MoPH	Ministry of Public Health
MVCA	Ministry-wide Vulnerability to Corruption Assessments
NAP	National Action Plan
NDS	National Directorate of Security
NGO	Non-Governmental Organization
NJSRP	National Justice Sector and Judicial Reform Plan
NPA	National Procurement Authority
NPC	National Procurement Commission
OGP	Open Government Partnership
PIO	Public Information Offices
RAP	Anti-Corruption Reform Acceleration Plan
SA	Social Associations
SAO	Supreme Audit Office

SIGAR	United States Special Inspector General for Afghanistan Reconstruction
SMAF	Self-Reliance through Mutual Accountability Framework
SNGP	Subnational Governance Policy
TORs	Terms of Reference
TPC	Training and Professionalization Centre
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
U.S.	United States
USAID	United States Agency for International Development
USD	United States Dollar
VCA	Vulnerability to Corruption Assessments
WAG	Warrants Action Group

Executive summary

In 2019 and early 2020, Afghanistan continued to implement anti-corruption measures, but the focus on the Presidential elections (28 September 2019) and the protracted vote counting process that ensued distracted from the sustained attention needed to advance the anti-corruption agenda. Before the election crisis was resolved, the effects of the corona virus (COVID-19) pandemic in the first quarter of 2020 further slowed the pace of anti-corruption reforms. The previous Anti-Corruption Strategy expired in December 2019 without a successor; the evaluation of that strategy began too late and a new strategy has yet to be drafted. The combination of these factors led to an unfortunate interruption of the reform momentum that had begun in 2017 with great promise backed by a strong government commitment. The Special Secretariat for Anti-Corruption is now working on the assessment of the 2017 Anti-Corruption Strategy's outcomes in collaboration with implementing institutions and civil society. This assessment will provide the foundation for developing the government's new Anti-Corruption Strategy, building on successes and lessons learned so far.

Legislative activities overall and on anti-corruption issues in particular slowed and were reduced to amending laws and developing by-laws rather than adopting new legislation. By neither substantially advancing nor fully implementing legislative and strategic frameworks, institutional gaps widened: the Anti-Corruption Commission provided for in the September 2018 Anti-Corruption Law is yet to be established and is urgently required; the functions of other anti-corruption bodies need to be clarified; the Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC) gradually lost staff and funding; the Ombudsperson's office inaugurated in the second half of 2019 has the potential to increase accountability, but has yet to consolidate its legal foundation and begin its functions; the High Council for Rule of Law and Anti-Corruption, the motor for reform in previous years, met only seven times in 2019 instead of monthly as it had previously and as a result was not able to catalyse reforms; and the Anti-Corruption and Justice Centre (ACJC) is yet to be effectively supported by a police component. On the other hand, the Independent Administrative Reform and Civil Service Commission (IARCSC) continued to steadily advance reforms bringing about more integrity in public administration. In addition, the Access to Information Commission is gaining importance.

In 2019, the ACJC held more trials (23) than in previous years (18 in 2017 and 17 in 2018) albeit with a declining trend towards the end of the year, while the average rank of those accused declined. The trial of the former election commissioners was noteworthy and revealed the ACJC's capacity to handle a politically sensitive case. The high rejection rate of ACJC indictments before trial demonstrated persisting uncertainties about legal interpretations of criminal procedural laws and the raised questions about the prosecution's ability to gather enough evidentiary material for trial. The ACJC suffered from weak law enforcement support as demonstrated in particular by a failure to fully execute all 255 arrest warrants pending for years. Efforts to enhance cooperation between police and prosecutors also did not result in an updated joint prosecution and police warrant list. Over twenty per cent of the ACJC's trials are held in the absence of the accused. COVID-19 related prison decongestion measures, leading to the release of key defendants convicted by the ACJC, while required for public health reasons nonetheless reversed successes that the ACJC had fought hard to win. Reinvigorated efforts to recover assets stolen through corruption are necessary, in addition to prison sentences, in order for ACJC trials to have a lasting impact. Transparency of corruption decisions at all levels remained problematic. A greater effort should be made to post verdicts online.

Civil society continued to play a strong role in monitoring, advancing and advising on anti-corruption reforms. On the other hand, the National Assembly did not noticeably improve its

performance on legislative, representative and oversight functions. The new Parliament, elected in October 2018, was not inaugurated until 26 April 2019 due to the disputed counting process. The late announcement of final election results for Kabul constituency and a protracted process for internal elections of the Wolesi Jirga (Lower House) administrative board and parliamentary commissions further delayed parliamentary work. The dismissal of a Senator following a conviction for corruption by a foreign country was a sign of some accountability in the National Assembly.

In 2020, current donor commitments, including commitments on and off budget and contributions to the Afghanistan Reconstruction Trust Fund, are scheduled to be reviewed and, it is hoped, renewed. Given a declining donor interest in Afghanistan as well as numerous competing priorities, the Afghan government will likely need to do more with less. Addressing the ruinous problem of corruption, in part by formulating an effective anti-corruption strategy and implementing it, would help restore some donor confidence and enable a better use of funds provided.

This report recommends that the government develop a realistic long-term strategy that builds on past achievements; that the Anti-Corruption Commission be swiftly established; that the law-enforcement capacity dedicated to corruption investigations and related arrests be boosted; that oversight and management of public resources be strengthened; and that justice sector reforms be prioritized by fostering judicial independence. It recommends that the justice sector improve the transparency and accountability of its work and independently adjudicate corruption cases. It recommends that the National Assembly collaborate with the executive in anti-corruption reforms while strengthening its own internal accountability and integrity. Finally, it recommends that civil society and the international community continue to support and indeed insist on anti-corruption reforms.

Chapter 1: Introduction

1.1. Context

Corruption is an indicator of weak political institutionalization. Institution-building has been at the heart of the internationally funded effort since 2001 in Afghanistan because, when effective, institutions remove the uncertainty of human interaction and build trust. Furthermore, they allow for the specialization of political functions that are necessary for modern governance. But the building of institutions poses the simultaneous problem of opportunities for corruption being created in the name of removing them. As institutions are being consolidated, there are huge incentives by those who have power to co-opt them. Those who have power at the beginning of a process stand the most to lose through the institutionalization of politics.

The dangers of corruption were anticipated during the re-founding of the state after 2001. A volume of papers prepared by international experts¹ for the constitutional drafting commission had three separate articles with anti-corruption provisions, noting the international trend of incorporating anti-corruption measures into new constitutions.² Despite this advice, the 2004 constitution contains no anti-corruption provisions or institutions, only mentioning the issue once and then in a desultory manner.³ Whether a constitutional provision would have limited the problem or not can be debated. What cannot be debated is that corruption metastasized and Afghanistan has been consistently ranked among the ten most corrupt countries in the world by Transparency International, except for a brief moment in 2015 and 2016 when it rose into the bottom 20.⁴ It has been consistently mentioned by Afghans in popular surveys as one of the biggest frustrations of their daily lives.⁵ It affected the confidence of donors at a time when the lifeblood of the state was – as it remains – external funding, and when increasingly disputed elections undermined the domestic political legitimacy of the state. These factors drove donors to encourage the creation of anti-corruption institutions and legislation.

While institutions exist to reduce uncertainty, the legacy of failed institution-building collided with uncertainties about Afghanistan's future in 2019. The effort begun by the United States in 2018 to reach a bilateral agreement with the Taliban created uneasiness about the future of the political order. The presidential elections held in September of 2019 added further uncertainty. These elections were organized in the shadow of the 2018 parliamentary elections, among one of the most complex held in Afghanistan. During these the late, unplanned introduction of biometric technology and its knock-on effect on the Independent Election Commission's (IEC) ability to effectively administer the process – evident in the issuance of late instructions – as well as the security environment contributed to confusion on election day. The protracted results management process proved even more challenging. In one of the few examples of swift and

¹ These were commissioned by the Center on International Cooperation's Afghanistan Reconstruction Project (now Afghanistan Regional Project).

² "Afghanistan: Towards a New Constitution", Center on International Cooperation (New York University: New York, 2003), pp. 163-179.

³ Article 75 lists as one of several functions of the government "Maintenance of public law and order and elimination of administrative corruption."

⁴ Afghanistan's score over time in the Anti-corruption index is illustrated at: <https://www.transparency.org/en/cpi/2019/results/afg#details> (accessed on 15 May 2020); in 2019 Afghanistan dropped one spot to 173 out of 183.

⁵ Demonstrated consistently in the annual Survey of the Afghan People, which has been carried out by The Asia Foundation since 2006.

enforced legal proceedings against high level officials, the commissioners of the IEC and Electoral Complaints Commission (ECC) were found guilty of wrongdoing, as this report later describes.

The commission that oversaw the 2019 presidential election was new and untested, but well aware of what had happened to their predecessors. Here was an opportunity to see if refusing to allow impunity could deter future corruption. The 2019 election was better managed than that of 2018, but problems remained. As the Secretary General assessed: “...the [election] process was widely acknowledged to have been technically better prepared and planned than previous elections. A marked improvement was noted in the deployment of biometric devices for voter verification and results transmission, and the IEC provided previously unseen levels of access for candidate agents and observers. While there was significant progress, challenges remained. Electoral management bodies and election observer groups noted technical glitches at polling stations and the malfunctioning of biometric voter verification devices, as well as difficulties in communication due to attacks on infrastructure.”⁶ President Ashraf Ghani was ultimately declared the victor after an adjudication process. Former Chief Executive and presidential candidate Abdullah Abdullah refused to recognize the result and threatened to form his own government. In mid-May the two leaders announced an agreement on how they would work together.

After eighteen months of negotiations, the United States (U.S.) and Taliban reached an agreement on 29 February 2020. The U.S. committed itself to a conditions-based military withdrawal from Afghanistan in exchange for guarantees from the Taliban that Afghanistan would not harbour or support groups that threatened U.S. security, as well as a Taliban commitment to begin intra-Afghan negotiations with the government. While preparations are underway at the time of writing, these negotiations have yet to begin.

The report that follows provides a detailed account of ongoing attempts to rein in the problem of corruption. It does not present a picture of significant progress, yet at every level there are explanations, some more convincing than others, of why progress could not be made. Throughout the report there is a theme of confusion: overlapping jurisdictions, bodies without legal foundation, confusingly drafted legislation, and mandates without resources. A legislative framework is based on the idea of justice, and justice cannot be achieved if laws are imprecise. The many lacunae in the legal framework provide escape hatches for impunity, and impunity facilitates corruption.

1.2. Purpose, scope and methodology of the report

Since 2006,⁷ the UN Security Council regularly highlighted the importance of anti-corruption reforms in its Afghanistan-related resolutions. Since 2012, UNAMA has been explicitly mandated to assist the government with its anti-corruption efforts.⁸ UNAMA’s current mandate, United Nations Security Council resolution 2489 (2019) of 17 September 2019, directed UNAMA to: “support the efforts of the Government of Afghanistan in fulfilling its commitments to improve governance and the rule of law, including transitional justice as an essential component of the ongoing peace process, budget execution and the fight against corruption throughout the country in accordance with the Kabul Process and the Geneva Mutual Accountability Framework (GMAF)”.

⁶ UN Secretary General Report A/74/582 S/2019/935, para. 76.

⁷ Security Council resolution 1662 (23 March 2006).

⁸ See Security Council resolutions: S/RES/2041 (2012); S/RES/2145 (2014); S/RES/2210 (2015); S/RES/2274 (2016); S/RES/2344 (2017); S/RES/2405 (2018); S/RES/2460 (2019).

On 25 April 2017, 15 May 2018 and 20 May 2019, respectively, UNAMA issued its first three anti-corruption reports.⁹ This year's report covers the period between January 2019 and 30 April 2020 (unless explicitly stated otherwise). Its purpose is to support Afghanistan's anti-corruption reforms by assessing the impact of anti-corruption measures and providing concrete recommendations.

This year's report uses the same methodology as previous years. The data includes open-source material, material collected during UNAMA's mandate implementation, and material provided to UNAMA specifically for the report. While designing the report, UNAMA met representatives from the Supreme Court, the Attorney General's Office, the Anti-Corruption Justice Centre (ACJC), the Independent Administrative Reform and Civil Service Commission, the Ministries of Interior, Justice and Finance, members of parliament, and civil society. Following COVID-19-related movement restrictions, starting in mid-March 2020, in-person meetings were no longer possible. UNAMA continued meetings via telephone and IT-tools, and finalized the validation process of the report's factual basis. Through this process, it received the strong support of the Special Secretariat for Anti-Corruption (Special Secretariat), which had also helpfully commented on the report's proposed outline.

On 9 April 2020, the first draft of this report was shared in English and Dari with the Special Secretariat. Through the Special Secretariat, UNAMA received feedback and data verification from the Special Secretariat and the Ministry for Industry and Commerce (on 20 April 2020); the Attorney General's Office, the National Procurement Authority, the Independent Joint Anti-Corruption Monitoring and Evaluation Committee, the Asset Declaration Office, the Afghanistan National Bank's Financial Transactions and Reports Analysis Centre, and the Supreme Audit Office (on 22 April 2020); the Independent Directorate of Local Governance, the Administrative Office of the President, the Ministry of Communications and Information Technology, the Ministry of Economy, the Ombudspersons Office, the Ministry of Justice, and the Access to Information Commission (on 30 April 2020); the Ministry of Interior (including the Major Crimes Task Force), the electoral commissions (Independent Elections Commission and Electoral Complaints Commission), the Independent Administrative Reform and Civil Service Commission, and the Ministry of Finance (on 2 May 2020); the Supreme Court (on 5 and 6 May 2020); and the Meshrano Jirga (Upper House) (on 6 May 2020). All feedback was considered in drafting the final version of the report.

The chapter on investigation, prosecution and adjudication of corruption offences is based on data gathered in UNAMA's structured trial monitoring programme¹⁰ of all cases processed before the ACJC, and an analysis of all its written decisions during the reporting period. Following feedback received during research for the 2018 Anti-Corruption Report by the ACJC, the accused in the cases analysed are not identified in the report. The focus in assessing the ACJC's work is on trends and

⁹ UNAMA, *Afghanistan's Fight against Corruption: The Other Battlefield*, April 2017, (UNAMA Anti-Corruption Report, April 2017); UNAMA, *Afghanistan's Fight against Corruption: From Strategies to Implementation*, May 2018, (UNAMA Anti-Corruption Report, May 2018); UNAMA, *Afghanistan's Fight against Corruption: Groundwork to Peace and Prosperity*, (UNAMA Anti-Corruption Report, May 2019). All available at: <https://unama.unmissions.org/corruption> (accessed on 6 February 2020).

¹⁰ This programme is conducted according to international best practices; 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 6 February 2020).

recurring observations, which are illustrated by individual case examples where appropriate. The United Nations Office on Drugs and Crime (UNODC) also provided input for the report.

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. The finalization of the report occurred during an extraordinarily challenging period, when COVID-19 was spreading in Afghanistan and the world. As this report focuses mainly on the 2019 calendar year, the authorities' COVID-response and COVID's impact on anti-corruption reforms will be more fully considered in the 2021 report.

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

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

International donors currently provide about USD 8.5 billion in on- and off-budget support to Afghanistan per year.¹¹ This amounts to about 45 per cent of gross domestic product and 75 per cent of government spending.¹²

Donors have increasingly voiced concerns about the government's implementation of concrete steps against corruption, called for enhanced measures to combat corruption, and noted that failure to deliver could affect future funding.¹³ These resulted in improved accountability frameworks, more strategic conditionality, and an ongoing search for better tools to measure progress.

2.1.1. The United Nations Convention Against Corruption (UNCAC)

Afghanistan's international legal 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 2008.¹⁴

The UNCAC's Implementation Review Mechanism is a peer review process that assists States parties in implementing the Convention. Each State party is reviewed by two peers, one from the same regional group, which are selected by a drawing of lots at the beginning of each year of the review cycle. The first review cycle for Afghanistan¹⁵ (2010-2015) focused on criminalization, law enforcement, and international cooperation. Its recommendations were largely incorporated in the new Penal Code adopted in 2017.¹⁶ The ongoing second review cycle (2016-2020) covers UNCAC's Chapter II, "Preventive measures", and Chapter V, "Asset recovery".¹⁷ Jordan and

¹¹ SIGAR, Quarterly Report, January 2020, p. 13; at: <https://www.sigar.mil/pdf/quarterlyreports/2020-01-30qr-intro-section1.pdf> (accessed on 7 February 2020).

¹² Report of the Secretary-General, The situation in Afghanistan and its implications for international peace and security, A/74/582-S/2019/935, 10 December 2019, para 51; see also: <http://documents.worldbank.org/curated/en/776581575555846850/Financing-Peace-Fiscal-Challenges-and-Implications-for-a-Post-Settlement-Afghanistan> (accessed on 7 June 2020).

¹³ UNAMA Anti-Corruption Report, May 2018, p. 10.

¹⁴ See UNCAC Signature and Ratification Status, available at: <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (accessed on 7 February 2020).

¹⁵ 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.

¹⁶ 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> (accessed on 7 February 2020).

¹⁷ See UNCAC country profiles Afghanistan at: <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AFG> (accessed on 7 February 2020).

Dominica are peer reviewers for Afghanistan. The review is based on Afghanistan's comprehensive self-assessment, supplementary information and a dialogue with the two peer States.¹⁸ The Special Secretariat compiled and submitted the answers to the self-assessment questionnaire in cooperation with government experts of relevant institutions.¹⁹ Between 9 and 11 September 2019, Afghanistan's representatives met the reviewing States parties in Vienna for the dialogue. Under the UNCAC review mechanism, the publication of the executive summary of the review is mandatory. In addition, State parties seeking additional transparency can voluntarily publish the full country report and commit to further involvement of other stakeholders including civil society.²⁰

2.1.2. The Geneva Mutual Accountability Framework

Results of the execution of the outstanding arrest-warrant list, two years afterwards:

In order to have an unambiguous benchmark to measure the steps taken to confront corruption by law enforcement authorities, development partners and the government agreed that 127 outstanding ACJC warrants (48) and summonses (79) be executed prior to the Geneva conference. By March 2019, the list grew to 255, when 46 outstanding arrest warrants and 82 summonses were added. By March 2020, the Ministry of Interior converted summonses on both lists into warrants and reported that 171 were executed and 84 remained outstanding, including those against 34 fugitives outside of Afghanistan. The list was never exhaustive; some prominent ACJC fugitives (for example a former nominated senator) have not been added to the list, without explanation. Moreover, out of 171 warrants executed, all but four defendants were immediately released. Only one defendant on the warrants list has been tried. In late April 2020, after a change in leadership, the Major Crimes Task Force (MCTF) aimed at developing an updated and more comprehensive list, but at the time of the publication of this report no mutually agreed list by prosecution and police is available.

The Geneva Conference on Afghanistan, co-hosted by Afghanistan and the UN on 27 and 28 November 2018,²¹ provided a high-level forum to reiterate the need for Afghanistan to deliver tangible results in curbing corruption.

The international community and the government agreed that six benchmarks should be met before the conference. These included the full execution of 127 arrest warrants and summonses of the Anti-Corruption and Justice Centre (ACJC). Partners agreed in the conference's Joint Communiqué that the benchmark was not met (see box).²²

¹⁸ Terms of Reference of the Review Mechanism, para. 27.

¹⁹ See Governmental Experts List (as of 19 December 2019), at: https://www.unodc.org/documents/treaties/UNCAC/IRG-Experts/English/SecondCycle/Afghanistan_E.pdf (accessed on 7 February 2020).

²⁰ Examples for wider stakeholder consultation and participation can be found <https://uncaccoalition.org/uncac-review/uncac-review-mechanism/> (accessed on 7 February 2020).

²¹ See <https://unama.unmissions.org/geneva-conference-afghanistan> (accessed on 2 February 2019).

²² Geneva Conference on Afghanistan: Joint Communiqué, para 5. Available at: [https://unama.unmissions.org/sites/default/files/geneva conference on afghanistan - joint communique - english_0.pdf](https://unama.unmissions.org/sites/default/files/geneva%20conference%20on%20afghanistan%20-%20joint%20communique%20-%20english_0.pdf) (accessed on 2 February 2020).

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 (MoI), 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."

The Geneva Mutual Accountability Framework²³ (GMAF) has four anti-corruption indicators. The aim was to define concrete, easy to measure and impactful reform goals so that the GMAF would have a greater effect on anti-corruption reforms than the 2017-2018 Self-Reliance through Mutual Accountability Framework (SMAF).²⁴ Throughout 2019, discussions between development partners, the Ministry of Finance (MoF) and the Special Secretariat for Anti-Corruption (Special Secretariat) revealed growing disagreement about whether targets were reached. The accountability framework, intended as a tool for like-minded government officials and development partners to advance reforms, became a source of controversy between partners in

part because of disputes over the wording of benchmarks. The link between benchmark completion and the overall reform process was too often not considered.

For example, while the government and development partners agreed that the first prong of benchmark 2.1, the revision of the Anti-Corruption Strategy, was accomplished, they disagreed on the completion of the second prong, the adoption of an action plan to increase corruption prosecutions. The MoF's third quarterly report of 2019 assessed that the benchmark was fully met²⁵ because a document with such a title was approved by the High Council for Rule of Law and Anti-Corruption on 3 July 2019. However, development partners highlighted the weak quality of the document, noting that it did not address identified problems such as arrest warrant execution, reduction of *in absentia* trials and length of investigations. The government acknowledged the need to revise the plan, but did not do so in 2019. Whether the benchmark was formally met or not, steps to achieve it had little impact on the problem it sought to address.²⁶ Another lesson can be drawn from the reporting on GMAF 2.2, which required the government to track progress on the investigation and prosecution of corruption cases and work towards an increase in the number

²³ Available at: https://unama.unmissions.org/sites/default/files/gmaf_final_26_nov_2018.pdf (accessed on 2 February 2020).

²⁴ UNAMA Anti-Corruption Report, May 2019, pp 9-11.

²⁵ MoF, Geneva Mutual Accountability Framework 2019-2020, 3rd Quarterly Report, July – September 2019, p. 5.

²⁶ See *infra* Chapter 3.

of cases. The figures in the recent GMAF Quarterly Report showed an increase but they could not be independently verified because no public data on the number of cases in provinces exists.²⁷

Deliverables that required new legislation sometimes led to reverses of previous gains due to the actions of legislators. For example, deliverable 2.4 required the implementation of the Access to Information Law, which was adopted by Presidential legislative decree on 3 March 2018. However, on 27 July 2019, the National Assembly amended the law by changing the composition of the selection committee for the Access to Information Commission, potentially weakening the independence of the Commission.²⁸ This legal change altered the basis of the mutual agreement with the donors.²⁹ Difficulties in implementing this benchmark show how challenging it is to unite various institutions, including the National Assembly, to cooperate in anti-corruption reforms.

A clear lesson is that accountability benchmarks need to be realistic and capable of being independently verified. The MoF told UNAMA that in preparation for the next pledging conference, expected to be held at the end of 2020, interagency consultations on possible benchmarks had started earlier.

2.1.3. U.S. Embassy/ Resolute Support Afghanistan Compact,

In August 2017, the Afghan Government, the U.S. Embassy, and the NATO-led Resolute Support Mission launched the Afghanistan Compact, a reform mechanism comprising time-bound benchmarks related to economic growth, governance, security, and peace and reconciliation. Each month, the Afghan Government reports its progress on pending benchmarks to four bilateral working groups. The working groups determine whether reform steps were achieved and whether benchmarks should be adjusted. The compact's benchmarks and the result of the compact meetings are not public. In the update of its 2018 Anti-Corruption Audit, the U.S. Special Inspector General for Afghanistan Reconstruction (SIGAR) reviewed progress under the compact³⁰ and found that the "Afghan government met some of the anti-corruption benchmarks contained in the Afghanistan Compact," and that "[b]oth the U.S. and Afghan governments acknowledged that the Compact is a useful tool, even though it has no enforcement requirements."³¹ SIGAR reported that the advantage of the Compact was that it provided a tool to "(1) hold the Afghan government accountable, (2) have the Afghan government hold itself accountable, (3) divide large goals into discrete tasks, (4) provide regular, high-level contact between Afghan and U.S. officials, and (5)

²⁷ MoF, Geneva Mutual Accountability Framework 2019-2020, 3rd Quarterly Report, July – September 2019, p. 7.

²⁸ See *infra* 5.2.

²⁹ MoF, Geneva Mutual Accountability Framework 2019-2020, 3rd Quarterly Report, July – September 2019, p. 9.

³⁰ State Department and Foreign Operations Appropriations; Fiscal Year 2018 Omnibus Joint Explanatory Statement Division K, 22 March 2018.

³¹ SIGAR 20-06 Audit Report, Afghanistan's Anti-Corruption Efforts: The Afghan Government Made Progress in Meeting its Anti-Corruption Strategy Benchmarks, but Serious Challenges Remain to Fighting Corruption, November 2019, p. 2; at: <https://www.sigar.mil/pdf/audits/SIGAR-20-06-AR.pdf> (accessed 7 February 2020).

monitor anti-corruption commitments.”³² However, SIGAR also noted the practice of shifting timelines of the benchmarks, which perhaps reduced the effectiveness of the tool.³³

Observations

Accountability frameworks emphasized the need for tangible steps in anti-corruption reforms and aimed at providing tools for advancing reforms. The anti-corruption-related GMAF did not catalyse reforms as much as expected.

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 to advance reforms of the justice system, improve the legislative framework and fight corruption.³⁴ Its most productive and active period was in late 2017 and early 2018.³⁵ It is one of eight development councils listed in the Afghanistan National Peace and Development Framework (ANPDF),³⁶ and is responsible for overseeing two National Priority Programmes: the National Justice Sector and Judicial Reform Plan (NJSRP) and the Effective Governance Programme.³⁷ The High Council was codified in the Anti-Corruption Law with the mandate to fight corruption and coordinate relevant entities under the chairmanship of the President.³⁸ In practice, throughout 2019 the chair of the High Council was often delegated to the Second Vice President.

The High Council draws its authority in part from the seniority of its members.³⁹ The active participation of senior officials in its meetings gives its conclusions political weight. This is necessary because the High Council’s decisions on their own are not legally binding; they require a separate endorsement by the Cabinet or the President to gain a formal legal status.⁴⁰

³² Ibid, p. 12.

³³ Ibid, p. 11.

³⁴ Presidential Decree 94, Regarding the High Council for Rule of Law and Anti-Corruption (17 August 2016).

³⁵ UNAMA Anti-Corruption Report, May 2018, p. 12.

³⁶ Afghanistan National Peace and Development Framework 2017-2021, Article 5.3.b (ANPDF).

³⁷ International observers in the High Council are Denmark, the United Kingdom, the United States, the European Union, SIGAR and UNAMA.

³⁸ 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).

³⁹ The High Council’s Secretariat stated that by 2020 the number of members grew to 29. Decree No. 94 Regarding the High Council for Rule of Law and Anti-Corruption (17 August 2016). Article 2 states as follows: 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 the Afghanistan Independent Human Rights Commission; Director of Independent Directorate of Local Governance; and Director of High Office of Oversight and Anti-Corruption. See Anti-Corruption Law, Article 24.

⁴⁰ UNAMA Anti-Corruption Report, May 2018, p. 13.

The High Council's Terms of Reference require that it convenes once a month.⁴¹ While the High Council met twelve times in 2017 and 2018 respectively,⁴² it met only seven times in 2019.⁴³ The frequency of subcommittee meetings⁴⁴ remained nearly the same in 2019 as in 2018: the legislative issues subcommittee met 23 times (compared to 22 in 2018), the justice subcommittee met 10 times (compared to 11 in 2018), the anti-corruption subcommittee never met (compared to twice in 2018), and the new subcommittee on Subnational Governance met twice.⁴⁵ As in 2018, the sub-committees were not able to develop agendas that effectively prepared the High Council meetings by resolving minor issues at the technical level.⁴⁶

The ExPres Committee –complement or duplication?

In 2019, the Executive Committee on Prevention of Corruption and System Development (ExPres), an ad hoc anti-corruption body, chaired by the former Chief Executive, the Minister of Justice and Integrity Watch Afghanistan (IWA) met eight times. It focused on the coordination of anti-corruption initiatives and deepened its cooperation with the Joint Anti-Corruption Monitoring and Evaluation Commission (MEC), aiming at overseeing the implementation of its recommendations.

In 2019, the High Council approved the revised benchmarks of the 2017 Anti-Corruption Strategy⁴⁷ and the Prosecution Action Plan required by GMAF 2.1.⁴⁸ The work on a short-term document guiding anti-corruption reforms in 2020, the Anti-Corruption Reform Acceleration Plan (RAP), which was announced at the 2019 World Bank meeting, was not completed.⁴⁹ As documented below, the High Council's lack of attention to strategic issues left Afghanistan without any strategic reform document to coordinate and guide anti-corruption efforts in 2020 and beyond.

The High Council continued to perform its oversight function of previously approved anti-corruption and justice reform documents. It received two reports from the Special Secretariat on the Anti-Corruption Strategy's implementation⁵⁰ and one report by justice institutions on the

⁴¹ Terms of Reference of the High Council for Rule of Law and Anti-Corruption of 29 June 2016, Article 7.

⁴² 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).

⁴³ In 2019, High Council meetings were held on 16 and 26 February, 27 March, 3 July, 13 October, 28 November, and 19 December. In 2020, High Council meetings were held on 27 January and 11 May 2020.

⁴⁴ Terms of Reference of the High Council for Rule of Law and Anti-Corruption of 29 June 2016.

⁴⁵ The Subnational Governance Subcommittee met on 29 January 2019 and 6 March 2019, but is yet to report to the High Council about its work.

⁴⁶ UNAMA Anti-Corruption Report, May 2019, pp. 13-14.

⁴⁷ High Council Meeting of 26 February 2019.

⁴⁸ High Council Meeting of 3 July 2019; the quality of the document is discussed *supra* under 2.1.2.

⁴⁹ See *infra* 2.3.

⁵⁰ High Council Meeting of 27 March and 19 December 2019.

The Special Secretariat for Anti-Corruption's work on investigative reports on corruption and implementation of the Whistleblowers Protection Law

On 21 February 2018, the High Council requested the Special Secretariat to monitor and analyze media reports of investigative journalism on corruption allegations and brief the High Council regularly. The Secretariat developed a checklist and procedure to monitor reports and discuss them with concerned institutions. The Special Secretariat monitors whistleblowers' accounts, checks whether the Attorney General's Office follows alleged corruption cases, and monitors whether institutions protect whistleblowers. According to the Special Secretariat, it is carrying out these tasks in the interim pending the establishment of an Anti-Corruption Commission. The Special Secretariat reported that so far it has addressed 10 investigative reports and one whistleblower complaint. The Special Secretariat consulted civil society and investigative journalists on its work and will insert the outcome of the consultation in the Anti-Corruption Strategy.

national justice sector reform plan.⁵¹ The performance of the ACJC was only once on the High Council's agenda in 2019.⁵² In 2019, the High Council never received a report on the implementation of the subnational governance policy, while the responsible subcommittee was supposed to report to the High Council on a quarterly basis.⁵³ The Independent Directorate of Local Governance (IDLG) informed UNAMA that it was ready to present the report, but was waiting for a meeting to be convened.

The failure of the High Council to meet once a month, as required by its own rules, undermined the planning and

implementation of anti-corruption reforms. A key role that the High Council plays is to provide high-level political backing for integrity and accountability measures by other government entities. If these entities do not have this backing, reform steps are delayed or lack conviction. In the new institutional setup, the High Council should review its own role and relationship with anti-corruption institutions and conduct meetings more predictably. As a fall back, it could consider developing approval modalities without holding meetings; this would avoid backlogs while still demonstrating political commitment.

Observations:

In 2019, the High Council reduced its activities and delivered less output. While it continued to perform its oversight functions of the implementation of the Anti-Corruption Strategy supported by the Special Secretariat, it did not devise significant new policy guidance.

2.3. The Anti-Corruption Strategy's final year

Afghanistan's National Strategy for Combatting Corruption (Anti-Corruption Strategy)⁵⁴ was adopted by the High Council on 28 September 2017. Its implementation began on 9 December 2017⁵⁵ and ended without a successor reform document in December 2019. Lessons learned from

⁵¹ High Council Meeting of 13 October 2019.

⁵² High Council Meeting of 3 July 2019.

⁵³ Order of the President on the Creation of a Local Governance Committee of 26 December 2018, Article 2; UNAMA Anti-Corruption Report, May 2019, pp. 13-14.

⁵⁴ Strategy and implementation progress available at: <https://www.sacs.gov.af/en> (accessed on 3 March 2020).

⁵⁵ Order 2771, *Presidential Decree on the Implementation of the Anti-Corruption Strategy* of 9 December 2017.

the Strategy should assist the new government in devising a new long-term strategy that builds on the successes that were achieved early in its mandate.

While the Anti-Corruption Strategy provided a prioritized reform framework against which progress could be measured, many stakeholders felt that its overall impact was limited. This was primarily due to the Strategy's short timeframe. While noting in its own introduction that anti-corruption measures "require time to take effect,"⁵⁶ the Strategy only covered a two-year period.⁵⁷ The original Strategy's strength was its clear prioritization and its realistic approach to commit only to actions that could be delivered in the given time. As described in detail in last year's report, the prioritization and the realistic approach were diluted during the 2018 revision process⁵⁸ where some benchmarks were revised to showcase progress rather than effectively reach tangible results. Some anti-corruption policy measures not foreseen in the Strategy were implemented in parallel, leading to ad hoc changes of course. Nonetheless, key achievements from the Strategy's implementation include: a significant increase in registered asset declarations by public officials,⁵⁹ an improved legal framework to fight corruption,⁶⁰ steps towards increasing integrity in human resource management in public service, and increased recruitment through an open, merit-based process in the civil service.⁶¹

The original Strategy contained five priority pillars,⁶² 66 goals and 38 time-bound benchmarks. On 24 November 2018 and 26 February 2019, the High Council revised the Strategy. It added a priority pillar⁶³ and eliminated the distinction between goals and time-bound benchmarks, reducing them to 102.⁶⁴ The Special Secretariat, under the auspices of the High Council, led the government's monitoring of the Strategy and reported on a quarterly, semi-annual and annual basis.⁶⁵ This unique monitoring mechanism ensured transparency and allowed all stakeholders to follow implementation steps. In the first year the implementation of the Strategy proceeded mostly according to schedule and the Special Secretariat reported that, by the end of 2018, 73% of the activities were fully completed.⁶⁶ The reform pace decreased in 2019. As noted in the latest Report of the Special Secretariat to the High Council of December 2019, until the third quarter of 2019, 82 of 102 benchmarks had reportedly been met, a quite small increase against the previous year.⁶⁷ The Special Secretariat, being a technical-level entity within the President's office, could not

⁵⁶ Anti-Corruption Strategy, VIII.

⁵⁷ UNAMA Anti-Corruption Report, May 2018, p. 14.

⁵⁸ UNAMA Anti-Corruption Report, May 2019, p. 16.

⁵⁹ See *infra* 2.6.

⁶⁰ See *infra* 2.3.

⁶¹ See *infra* 2.5.

⁶² The pillars were: 1) political leadership and institutions; (2) ending corruption in the security sector; (3) replacing patronage with merit; (4) prosecuting the corrupt; and (5) tracking money flows.

⁶³ A sixth pillar, Improving Economic Institutions, was added on 24 November 2018.

⁶⁴ Revised Anti-Corruption Strategy, at: https://sacs.gov.af/uploads/strategy_pdf/Strategy_en.pdf (accessed on 3 March 2020); See UNAMA Anti-Corruption Report, May 2019, p. 16.

⁶⁵ See <https://sacs.gov.af/en> (accessed on 5 March 2019). UNAMA Anti-Corruption Report, May 2018, p. 15.

⁶⁶ Special Secretariat, Annual report of fiscal year 2018 on the implementation of National Strategy for Combating Corruption, p. 13. at: https://www.sacs.gov.af/en/reports/report_details/210 (accessed on 5 March 2020).

⁶⁷ Special Secretariat, <https://www.sacs.gov.af/uploads/reports/quarterly/261.pdf>, (accessed on 5 March 2020). A more recent report is not available absent approval of the High Council.

compensate for the declining political attention to the Strategy's implementation or redress the lack of guidance resulting from the irregular frequency of High Council meetings.⁶⁸

The RAP: an announced plan never delivered on

To demonstrate progress in anticorruption reforms in response to increasing donor criticism, the Ministry of Finance presented a "Draft Reform Acceleration Plan" (RAP) at the annual World Bank meeting in October 2019. Without a clear link to the Anti-Corruption Strategy, the RAP presented a list of 58 loosely connected reform measures to be achieved in 2020. Many of these were unimplemented reform goals already contained in the Anti-Corruption Strategy, rather than genuinely new goals. The RAP had not been consulted with any implementing organization or donors, and was never finalized. The Special Secretariat informed UNAMA that work on the RAP was now abandoned.

The Anti-Corruption-Strategy provided a mechanism to transition into a successor reform document: "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."⁶⁹ At the High Council meeting of 19 December 2019, the President ordered that the assessment of the Anti-Corruption Strategy's outcomes should begin.⁷⁰ This initiation of the review came too late to ensure a seamless transition into a new comprehensive reform document. The

Special Secretariat suggested that 31 December 2019 should not be interpreted as the end date of the Strategy, but only of the activities provided for in its benchmarks. With this interpretation the Secretariat proposed that the Strategy would remain in force until a replacement document was developed. It began to work on an extension of its benchmarks into 2020. These extended benchmarks, which could be a useful interim solution until a new comprehensive Anti-Corruption Strategy is developed, have yet to be finalized. This leaves Afghanistan without any work plan or schedule directing and coordinating current anti-corruption efforts.

In early 2020, the committee leading the impact assessment of the 2017 Strategy began its work. It is composed of representatives of the Palace Ombudsperson's Office, the Special Secretariat, the Attorney General's Office, the Ministry of Finance, and Integrity Watch Afghanistan (IWA). The committee met three times at the decision-making level and twice at the technical level. Meetings stopped as a measure of COVID-prevention in late March 2020, hence any new document will understandably be delayed. However, it remains important for the government to build on previous reform efforts and devise convincing reforms early in its term.

⁶⁸ See *supra* 2.2.

⁶⁹ Revised Anti-Corruption Strategy, VII.

⁷⁰ High Council of Rule of Law and Anti-Corruption, 19 December 2019, minutes.

Observations:

In 2019, the development of strategic anti-corruption reform documents slowed down compared to previous years and left Afghanistan without an anti-corruption-reform document or a schedule outlining sequenced reform steps on anti-corruption in 2020. COVID-19 hit Afghanistan at a time when efforts to assess previous reform steps and devise follow-up reform documents were underway. Resulting delays, while understandable, should not lessen the resolve to devise a new comprehensive Strategy early in the new term.

2.4. Legislative Reforms

The current legal framework provides a good basis for advancing anti-corruption reforms though some adjustments to clarify the institutional framework would improve it. In 2019, legislative achievements included the reform of the State Audit Office (SAO) Law which expanded its mandate and improved its working modalities. The adoption of asset recovery rules, discussed in chapter 3, completed the legislative framework for asset recovery. Legislative projects that were forecasted but not completed in the reporting period include the Ombudsperson Law,⁷¹ the NGO Law⁷² and adjustments of the Penal Code. Overall, in 2019, 17 legislative acts were passed by Presidential decree under emergency powers⁷³ while nine laws were passed by the National Assembly according to normal procedures,⁷⁴ indicating a decrease of legislative activity.⁷⁵

The Constitution states that the President's emergency power to legislate should be utilized only "in case of immediate need".⁷⁶ But, as in previous years, legislative emergency competence was routinely used to legislate.⁷⁷ The Assembly's review of anti-corruption-related Presidential decrees often threatened to reverse previous gains.⁷⁸ The failure of the National Assembly to consider key legislation adopted by Presidential decree, such as the Penal Code, the Whistle-Blower Protection Law and the Anti-Corruption Law, caused uncertainty about the status of those laws.

The Ministry of Justice (MoJ) continued to provide technical assistance in legislative drafting on an *ad hoc* basis, rather than strategically implementing a legislative reform agenda.⁷⁹ A more

⁷¹ Discussed *infra* Chapter 5.

⁷² Discussed *infra* Chapter 6.

⁷³ 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." By the time of the publication of the Report, three of them have also been adopted in Parliament.

⁷⁴ Counted is legislation published in the Official Gazettes.

⁷⁵ UNAMA Anti-Corruption Report, May 2019, p. 17 (34 legislative Presidential decrees and 14 laws in the National Assembly adopted in 2018); UNAMA Anti-Corruption Report, May 2018, p. 17 (36 legislative Presidential decrees and 16 laws in the National Assembly adopted in 2017).

⁷⁶ Afghan Constitution, Article 79.

⁷⁷ UNAMA Anti-Corruption Report, May 2019, p. 17; UNAMA Anti-Corruption Report, May 2018, p. 17.

⁷⁸ See *infra* 4.

⁷⁹ UNAMA Anti-Corruption Report, May 2019, p. 18.

comprehensive reform of the MoJ remained pending.⁸⁰ The Criminal Law Reform Working Group, an MoJ-led, internationally supported expert group, did not consider any anti-corruption legislation in 2019.

2.4.1. The Anti-Corruption Law

The Anti-Corruption Law was enacted through Presidential legislative decree on 5 September 2018 and entered into force immediately upon adoption. On 5 March 2019, it was amended by another Presidential legislative decree altering the contentious selection process of the Anti-Corruption commissioners. The revision was a compromise with civil society over the matter.⁸¹ During the reporting period, the National Assembly did not debate the law.⁸² As a result, the March 2019 version remains in force.

The Anti-Corruption Law, while welcomed, has had little impact on anti-corruption reforms. For example, it finally codified the ACJC, which had previously been based on an executive decree alone.⁸³ But the fact that the Ministry of Interior (MoI) was not able to provide an effective police-component to support the ACJC⁸⁴ made it less effective, even if it had a more solid legal basis. Similarly, the Anti-Corruption Law's asset recovery provisions did not lead to greater asset recovery⁸⁵ because it required the drafting of a by-law without clarifying whether the by-law should cover the recovery of assets solely from proceeds of anti-corruption offences or proceeds of all crimes.⁸⁶ This protracted disagreement stalled the drafting process while the asset-recovery unit put its work on hold pending clarity on asset recovery rules.⁸⁷

The law's major reform, the creation of an Anti-Corruption Commission, remains to be implemented. This Commission should be independent and exercise the functions of an UNCAC Article 6 anti-corruption prevention body.⁸⁸ After the amendment of the law on 5 March 2019, civil society and the government negotiated detailed rules on the selection and appointment of commissioners and the civil societies' involvement in this process. Having reached a compromise, the rules were adopted on 8 December 2019 and civil society re-engaged in the selection process for commissioners. The agreed appointment process calls for the President to select commissioners from a short-list presented to him by the Independent Administrative Reform and Civil Service Commission.⁸⁹

Article 40 of the Anti-Corruption Law states: "Upon establishment of the commission, the parallel anti-corruption entities shall be incorporated into the Commission within one year in accordance

⁸⁰ 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).

⁸¹ Presidential Decree No. 354 of 5 March 2019.

⁸² The Law was submitted to the National Assembly on 11 October 2018, which may approve, revise or reject it, according to the Afghan Constitution, Article 79.

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

⁸⁴ See *infra* 3.

⁸⁵ See *infra* 3.6.

⁸⁶ Anti-Corruption Law, Article 35 *et seq*.

⁸⁷ See *infra* 3.6.

⁸⁸ Anti-Corruption Law, Article 6(2) and Article 20.

⁸⁹ Anti-Corruption Law, Article 10.

with an order of the President.”⁹⁰ In the absence of a Presidential decree, this created legal uncertainty for anti-corruption institutions.⁹¹ Last year’s report pointed to the need to remove this uncertainty and recommended that the Anti-Corruption Law should become the single comprehensive codification of Afghanistan’s anti-corruption institutions.⁹² Instead, the trend has been in the direction of a proliferation of rules and institutions. Examples include the separate codification of institutions and procedures in the asset registration and verification law⁹³ and in the draft Ombudsperson law,⁹⁴ which would be best codified in a chapter of the Anti-Corruption Law. UNCAC Articles 5, 6 and 36 do not require the adoption of a comprehensive law on anti-corruption institutions,⁹⁵ 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.”⁹⁶ 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.⁹⁷ The notion of “clear mandates” requires that delineation of competencies of anti-corruption bodies should be codified. Future amendments to the Anti-Corruption Law should deliver on this aim.

2.4.2. The revised Supreme Audit Office Law

On 5 March 2020, the President issued a revised Supreme Audit Office Law (SAO Law)⁹⁸ through Presidential legislative decree. While the law entered into force immediately upon adoption, the National Assembly may still revise, reject or approve the law, but has not acted at the time of publication of this report.⁹⁹ The adoption of fundamental changes to the SAO Law successfully concludes a long consultative revision process, led by the Supreme Audit Office and supported by international experts and the MoJ, in which UNAMA and partners provided comments.¹⁰⁰

The changes bring about further alignment with international standards and norms, in particular the Lima Declaration of Guidelines on Auditing Precepts and the Mexico Declaration on Supreme Audit Institutions’ Independence.¹⁰¹ They strengthen the independence and powers of the SAO in

⁹⁰ Anti-Corruption Law, Article 40(2).

⁹¹ UNAMA Anti-Corruption Report, May 2019, p. 20.

⁹² UNAMA Anti-Corruption Report, May 2019, pp. 18-20; see also Anti-Corruption Law Articles 2 (1) and (2).

⁹³ See *infra* 2.2.

⁹⁴ See *infra* 5.3.

⁹⁵ UNODC, Legislative Guide for the Implementation of the UNCAC, paras 48 and 60. Available at: https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf (accessed on 5 March 2020).

⁹⁶ 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).

⁹⁷ *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).

⁹⁸ Presidential Legislative Decree No. 45 dated 15/12/1398 (5/3/2020) (Hereinafter referred to as the “Revised SAO Law”).

⁹⁹ The Ministry of Justice sent the decreed law to the Office of State Minister on Parliamentary Affairs, for transmission to the National Assembly via letter No. 87 dated 10/01/1399(29/03/2020).

¹⁰⁰ Comments on the draft SAO Law 10 February 2019.

¹⁰¹ The Lima Declaration of Guidelines on Auditing Precepts (adopted by the Ninth Congress of the International

its operations and human resources and financial management and define the required professional qualifications of the Auditor General.¹⁰² The tenure of the Auditor General was increased from four to six years (renewable once).¹⁰³ The immunity and – on balance – the accountability regime of senior audit officials was boosted.¹⁰⁴ Revisions kept the remuneration scheme for employees of the SAO with the aim of attracting and retaining qualified staff. They also expanded the SAO's mandate to include conducting emerging types of audits such as performance, forensic, system and environmental audits.¹⁰⁵ The SAO was upgraded to an independent budget user¹⁰⁶ and will now prepare, in consultation with the Government, its own budget which will be submitted to the National Assembly as a national budget supplement for the Assembly's approval.¹⁰⁷ This mitigates the SAO's previous financial and budget dependency on the Ministry of Finance. In sum, the changes bring a welcome reinforcement of the Office, which is now better positioned to effectively exercise its oversight functions over budget and State assets' utilization. To complement the SAO Law, regulations are required to define the procedures for outsourcing audits and clarify rules on control, income, asset disclosure and conflict of interest of SAO staff.

Throughout 2019, already well ahead of legislative changes, the SAO increased its focus on internal integrity. This resulted in the referral of cases of three staff members to the Attorney General's Office for investigation, which are still pending, and the internal transfer of others. The SAO is in the process of hiring an independent audit firm to audit its accounts and financial statements. All SAO staff declared their assets in 2019 in compliance with the Asset Declaration Law. As part of its professionalization strategy, the SAO established a Training and Professionalization Centre for a more focussed capacity development of staff, which is planned to be upgraded to a National Audit Academy for external and internal auditors in the public sectors.

UNCAC requires an effective system of accounting and auditing standards with measures to ensure oversight of management of public finances. It also requires that non-compliance with the system be sanctioned through civil, administrative and criminal measures where required.¹⁰⁸ The SAO Law complemented by criminal sanctions in the Penal Code fulfils this UNCAC obligation. The new SAO law and recent improvements in internal management should turn Afghanistan's SAO into a functioning institution that can effectively contribute to accountable budget use.

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: https://www.intosai.org/fileadmin/downloads/documents/open_access/INT_P_1_u_P_10/issai_1_en.pdf and https://afrosai-e.org.za/wp-content/uploads/2019/04/ISSAI-10_-Mexico-Declaration-on-SAI-Independence1_00.pdf (accessed on 30 March 2020).

¹⁰² Revised SAO Law, Article 8.

¹⁰³ Ibid, Article 9.

¹⁰⁴ Ibid, Article 14; Article 10(2).

¹⁰⁵ Ibid, Article 3.

¹⁰⁶ Ibid, Article 6(2).

¹⁰⁷ Ibid, Article 6.

¹⁰⁸ UNCAC, Articles 9(2)(c) and (3).

2.4.3. Anti-Corruption Legislation and Parliamentary Review

In 2019, anti-corruption related legislation, including the Penal Code, the Anti-Corruption Law, the Whistle-blower Protection Law, the Asset Declaration Law and the Access to Information Law, previously adopted as Presidential decrees, were reviewed by the National Assembly according to Article 76 of the Constitution. Only the latter two decrees were passed.

On 27 July 2019, the National Assembly adopted the Access to Information Law, with amendments that increased the number of commissioners on the Access to Information Commission from five to seven, and specified that a representative of the National Assembly and the Ministry of Justice should be part of the selection committee.¹⁰⁹ While the National Assembly's adoption of this law could signal commitment to increased transparency and respect for the legislative process, the provision to increase the members in the selection committee risks politicising it or creating the perception of politicization. The amendments contravene Afghanistan's obligations under the GMAF, which require the implementation of the Access to Information Law as it was when the GMAF was agreed.¹¹⁰

On 1 January 2019, the National Assembly approved the Assets Declaration Law as decreed by the President on 5 September 2017.¹¹¹ It expanded the categories of government officials and employees who were required to declare their assets,¹¹² obligated the publication of asset declarations of Government officials in addition to the high-ranking officials listed in Article 154 of the Constitution,¹¹³ and transferred the responsibility to register assets from the unsuccessful High Office of Oversight and Anti-Corruption (HOOAC), which was subsequently dissolved, to a newly established Asset Registration and Verification Agency within the Office of Administrative Affairs of the President.¹¹⁴ As reported last year, the new law led to an increase of asset registrations of public officials.¹¹⁵ Less than six months after it was adopted, however, the National Assembly made attempts to revise it, resulting in disagreements between the Upper and the Lower House. On 15 July 2019, the Wolesi Jirga (Lower House) removed the requirement for public officials to declare, in addition to their own, the assets of their spouses, parents and children. The Wolesi Jirga's change also excluded members of the provincial, district and municipal councils from those who must declare assets.¹¹⁶ On the other hand, the Meshrano Jirga (Upper House) proposed amendments that require the declaration of assets of spouses and minor children, and removed the requirement for annual declarations.¹¹⁷ The amendments are currently being considered by a joint committee of the two Houses. If adopted they would lower the standards of the law and reduce Afghanistan's compliance with UNCAC Article 8. Considering that the implementation of the Asset Declaration

¹⁰⁹ Decree of the President of Islamic Republic of Afghanistan, About the Endorsement of the Access to Information Law, 1 October 2019.

¹¹⁰ See *supra* 2.1.

¹¹¹ 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, 20 February 2019 (Assets Declaration Law).

¹¹² Assets Declaration Law, Articles 7 and 8.

¹¹³ Assets Declaration Law, Articles 7 and 8.

¹¹⁴ UNAMA Anti-Corruption Report, May 2019, p. 26.

¹¹⁵ UNAMA Anti-Corruption Report, May 2019, p. 26.

¹¹⁶ Wolesi Jirga Decision No. 311 of 15 July 2018.

¹¹⁷ Meshrano Jirga Decision No. 327 of 1 January 2019.

Law is a GMAF deliverable,¹¹⁸ the amendments would also be in contravention of Afghanistan's agreement with donors. While the government's difficulties with fulfilling commitments to donors related to legislation are understood, the government should deepen engagement with the National Assembly on the implications of changes to laws subject to GMAF benchmarks.

2.4.4. Penal Code

The new Penal Code, endorsed by Presidential legislative decree on 4 March 2017¹¹⁹ and in force since 14 February 2018, represents a milestone in advancing anti-corruption reforms in Afghanistan. It is the result of several years of effort to revise the 1976 Penal Code, which was in until February 2018, and to codify criminal provisions in other statutes. The Code was submitted to the National Assembly but has not been debated.¹²⁰ Meanwhile, application of the Code in the first few months of its coming into force have revealed lacunas and or grey areas. The Supreme Court took the lead in supporting the country-wide unified application of the Penal Code.

On 6 March 2019, following a recommendation of UNAMA's Penal Code implementation study, the Supreme Court issued a circular directing judges to mention the basis and reasoning for their sentencing decisions in an evidence-based manner, especially where the judges ruled on mitigation or aggravation, or on the use of minimum or maximum punishments anticipated in the law.¹²¹ To comprehensively map out the main challenges faced by judicial institutions in applying the new Code, the Supreme Court, supported by the UN and partners,¹²² held two seminars in 2019 and 2020 where judges, prosecutors, Ministry of Justice legislative drafters (the *Taqnin* Department), the Bar Association, and others shared their experiences. The goal was to foster consistent jurisprudence by supplying explanations to complicated provisions in the Code and identifying provisions where experience showed that amendments were needed. The seminars delivered two main products: a commentary providing explanations to complicated Penal Code provisions and a comprehensive list of Penal Code articles that were proposed for amendment. The Supreme Court's Commentary on the Penal Code offers guidance in legal interpretation, including on terms such as "illegal benefit", a subset of the definition of bribery. It is authoritative given the Supreme Court's legally mandated power to interpret laws and to provide clarification to courts "in order to implement law in a sound manner and to ensure a unified judicial precedent."¹²³

¹¹⁸ See *supra* 2.1.

¹¹⁹ Presidential Decree 256, 4 March 2017.

¹²⁰ Pursuant to Article 79 para 3 of the Constitution, Legislative decrees shall be presented to the National Assembly within 30 days of convening its first session, after recess.

¹²¹ Office of the Chief Justice Circular Letter# 2206-2275 dated March 6, 2019 issued pursuant to Supreme Court High Council Approval Number (1002) dated 26 February 2019).

¹²² UNAMA, UNDP and the *Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH* (GIZ) supported the seminars financially and logistically, and advised on the agenda.

¹²³ Law on Organization and Jurisdiction of Courts, OG 1109 of 30 June 2013, Article 31 (6).

A comprehensive process of collecting and discussing all proposals for the amendment to the Penal Code should also resolve the protracted debate on whether the ACJC's (and other courts') decisions can be published with a view to bringing about more transparency to the counter corruption work of the justice sector. ACJC judges have so far argued that Penal Code Article 183 (1) bars the publication of ACJC *faisalas* (verdicts) absent a formal court order.¹²⁴ However, Article 387(1) of the Penal Code mandates the publication of verdicts where there is a conviction for bribery. One way of dealing with the bottleneck in Article 183(1) is by amending the Penal Code to provide for mandatory publication of verdicts in convictions for all corruption offences.

Observations:

Afghanistan's legal framework already provides a good basis for advancing anti-corruption reforms. Further adjustments should be strategic, conserve gains and avoid proliferation of separate laws and institutions. The reporting period showed again the need to foster collaboration between the National Assembly and the government in anti-corruption reforms to prevent reversal of legislative gains in the National Assembly.

2.5. Merit-based recruitment and reforms advanced by the Civil Service Commission

The Constitution mandates that Afghanistan's "administration shall perform its duties in complete neutrality and in compliance with the provisions of the laws" and gives all Afghan citizens the right to "be recruited into public service on the basis of ability, without any discrimination, according to the provisions of the law."¹²⁵ The Independent Administrative Reform and Civil Service Commission (IARCSC) was established through the 2008 Civil Service Law to realize these rights¹²⁶ and has evolved considerably since.¹²⁷

On 19 January 2020,¹²⁸ IARCSC released its 2020-2025 Strategic Plan aimed at continuing previous reforms towards building integrity, service orientation and citizens-focus in Afghanistan's civil service.¹²⁹ The IARCSC Chairperson noted in the foreword: "Afghanistan will not be transformed without creating a strong, non-political, corruption free and efficient civil service. Only then will our nation be able to remove its economic dependency and enable us to release our key partners from the burden of our financial assistance."¹³⁰ The recognition of the importance of de-politicization, integrity and efficiency in the civil service is significant. Achieving these goals would

¹²⁴ UNAMA Anti-Corruption Report, May 2019, p. 11.

¹²⁵ Afghan Constitution Article 50.

¹²⁶ Civil Service Law, OG 951 of 8 June 2008.

¹²⁷ UNAMA Anti-Corruption Report, May 2018, p. 60-61.

¹²⁸ 2020-2025 IARCSC Strategic Plan, 19 January 2020, 2020-2025 (IARCSC Strategic Plan). Available at: https://iarcsc.gov.af/en/wp-content/uploads/sites/4/2020/01/V12_IARCSC_StrategicPlan_withPhoto-new.pdf (accessed on 10 March 2020).

¹²⁹ 2020-2025 IARCSC Strategic Plan, p. 5.

¹³⁰ 2020-2025 IARCSC Strategic, p. 1.

mean reversing a long tradition of nepotism and rewarding political loyalty with appointments in public positions.

According to IARCSC, the plan was developed after consultation with stakeholders¹³¹ and aligned with key strategies such as the Afghanistan National Peace and Development Framework.¹³² The plan focuses on the reform of six sub-units: (i) Appointments Board, (ii) Appeals Board, (iii) civil service management, (iv) Civil Service Institute, (v) Administrative Reform Secretariat, and (vi) strategic communications and public relations.¹³³ It lists reform activities for these units, but does not contain time-bound actions.¹³⁴ In its situational analysis, IARCSC acknowledges the difficulties of rolling out reforms at the provincial and local level.¹³⁵ The IARCSC assesses that peace negotiations present an opportunity for the country, but the possible outcome of a power sharing agreement may be used by political elites to use government institutions as resources to be divided among factions, undermining recent achievements in merit-based recruitment as the sole process to fill positions in public service.¹³⁶ The IARCSC's reform agenda is supported by the World Bank through the Tackling Afghanistan's Government Human Resource Management and Institutional Reforms Project.¹³⁷ While the IARCSC's reform plan highlights that "[t]he work of the commission sits within a wider National Anti-Corruption Strategy, which is a national priority, and which reinforces the commission's reforms"¹³⁸ it does not acknowledge that the benchmarks of the Anti-Corruption Strategy were only extended to December 2019 and that a new Strategy may require IARCSC to revise its plan.

Implementing a total of 126 presidential directives, decrees, cabinet and High Council decisions related to IARCSC in 2019, the commission strengthened public administration capacities, undertook functional reviews, led structural and legislative reforms, and worked towards the professionalization of public administration through merit-based recruitment. In 2019, the IARCSC continued to conduct functional reviews of public institutions to streamline functions and support administrative reforms.¹³⁹ To this end, the IARCSC has signed Memoranda of Understanding with the Ministries of Education, Agriculture and Livestock, Water and Energy, and Information and Technology, and the Supreme Audit Office. The IARCSC also reviewed and standardized job descriptions to streamline the appointment process, standardize recruitments and attract the most qualified candidates.¹⁴⁰ With a view to improving the efficiency of the public institutions and meeting the needs for capacity within government bodies, the IARCSC trained 2,411 employees inside the country and introduced 1,180 more employees to international training programmes held outside Afghanistan.

¹³¹ 2020-2025 IARCSC Strategic Plan, p. 6.

¹³² 2020-2025 IARCSC Strategic Plan, p. 1.

¹³³ 2020-2025 IARCSC Strategic Plan, p. 5.

¹³⁴ 2020-2025 IARCSC Strategic Plan, p. 22 *et seq.*

¹³⁵ 2020-2025 IARCSC Strategic Plan, p. 16 *et seq.*

¹³⁶ 2020-2025 IARCSC Strategic Plan: 2020, p. 13.

¹³⁷ 2020-2025 IARCSC Strategic Plan: 2020, p. 32.

¹³⁸ 2020-2025 IARCSC Strategic Plan: 2020, p. 14.

¹³⁹ 2020-2025 IARCSC Strategic Plan: 2020, p. 4.

¹⁴⁰ IARCSC MOU with ministries on reforms: <https://iarpsc.gov.af/en2361-2> (accessed 9 March 2020).

In 2019, the focus of the IARCSC remained on improving the quality and transparency of merit-based recruitment and increasing the number of senior level civil servants appointed through competitive recruitment while strengthening female representation in the civil service. In early 2019, the IARCSC established its own Exam Content Development and Research Centre to minimize the possibility of interference in the recruitment process using state-of-the-art technology.¹⁴¹ Computerized written exams were used for the employment of 752 senior Grade 1&2 level positions, and facilitated the identification of 651 candidates who were appointed, including 59 women. In addition to two electronic computerized exam centres established in 2018 in Kabul, the IARCSC established such centres in Balkh, Kandahar, Herat, Jalalabad, Bamyan, and Khost in 2019, with a plan to establish centres in 13 more provinces by the end of 2020. The provincial centres provide computer based written exams for Grade 3&4 level positions.

Applicants for civil service positions can appeal against decisions in the recruitment process before the IARCSC Appeals Board, the general complaint mechanism for civil servants and contracted employees. The availability of this remedy helps bolster a sense of fairness. Civil servants can use the mechanism if they disagree with their evaluations, lack of promotion, retirement, or other administrative decisions, including dissatisfaction related to dismissal. The surge in complaints in 2019 (5,209) is mainly attributed to the 2017/2018 country-wide mass recruitment exams for 17,500 entry-level positions. As further data show¹⁴² in 2019/20 a total of 3,218, or 62% of complaints, were from applicants who had not been shortlisted. In many cases it was found that applicants did not submit all required certified documentation with their applications. Another 1,359 applicants (26%) disagreed with the written exam results. Findings in the appeals decisions, suggestions on the website and other lessons learned during the 2017/18 mass recruitment process helped to improve recruitment processes for 2020, in which 6,000 entry-level positions were filled.

In February 2019, the IARCSC started to populate the civil service's "Human Resource Management Information System" in close cooperation with ministries and agencies at the national and subnational levels.¹⁴³ The database is intended to advance a merit-based career system across the civil service by maintaining accurate performance data on civil servants. When linked to the salary payroll system, the "Human Resources Management Information System" will also allow for the elimination of ghost officials and teachers. Data in this system, once completely populated, will include the full organizational structure (*tashkeel*) of all institutions, personal records of staff (*Sawaneh*), biometric attendance records, payroll information, performance evaluation and training records. *Tashkeel* information of all 54 line-ministries and agencies in 34 provinces (a total of 436,696 staff) has been uploaded to the system. 324,990 biometric data from 51 line-ministries and agencies have been entered. Currently, the IARCSC is reviewing the data for accuracy and deduplication. Like the Attorney General, the IARCSC's leadership board continued the tradition of having Mondays open to the public to directly hear citizens' concerns. In 2019, 1,349 members of the public used this service.

¹⁴¹ See <https://iarpsc.gov.af/en/board/> (accessed 9 March 2020).

¹⁴² IARCSC Appeals Board presentation to a stakeholders meeting, 27 January 2020.

¹⁴³ See <https://iarpsc.gov.af/en/news-12/> (accessed on 9 March 2020).

Observations:

Civil service reform measures continued to progress in 2019/2020. The introduction of a merit-based career system will require persistence, as will the work of streamlining public services and using IT-systems to manage data on human resources in public service. IARCSC's five-year strategic plan helped sequence reform steps with a long-term perspective.

2.6. Asset Registration and Verification

According to UNCAC, States parties are required to establish a legal framework for asset declarations in accordance with the principles of their domestic law.¹⁴⁴ Afghanistan's assets declaration and verification regime is governed by the Constitution,¹⁴⁵ the 2017 Law on Declaration and Registration of Assets of High-Ranking Officials and Employees (Assets Declaration Law),¹⁴⁶ the 2018 Penal Code¹⁴⁷ and the 2018 Anti-Corruption Law.¹⁴⁸ In addition, the required sub-legislation is currently being developed. The Constitution requires that the wealth of the President, Vice Presidents, Ministers, members of the Supreme Court and the Attorney General should be registered, reviewed and published prior to and after their terms of office.¹⁴⁹ The Asset Registration and Verification Agency (Agency), which was established under the Administrative Office of the President by the Assets Declarations Law and will transition to the Independent Anti-Corruption Commission twelve months after its establishment,¹⁵⁰ is responsible for the registration and verification of assets. The 2018 Penal Code criminalizes and punishes offences related to declaration of assets, including illicit enrichment¹⁵¹ and false declarations.¹⁵²

In 2019, the Agency continued to administer assets registration and verification,¹⁵³ building on successes in 2018,¹⁵⁴ and further consolidating the legal and administrative framework for asset registration. In 2019, the Agency registered a total of 21,362 asset declarations. In the first four months of 2020, the Agency registered 6,548 asset declarations. As in previous years, this success

¹⁴⁴ UNCAC, Article 8(5).

¹⁴⁵ Afghan Constitution, Article 154.

¹⁴⁶ 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); changes to the Law in 2019 are discussed under 2.4.

¹⁴⁷ Penal Code, OG 1260, 15 May 2017, Articles 680 and 421.

¹⁴⁸ Presidential Decree No. 187, on the Endorsement of the Anti-Corruption Law of 5 September 2018, OG-01314 (Anti-Corruption Law).

¹⁴⁹ Afghan Constitution, Article 154.

¹⁵⁰ Anti-Corruption Law, Article 17.

¹⁵¹ Penal Code, Articles 419 and 420.

¹⁵² Ibid, Article 421(1) If a public official makes false or misleading declaration on his/her assets declaration form based on the circumstance shall be sentenced to 30,000 to 180,000 AFN. (2) The funds and assets earned through commission of crimes stated in this chapter shall be confiscated based on court order.

¹⁵³ According to Articles 7(1)(17) & (18) of the Anti-Corruption Law, the function of asset registration was vested in the anti-corruption commission and was to be assumed 12 months after its establishment.

¹⁵⁴ In 2018, 16,943 government officials and employees and all, except one, high-ranking government officials under Article 154 of the Constitution declared their assets. UNAMA Anti-Corruption Report, May 2019, p. 26.

was attributed also to the President's direct support in ensuring compliance with asset declaration obligations. Despite this success, asset registration by constitutionally mandated officials declined in 2019, with only 31 out of 38 officials in this category registering their assets. Both the former Chief Executive and the former First Vice President did not register their assets in 2019¹⁵⁵ and only 23 sitting and three former ministers registered their assets. The ministers who did not declare their assets were sanctioned by suspending salaries and banning overseas trips. In 2019, 2,085 out of 2,185 judges and 3,351 out of 3,383 prosecutors registered their assets.¹⁵⁶ Among agencies with anti-corruption mandates, the National Procurement Authority (NPA), the Supreme Audit Office (SAO) and the Financial Transactions and Reports Analysis Centre of Afghanistan (FinTRACA) reported full compliance of their staff with asset declaration obligations in 2019. To enforce compliance with asset declaration obligations, the Agency may suspend the salaries and request travel bans for non-compliant officials. In 2019, the Agency sanctioned 651 officials by requesting the withholding of their salaries, and as a result 534 additional officials complied.

Success in registering asset declarations was, however, not replicated in the verification process. Only 130 out of the 21,362 declarations filed in 2019 were verified. Verification of 3,666 declarations was underway in late April 2020. The Agency attributed the low level of verification to the absence of comprehensive administrative procedures, lack of information registries in related government agencies and insufficient staff numbers. To address some of these problems, the Agency developed regulations and procedures for guiding the asset declaration, publication and verification process.¹⁵⁷ These are still to be reviewed by the MoJ. It also finalized a flow chart for its work from declaration to publication and piloted an online declaration system in January 2020. While its staffing levels continued to be too low in 2019,¹⁵⁸ the Agency conducted capacity building activities for its own staff and other public servants. The Agency also developed a system of verifying the asset declarations of high-ranking officials under Article 154 of the Constitution, whose declarations the Agency must register, review, and publish upon assumption of office and upon vacating it. However, many declarations published online are incomplete.

From the 130 verified declarations, the Agency found at least six possible cases of criminal violations which it referred to the Attorney General's Office (AGO). After reviewing the files, the AGO requested further information from the Agency, which the Agency continues to gather. No criminal proceeding for non-compliance with asset registration obligations has been initiated to date.

Under the GMAF,¹⁵⁹ Afghanistan committed to demonstrate its implementation of the Asset Declaration Law by transferring all asset declarations of successful 2018 parliamentary candidates to the Agency by verifying the declarations of high-ranking government officials, prosecutors and judges, and by enforcing sanctions against those who were non-compliant or provided false

¹⁵⁵ See: https://aop.gov.af/dr/asset_publishing/11 (Accessed on 10 May 2020).

¹⁵⁶ Supreme Court responses to a request by UNAMA for data dated 29 February 2020.

¹⁵⁷ This sub-legislation is mandated by Article 15 of the Assets Declaration Law and has four objectives, among them for better explanation and implementation of the Asset Declaration Law and to adjust and improve declarations, registration, investigation and publication of assets. It also outlines the responsibilities of the Agency in the verification process (draft Article 10).

¹⁵⁸ The overall *tashkeel* remained at 54, although the Agency was promised a review in 1399 (March 2020).

¹⁵⁹ *Supra* Chapter 2.1.

declarations.¹⁶⁰ According to the Agency, 285 out of the 320 members of the outgoing Wolesi Jirga declared their assets in 2019, while 243 members of the incoming Wolesi Jirga complied. Sixty-eight members of the Meshrano Jirga declared their assets in 2019. As of 30 April 2020, 48 members of the Wolesi Jirga and 29 Senators had registered their assets. The GMAF 3rd Quarterly Report, however, noted that the Independent Elections Commission (IEC) did not transfer the asset registrations of successful Wolesi Jirga candidates in 2019, as required under this GMAF Commitment. After an initial explanation by the IEC that its officials were too busy with the presidential election to comply, it subsequently stated that asset declaration forms were confidential IEC documents and their transfer to the Agency would violate IEC procedures.¹⁶¹ According to the third quarterly report, only 40% of this GMAF 2.3 deliverable was considered to be met.¹⁶²

Observations:

In 2019, the welcome 2018 trend of increasing compliance of public officials with the requirements to declare and register assets continued, while improvements in the verification system were marginal.

2.7. Financial Transactions and Reports Analysis Centre of Afghanistan (the Financial Intelligence Unit)

The Financial Analysis and Reports Analysis Centre of Afghanistan (FinTRACA) was established as the Financial Intelligence Unit (FIU) in 2006 under the Anti-Money Laundering and Proceeds of Crime Law (AML-PC Law),¹⁶³ endorsed by Presidential legislative decree. Based on the amended AML-PC Law, FinTRACA, while a unit of the central bank, is independent in its operations for the purpose of enforcing its powers, duties and functions. As such, it retains full autonomy in decisions to receive, analyse and disseminate information related to money laundering and terrorist financing.¹⁶⁴ FinTRACA shares suspicious transaction reports with the Attorney General's Office (AGO) that may trigger investigation and prosecution or support the recovery of stolen assets.

According to FinTRACA, in 2019 a total of 843 suspicious transaction reports were compiled, a 9% increase from 2018. A total of AFN 11,547,400 in financial penalties was levied, 11,247,400 on non-banking financial institutions and AFN 300,000 on banking institutions. Reports disseminated by FinTRACA to the AGO for investigation and prosecution led to 67 persons being indicted at the Anti-Corruption Justice Centre (ACJC). This resulted in 23 convictions and penalties of AFN 37,580,000 and USD 102,297,675, as well as confiscations of various amounts in foreign currencies.¹⁶⁵ Between January and December 2019, FinTRACA received 2,788 cash and Bearer Negotiable Instruments

¹⁶⁰ 2.1.2. Geneva Mutual Accountability Framework (GMAF), Short deliverable GMAF 2.3.

¹⁶¹ GMAF 3rd Quarterly Report, July-September 2019, p. 8. The internal regulation cited was the Candidates' Financial Guideline approved in Decision No. (41) 1397.

¹⁶² Ibid, p. 7.

¹⁶³ Anti-Money Laundering and Proceeds of Crime Law (AML-PC Law), published in OG 1142, of 23 July 2014.

¹⁶⁴ Article 25(2)-(3), AML-PC Law.

¹⁶⁵ Ibid, p. 4.

declarations with a value of USD 50,389,629 through Customs ASYCUDA Database.¹⁶⁶ During the same period, there were five cash and gold seizures, one of which resulted in conviction, imprisonment, and confiscation of assets;¹⁶⁷ the remaining four cases are still under investigation.¹⁶⁸

FinTRACA's Analysis Section analysed and shared 31 cases with investigative and detective agencies. It responded to 253 of 293 requests for information pursuant to Article 28 of the AML-PC Law, from the AGO, Mol, National Directorate of Security (NDS), the Asset Registration and Verification Agency, the National Procurement Agency (NPA) and the Afghanistan Revenue Department.¹⁶⁹ As a result, 286 predicate offences were identified. In accordance with Article 37 of the AML-PC Law, FinTRACA froze 34 corporate and individual bank accounts with total amount of AFN 51,538,178 and USD 2,466,984 following request by the ACJC, National Directorate of Security, and Major Crimes Task Force (MCTF), and others.¹⁷⁰ FinTRACA supported the Asset Registration and Verification Agency in verifying declared assets of high-ranking officials.¹⁷¹ In 2019 FinTRACA received 21 requests from the Asset Registration and Verification Agency regarding the financial analysis of 522 individuals; it responded to 15 regarding 332 individuals. This was an increase of 133% in requests received from the Agency and a 200% increase in the responses by the Centre.¹⁷²

On 19 December 2019, the General Director of Banking of the Afghanistan Central Bank was appointed as the new Director General for FinTRACA, in an exchange of offices with the long serving former director. According to the new Director General, this change in leadership was a planned, routine rotation of officers within the Central Bank and the change will not affect the work or policy direction of the organization. UNAMA is not aware of any formal human resource management process conducted for this change in positions.

Observations:

In 2019, FINTRACA continued to generate valuable information for criminal investigations in anti-money laundering and corruption cases and increasingly supported the verification of asset declarations of public officials. The agency is an example of Afghanistan's potential to build a strong expertise in a sensitive area.

¹⁶⁶ FinTRACA 2019 Annual Report, p. 8.

¹⁶⁷ Money laundering case of Mohammad Omar Khan which was tried by the ACJC Primary Court on 18 March 2019 resulting in a sentence of 5 months' imprisonment and confiscation. The verdict and sentence were affirmed by the ACJC Appeal Court on 9 April 2019.

¹⁶⁸ FinTRACA 2019 Annual Report, p. 8.

¹⁶⁹ Ibid, p. 16.

¹⁷⁰ Ibid, p.17.

¹⁷¹ Ibid, p. 18.

¹⁷² Ibid, p. 18.

2.8. Public Procurement Reforms

UNCAC requires that Afghanistan takes 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.”¹⁷³ With the 2016 Procurement Law,¹⁷⁴ Afghanistan enacted a framework to implement these obligations. However, procurement continues to be cited in national and international reports as vulnerable to corruption.

The National Procurement Commission (NPC) is by law composed of the Ministers of Finance, Economy, and Justice.¹⁷⁵ In practice, the President chairs the Commission’s meetings, which were also attended by former Chief Executive Abdullah and Second Vice President Sarwar Danesh. Its meetings are open to international and national observers, including civil society members. The NPC reviews and approves, and amends or rejects, bids for contracts that are beyond the threshold authority of procuring entities.¹⁷⁶ The threshold for open bidding contracts for goods and services in the domestic market is AFN 20 million and that for construction is AFN 100 million. The threshold is raised two-fold if procurement is international. Thresholds of restricted bidding and single-source procurement are even lower.¹⁷⁷ These thresholds appear low for consideration by the NPC, which, as noted, is chaired by the President. In 2019, the Commission held 33 sessions compared to 45 sessions in 2018. The publication of detailed minutes of the meeting would give additional transparency to the meetings.

The National Procurement Authority (NPA), through its National Procurement Commission Secretariat, manages procurements that are within the authority of the NPC.¹⁷⁸ The NPA also monitors and supervises other procurement proceedings for efficiency, transparency and compliance with the law, and monitors progress of contract implementation in accordance with procurement rules and procedures.¹⁷⁹ Presidential executive decree No. 100, issued in November 2018 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”, further clarified the NPA’s role in relation to procuring entities. While procurement below the NPC threshold remained the responsibility of the procuring government entity, the NPA supervised the process from the receipt of the “needs verification document” to the conclusion of the contract.¹⁸⁰

In 2019, the NPA reported implementing reforms aimed at fighting corruption. It created an integrity email address and affixed complaints boxes in all procurement offices to receive complaints electronically and physically, and instituted remedies for whistle-blowers resulting in 44 cases being reported.¹⁸¹ It held weekly “procurement transparency days” to receive complaints

¹⁷³ UNCAC, Article 9 (1).

¹⁷⁴ Procurement Law, OG No. 1223 of 17 September 2016 (Procurement Law).

¹⁷⁵ Procurement Law, Article 54(1).

¹⁷⁶ Procurement Law, Article 54(1).

¹⁷⁷ As low as AFN 5 million and AFN 8 million for single-source and restricted bidding respectively for procurement of services in the domestic market.

¹⁷⁸ Procurement Law, Article 54(6).

¹⁷⁹ Procurement Law, Articles 56 and 57.

¹⁸⁰ Article 1, Decree of President of Islamic Republic of Afghanistan on Coordination of Procurement Processes for Government Administrations, Decree No. 100, November 2018.

¹⁸¹ Thirty-three of these reports were investigated and resolved, while 11 are under process.

and interact with contractors and the public in the presence of the Access to Information Commission, civil society organizations and media representatives. This resulted in 130 cases being resolved. As part of its drive to encourage women to take part in government tenders, the NPA gave preference to companies owned by women. Despite these measures, accountability remained weak. It is unclear what happened to the 44 cases exposed by whistle blowers. On 19 September 2019, the Secretary of State of the United States of America, Mr. Michael Pompeo, expressed concern over the lack of transparency surrounding procurement decisions taken by the NPA and announced the withholding of USD 60 million in planned assistance due to the government's failure to meet benchmarks for transparency and accountability.¹⁸² A major bid rigging case of 2016 remains unprosecuted.¹⁸³

In February 2020, the NPA finalized plans to pilot an electronic tendering process, as part of its electronic procurement system introduced in October 2018. The NPC also asserted that as a result of its implementation of Presidential executive decree No. 100,¹⁸⁴ red tape in procurement had been reduced, increasing the number of projects it had processed from 763 in 2018 to 1,018 in 2019 with a consolidated value of AFN 178.1 billion. In 2019, 24 companies were debarred from the procurement process and 138 companies were investigated.¹⁸⁵ The NPA also claimed to have saved AFN 65.5 billion from wastage in public procurement in the last five years.

Observations:

While integrity in procurement continues to improve, the government must find ways to close remaining loopholes inviting abuse.

2.9. Increased transparency in budget planning and execution

According to UNCAC, State parties shall “take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia: Procedures for the adoption of the national budget; Timely reporting on revenue and expenditure; A system of accounting and auditing standards and related oversight; Effective and efficient systems of risk management and internal control; and where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.”¹⁸⁶ In addition, a State party shall take 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.”¹⁸⁷

¹⁸² U.S. State Department, “Statement on Accountability and Anti-Corruption in Afghanistan”, 9/19/2019 <https://www.state.gov/statement-on-accountability-and-anti-corruption-in-afghanistan/> (accessed on 10 March 2020). The NPA response is published at:

<https://www.facebook.com/833952173357446/posts/2431447486941232/?d=n>. (accessed on 10 March 2020).

¹⁸³ UNAMA Anti-Corruption Report, May 2018, p. 39.

¹⁸⁴ The decree was issued in November 2018 with the stated aim 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”.

¹⁸⁵ See <https://ageops.net/en/companies/debarment/debarred-vendors> (accessed on 14 March 2020). Debarment entails temporary prevention from bidding for a stated period.

¹⁸⁶ UNCAC, Article 9(2).

¹⁸⁷ UNCAC, Article 9(3).

Allocation and oversight of resources for Afghanistan's COVID-19 response

On 16 March 2020, President Ghani established the COVID-19 Committee chaired by Second Vice President Danesh to execute the National COVID-Response Programme in an efficient, effective, transparent and accountable manner. On 2 May 2020, the Cabinet allocated USD 1,181million to the COVID-response out of which 38% are sourced from domestic revenues and 62% from external funds. The largest part is allocated to public welfare (37%) and social immunity (31%), while only 15% is allocated to health services for patients and 12% to health infrastructure, medical equipment and personal protection gear. Between USD 263,000 and USD 5.26 million (depending on the provinces' category) were allocated to the COVID-response of provincial administrations and dialogue between national and subnational government representatives on the COVID-response intensified. On 23 April, the government reported that provincial oversight committees, comprising representatives of provincial councils, civil society (some selectively admitted or removed by governors), municipalities, provincial administrations, private sector and local media, and members of parliament, were established to monitor the COVID-19 response in their respective provinces and report publicly. Integrity Watch Afghanistan (IWA), International Budget Partnerships and civil society partners pointed to the lack of consultation and transparency in developing the COVID-response budget allocation. Different approaches to oversight at the subnational level include: in Kapisa, the provincial governor requested civil society networks (including IWA) to monitor the management of the allocated funds; in Paktika, Ghazni, Khost and Paktya, media briefings on the COVID-expenditures were organized; in Bamyan, budget constraints led to insufficient diagnostic facilities and effective management of district quarantine centres; in Farah and Laghman, civil society expressed concerns regarding the management of COVID-funds.

COVID-19 risks to exacerbate weaknesses in budget execution, because the government may face difficulties in executing the national budget (fiscal year 1399/ 2020) and the COVID-19 budget simultaneously. More of the national budget should be allocated for the COVID-response, especially in health service delivery, building of additional health infrastructure, improved diagnostic capacity, procurement of more medical and personal protection equipment and livelihood. Continued efforts to boost the credibility and transparency of the government's COVID-response are required.

Previous reports highlighted reform steps in the finance management systems which lead overall to a more realistic budget.¹⁸⁸ Nevertheless, challenges to budget planning, revenue collection and expenditure accounting continue to prompt concerns over transparency and create opportunities for rent-seeking and corruption. While political uncertainties during the election year 2019 challenged the fiscal sector, the government managed to avoid a budget crisis triggered by presidential elections (compounded by the withdrawal of foreign troops) like in 2014. The MoF reported that the development budget retained a 90% execution rate and in a first phase of the budget reform aimed at increasingly incorporating international standards to address structural issues. In 2019, the MoF policy department furthered the public investment management reform efforts and developed national guidelines for economic evaluations and costing of new policy proposals. In a second reform phase, the MoF anticipates working towards increasing transparency, public participation, consideration of sub-national budgets and better data management, including on donor contributions. However, the 2020 budget remained vulnerable to undue influence, such as the inclusion of a considerable number of projects

which had not passed the regular cost-benefit analysis during the parliamentary review.

In 2019, the government reported that domestic revenues of the Government amounted to AFN 207 billion, an increase of 9 per cent from the previous year, equivalent to 14 per cent of the GDP

¹⁸⁸ UNAMA Anti-Corruption Report, May 2019, p. 31.

and meeting the annual target.¹⁸⁹ These reports have been challenged by some experts.¹⁹⁰ The Afghanistan Revenues Department categorizes the government revenues into three categories, “tax revenues”, “customs revenues” and “non-tax revenues”, each accounting for, respectively, 41 per cent, 18 per cent and 41 per cent of the total revenue in 2019. Reforms of the revenue collection system continued, and the improved system of taxation was credited for a relatively strong performance in revenue collection in 2019, while reforms in customs continue to lag.

In May 2019, the MoF started publishing fortnightly revenue reports on its website with disaggregated tax performance data at the level of collection points, and tracked progress against government revenue targets to increase the transparency of its work.¹⁹¹ Another reform step was the establishment of the Tax Dispute Resolution Board in accordance with the Tax Administration Law, which held its first meeting in October 2019. The customs department informed UNAMA that its integrity-related reforms in 2019, included the adoption of a risk-based customs clearance procedures in Herat, Nangarhar and Nimroz, which shortened clearance procedures and improved the fraud detection capacity. Customs continues to implement its five-year strategic plan, which started in 2018, and incorporates international standards and norms.¹⁹² Customs also informed UNAMA that cases against around 600 customs officers were sent to the Attorney General’s Office with the recommendation to investigate suspicion of corruption following an internal audit.

Meanwhile, the government’s use of emergency codes (emergency funds), such as code 91 and Code 92, expanded in recent years. These funds can only be accessed upon the president’s order, without parliamentary scrutiny. In December 2019, parliament established a commission to probe those transfers in response to concerns over their transparency and legality.

Observations:

Continued focus on budget credibility is required. Steps in reforming revenue collection are welcome and should continue.

2.10. Integrity reforms at the subnational level

Afghanistan is composed of 34 provinces, 387 districts, 165 municipalities, and approximately 45,538 villages.¹⁹³ The Constitution provides for a unitary state while stating that “necessary powers” shall be transferred “in accordance with the law, to local administrations in order to

¹⁸⁹ World Bank (2020). Navigating a Sea of Uncertainty. Afghanistan Development Update, January; at: <http://documents.worldbank.org/curated/en/328861579623579913/Afghanistan-Development-Update-Navigating-a-Sea-of-Uncertainty> (accessed on 14 March 2020).

¹⁹⁰ See, for example, <https://www.usip.org/publications/2020/03/essential-afghan-peace-funding-government> (accessed on 18 May 2020).

¹⁹¹ Ministry of Finance, Afghanistan Revenue Department, <https://ard.gov.af> (accessed on 9 May 2020).

¹⁹² IMF (2019). Islamic Republic of Afghanistan. Fifth review under the extended credit facility arrangement and request for modification of performance criteria, May, at: <https://www.imf.org/en/Publications/CR/Issues/2019/06/07/Islamic-Republic-of-Afghanistan-Fifth-Review-Under-the-Extended-Credit-Facility-Arrangement-46973> (accessed on 10 March 2020).

¹⁹³ IDLG, A roadmap for Subnational Reform, Citizen-Centred Governance, July 2018 (Subnational Governance-Policy), at: <https://idlg.gov.af/en/departments-policy/> (accessed on 5 March 2020).

accelerate and improve economic, social as well as cultural matters, and foster peoples' participation in developing national life."¹⁹⁴

On 14 May 2018, the High Council for Rule of Law and Anti-Corruption approved Afghanistan's Subnational Governance Policy (SNGP). The policy aims at creating a functional and accountable subnational governance mechanism long-term under which services are delivered in a cost-effective and transparent manner, leading to enhanced economic opportunities for the local populations. Its reforms include measures to enhance integrity at the subnational level through merit-based recruitments of district governors, mayors and deputy provincial governors as well as their performance management at the subnational level. The SNGP proposes policy prescriptions for resource allocation and service delivery and offers policy guidance for subnational accountability mechanisms, including the oversight roles of provincial councils and civil society monitoring and advocacy.¹⁹⁵ Implementation of the SNGP, led by the Independent Directorate of Local Governance (IDLG) continued in 2019 under the framework of the Subnational Governance Roadmap developed in May 2018. The subnational governance subcommittee of the High Council for Rule of Law and Anti-corruption met only twice in early 2019¹⁹⁶ and its achievements consisted mainly of initial administrative steps such as developing workplans.¹⁹⁷ On 10 June 2019, the President established the District High Council under his leadership to ensure that districts take on increased responsibilities for local development.¹⁹⁸

In 2019, the subnational legal framework was consolidated and the implementation of the Municipalities Law¹⁹⁹ and the Local Councils Law began.²⁰⁰ Working procedures and guidelines for the establishment of new municipalities and legal frameworks for municipality revenue generation have been drafted. The IDLG facilitated consultations in 18 municipalities on these drafts and on the overarching issue of urban governance.²⁰¹ It introduced the Local Councils Law to local authorities in 28 of the 34 provinces. Both the Municipalities and Local Councils laws clarify governance structures with lines of responsibility for local governance entities.

Implementation of the SNGP comes with major challenges. Subnational governance entities remain weak and lack decision-making authority on key development and service delivery processes. The primary oversight mechanism of SNGP implementation rests with the Subnational Governance Subcommittee of the High Council for Rule of Law and Anti-corruption, along with the local councils' oversight. While the Subnational Governance Subcommittee is yet to be fully operational, the local councils lack the technical capacity to exercise effective oversight on local administrations. Moving forward, it is critical that the Afghan Government continues to deliver on its commitment

¹⁹⁴ Afghan Constitution, Article 136.

¹⁹⁵ The government's budget allocation for the implementation of the SNGP is inadequate at a time when direct support from partners is dwindling.

¹⁹⁶ The Subnational Governance Subcommittee met on 29 January 2019 and 6 March 2019, but is yet to report to the High Council about its work.

¹⁹⁷ Subnational Governance Subcommittee of High Council for Rule of law and Anticorruption Working Group work plan reports for 2019.

¹⁹⁸ Presidential Decree Number 29 of 10 June 2019: establishment of a High Council of the Districts.

¹⁹⁹ Municipalities Law Presidential Decree of 5 September 2018, OG 1316 of 15 October 2018.

²⁰⁰ Local Councils Law Presidential Decree of 5 March 2019, OG 1342 of 14 April 2019.

²⁰¹ IDLG report on the activities and achievement of general Directorate of Urban Governance, 2019 (1398).

to subnational reforms, ensuring that subnational entities are sufficiently capacitated, empowered and resourced, but also held to higher standards of accountability.

Observations:

The consolidation of the legislative and strategic framework at the subnational level requires continued attention to strengthening integrity and accountability measures.

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

Little progress was made in advancing justice reforms during the reporting period. Opinion polls taken in 2019 continued to show a lack of confidence in judicial institutions. Only 66% of respondents found state courts to be fair and trusted and only 53% found them to be effective in delivering justice.²⁰² While 44% of rural and 52% of urban respondents stated to have “in no case” experienced corruption in the judiciary and only 19% of rural and 14% of urban respondents stated to have experienced corruption in most cases,²⁰³ the population’s trust in the informal justice system is still significantly higher,²⁰⁴ with 81% of respondents saying they trust local Shuras and Jirgas and 74% saying these informal mechanisms are more effective in delivering justice.²⁰⁵

Efforts to codify the relationship between informal and the formal justice systems were revitalized in 2019, according to the National Justice Sector and Judicial Reform Plan. On 19 February 2019, the President ordered the Ministry of Justice (MoJ) to uniformly codify informal justice mechanisms and harmonize their work with the formal justice system.²⁰⁶ The MoJ developed a draft law, which limits the jurisdiction of Shuras and Jirgas to civil matters and explicitly bars certain practices which violate constitutional and international human rights standards. The new leadership of the Afghan Independent Human Rights Commission worked with the MoJ to finalize the law. While it remains to be seen whether Shuras and Jirgas will follow the new law, the codification intended to clarify the relationship between the two systems and improve the quality of justice delivered by both systems. It seeks to unburden the formal justice system, improve access to justice and improve the human rights record of the informal system. The remainder of this chapter focuses on the formal justice system.

In March 2020, COVID-19 hit an already weak justice sector. While the judicial sector’s primary initial focus was on prisoner releases, starting in May the Supreme Court began to consider alternative options to hear cases remotely via telecommunication systems. Releasing prisoners and suspending trials, while perhaps necessary under the exceptional situation of a pandemic, undoes hard-fought successes and potentially has a lasting impact on the judiciary.

²⁰² See The Asia Foundation, “Afghanistan in 2019: A Survey of the Afghan People”, 2 December 2019, <https://asiafoundation.org/publication/afghanistan-in-2019-a-survey-of-the-afghan-people/> (accessed on 18 March 2020), p. 148.

²⁰³ Ibid, p. 145.

²⁰⁴ For previous years see: UNAMA Anti-Corruption Report, May 2019, p. 36; UNAMA Anti-Corruption Report, May 2018, p. 29.

²⁰⁵ See The Asia Foundation, “Afghanistan in 2019: A Survey of the Afghan People”, 2 December 2019, <https://asiafoundation.org/publication/afghanistan-in-2019-a-survey-of-the-afghan-people/> (accessed on 18 March 2020), p. 148.

²⁰⁶ Presidential Order 2716, On Improving Governance at District Levels in the Country of 19 February 2019.

3.1. Justice reform

On 27 December 2016, the government adopted the five-year National Justice Sector and Judicial Reform Plan (NJSRP).²⁰⁷ On 22 June 2017, the High Council on the Rule of Law approved institutional reforms for the Supreme Court, the Attorney General's Office (AGO), the MoJ and the Afghanistan Independent Bar Association, aligning their internal action plans to the six general strategic goals of the NJSRP.²⁰⁸ The Supreme Court reported to UNAMA that among the main gains for integrity in implementing the NJSRP during the reporting period were: a shift of all recruitment for administrative positions to the Independent Administrative Reform and Civil Service Commission, establishment of an internal investigation department and the increase in asset declarations of judges. While implementing institutions continued to report to the High Council²⁰⁹ on the implementation status, oversight of the results of the implementation of the NJSRP was weak due to the lack of a dedicated technical level monitoring secretariat. In late 2020, the results of the NJSRP should be evaluated and a realistic follow-up strategy after its expiry in 2021 should be designed.

The Anti-Corruption Strategy's measures on strengthening the capacity of the justice sector to tackle corruption cases and its integrity are listed in its Pillar 4.²¹⁰ Unfortunately, they were amongst the least successful of the Strategy. The central measure to establish a dedicated Deputy Attorney General for Anti-Corruption Affairs (DAG-AC) did not result in a tangible improvement of anti-corruption prosecutions. Embedding the asset recovery office into this directorate created confusion. The fact that it reported to the DAG-AC made it difficult to argue that it was competent to recover assets from crimes beyond the DAG-AC's jurisdiction. The Strategy's measures to increase the transparency of the work of the justice sector were not implemented; in particular, the Anti-Corruption Justice Centre (ACJC) still did not publish all verdicts online.²¹¹ Somewhat successful was the extension of prosecution offices and courts with 14²¹² new courts and 63 prosecution offices having opened during the implementation period of the Anti-Corruption Strategy.

Security remained the main challenge to the provision of justice services. Justice sector personnel and institutions remained the main targets of the insurgents and criminal groups. UNAMA documented 17 incidents of deliberate attacks against members of the judiciary in 2019, causing 31 civilian casualties (20 killed and 11 injured), an increase from five such incidents in 2018 that resulted in the deaths of five civilians.²¹³ In 2019, targeted attacks against judicial staff resulted in the killing of 13 judges, and three judicial staff. The Attorney General's Office (AGO) reported that 19 prosecutors were killed in targeted attacks in 2019. No complex attack against court premises

²⁰⁷ UNAMA Anti-Corruption Report, May 2018, p. 29.

²⁰⁸ UNAMA Anti-Corruption Report, May 2018, p. 29.

²⁰⁹ See *supra* 2.2.

²¹⁰ 2017 Afghanistan National Anti-Corruption Strategy, Pillar 4.

²¹¹ A list, but not the full final judgements of Supreme, is published on the AGO website: <https://ago.gov.af/en/number-persons-convicted-supreme-court> (accessed on 18 March 2020).

²¹² 7 in 2019 and 7 in 2020 (as of 30 April).

²¹³ UNAMA, Afghanistan Protection of civilians in Armed Conflict, 2019, released in February 2020, p. 44, at: https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2019_-_22_february.pdf (accessed on 18 March 2020).

The COVID-19 response of Afghanistan's justice sector

Prisoner release: The immediate response to COVID-19 by Afghanistan's justice sector was focused on decongesting overcrowded prison and detention facilities (estimated 37,000 inmates in mid-March 2020). On 26 March 2020, President Ghani issued a Special Decree on Pardons, Suspension of Investigations and Enforcement of Sentences with the declared aim of reducing the overall prison population by about 10,000 within ten days. The Decree allowed for three different types of release processes for prisoners, juvenile offenders and suspects in pre-trial detention. While implementing COVID-19 prevention measures, such as work-from-home-arrangements for vulnerable staff and a reduction in working hours, justice and corrections institutions could not meet the ambitious timeframe and release inmates as quickly as planned. Amid criticism on the pace of the release process, strikes in some prisons and a rising number of inmates who tested positive for COVID-19, authorities saw the need to accelerate the process. On 27 April, President Ghani on the occasion of the Anniversary of the Jihad Victory commemoration issued a new Decree under which all crimes but violence against women, crimes against internal and external security and those explicitly exempt by the Criminal Procedure Code (Article 350) were pardoned. There was also a generous commutation of sentence for other crimes, including corruption offences. While under the first decree those convicted of corruption offences could only benefit from a sentence reduction upon deposit of bail (unless suffering from an incurable disease), which was applied to the ex-elections commissioners, the second decree allowed for the reduction of the remaining sentence by a third. By the end of May about 10,000 inmates had been released on the basis of both decrees.

Suspension of trials and remote hearings: The 26 March decree authorized the Attorney General to suspend trials and release pre-trial detainees. On 9 May, the Supreme Court formed a working group exploring options to hold remote trials pending the pandemic. Courts interpreted the suspension of trials differently, whereas the courtier-narcotics court continued hearings, the ACJC stopped all trials between mid-March and 8 June.

occurred in 2019. No case of an attack against the judiciary was ever sufficiently investigated to indict the crime. This *de facto* impunity made the judiciary even more vulnerable. Poor security and direct threats to judges contributed to a reluctance by female judges to work in remote districts.

The Supreme Court informed UNAMA that as of March 2020, 2,614 positions of judges were classified in the court budget and 2,024 positions were filled with 1,767 male and 257 female judges.²¹⁴ This represents a decline of 59 actively working judges compared to the previous year.²¹⁵ Out of 384 primary district courts, 290 were functioning in the district under their jurisdiction and 94 district courts were working remotely. In 2019, the Supreme Court's Judicial Control and Surveillance Department uncovered a total of 81 alleged corruption cases, leading to the arrest and conviction of 2 judges, 3 administrative staff and 2 defence attorneys. In 2019, disciplinary measures were imposed against 91 judges and eight administrative staff in accordance with the Code of

Conduct for Judicial Offenses and Civil Servants Law. This resulted in the dismissal of one judge, the transfer of two judges, and a reduction of salary of 17 judges. Written warnings and advice notices on conduct were issued to 28 and 43 judges, respectively. Five written warnings were issued to administrative staff. The Supreme Court improved the transparency of the work of the justice sector by making the recording of all court hearings mandatory.

The AGO has offices in 297 out of 387 districts. Of these, 263 offices are operating in the district of their jurisdiction. In March 2020, the AGO informed UNAMA that 3,533 prosecutors and administrative staff are in service, with 1,512 serving in Kabul and 2,011 in the provinces. More than a third of the AGO's administrative staff is female and one-twelfth of the prosecutors are

²¹⁴ Primary district courts in the provinces of Kabul, Balkh, Herat, Parwan, Kapisa and Panjshir have female judges.

²¹⁵ UNAMA Anti-Corruption Report, May 2019, p. 37.

female. In 2019, the AGO's Control and Monitoring Department prosecuted 22 staff, including 17 prosecutors, for corruption offences. In 2019, the Inspection Department of the AGO issued disciplinary warnings to 84 prosecutors and provided guidance on conduct to 44 prosecutors, while 11 received a performance reward.

Observation:

In 2019 justice reform progressed slowly. On a positive note, efforts to codify the complementarity of formal and informal justice mechanisms were reinvigorated. COVID-19 hits Afghanistan's weak judiciary hard, while it was struggling to gain the citizens' trust. COVID-related release measures and suspension of trials undo successes that the judiciary had fought hard to win.

3.2. Prosecution of corruption cases in the provinces

The AGO's anti-corruption directorate investigates corruption cases that do not meet the jurisdictional threshold of the ACJC and prosecutes them before ordinary provincial courts.²¹⁶ Cases not within the ACJC's jurisdiction may be transferred from provincial courts to the ACJC upon the defendant's request to the Supreme Court.²¹⁷

According to the AGO, during 1398²¹⁸ the DAG-AC's Office processed a total of 2,018 administrative corruption cases countrywide, including 213 cases pending from the previous year, representing a slight increase compared to 1,911 cases in 1397.²¹⁹ Of these, 390 cases were adjudicated by the Primary Courts, 126 by the Appeal Courts, and 363 by the Supreme Court. One hundred and eighty-seven (187) cases were dismissed for lack of evidence, 506 transferred for lack of jurisdiction and 446 are still under process of the AGO. Among those prosecuted were 17 prosecutors and five AGO administrative staff. However, the figures provided by the AGO to UNAMA upon request for this report (as reported above) are inconsistent with those reported in the GMAF 2019 Third Quarterly Report.²²⁰ According to the latter, the Attorney General's Office investigated 901 cases by the third quarter of 1398 (2019) compared to 684 cases in the same period in 1397 (2018).²²¹ A clear, public tracking and reporting mechanism for this data is needed for assessing Afghanistan's compliance with GMAF deliverable 2.2²²² and making informed judgements about trends in corruption prosecution at the local level. According to the AGO, of the above listed prosecutions, 875 persons were convicted and sentences of AFN 249,352,680 and USD 108,308 in either fines or compensation ordered, out of which AFN 113,246,365 and USD 42,339 was recovered.²²³ In contrast, according to the Supreme Court, its provincial courts adjudicated 202 administrative corruption cases in 2019. Various numbers are difficult to reconcile, which is partly due to data

²¹⁶ UNAMA Anti-Corruption Report, April 2017, p. 49.

²¹⁷ An example is the case of former director of public works in Farah Province (Case No. 16).

²¹⁸ The AGO and courts collect figures according to the Islamic calendar year thus for 1398 21 March 2019-20 March 2020.

²¹⁹ UNAMA Anti-Corruption Report, May 2019, p. 47.

²²⁰ MoF, Geneva Conference on Afghanistan Third Quarterly Report, July – September 2019, Geneva Mutual Accountability Framework 2019-2020.

²²¹ Ibid, p. 6.

²²² See *supra* 2.1.

²²³ AGO Responses to a UNAMA request for information for this Report, 7 February 2020.

collection being based in some institutions on the Gregorian calendar and others on the Islamic calendar. More transparency of institutions in publishing the output of provincial courts and prosecutions offices regularly online would be welcomed.

Observation:

Tracking corruption prosecutions in the provinces has been challenging. With the increasing spill-over of ACJC prosecutions to provincial courts, there is a need for more transparency on the cases processed in provinces and more reliability in reporting.

3.3. The Anti-Corruption Justice Centre

The ACJC was established in June 2016 by Presidential executive decree to prosecute and adjudicate those “accused of major-crimes of corruption, the perpetrators of which are high ranking officials, based on documents, evidence and witnesses, in order to conduct comprehensive investigation, to prevent exertion of influence, to adhere to fair trial standards as well as to address the aforementioned criminal cases in a speedy and transparent manner.”²²⁴ The ACJC was given jurisdiction over corruption offences when the alleged perpetrator was of a stated seniority in rank or a monetary threshold of the benefits obtained in the alleged crimes was met.²²⁵ The 2018 Anti-Corruption Law²²⁶ codified the ACJC and finally provided it with a firm legal basis. The law defined the duties and authorities of the Centre highlighting that it should initiate criminal action, conduct prosecutions and render judicial decisions free from undue influence.²²⁷ The ACJC has jurisdiction to adjudicate specified corruption offences when committed by government high-ranking officials,²²⁸ 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 involved²²⁹ or irrespective of the defendant’s rank, if the benefit obtained from the commission of the crime exceeds AFN 10 million (USD 130,000) or its equivalent in foreign currencies.²³⁰ For the crimes of bribery²³¹ and money laundering,²³² the ACJC’s pecuniary threshold is half that amount.²³³ In May 2019, while deciding the jurisdiction in the election commissioners’ case, the Supreme

²²⁴ Article 1, Decree of the President of Islamic Republic of Afghanistan on establishing Anti-Corruption Justice Centre, Decree No. 53 dated 30/06/2016 (10/04/1395).

²²⁵ Approval Number 385 dated 29/4/1395 (19th July 2016) of the High Council of the Supreme Court on the jurisdiction of the ACJC.

²²⁶ Decree No. 187 of 5 September 2018 published in OG-01314.

²²⁷ Anti-Corruption Law, Article 26.

²²⁸ 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.

²²⁹ Article 27(1) of the Anti-Corruption Law.

²³⁰ Anti-Corruption Law, Article 27(2)(1).

²³¹ Penal Code, Chapter One, Part Four, starting with Article 370.

²³² Penal Code, Chapter Two, Part Six, starting with Article 498.

²³³ Anti-Corruption Law, Article 27(2)(2).

Court issued a circular confirming that the ACJC had jurisdiction to hear certain election crimes if they entailed an element of corruption.²³⁴ The Supreme Court may also delegate a case to the ACJC based on a request from the Attorney General or the defendant(s), “in the presence of justifiable reasons and a dire need in accordance with provisions of law”.²³⁵

The 14 judges of the ACJC were appointed by the Supreme Court.²³⁶ All, except one Appeal Court judge, who is deceased, have remained in post since the establishment of the ACJC. The two chief judges of the Primary and Appeal Court have presided over all trials in their respective courts. Cases were on hold when they were on leave or travelling outside Kabul. Unlike in 2018, the composition of the AGO’s ACJC prosecution office did not experience significant change in the number of personnel in 2019/2020.²³⁷ The total number of prosecutors throughout 2019 was 111. Despite the high number of prosecutors, the output of the ACJC, in terms of cases proceeding to trial, remained low.

Security of ACJC staff continued to be a matter of concern. The 2017 Presidential order to increase security and ensure physical safety of ACJC personnel and its headquarters²³⁸ is yet to be fully implemented. ACJC staff were to be provided residential housing at a secure central location based on certain occupancy conditions. Construction of the residential houses, which commenced in 2017, is still continuing with expected completion in mid-2020.²³⁹ In the meantime, and despite attempts to improve the physical security of ACJC personnel, including through the provision of personal armour, attacks continued. One attack, on 6 July 2019, resulted in the death one ACJC prosecutor and another attack on 24 April 2020 resulted in serious injury to a prosecutor. On 12 February 2020, a staff of the Major Crimes Task Force (MCTF) was shot and injured while on duty in Kabul.

3.3.1. Police support to the ACJC

Provisions in the Anti-Corruption Law that regulate the functions of the “Major Anti-Corruption Police”²⁴⁰ remained largely unimplemented.²⁴¹ Since the establishment of the ACJC in 2016, the Major Crimes Task Force (MCTF) through its anti-corruption related sub-division, has served as the detective and police component of the Centre. The MCTF was established through a Presidential Executive Decree in 2009, with considerable international support,²⁴² as a functionally independent police unit under the Ministry of Interior (MoI) mandated to investigate major corruption,

²³⁴ *Infra* 3.4.4.

²³⁵ 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 usurpation of States lands and other properties, for the Central zone comprising Kabul, Maidan Wardak, Parwan, Logar, Kapisa and Ghazni provinces.

²³⁶ *Ibid*, Article 84: “A judge normally may not be transferred before completing three years of service, except upon his own demand substantiated with reasons acceptable to the Supreme Court, or at the discretion of the administration. The transfer of a Judge shall take place normally once every three years in the month of Hoot and shall become effective from the beginning of the subsequent year.”

²³⁷ UNAMA Anti-Corruption Report, May 2019, p. 49.

²³⁸ Presidential Decree No. 948 dated 3 June 2019 (1396/3/13).

²³⁹ Update, UNAMA ACJC meeting of 28 January 2020.

²⁴⁰ Anti-Corruption Law Articles 28 and 29.

²⁴¹ *Supra* 2.4.

²⁴² UNAMA Anti-Corruption Report, May 2019, p. 44.

kidnapping and organized crime cases. It was assigned to support the ACJC when it was established in 2016. Also, in 2016, the President authorized an increase in the MCTF's staffing table from 130 to 300 personnel, of which approximately 200 are investigators. Based in Kabul only, the MCTF indicated that it could carry out intelligence, analysis and investigative functions for the ACJC, but could not be the sole unit responsible for executing the ACJC arrest warrants and orders.

The 2018 Anti-Corruption Law refers to a "Major Anti-Corruption Police" within the organizational structure of the MoI with a mandate to detect major corruption crimes.²⁴³ According to the law, this Major Anti-Corruption Police Unit should report directly to the Minister of Interior.²⁴⁴ While the law was unclear whether the term "Major Anti-Corruption Police" referred to the MCTF or a part of it,²⁴⁵ throughout 2019 the MoI did not alter the working relationship between the MCTF and the ACJC. In the second half of 2019, the MoI informed UNAMA that the MoI Directorate General for Intelligence and Combating Crime (DGICC) would incorporate the MCTF and boost its anti-corruption focus.²⁴⁶

However, the then MCTF Director took decisions that appeared to make the unit more autonomous and more aligned to the mandate of the ACJC. In 2018-2019, responding to what it assumed to be its mandate under the new Anti-Corruption Law, the MCTF proposed a new structure that would focus its then entire complement of 291 staff members on anti-corruption cases, including money laundering and proceeds of crime, loss and theft of historical relics, illegal extraction of mines, and usurpation of state properties, thereby mirroring the jurisdiction of the ACJC.²⁴⁷ Later in the year, the MoI plan to incorporate the MCTF under DGICC, together with the Criminal Investigations Directorate, Technical Intelligence Directorate and the Interpol National Central Bureau, became public. While the incorporation of the MCTF within the DGICC conceivably would allow for better coordination with the other components of the directorate, it is arguably contrary to the provisions of the Anti-Corruption Law, which requires the "Major Anti-Corruption Police" of the ACJC to report directly to the Minister of Interior.²⁴⁸ Furthermore, the Anti-Corruption Law required that the "Major Anti-Corruption Police" works at the ACJC,²⁴⁹ which can be interpreted as requiring co-location to ACJC premises.

Notwithstanding these possible inconsistencies with the Anti-Corruption Law, in mid-2019 the MCTF was integrated with the DGICC. The MoI argued that the reform would allow other operational sub-pillars of the MoI that have a provincial outreach to support the MCTF as well as enable support from the other DGICC directorates. Consolidation under the DGICC would also enable systematic utilization of the Case Management System (CMS), coordinate anti-corruption efforts with other crime combatting functions and provide a clear command line for the entire crime-combatting umbrella, in general orienting the MoI towards full-force anti-corruption

²⁴³ Anti-Corruption Law, Article 28(1).

²⁴⁴ Ibid, Article 28(4).

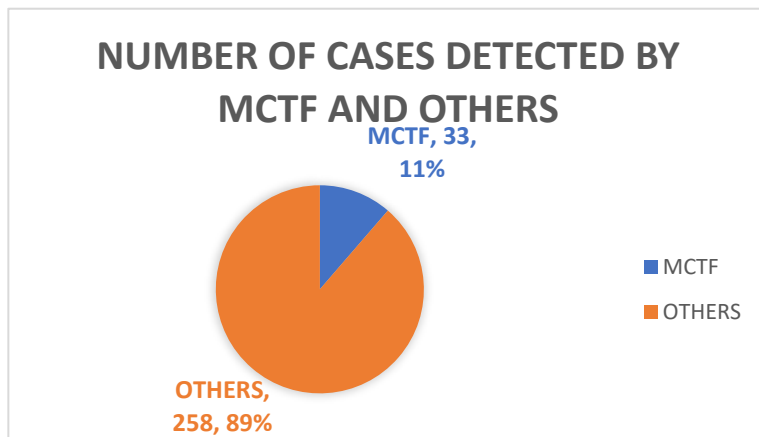
²⁴⁵ Anti-Corruption Law Article 28 refers to "Major Anti-Corruption Police".

²⁴⁶ UNAMA ACJC Meeting, 11 November 2019.

²⁴⁷ UNAMA Anti-Corruption Report, May 2019, p. 44.

²⁴⁸ In response to an earlier draft of this report, the MCTF asserted that it reported directly to the Minister of Interior regarding its detective and operational proceedings and coordinated its daily administrative work with the DGICC.

²⁴⁹ Anti-Corruption Law, Article 28(1).



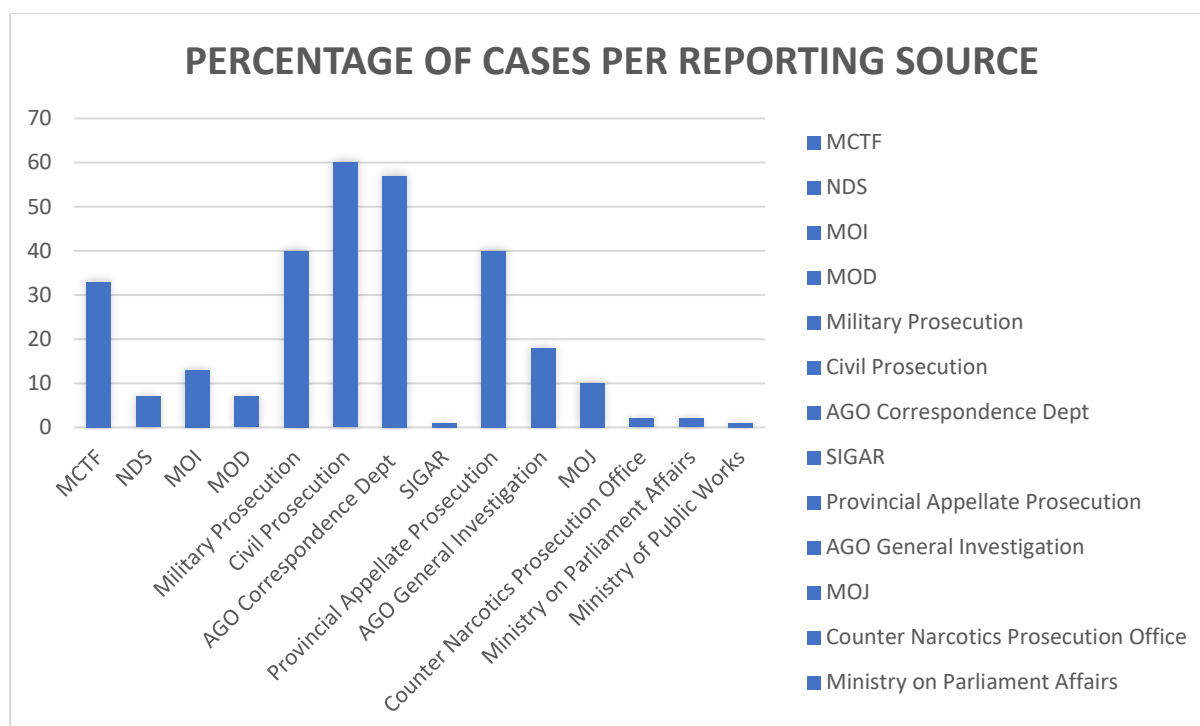
efforts.²⁵⁰ The MCTF's *tashkeel* would be finalized after its staffing needs were assessed following the integration with the DGICC. Every officer would have a job description protecting them from arbitrary assignment elsewhere. Assignments to the MCTF would be merit-based and officers would be vetted and be required to pass internationally supported

polygraph tests. During the reporting period, the MCTF only referred 33 new cases to the ACJC, representing only 11 percent of all cases referred to the ACJC prosecutions office. According to that office, most of the cases received from the MCTF were incomplete and had to be referred back for further investigation.²⁵¹

The rest of the ACJC cases were received from the National Directorate of Security (7), the MOI (13), the Ministry of Defence (7), the Military Anti-Corruption Prosecution Office (40), the Civil Anti-Corruption Prosecution Office (60), and SIGAR (1), among others. The MCTF stated that in addition to the 33 cases investigated for the ACJC in 2019, it had also finalized the discovery process in 45 cases, which it determined to be not within the ACJC's jurisdiction and forwarded them to the AGO for investigation. Furthermore, 46 cases that were determined to be not within the MCTF's jurisdiction were handed over to the relevant detective agencies.

²⁵⁰ Presentation by the Deputy Director of GDICC at UNAMA ACJC meeting, 11 November 2019.

²⁵¹ ACJC prosecution office's comments to the first draft of this report.



On 26 March 2020, a new head of the MCTF was appointed, continuing the trend of an exceptionally high turnover in this position, with a new head appointed nearly every year.²⁵² The new head identified shortage of staff and resources as the main obstacles to fulfilling its mandate and developed a strategic plan to meet these. In April 2020, a staffing level of 234 personnel was authorized for the MCTF. An overall strategy for the MCTF, clarifying that it is solely responsible for corruption offences, remains pending approval in the MoI. A reform of the MCTF, or the designation of another functioning police-component specifically to support the ACJC, is crucial for the court to fulfil its mandate as an effective check against corruption.

3.3.2. Efforts to increase the ACJC's output in 2019

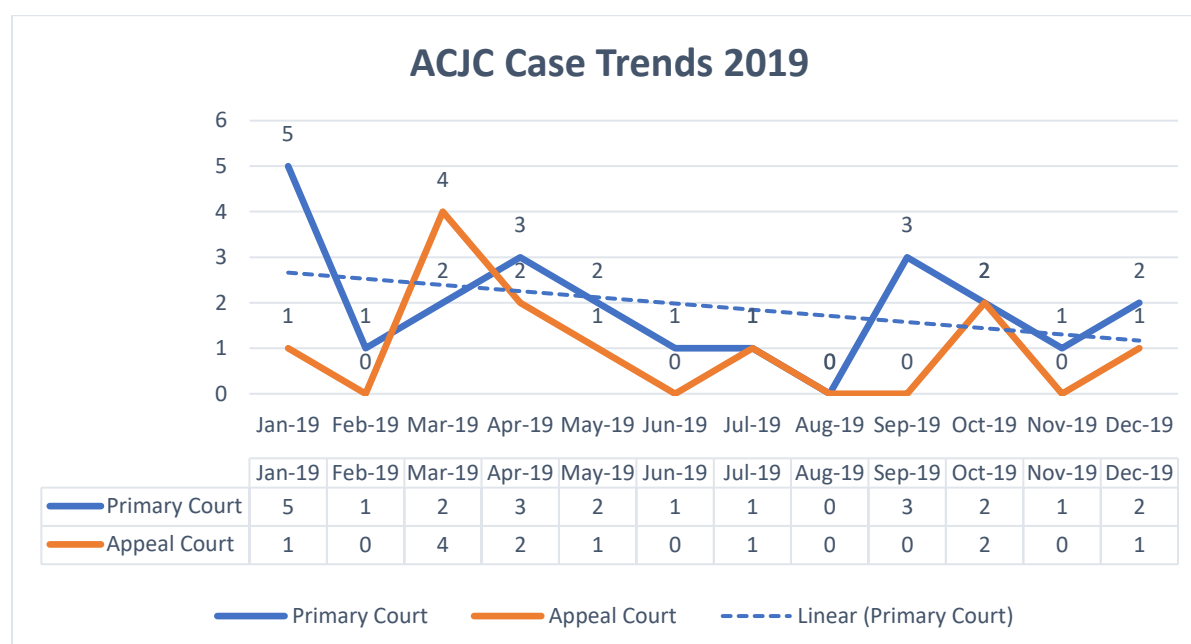
Since it began its activities in mid-2016, the ACJC Primary Court has tried 261 defendants in 69 cases, convicting 208 defendants and acquitting 51 (two defendants died before a final verdict was delivered).²⁵³ The Appeal Court heard 61 cases with 199 defendants, convicting 174 defendants, acquitting 19, nullifying cases against four defendants and postponing the cases of two others. In 2019 the Supreme Court decided five, rejected three and quashed four ACJC cases.²⁵⁴ The Supreme Court has to date reviewed a total of 48 ACJC cases, publicity in these cases remained low given the lack of public hearings and because verdicts are not published.

²⁵² UNAMA Anti-Corruption Report, May 2019, p. 44.

²⁵³ Figures as of 30 May 2020.

²⁵⁴ Data provided by the Supreme Court for the purpose of this report.

The total number of cases adjudicated by the Primary Court in 2019 increased to 23 compared to 18 in 2017 and 17 in 2018. The average monthly output of both the Primary and Appeal Courts remained between one to two cases respectively.²⁵⁵



The impact of COVID-19 release decrees on ACJC cases

The 26 March 2020 Special Decree on Pardons, Suspension of Investigations and Enforcement of Sentences (Decree) issued by President Ghani in response to COVID-19 reiterates CPC provisions that those convicted of corruption offences cannot have their remaining sentences pardoned unless they are found to suffer from an incurable disease. However, those convicted of corruption cases can have the enforcement of their sentence suspended if they are able to pay the amount of bail set by the Court. This procedure led to the temporary release of the ex-IEC/ECC commissioners on 15 April 2020. They were the first ACJC convicts to benefit from the decree after legal and political advocacy. Those in pre-trial detention will be temporarily released while court proceedings are suspended. While setting a high amount of bail, the ACJC is aware that re-arresting those temporarily released after the pandemic may be challenging.

On 27 April 2020, the President issued another pardon and commutation decree on the occasion of the 28th Anniversary of the Jihad Victory commemoration, which still prohibits pardons for corruption convictions, but allows for commutation of sentences for corruption by three quarters.

In 2019, the Primary Court convicted 66 defendants and acquitted 17. Only four cases²⁵⁶ were not appealed, by either party, to the Appeal Court in 2019, making the decision of the Primary Court final. Of the 12 appeals heard in 2019, the Appeal Court convicted 41 and acquitted five. The Supreme Court heard 11 appeals in 2019.

Between 1 January 2020 and until COVID-19 related measures forced hearings

to be suspended in late March 2020, the ACJC Primary Court concluded three cases resulting in the acquittal of all defendants. According to the ACJC prosecution, during the same period, 14 cases were

²⁵⁵ Judges highlighted that the number of cases tried by the court is directly dependent on the ability of the prosecution office to send cases to court, and the greater the number of cases investigated by the prosecution office, the greater the number of cases that will be tried by the courts.

²⁵⁶ These are: the case of misuse of authority of Deputy Minister of Information; the director of the IEC in Daikundi; and in two other cases – three defendants in case of GCPSU and one defendant in the case of Afghanistan Islamic Bank.

referred to the Primary Court out of which nine cases were returned to the prosecution through judicial rulings and four were still under the court's consideration. The Appeals Court adjudicated seven cases with 19 defendants resulting in the conviction of 12, acquittal of three and referral of one case (with four defendants) to another court due to lack of jurisdiction. In the first quarter of 2020, the Primary Court recorded the lowest output, adjudicating only three cases compared to seven, five and eight cases in 2017, 2018 and 2019, respectively. During the same period, the ACJC Appeal Court heard seven cases. The ACJC did not conduct any substantive trials between 26 March and 8 June 2020, following the suspension of trials in response to the COVID-19 challenge. However, the ACJC Appeals Court ruled on bail applications lodged pursuant to the COVID-related special Presidential decree on Pardon of Punishments, Suspension of Investigation and Postponement of Sentence Enforcement of Confinees and Prisoners.²⁵⁷

3.3.3. Fewer higher-ranking officials were prosecuted

The ACJC has personal jurisdiction over corruption crimes when committed by high-ranking Government officials.²⁵⁸ While the ACJC has over the last three years tried many deputy ministers and military generals,²⁵⁹ in 2019 fewer officials of the highest rank, particularly military officials, were indicted compared to previous years. Only two deputy ministers,²⁶⁰ one member of the Upper House of Parliament,²⁶¹ several members of Provincial Councils, one provincial and one district governor, and the commissioners of the two electoral commissions were indicted and tried.

The trend of not indicting Ministry of Defence (MoD) officials highlighted in last years' report²⁶² continued in 2019-2020. One police general was indicted, tried and acquitted by the ACJC in March 2020 for misuse of authority related to the illegal acquisition of a weapon.²⁶³ Three indictments related to crimes committed either by electoral officials or in relation to an election, including ten top former officials of the Independent Elections Commission and the Electoral Complaints Commission, a member of the Provincial Electoral Commission of Daikundi Province and three members of the Provincial Council of Paktika Province. These cases were, to some degree, outliers as it was the first time an electoral commissioner had been indicted, let alone all members of both commissions. According to the ACJC prosecution office, cases against 11 generals, both MoI and MoD, were investigated or under investigation during 2019; some had been referred to the Primary Court, but their trials have not yet been scheduled. Between 1 January and 30 April 2020, the ACJC prosecution office submitted five cases of military officials to the Primary Court out of which three were returned to the prosecution office for further investigation.

²⁵⁷ Decree No. 1 dated 26 March 2020.

²⁵⁸ As defined in the Law on Regulating Salaries of Government High Ranking officials, OG 1121 dated 30 October 2013. The ACJC does not however have jurisdiction over Ministers whose trial is regulated under the Special Courts Law.

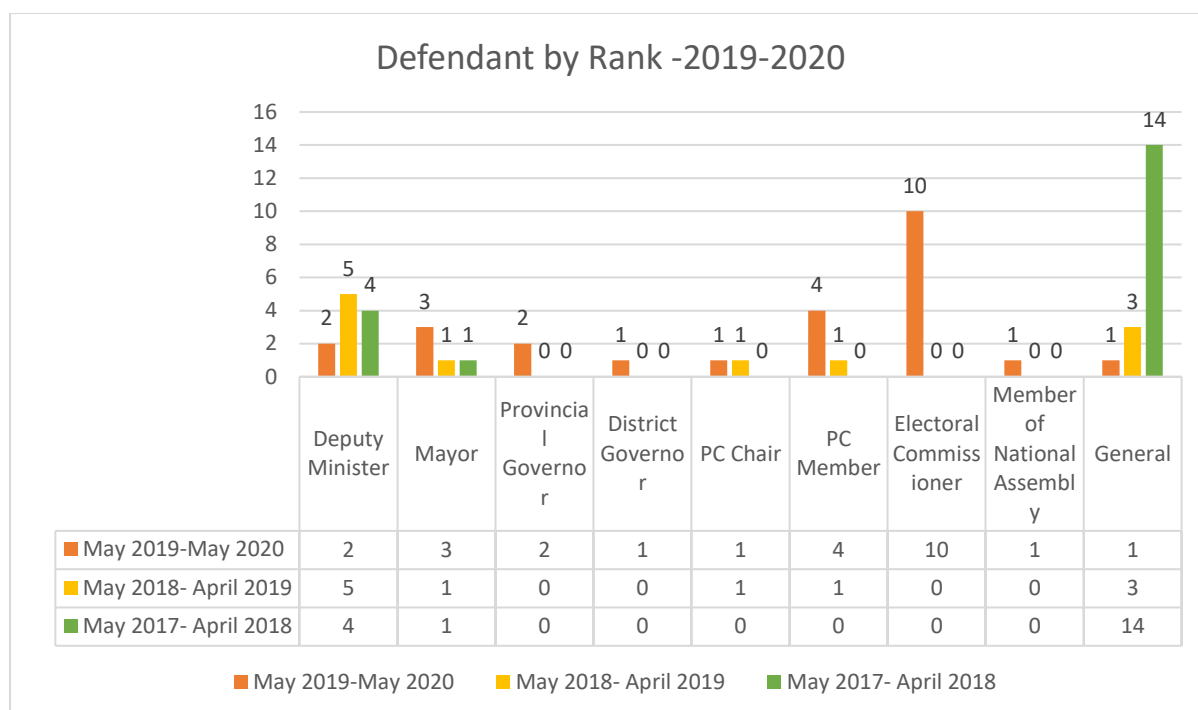
²⁵⁹ Overall, the ACJC has tried 19 generals, 10 Deputy Ministers and 2 Provincial Governors.

²⁶⁰ Both were former Deputies in the Ministry of Finance.

²⁶¹ Former Senator Ahmad Yusuf Nooristani (Case No.11).

²⁶² UNAMA Anti-Corruption Report, May 2019, p. 53.

²⁶³ Case of former Chief of Police of Kapisa, which was heard by the Primary Court on 17 March 2020. The ACJC prosecution office has since appealed the acquittal.



3.3.4. Types of offences and charging patterns under the new Penal Code

When the ACJC was set up in 2016, the 1976 Penal Code was still applicable. Other statutes, including the Anti-Money Laundering and Proceeds of Crime Law,²⁶⁴ the Law on the Protection of Historical and Cultural Properties²⁶⁵ and the Law on Crimes against Internal and External Security,²⁶⁶ among others, provided the legal basis for the other offences within the ACJC's jurisdiction.²⁶⁷ The new Penal Code, adopted by Presidential legislative decree in March 2017, codified all²⁶⁸ criminal provisions that were previously dispersed among various statutes and significantly revised and refined definitions of various crimes, including "corruption crimes". For example, misuse of authority, which was defined in a single article²⁶⁹ in the 1976 Penal Code, now has a fully dedicated chapter comprising fifteen articles.²⁷⁰

As highlighted in last year's Report, the majority of ACJC defendants in 2016-2017 were indicted for the offences of misuse of authority, embezzlement, bribery, forgery of documents, and money

²⁶⁴ Amendments to the Anti-Money Laundering and Proceeds of Crime Law (AML), Official Gazette No.1142, 23 July 2014.

²⁶⁵ Decree No. 3367 of 1383/02/26 (16 April 2004).

²⁶⁶ Decree No. 153 of October 1987.

²⁶⁷ High Council of the Supreme Court, Directive No. 385, 19 July 2016 (29/04/1395).

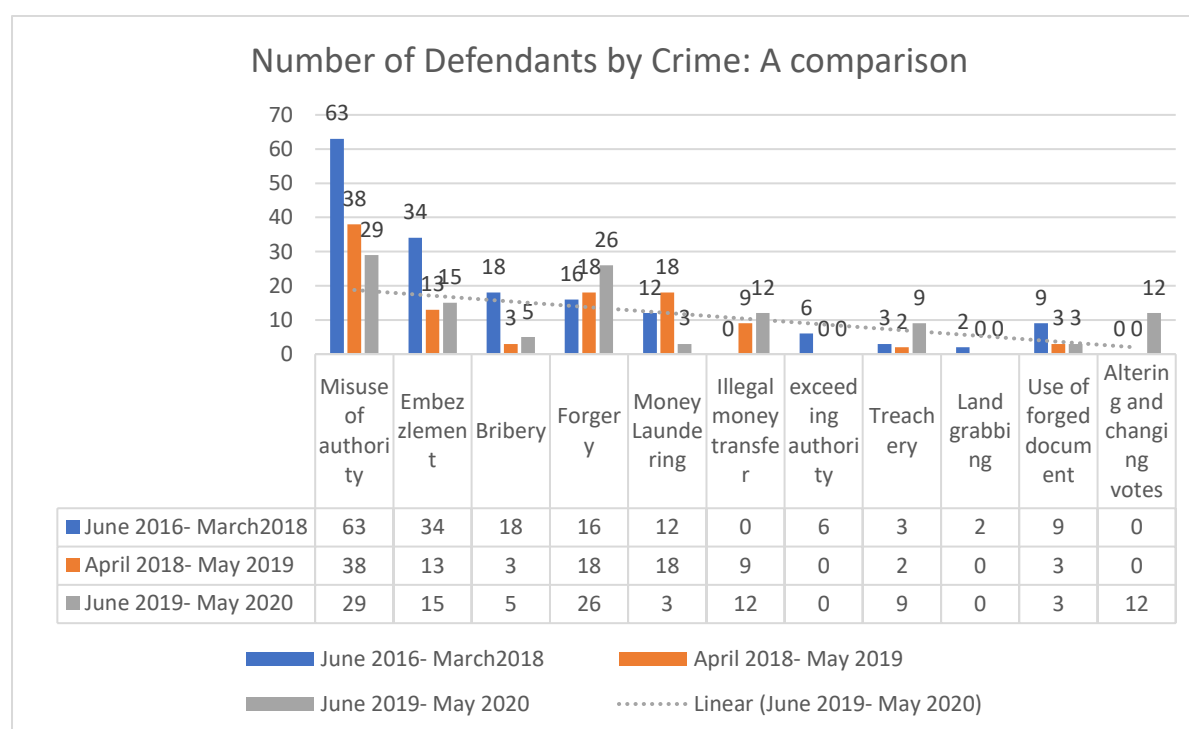
²⁶⁸ Except those not included in Article 916 of the Code, notably the EVAW Decree.

²⁶⁹ 1976 Penal Code, Article 285(1): "If the official of public services, making use of his official authority, deliberately and without legal grounds stops the implementation of provisions of laws, regulations, verdict and decision of the court, or orders issued by competent authorities of the government, and/or collection of goods and taxes stipulated by the law, the official shall be sentenced in the light of circumstances to short imprisonment of not less than three months of cash fine of not less than three thousand and not more than twelve thousand Afghanis. (2) If as a result of stoppage mentioned in the above paragraph the execution of State plans are delayed or interrupted or a loss is inflicted upon public property, the offender shall be sentenced in the light of circumstances to long or medium imprisonment."

²⁷⁰ Penal Code, Book Two, Part Four, Chapter Four, Articles 403-418.

laundering, in that order.²⁷¹ Implementation of the new Code by the ACJC resulted, in 2018-2019, in reduced reliance by prosecutors on the more general, catch-all charge of “misuse of authority”.²⁷² This trend continued in 2019-2020, as can be seen in the chart below.

During 2019, the ACJC prosecution office referred 67 cases to the ACJC Primary Court out of which 23 were tried. The rest were returned to the prosecution office to fill identified gaps and complete investigations. For the first time since its inception, the ACJC indicted “corruption” crimes related to elections. In the Kunar case, the defendants were indicted under Penal Code 2018, Article 432, for the offence of decreasing or increasing ballots during an election in favour of or against a candidate. The dispute over whether these crimes fell under the ACJC’s jurisdiction is described below.²⁷³ There was a notable reduction in the number of indictments for bribery (five) or mediation of bribery compared to the previous years. Forgery, misuse of authority, and illegal transfer of money constituted the highest number of indictments, in that order. The number of defendants charged with misuse of authority, forgery and embezzlement remained high, at 29, 26 and 15, respectively. The ACJC did not try any case of illicit enrichment as none was referred to the prosecutor for investigation.



3.3.5. The difficulty of ACJC prosecutors to complete indictments

The number of cases processed for trial by the Primary Court remained low despite the high number of indictments referred by the prosecution. Under Article 202(4)(4) of the Criminal Procedure Code (CPC) the court can, through a judicial ruling, refer a case back to the prosecutor

²⁷¹ UNAMA Anti-Corruption Report, May 2018, p. 37.

²⁷² UNAMA Anti-Corruption Report, May 2019, p.46.

²⁷³ *Infra* 3.3.5.

for additional investigation. The court may also order the prosecutor to investigate other suspects who were not indicted and to indict them jointly or separately.

In 2019, the ACJC prosecution office referred 67 cases to the Primary Court, out of which only 23 cases proceeded to trial. The rest, 44 cases, were returned by the Primary Court to the prosecution office for further investigation to cover identified investigative gaps. According to the Primary Court, at least 40 cases returned to the ACJC prosecution office for further investigation had not been resubmitted to the court, 27 of which had been pending for over a year. In addition, the ACJC prosecution office had not acted on the cases of 75 individuals whom the Primary Court had, in its detailed judgments in various cases, ordered to be indicted.

Responding to UNAMA requests for clarification as to the reasons for such a high number of judicial orders remaining unaddressed, the ACJC Chief Prosecutor explained that some of the crime scenes were not secure or within government control, and it was therefore not possible to conduct investigations in those places. The ACJC prosecution office added that the ACJC court, in returning cases, sometime raised issues that did not affect the nature of the case or requested investigations that were either not feasible or too lengthy.²⁷⁴ Furthermore, the Chief Prosecutor indicated his view that, once suspects had escaped to territory not in Government control, the ACJC prosecution office had very limited latitude for action. The Chief Prosecutor also noted poor cooperation by other government agencies delayed investigations. Lack of cooperation by the electoral bodies²⁷⁵, for example, contributed to delays in the Badakhshan elections case referred by the Primary Court to the Chief Prosecutor in July 2019.²⁷⁶ Notwithstanding the challenges articulated by the Chief Prosecutor in certain cases, the high number of indictments returned to the prosecution for lack of jurisdiction or defects in their evidentiary basis is of concern.

3.3.6. Adjudication of elections related crimes before the ACJC

The 2018 Penal Code codified all crimes contained in the 1976 Penal Code and in many other laws and statutes. Electoral crimes, previously enumerated in Article 99 of the 2016 Elections Law,²⁷⁷ became part of Chapter 6 of Part IV of the 2018 Penal Code under a general rubric titled “corruption and financial crimes.” Neither the Criminal Procedure Code²⁷⁸ nor the Law on the Structure and Jurisdiction of the Courts provided definitive guidance as to which court had the jurisdiction to adjudicate these crimes.

In early July 2019, the ACJC prosecution office submitted the indictments in both the Kunar and Badakhshan elections cases to the ACJC Primary Court. The prosecutor charged all defendants with misuse of authority offence under Penal Code Article 403.²⁷⁹ Following several referrals of both

²⁷⁴ ACJC prosecution office’s comments to an initial draft of this report, 22 April 2020.

²⁷⁵ The electoral bodies claimed to be preoccupied with the then ongoing presidential elections process.

²⁷⁶ Judicial Ruling number 13 (6 July 2019).

²⁷⁷ Elections Law, OG No. 1226 of 25 September 2016.

²⁷⁸ Criminal Procedure Code, Published in Official Gazette No. 1132 dated 5 May 2014 (15 Sawr 1393).

²⁷⁹ Misuse of Public Official. Article 403 provides that “(1) If a public official for the purpose of obtaining undue advantage for himself/herself or another person commits an illegal act or omits a legal act, this act shall be considered abuse of function and he/she shall be sentenced to medium imprisonment or cash fine from 60,000 AFN – 300,000 AFN. (2) If the perpetrator of the crime stated in paragraph (1) of this article is a public official, he/she shall also be dismissed and relinquished from profession and duty (3) If one of the authorities stated in

Jurisdiction in election crimes: a protracted battle

Whereas some crimes defined within the Penal Code chapter on electoral crimes may generally be described as corruption crimes, the 2018 Anti-Corruption Law does not include elections crimes in its definition of corruption crimes. Article 5 of the Anti-Corruption Law defines corruption crimes as being those crimes defined in: chapters one, two, three, four, five, eight, ten, eleven, and twelve of section four; chapter one of section five; chapter two of section six; chapters two and six of section nine and chapter four of section ten of Book Two of the Penal Code, thereby expressly excluding chapter 6 of part four on electoral crimes.

The Anti-Corruption Law confers on the ACJC jurisdiction to try major corruption crimes under Article 5, when (a) committed by certain named categories of high-ranking officials or (b) when they meet set monetary thresholds. Accordingly, the ACJC does not have jurisdiction to adjudicate electoral crimes. This was, indeed, the finding of the ACJC Primary Court when it declined jurisdiction to hear the first elections case submitted to it, relating to alleged crimes committed in the October 2018 Wolesi Jirga elections in the Kunar Province electoral constituency (the Kunar case). In the Kunar case, the ACJC Chief Prosecutor indicted twelve defendants comprising all the seven former commissioners of the Independent Election Commission (IEC), three former commissioners of the Electoral Complaints Commission (ECC) and two (2) senior officers of the IEC Secretariat for the offence of “altering or changing documents and increasing or decreasing votes” under Article 432(2) of the Penal Code. The two senior IEC officials were, in addition, charged under Article 435 of the Penal Code for aiding and abetting a crime.

On 23 April 2019 (03/02/1398), after reviewing the indictment, the Primary Court issued a judicial ruling holding that: “(T)he nature of crime (adding or deducting votes) are mentioned in paragraph 2 of Article 432 of Penal Code, which comes under the title of “Electoral Crimes” in Chapter 6, section 4. Based on Article 5 of Anti-Corruption Law, none of electoral crimes come under the definition of corruption. Therefore, based on paragraph 1 of Article 31 of Anti-Corruption Law, the jurisdiction of this court is limited to proceeding on corruption crimes mentioned in Article (5) of the Anti-Corruption Law, which are considered as Major Crimes in accordance with Article (27) of the mentioned law.” Accordingly, pursuant to Article 70(1) of the Law on the Structure and Authority of the Courts and Article 183 and 202(1) of the Criminal Procedure Code, the Primary Court found that it lacked jurisdiction in the matter, after preliminary assessment.

Following this initial decision, the AGO did not submit the other elections case, which arose from the elections in Badakhshan Province, to the ACJC Primary Court. Instead, the AGO prosecutorial committee, established to investigate the election cases, submitted both indictments in the Kunar and Badakhshan cases to the Primary Court in Kabul Police District 4, the district within which the Electoral Complaints Commission (ECC) offices are located and which thus had territorial jurisdiction. However, on 23 May 2019, before the Kabul PD 4 Court had considered the cases, the Supreme Court, at the request of the Kabul Appeal Court (Anti-Corruption Division), in a different case determining jurisdiction over electoral crimes, issued Circular No. (908_834) in which it ruled that considering Articles 5 and 27 of the Anti-Corruption Law, electoral crimes committed by a public servant were within the jurisdiction of the ACJC. The court further delegated jurisdiction on electoral crimes which do not fall under Article 5 of the Anti-Corruption Law to the anti-corruption court (in the capital), and to the public security division in urban courts in the provinces “in order to avoid confusion and disarray”.

The Supreme Court’s directive was anchored on three grounds: first, that as a rule, crimes and punishments are defined based on the criminal description of the acts and their perpetrators and not by the organ to which the perpetrators are affiliated; second, that “although Chapter six of Part Four of the Penal Code (Elections Crimes) is not listed in Article 5 of the Anti-Corruption Law, overall, Part Four dealt with corruption and financial crimes”; and third, that “elections crimes committed by public servants, in view of Article 5 of the AC Law, are considered administrative corruption crimes adjudication of which shall be done in accordance with their normal characteristics and the status of their perpetrators.”

Although the Supreme Court directive was not definitive on the legal basis, the ACJC Chief Prosecutor interpreted the directive as conferring jurisdiction upon the ACJC courts to try electoral crimes if the criteria in Article 27 of the Anti-Corruption Law was met. Accordingly, the ACJC Chief Prosecutor resubmitted both the Kunar and Badakhshan indictments to the ACJC Primary Court.

case files to the prosecution office to cover investigatory gaps, the Kunar case file was finally submitted to the Primary Court on 20 July 2019. On 2 and 3 September, the ACJC Primary Court tried the case in the presence of all the accused, save one defendant (former IEC Deputy), all of whom were represented by counsel. The Court found ten²⁸⁰ of the twelve defendants guilty on the charge of illegally altering an electoral decision by changing the number of votes in a result sheet. The charge of misuse of office was dismissed in respect to all defendants. The remaining two defendants, both senior officers of the IEC Secretariat, were acquitted. The court sentenced all ten convicted defendants to the maximum penalty of 5 years’ imprisonment.²⁸¹

article 151 of constitution conducts a profitable contract with the government during work tenure, he/she shall be sentenced to cash fine equivalent to price of contract.”

²⁸⁰ All the seven IEC and all three ECC commissioners. One IEC commissioner was tried in absentia pursuant to CPC Article 212 after having consistently cooperated with the ACJC prosecution in the entire investigation process.

²⁸¹ Primary Court Decision No. (8) Dated 12/06/1398 (03/09/2019).

While the primary prosecutor's office agreed with the Primary Court's decision, the defendants²⁸² appealed both the verdict and sentence. On 15 January 2020, almost five months²⁸³ after the Primary Court decision, the ACJC Appeal Court heard the case. Its ruling confirmed the Primary Court's guilty verdict but reduced the sentences for all defendants from five years' imprisonment to two years and six months. In line with the CPC and a directive of the Supreme Court,²⁸⁴ the Appeal Court explained the mitigating factors supporting its reduction of the sentences, including, among other factors, that the defendants were hitherto highly regarded members of society, were first offenders, some were in ill health, and that the crimes were committed without malice.²⁸⁵ On 22 March, the Supreme Court affirmed the convictions and sentences of the ACJC Appeal Court and further directed the Attorney General to investigate three other staff members of the IEC for their possible participation in the crime.

Following their conviction by the Primary Court in September 2019, the nine commissioners were arrested and incarcerated. The ACJC Appeals Court rejected the ACJC Chief Prosecutor's and the defendants' requests for their release on bail or guarantee pending a verdict on appeal. One defence lawyer, noting the serious health concerns of their client, highlighted that the rejection of bail was at variance with established ACJC practice of defendants being released on bail pending the final disposal of a case.²⁸⁶ One commissioner, who had absconded trial, was convicted *in absentia* and has since remained at large.

On 15 April 2020, the ACJC Appeals Court postponed the enforcement of the sentences and released all nine commissioners on a bail of AFN 250,000 pursuant to the special Presidential Decree No. 1 of 26 March 2020. A subsequent Presidential Pardon and Commutation Decree issued on 20 April 2020, on the 28th anniversary of the Jihad Victory, reduced the commissioners' remaining sentences by three quarters.²⁸⁷

Meanwhile, the Badakhshan case, in which all the former seven IEC, five ECC commissioners and two IEC officials were indicted, is still under investigation and has not yet been listed for trial before the ACJC Primary Court. The case had been referred back to the prosecution office on a number of occasions by the Primary Court for further investigatory action. Notwithstanding the explanations

²⁸² In accordance with CPC Article 263(3), one defendant who was tried and sentenced by the Primary Court in *absentia*, could not appeal the sentence until it was enforced.

²⁸³ In the intervening period, the Appeal Court had, through Judicial Decision No. 10 of 11/7/1398 (3 October 2019), directed the prosecution office to cover gaps in the evidence that the court had identified.

²⁸⁴ CPC Article 243(3)(10); The High Council of Supreme Court Newsletter of 7 Hood 1397 (26 February 2019).

²⁸⁵ Appeal Court Judgement, No. 13 dated 25/10/1398 (15/01/2020), p. 24 (informal English translation).

²⁸⁶ ACJC Appeal Court Judgement, No. 13 dated 25/10/1398 (15/01/2020), p. 18 (informal English translation). However, the ACJC prosecution confirmed that the defendant was provided with the medical assistance required under the law, was treated at the Ghazi Amanullah Khan Hospital and returned to detention when her condition improved. In addition, in response to an earlier draft of the report, the ACJC Appeal Court clarified that the defence team had never submitted the defendant's medical records to court for the court's assessment and pronouncement on bail.

²⁸⁷ President Decree of the President of the Islamic Republic of Afghanistan concerning commutation and Pardon of Juveniles and Prisoners' sentences on the 28th Anniversary of Jihad Victory of the People of Afghanistan.

given for the delay,²⁸⁸ the ongoing inaction gives rise to the observation that the ACJC prosecution office needs to enhance its performance to expedite such matters.

3.3.7. ACJC as a special court for land cases in the central region

In 2018,²⁸⁹ the Supreme Court established a number of special courts for the investigation of cases of the usurpation of state lands and other defined properties. The Court's High Council designated the ACJC as the special court to adjudicate land usurpation cases in the Central Zone (comprising Kabul, Maidan Wardak, Parwan, Logar, Kapisa and Ghazni provinces) involving ten or more *jeribs* of land or properties on which buildings had been erected.²⁹⁰ The special courts have authority to adjudicate over both civil and penal aspects of land grabbing. Appeals against the decisions of the special courts are referred to the Public Rights Tribunal of the Supreme Court.²⁹¹ The Supreme Court's decision to designate the ACJC as the Kabul Zone special court for land cases was based on the assessment that both the ACJC trial and appeal courts did not have a high workload and that both would have the capacity to adjudicate in land cases. Between January 2019 and 30 February 2020, the ACJC Primary Court received 60 land cases. Of these, the court decided one, returned 41 through judicial ruling, referred 14 to relevant departments through the sending of official letters, and four cases were still under process. During the same period, the ACJC Appeal Court received 34 land cases. Out of these, the court decided on eight, issued judicial rulings on four, referred 13 to relevant departments through the sending of official letters, and nine were still under process. As a result of the Court's decisions in the eight cases, 478 *jeribs* of land in Nangarhar Province and 10,326 *jeribs* of land in Kandahar and Logar provinces had been returned to the government. In sum, in 2019 as a result of the low corruption caseload, the ACJC appeals court, became mainly occupied with land cases.

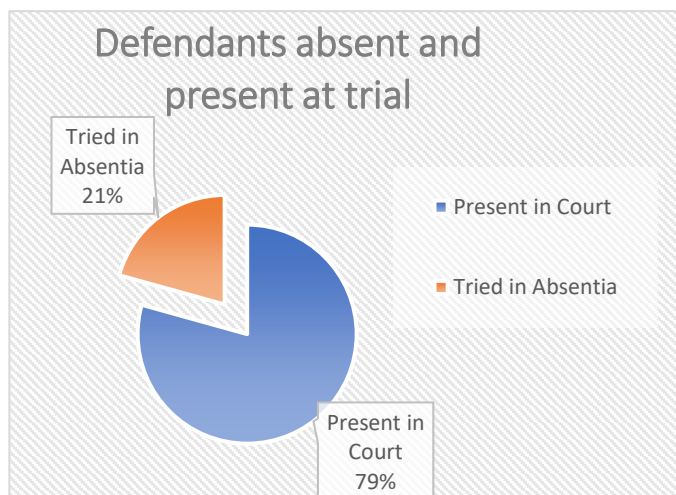
²⁸⁸ The ACJC Chief Prosecutor asserted that part of the delay was caused by the limited cooperation provided by both the Independent Elections Commission and the Electoral Complaints Commission who officially excused themselves since the institutions were busy with the presidential elections.

²⁸⁹ Through Decision No. (676), dated 22/06/1396) of the Supreme Court's High Council and Order No. (2709), dated 11/09/1396 of the President of Islamic Republic of Afghanistan.

²⁹⁰ Supreme Court High Council Approval No. (82), dated 1 January 2018 (11/10/1396).

²⁹¹ Ibid.

3.3.8. *In absentia* trials before the ACJC



Since its establishment, the ACJC has tried 261²⁹² defendants at the Primary Court level. Out of these 54 (21 per cent) have been tried *in absentia*, either under CPC Article 209 or Article 212. In this reporting period, since May 2019, the ACJC Primary Court has tried 17 cases with 51 defendants of whom 41 were present in court while 10 were tried *in absentia*.

One reason for the high number of *in absentia* trials is that the Afghan

criminal procedure is conducive to proceeding in the absence of the defendant. According to the CPC, the presence of the accused person or his/her lawyer is a fundamental requirement for the conduct of a judicial session in misdemeanour and felony crimes.²⁹³ In other cases, the accused's presence is mandatory if the court deems it necessary and useful.²⁹⁴ If the accused does not appear, notwithstanding notification, the court shall in the first instance issue summons or arrest warrants. Subsequently, the court will issue an announcement which, if not honoured, will lead the court to assign a legal aid attorney, hear the case without the accused, and issue a decision.²⁹⁵

Another reason for the high number of *in absentia* trials before the ACJC is that several defendants absconded during their pre-trial release and the difficulties of executing arrest warrants. While the ACJC practice on granting pre-trial and post-conviction (or acquittal and pending appeal) release on bail has not been consistent, it clearly shows that most defendants are not detained during their ACJC trials. The ACJC prosecution has cited that, according to the CPC, a defendant may only be detained for a maximum of 75 days during investigations,²⁹⁶ while corruption investigations are complex and may take longer. The ACJC statistics show that the release of suspects and accused persons on bail or guarantee has resulted in a high number of accused being tried *in absentia* and whose sentences are therefore not enforced. Between January 2019 and March 2020, of the 85 defendants indicted, 56 were present in court during their trial. Sixteen of those were detained while the rest were released on guarantee. Of the 85 indicted defendants, 29 were tried *in absentia*, of whom 27 had been released on guarantee while two²⁹⁷ had been released by the police without guarantee.

²⁹² As of 30 May 2020.

²⁹³ CPC Article 212(1).

²⁹⁴ CPC Article 206 Provides that: The court demands the appearance of the accused person, victim's defense attorney, public rights claimant or his representative, and other people if their appearance in judicial session is deemed necessary and useful.

²⁹⁵ CPC Article 209(2).

²⁹⁶ CPC, Article 100.

²⁹⁷ In the Gold Case (Case No. 11).

3.3.9. Difficulties in the enforcement of arrest warrants and summonses

Whether corruption prosecutions deter corruption depends on the ability of Afghanistan's law enforcement authorities to enforce arrest warrants and summonses, which has generally been weak.²⁹⁸ The challenge persisted in 2019 and 2020. In the run up to the Geneva Conference in November 2018, the government released a list of 127 ACJC issued warrants and summonses that were targeted for enforcement. A further list of 128 was released in early 2019. A report²⁹⁹ issued by the Attorney General's Office (AGO) in February 2020 showed that, from the two lists, a combined total of 171 arrest warrants and summonses had been implemented,³⁰⁰ 50 were under process, and 34 individuals had been identified as residing outside the jurisdiction. A further update issued in early March 2020 showed no change in the status of execution.

The two warrants and summonses lists were not exhaustive of pending ACJC warrants as names of some ACJC convicted defendants who were convicted in *absentia* had not been added to the lists and remained at large. For example, powerful individuals like the former commander of the Afghan National Civil Order Police (ANCOP), a former deputy minister in the Ministry of Haj, a former Senator and a former Provincial Council Member, all convicted by the ACJC, were yet to be arrested. Meanwhile, the Warrant Action Group (WAG), which was created by the Afghan National Police, Combined Transition Command-Afghanistan (CSTC-A) and the MCTF in 2018 to increase coordination amongst law enforcement agencies, did not significantly increase the number of executed warrants.³⁰¹ In mid-2019, the Minister of Interior took steps to streamline the process of executing arrest warrants and summonses by directing that arrest warrants issued by the AGO, particularly those related to the ACJC, were to be sent to the MoI, which would clear them and issue specific instructions to relevant departments to enforce the warrants. The Minister assigned the MCTF the responsibility of enforcing warrants from the ACJC.³⁰²

²⁹⁸ See, for example, SIGAR, January 30, 2019 Quarterly Report to Congress, p.134 <https://www.sigar.mil/pdf/quarterlyreports/2019-01-30qr.pdf> (accessed on 10 May 2020); SIGAR, April 30, 2019 Quarterly Report to Congress, p. 126 <https://www.sigar.mil/pdf/quarterlyreports/2019-04-30qr.pdf> (accessed on 10 May 2020) and UNAMA Anti-Corruption Report, May 2019, Chapter 3.4.2.

²⁹⁹ Report on date and figures related to arrest warrants of prosecution office of Anti-Corruption Justice Centre, Prepared by the Subcommittee for Execution of Warrants, 11 February 2020 (22/11/1398).

³⁰⁰ The AGO informed that all summonses had been turned into warrants by then.

³⁰¹ SIGAR, Afghanistan's Anti-Corruption Efforts, November 2019, p. 21. See <https://www.sigar.mil/pdf/audits/SIGAR-20-06-AR.pdf> (accessed on 1 March 2020).

³⁰² Letter No: 4685 dated 4/4/98 (25 June 2019).

On 24 December 2019, the Attorney General and the Minister of Interior, recognizing the need for better coordination, set up the Arrest Warrants Joint Committee to accelerate execution of orders of the courts by the MoI.³⁰³ A representative of the AGO chairs the committee. The composition of the group was revised after the new MCTF director was appointed. In May 2020, the MCTF provided a consolidated warrant list which showed that in addition to the 50 unexecuted warrants from the two lists of 127 and 128, a further 344 newly issued ACJC warrants with 349 individuals were added in 2019. A different set of numbers was received from the ACJC prosecution.

Observations:

2019 showed an increase in ACJC cases adjudicated at the trial level but the complexity of cases and the rank of the defendants generally dropped. A closer analysis of ACJC data uncovered that many ACJC indictments were not tried because the court deemed them incomplete or below its jurisdictional threshold. Weaknesses in the ACJC's police component became increasingly concerning, as they frustrated arrests or successful collection of evidentiary material.

With the case against the former election commissioners the ACJC demonstrated its ability to handle a politically sensitive case, sending a strong signal to electoral officials prior to the 2019 Presidential elections.

3.4. The Supreme Court's adjudication of corruption cases

The Constitution of Afghanistan and the Law on the Structure and Authority of Special Courts confers on the Supreme Court exclusive jurisdiction to adjudicate cases of serving or former Ministers for crimes associated with the performance of their functions.³⁰⁴ However, in 2019, the Supreme Court did not try any minister-level special court case. The first and, so far, only case that the Court has heard is the case of former Minister of Telecommunications and Information Technology.³⁰⁵ It has not published the judgement in this case in the Court's monthly report.³⁰⁶ According to the Supreme Court, in 2019, two special court cases were reviewed and both were returned for further investigations. One case could not proceed to the hearing because the defendant resided abroad, and the file was returned to the AGO with directions to resubmit it to the Supreme Court when the accused was in Afghanistan.³⁰⁷

In other criminal cases, appeals to the Supreme Court may be brought when legal errors in the lower court's decision are alleged or when it could be found invalid for various reasons.³⁰⁸ While

³⁰³ Ministry of Interior Memo No. 586 dated 2 January 2020.

³⁰⁴ Afghan Constitution, Articles 78, 127; Law on the Structure and Authority of Special Courts, OG 1130 of 12 April 2014 (Special Courts Law).

³⁰⁵ Judgement was rendered on 25 December 2018.

³⁰⁶ 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.

³⁰⁷ Supreme Court responses to UNAMA request for data, 19 February 2020.

³⁰⁸ CPC Article 270(1) Paras 1, 2 and 3.

Article 234(1) of the CPC requires courts to announce the sentence openly,³⁰⁹ the Supreme Court has never pronounced any of its decisions or sentences³¹⁰ in ACJC-related appeals in open court.³¹¹

In 2019, the Supreme Court considered 12 appeals from ACJC judgements. The court has considered 48 appeals from the ACJC since it was established. As in previous years,³¹² the Supreme Court confirmed most verdicts and sentences entered by the ACJC Appeal Court. There was one notable exception in 2019: the case of a former deputy minister of Finance. In that case, the ACJC Appeal Court had reversed the Primary Court's conviction and sentence of three years' imprisonment³¹³ and acquitted the defendant on two counts of misuse of office.³¹⁴ In its decision rendered on 18 November 2019, the Supreme Court reversed the judgment of the ACJC Appeal Court based on an error in the application of the law and returned the file to the prosecution office to address the investigatory gaps that the court had identified.³¹⁵ Upon completion of the additional investigation, the prosecution sent the case to the ACJC Appeal court which, on 12 February 2020, again acquitted the defendant. In a previous case when the ACJC Appeal Court had declined to change its decision following the remittance of the case from the Supreme Court, the Supreme Court had sent the case to another court of parallel jurisdiction for rehearing.³¹⁶

On 22 March 2020, the Supreme Court affirmed the convictions and sentences of two and a half years' imprisonment entered by the ACJC Appeal Court in the Kunar province elections case and directed the AGO to investigate three other staff members of the IEC in relation to this case.³¹⁷

Observation:

The Supreme Court was active in adjudicating appeals against ACJC decisions. In a landmark decision it clarified the jurisdiction in the election cases. In the reporting period, the Supreme Court heard no minister-level special court case. Transparency in Supreme Court cases did not improve.

3.5. Asset recovery initiatives

The December 2017 Afghanistan National Strategy for Combating Corruption envisaged a revision of civil and criminal substantive and procedural laws to "foster the prosecution of corrupt individuals and to promote the recovery of illegally acquired assets".³¹⁸ The 2018 Penal Code,³¹⁹

³⁰⁹ CPC Article 234(1) provides that "(1) The sentence shall be announced openly in any case even if the trial was a closed session".

³¹⁰ This position was rationalized by referring to Penal Code, Article 183.

³¹¹ UNAMA Anti-Corruption Report, May 2018, p. 45.

³¹² UNAMA Anti-Corruption Report, May 2018, p. 47.

³¹³ Primary Court Judgement of 2/11/1397(22/01/2019).

³¹⁴ Appeal Court Judgement No. 5 of 30/04/1398 (21/07/2019).

³¹⁵ Supreme Court Ruling No. 1420 dated 28/07/1398 (20/10/2019).

³¹⁶ In the Ministry of Urban Affairs Case, Supreme Court Judicial Ruling No. 780 dated 7/5/1396(29/07/2017) and Supreme Court Judicial Ruling No. 1233 dated 1/8/1396(23/10/2017).

³¹⁷ See *supra* 1.3.5.

³¹⁸ Anti-Corruption Strategy, Pillar 1: Political Leadership and Empowering Reformers.

³¹⁹ Adopted through a Presidential Legislative Decree in March 2017.

amendments to the Law on Structure and Authority of the Attorney General's Office³²⁰ and the 2018 Anti-Corruption Law³²¹ paved the way for a better asset recovery system. The asset recovery regulations, adopted by Cabinet on 4 March 2020, completed the legal framework.³²²

The regulations clarify the duties and authorities of justice institutions and other relevant organizations in the recovery of illicit assets; identify illicit assets controlled or possessed by real or legal persons; state how to manage confiscated assets; and aim to improve coordination among governmental institutions, foreign States, national and international organizations to identify, and recover illicit assets.³²³ The draft regulations were consulted with the UN³²⁴ and partners.

In 2019, recoveries related to the Kabul Bank scandal continued and, according to the AGO, brought the total amount of cash recovered to USD 271 million. Payments agreements have been reached for USD 29 million and about USD 47 million worth of assets were traced to Dubai. On 22 July 2019, the Office of Chief of Staff of the President directed the Attorney General to release Khalilullah Ferozi, the principal organizer of the Kabul Bank fraud, from prison to home detention. This was on the basis of Mr. Ferozi's poor health and his new commitment to repay his debt, which he signed on 18 July 2019.³²⁵ According to the AGO, since his release, Mr. Ferozi has submitted nine titles to his properties to the Kabul Bank Clearance Office. Four of the properties, valued at AFN 873,470,466 (about USD 11,400,000) are being transferred to the Ministry of Finance.

In addition to imprisonment sentences, the ACJC continued to order payment of fines, compensation, restitution and or confiscation of illegally acquired assets. In cases tried in 2019, the ACJC Primary Court ordered payment of a total of AFN 19,956,000 and USD 80,000 in cash fines; AFN 282,905,040 in restitution; confiscation of USD 102,277,675, EUR 15,000, AFN 83,050,000, AED 100,000, and SAR 5,626,000; and 41.375 grams of gold. The ACJC Appeal Court affirmed orders for cash fines, compensation, restitution and confiscation in the amounts of AFN 336,836,071, USD 80,000, AED 100,000, SAR 150,000 and EUR 15,000, in total in all cases it heard in 2019³²⁶ But the percentage of recoveries made from those court orders continued to be low.

Observation:

The welcome adoption of the asset recovery rules in March 2020 operationalizes the legislative framework for asset recovery and should accelerate recovery of assets stolen from the Afghan people.

³²⁰ 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.

³²¹ Adopted by Decree on 5 September 2018 and amended through Presidential Legislative Decree No. 354 dated 5 March 2019.

³²² Regulation on Recovery of Illicit Assets of Proceeds of Corruption adopted by cabinet on 4 March 2020.

³²³ Regulation on Recovery of Illicit Assets of Proceeds of Corruption, Article 2.

³²⁴ UNAMA and UNODC provided joint comments on 13 October 2019.

³²⁵ Letter No. 2414 dated 22 July 2019. A 5 September 2018 amendment to Article 350 of the CPC (PD No. 308 published in OG 1132) made it possible for prisoners suffering from incurable illness to benefit from presidential pardon and commutation decrees issued under Article 64 of the Afghan Constitution.

³²⁶ Supreme Court responses to a UNAMA request for data, 19 February 2020.

4. Anti-Corruption measures in the legislative branch

In October 2018, Afghanistan held elections for the Wolesi Jirga (Lower House of the National Assembly) that had been deferred since 2015. Management of the election, including numerous logistical failures, allegations of fraud, and lengthy complaints and adjudication procedures led to the delays in finalizing results. The new parliament was not seated until 26 April 2019. The late announcement of final election results for Kabul constituency and a protracted process for internal elections of the Wolesi Jirga's administrative board and commissions further delayed parliamentary work leaving little time in 2019 for parliament to effectively exercise its legislative, oversight and popular representation functions. Disappointingly, allegations of corrupt practices persisted within the National Assembly, despite the fact that a significant number of elected candidates campaigned on anti-corruption platforms.

In June 2019, the MEC released its vulnerability to corruption assessment of the Parliament.³²⁷ Otherwise, apart from UNAMA's assessments of parliament in its annual anti-corruption reports, little research on integrity measures in the National Assembly is available. International projects to improve the integrity and effectiveness of the National Assembly received little traction. A new UNDP-led parliamentary support programme, "Strengthening of Legislature in Afghanistan" (SOLA 2020-2024), focuses on support to both Houses of Parliament to better exercise its legislative function, help improve its oversight of the executive branch, and supporting communication and outreach capacities for greater transparency and citizen and civil society engagement.

4.1. The new Parliament after Wolesi Jirga elections

Afghanistan's bi-cameral National Assembly comprises the Wolesi Jirga (Lower House) with 250 seats and the Meshrano Jirga (Upper House) with 102 seats.³²⁸ The Wolesi Jirga elected in 2018 comprises 181 men (72.4 per cent) and 69 women (27.6 per cent). Out of the 250 members of parliament, 157 (127 men and 30 women) were newly elected. The Meshrano Jirga currently comprises 68 senators, 34 were appointed by the President and 34 were elected from Provincial Councils. The 34 seats for District Council representatives remain vacant as District Council elections have never taken place.

After a protracted vote-counting and complaints process, the final certified parliamentary election results for all 35 participating electoral constituencies were announced on 14 May 2019. The new National Assembly was inaugurated with representatives from all constituencies except Kabul, where counting was still unresolved, and Ghazni³²⁹ provinces on 26 April. On 15 May, provincial representatives from Kabul were finally sworn in. The internal election of the Wolesi Jirga administrative board consisting of the chairperson, first and second deputy chairperson, secretary and assistant secretary was lengthy and contentious. It was completed on 7 July 2019, after several

³²⁷ MEC, Vulnerability to Corruption Assessment of Afghanistan's Parliament, 27 June 2019, at: https://www.mec.af/files/2019_07_21_parliament_vca_full_report_en.pdf (accessed on 11 March 2020).

³²⁸ Afghan Constitution, Article 82 *et seq.*

³²⁹ The Wolesi Jirga elections in Ghazni were delayed due to insecurity and are yet to be held as of time of publication of this report. Until elections take place, Members of the Wolesi Jirga from the previous Ghazni election remain in Parliament.

unsuccessful rounds of voting. The election of members of the 17 parliamentary commissions was not finalized until November 2019, after the summer recess. While in the past familiarisation sessions on the work of the National Assembly had been held for new members, these sessions were omitted to make up for the delays.³³⁰ Parliamentarians told UNAMA that this impacted on the quality of their work.

Delays in the inauguration and constitution of internal governance structures of the National Assembly's 17th legislative term resulted in a backlog of over 120 draft laws and documents pending parliamentary review. In April 2020, over 80 legislative acts remained pending. The unpredictability in legislative activities led the executive branch to routinely exercise legislative functions under its emergency powers pursuant to Article 79 of the Constitution.³³¹ In 2019, 17 legislative acts were passed by Presidential decree, while nine were passed by the National Assembly following approval by both Houses,³³² representing a reduction from previous years.³³³ Reasons for the slow pace of National Assembly legislation include lack of quorum, technical capacity by parliamentary commissions and difficulties to form consensus on substantive issues among parliamentarians. Other weaknesses in the National Assembly's legislative work identified by the MEC include poor cooperation between the executive and judicial branches, unclear procedures, low capacity of members, and ineffective cooperation with the legislative department of the Ministry of Justice (*Taqnin*).³³⁴ The MEC also highlighted a need for greater transparency of the legislative process.³³⁵

4.2. Anti-Corruption measures in the National Assembly

The Constitution mandates that members of the Assembly shall vote according to the public's interest and to the benefit of the people of Afghanistan.³³⁶ Draft legislation such as the Lower House's proposal to reduce obligations under the Asset Declaration Law, which remains pending before the Parliament's mixed committee for resolution,³³⁷ cast doubt as to whether Parliamentarians are indeed focusing on the public's interest or their own. As of 30 April 2020, 48 members of the Wolesi Jirga and 29 Senators had registered their assets.

The Rules of Procedure of the Lower House³³⁸ and the Upper House³³⁹ provide for enforcement of disciplinary measures for acts contrary to the Constitution. The rules prohibit Members of the National Assembly from engaging in other employment³⁴⁰ during their terms in office and contain

³³⁰ UNAMA meeting with the Wolesi Jirga Legislative Committee on 11 March 2019.

³³¹ See *supra* 2.4. and Afghan Constitution, Article 79.

³³² Counted is legislation published in the Official Gazettes.

³³³ See *supra* 2.4. and UNAMA Anti-Corruption Report, May 2019, p. 17; UNAMA Anti-Corruption Report, May 2018, p. 17.

³³⁴ MEC, Introduction Report on Vulnerability to Corruption Assessment of Afghanistan's Parliament, 27 June 2019, at: https://www.mec.af/files/2019_07_21_parliament_vca_full_report_en.pdf (accessed on 11 March 2020), pp. 12-16.

³³⁵ MEC, Introduction Report on Vulnerability to Corruption Assessment of Afghanistan's Parliament, 27 June 2019, at: https://www.mec.af/files/2019_07_21_parliament_vca_full_report_en.pdf (accessed on 11 March 2020), p. 16.

³³⁶ Afghan Constitution Article 81.

³³⁷ See *supra* 2.4.

³³⁸ Rules of Procedure of the Wolesi Jirga, Chapter 12, Article 70.

³³⁹ Rules of Procedure of the Meshrano Jirga, Chapter 12.

³⁴⁰ Afghan Constitution, Article 152.

provisions for the criminal prosecution of Members.³⁴¹ The Upper House's Rules of Procedure³⁴² allow for the dismissal of a Member upon a vote for acts contrary to the Constitution. Members of both houses have argued that no dedicated code of conduct for Parliamentarians is required because disciplinary matters are sufficiently regulated in the rules. The MEC, however, highlighted that members of the National Assembly were unfamiliar with Codes of Ethics, disregarded rules on conflict of interest and that disciplinary measures were unequally enforced.³⁴³ During the reporting period, no disciplinary measures were taken against any members of either house.

In an effort to increase the transparency of their working procedures, both houses intended to publish legislation both adopted and under consideration as well as international agreements, conventions and treaties ratified. The online-list remains incomplete and unreliable.³⁴⁴ The Wolesi Jirga recently began publishing attendance records³⁴⁵ and the agenda of its sessions on its website.³⁴⁶ Attendance of parliamentary sittings continued to be generally low, with an average of 55 percent of parliamentarians present. Not attending sessions was not sanctioned.

The 2017 Anti-Corruption Strategy stated: "Parliament should be urged to formulate and enforce an anti-corruption strategy built on a code of conduct against corrupt practices, verified asset declarations, and report cards that are released to the public."³⁴⁷ Its revised benchmarks foresaw that the Parliament should adopt its anti-corruption plan by December 2019.³⁴⁸ In late 2018, the Wolesi and Meshrano Jirgas' Secretariats developed their respective internal anti-corruption plans. While regulating relevant areas such as recruitment and procurement, the plans' temporal scope (1397³⁴⁹ only) and limited jurisdiction, over the secretariats alone, diminished their impact. The Meshrano Jirga Secretariat extended the time period of the action plan for anti-corruption to 1398³⁵⁰ without following through on the implementation.

Under the Institutional and Capacity Support to the Parliament of Afghanistan (ICSPA) project, which closed in late 2019, UNDP provided technical assistance to National Assembly secretariats and directorates to implement Inter-Parliamentary Union standards and increased public access to information through support to publishing on the parliamentary website the status of bills and laws through the Legislative Tracking System, parliamentary debates, proposed legislation, policy reviews, and plenary and committee reports. As noted, these remained incomplete.

³⁴¹ Afghan Constitution, Article 102.

³⁴² Rules of Procedure of the Meshrano Jirga, Chapter 3, Article 12.

³⁴³ MEC, Introduction Report on Vulnerability to Corruption Assessment of Afghanistan's Parliament, 27 June 2019, at: https://www.mec.af/files/2019_07_21_parliament_vca_full_report_en.pdf (accessed on 11 March 2020), pp. 25 *et seq.*

³⁴⁴ See <http://www.bil.parliament.af/> (accessed on 11 March 2020).

³⁴⁵ See <http://wolesi.website/pvd/document.aspx?Cat=103> (accessed on 11 March 2020).

³⁴⁶ See <http://wolesi.website/pvd/document.aspx?Cat=101> (accessed on 11 March 2020).

³⁴⁷ Anti-Corruption Strategy, Pillar 1 Political Institutions and Leadership, https://www.sacs.gov.af/uploads/strategy_pdf/Strategy_en.pdf (accessed on 10 March 2020).

³⁴⁸ Anti-Corruption Strategy, Benchmarks, Pillar 1 https://www.sacs.gov.af/uploads/strategy_pdf/Strategy_en.pdf (accessed on 10 March 2020).

³⁴⁹ March 2018-March 2019.

³⁵⁰ March 2019-March 2020.

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 powers to oversee the work of the executive through its authority to approve the budget and question ministers,³⁵¹ and the Wolesi Jirga with the authority to decide on development programmes, and approve or reject the appointment of ministers.³⁵²

In the legislative term since 26 April 2019, the Wolesi Jirga summoned five ministers and four government officials for questioning, while the Meshrano Jirga summoned four ministers. During the reporting period, the President made several new government appointments. On 29 June 2019, the President appointed the State Minister of Peace,³⁵³ following a process not requiring parliamentary approval. The National Assembly approved the State Ministry of Peace as an independent government entity on 30 December 2019 and approved its funding in the 2020 fiscal year national budget on 22 January 2020. The three ministers and a deputy minister appointed in an acting capacity prior to the announcement of the final results of the presidential election on 18 February have not yet been introduced to parliament for approval. Neither have the acting cabinet appointments announced in March and April 2020 introduced for parliamentary approval.

In contrast to the collaborative deliberations of the 2019 budget, the approval of the 2020 fiscal year (1399 solar year) national budget was prolonged by the efforts of several parliamentarians to gain more development allocations for their constituencies. On 21 January 2020, the Wolesi Jirga approved the 2020 national budget. Out of 171 parliamentarians present, 101 approved, 45 objected, and 25 abstained. At the same time, during the review of the Government's 2018 (1397 solar year) national budget expenditure report, Members of Parliament highlighted concerns over the use by Government of the budgetary code 91, which is designated for emergencies and thus exempt from the regular budgetary process and controls. Parliamentarians accused leaders of the government of embezzlement and misappropriation of funds. Reports suggest around 280 decrees authorized the use of funds under code 91, most of which were reportedly justified as "*cash aid*," with the National Directorate of Security, the Administrative Office of the President, the Office of Chief Executive, the Office of the Chief of Staff for the President, and the Office of National Security Council of Afghanistan the largest beneficiaries of funds used through the code.

4.4. Criminal accountability and the National Assembly

The UNCAC requires States 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."³⁵⁴ This provision should ensure accountability for corruption offences of public

³⁵¹ Afghan Constitution, Articles 90(3), 93, 98-99.

³⁵² Afghan Constitution, Articles 91-93.

³⁵³ The appointment was made pursuant to Article 64(13) of the Constitution.

³⁵⁴ UNCAC, Article 30(2).

officials.³⁵⁵ 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.”³⁵⁶ The Constitution provides absolute functional immunity from prosecution for members of the National Assembly for exercising their voting rights or expressing opinions in discharging their duties.³⁵⁷ Article 102 of the Constitution provides that Members of Parliament must be prosecuted for other crimes and the respective House should be informed about the case. The approval of the relevant House is required for the detention or other measures of restraint regarding its members.³⁵⁸

During an investigation, the Attorney General has to request such approval when a suspect does not answer to summonses voluntarily. In 2018, the Attorney General requested the approval to detain Members of the Lower House three times, and three times for Members of the Upper House.³⁵⁹ The AGO did not provide updated figures for 2019. No authorization to remove immunity of any Parliamentarian is on record, which created a culture of de facto impunity. The protection of Article 102 of the Constitution, however, is temporary, and once the Members’ mandate expires, they are no longer afforded special protection in criminal cases. The AGO reported that it has not arrested any former member of the National Assembly after their immunity from arrest ended.

In total two members of Parliament were convicted for corruption in Afghanistan. On 5 May 2019, the ACJC found a sitting Senator guilty of illicit enrichment and sentenced him to one year and one-month imprisonment and restitution of AFN 1,000,000.³⁶⁰ Despite a travel ban, the Senator, who was convicted *in absentia*, escaped to the US. In December 2019, he was convicted in the U.S. for federal welfare fraud, an offence to which he pled guilty.³⁶¹ While the National Assembly did not relieve him from duty after the ACJC decision, the Senate informed UNAMA that he was dismissed from Senate following the U.S. conviction by Presidential order of 11 January 2020.

Observations:

Little progress in the development of integrity, transparency and accountability frameworks was observed in Parliament during the reporting period. This lack of progress was partly caused by delays in the inauguration and constitution of the Wolesi Jirga but can also be attributed to a prevailing culture of impunity within the legislature. The dismissal of a Senator after a foreign conviction for fraud is a welcome turn towards accountability.

³⁵⁵ UNODC, Legislative guide for implementation of the UNCAC, 2012, paras. 386-387.

³⁵⁶ 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 2020).

³⁵⁷ Afghan Constitution, Article 101.

³⁵⁸ Afghan Constitution, Article 102.

³⁵⁹ UNAMA Anti-Corruption Report, May 2019, p. 64.

³⁶⁰ ACJC primary court decision 4 date of 5 May 2019 and appeal court decision # 4 date of 12 May 2019.

³⁶¹ Case 19-cr-4967-BAS: <https://www.justice.gov/usao-sdca/pr/afghan-senator-convicted-federal-welfare-fraud> (accessed 10 March 2020).

5. Independent institutions' anti-corruption work

Continued changes in the institutional framework of anti-corruption bodies thwarted coordinated counter corruption approaches. While UNCAC provides for discretion on how States parties design their institutional framework so that it remains in line with the “fundamental principles of its legal system”,³⁶² a consistent approach is necessary to build effective anti-corruption institutions. Afghanistan, however, has had difficulties in making consistent policy choices on its institutional framework, which undermined the effectiveness of anti-corruption measures and led to overlapping mandates and occasional self-censorship of anti-corruption bodies.³⁶³

A weakness of the 2017 Anti-Corruption Strategy, its revision, and the 2018 Anti-Corruption Law³⁶⁴ was that they did not fulfil the key expectation of clarifying, rationalizing and streamlining Afghanistan's complicated structure of anti-corruption bodies.³⁶⁵ Absent an overarching policy specifying a rational anti-corruption regime, the re-construction and deconstruction of anti-corruption agencies continued and institutions closed or opened without strategic plan. Anti-corruption institutions were left without solid mandates or clarity on their future. While the Anti-Corruption Law laid the legal foundation for a formally independent Anti-Corruption Commission, which is expected to fulfil the functions of an UNCAC Article 6 body, the Commission has still not been established and uncertainty about how overlapping functions of other bodies will be reconciled still exist.³⁶⁶ The new Anti-Corruption Strategy should clearly outline the institutional framework and the Anti-Corruption Law should be developed into a single codification to incorporate and coordinate anti-corruption institutions as comprehensively as possible.

5.1. Independent Joint Anti-Corruption Monitoring and Evaluation Committee

In 2019, the Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC), a hybrid body with three national and three international commissioners, that is temporary in nature, gradually lost capacity. Despite years of uncertainties about its future³⁶⁷ and donors' declining interest in funding the body,³⁶⁸ the MEC did not plan for its phased drawdown or develop recommendations to transition functions to other anti-corruption institutions or civil society.

The MEC was initially established within a predecessor UNCAC Article 6 body of the Anti-Corruption Commission, the High Office of Oversight and Anti-Corruption (HOOAC), in an attempt to improve

³⁶² UNCAC Article 6.

³⁶³ Afghanistan Analysts Network, Afghanistan's Anti-Corruption Institutions: Too many with too few results, May 2019, at: <https://www.afghanistan-analysts.org/en/reports/economy-development-environment/afghanistan-anti-corruption-institutions-too-many-and-with-too-few-results/>; Integrity Watch Afghanistan, Fighting Corruption in Afghanistan: Solving the Institutional Puzzle, November 2016, at: <https://iwaweb.org/wp-content/uploads/2016/11/Solving-the-Institutional-Puzzle.pdf> (accessed on 2 March 2019).

³⁶⁴ Article 40 of the Anti-Corruption Law allows the merging of institutions upon presidential order.

³⁶⁵ UNAMA Anti-Corruption Report, May 2018, p. 16.

³⁶⁶ UNAMA, Anti-Corruption Report May 2018, p. 69 *et seq.* See *supra* 2.4.

³⁶⁷ UNAMA, Anti-Corruption Report May 2018, p. 59-61; UNAMA, Anti-Corruption Report May 2019, p. 69.

³⁶⁸ Statement Secretary of State Pompeo, 19 September 2019.

this body's performance.³⁶⁹ A 2016 Presidential Decree³⁷⁰ separated the MEC from the HOOAC and gave it strengthened functions in five areas:³⁷¹ (1) monitoring and evaluating the anti-corruption efforts of the Government and the international community; (2) issuing recommendations for introducing reforms; (3) monitoring and evaluating the effectiveness, transparency and accountability of international aid; (4) monitoring the implementation of its recommendations; and (5) reporting on the status of implementation of the committee's recommendations and overall situation of corruption in the country to the President, Parliament and the international community.³⁷² This Presidential Executive Decree remains the MEC's only legal foundation. Its flaw is that it can be changed at any time and therefore does not provide for legal certainty.

The President's powers over the MEC's composition, including his prerogative to appoint Committee members, combined with the body's exclusive reliance on donor-funding and the donors' role in selecting the international commissioners,³⁷³ impacted on the pace of the Committee's operations in 2019. Since March 2020, the MEC has been without a committee. Mandates of Committee members, whose tenures ended in 2019 and 2020, were not renewed and new candidates were not selected to replace them. The Jakarta principles' recommendation regarding continuity of the duties of anti-corruption agencies' leadership require that functions of the committee members should have been delegated until the appointment of their replacements.³⁷⁴ The MEC's core-funding ended in December 2019, leaving it with only international project funding to publish remaining assessments and produce follow-up reports. The executive decree that provides the legal basis for the MEC was never amended to reflect its rump composition since March 2020, which makes its ongoing operations legally questionable.

Between its establishment and April 2020, the MEC has issued 1,247 recommendations, published four Ministry-wide Vulnerability to Corruption Assessments (MVCA),³⁷⁵ 15 Vulnerability to Corruption Assessments (VCA), four special reports³⁷⁶ and 26 follow-up reports.³⁷⁷ In 2019, the MEC published 18 reports,³⁷⁸ including VCAs on the National Assembly, the Ministry of Interior,

³⁶⁹ Presidential Decree on Effective Combat Against Corruption (Decree No. 61), 18 March 2010, Article 8.

³⁷⁰ 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.

³⁷¹ Ibid, Articles 1 and 2.

³⁷² Article 5, Terms of reference, authorities, functioning and organizational structure of the Independent Joint Monitoring and Evaluation Committee annexed to Presidential Decree on the amendment of legal personality, duties, functioning and authorities of The Independent Joint Anti-Corruption Monitoring and Evaluation Committee (Decree No. 115), 18 September 2016. (MEC TORs).

³⁷³ 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 24 February 2020).

³⁷⁴ Jakarta Statement on Principles for Anti-Corruption Agencies, 26-27 September 2012, accessible at: https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf (accessed 24 February 2020).

³⁷⁵ MoPH, MoE, MoMP and MoI.

³⁷⁶ AGO, Land Usurpation, Fuel and Liquid Gas Importation and Selected foreign Assistance Program.

³⁷⁷ Three on Kabul Bank; seven on the Ministry of Public Health; four on the AGO; five on the Ministry of Education; two on the Ministry of Interior; two on the Ministry of MoMP; one on Da Afghanistan Breshna Sherkat; one on Fuel and Liquid Gas; and one on the Pension Payment Process.

³⁷⁸ See <http://www.mec.af/> (accessed 15 March 2020).

and the recruitment practises of the Ministry of Foreign Affairs. In 2020, the publication of VCAs on elections, public procurement and custom revenues remained pending. The assessment of the Law and Order Trust Fund for Afghanistan (LOTFA) — scheduled for 2018 — was permanently shelved for unclear reasons. In addition to its assessments, the MEC provided expert comments to anti-corruption legislation and policies. Between 2016 and 2018, the MEC reviewed anti-corruption action plans of eleven ministries and provided the reviews to the Special Secretariat for use in its work overseeing the implementation of action plans under the current Anti-Corruption Strategy.

In 2019, the MEC continued to present its reports to the High Council for Rule of Law and Anti-Corruption and request the Council’s approval prior to publication.³⁷⁹ This routine gave additional attention to the reports but slowed down their release when the frequency of High Council meetings declined.³⁸⁰ In May 2020, the MEC informed UNAMA that its last three reports had not been published because the High Council did not meet to approve them. In 2019, the MEC worked increasingly with the former Chief Executive-led Executive Committee on Prevention of Corruption and System Development (ExPres committee), because it deemed the ExPres committee well placed to coordinate the implementation of the MEC reports’ recommendations. As described above, the ExPres committee met too few times to develop an impactful working routine.³⁸¹

As the MEC winds down, its experience should be captured and made available to civil society, the Anti-Corruption Commission and other anti-corruption bodies who may draw on its lessons learned. While the MEC told UNAMA that all MEC reports and recommendations would remain publicly accessible, some of the MEC’s procedural experiences should also be captured in a report. These include the importance of legal certainty for anti-corruption bodies, the need for a mandatory trigger for the recruitment of new Committee Members within a defined period after their tenures ended, difficulties in seeking approval prior to issuing public anti-corruption reports and the importance of adopting code of ethics for anti-corruption bodies.

Observations:

During the reporting period, the MEC was gradually dissolving by losing staff, committee members and funding. A structured draw-down, allowing for handing over functions and conserving lessons learned would have been preferable.

5.2. The Access to Information Commission

UNCAC highlights the importance of access to information for preventing corruption. It states that access to information rights are designed to “promote the active participation of individuals and groups outside the public sector [...] in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by

³⁷⁹ High Council Meeting of 13 February and of 3 July 2019.

³⁸⁰ See also UNAMA, Anti-Corruption Report May 2019, p. 69. According to the Special Secretariat the MEC is bound by Resolution Nr. 6 of the High Council dated 22.06.1396, which mandates: “all MEC reports should be submitted to the High Council hereafter”; see also section 4 of Resolution Nr. 11 of the high council, dated 30.09.1396, “MEC should submit each report prior to its release to the High Council”.

³⁸¹ See *supra* 2.2.

corruption.”³⁸² This entails a range of activities from awareness raising³⁸³ to promoting the freedom to seek and receive information³⁸⁴ to ensuring effective access to information itself.³⁸⁵ A broad interpretation of access to information rights should mandate the proactive disclosure of any work processes of government entities in understandable language to help citizens understand government practices and thereby build trust.³⁸⁶ This includes establishing and publishing policies on reporting obligations, making reports accessible, defining official documents and rules for denial of disclosure (including for reasons of national security and personal privacy), establishing timetables for the provision of documents, and setting up appeals procedures when disclosure is denied.³⁸⁷

In Afghanistan, the Access to Information Commission was established by the Law on Access to Information,³⁸⁸ as strengthened by Presidential Decree of 3 March 2018,³⁸⁹ which amended the 2014 Access to Information Law.³⁹⁰ The Commission should realize the citizens’ right to access to information according to Article 50 of the Constitution. In recognition of its importance, the implementation of the Access to Information Law is a deliverable of the GMAF, which required the “implementation of policies and procedures for tracking requests, quality and timeliness of responses, maintaining statistics, and providing public quarterly updates; and deliver[s] awareness programs in 15 provinces in 2020.”³⁹¹

The Access to Information Commission assumed its functions on 30 December 2018, after five commissioners were appointed by the President on 22 November 2018.³⁹² The commissioners’ term is five years and non-renewable.³⁹³ The Commission was included as an independent budget entity in the 2020 budget adopted on 22 January 2020, which is expected to boost its independence and fiscal security for 2020. In 2019, the Commission was still dependent on the Ministry of Information and Culture’s budget line. Less than one year after the appointment of the commissioners, the selection process for the Access to Information commissioners was already changed when the National Assembly adopted the Access to Information Law on 27 July 2019 in amended form. The amendment increased the number of commissioners on the Access to Information Commission from five to seven and required the inclusion of a representative of the Meshrano Jirga and the Ministry of Justice in the selection committee.³⁹⁴ These new provisions became relevant in January 2020, when a commissioner resigned and the President instructed the Minister for Information and Culture to trigger the new appointment mechanism and select three new commissioners (the one who resigned and the two new commissioners). The incumbent

³⁸² UNCAC, article 13.

³⁸³ UNCAC, article 13(c).

³⁸⁴ UNCAC, Article 13(d).

³⁸⁵ UNCAC, Article 13(b).

³⁸⁶ UNODC, Technical Guide to the United Nations Convention against Corruption, p. 63.

³⁸⁷ UNODC, Technical Guide to the United Nations Convention against Corruption, p. 44.

³⁸⁸ Access to Information Law, Article 22.

³⁸⁹ Access to Information Law (Access to Information Law), Legislative Decree 256, dated 3 March 2018.

³⁹⁰ Law on Access to Information, Official Gazette 1156, 23 December 2014. (Law on Access to Information, 2014).

³⁹¹ GMAF, short term deliverable 2.4.

³⁹² Presidential Executive Decree 106 of 22 November 2018.

³⁹³ Access to Information Law, Articles 20 (5)-(7); the terms of two initial members are only three years.

³⁹⁴ Decree of the President of Islamic Republic of Afghanistan, About the Endorsement of the Access to Information Law, 1 October 2019; see *supra* 2.4.

commissioners expressed concern to UNAMA that the National Assembly's representative in the appointment process added a political element and could reduce the Commission's independence.

The Commission's responsibilities include overseeing the implementation of the Access to Information Law, including the process of requesting information and assessing reports by authorities on information sharing.³⁹⁵ Its outreach function includes promoting its own work and the rights guaranteed in the Access to Information Law leading towards of a culture of transparency and information sharing.³⁹⁶ The Commission addresses complaints arising from the denial of the right to access information, advises citizens on how to exercise their right to information and issues direct requests to authorities to provide information on the citizens' behalf.³⁹⁷

In 2019, the Commission adopted its first annual plan, which focused on increasing awareness of its work in the provinces, monitoring the activities of government bodies based on article 15 of the Access to Information Law, and recruiting access to information experts in six regions (Balkh, Herat, Jalalabad, Kandahar, Kunduz and Paktia). On 24 April 2020, the Commission also adopted a strategic five-year plan. Since its inception, the Commission has developed nine regulations as well as policies for tracking requests in order to meet GMAF deliverable 2.4. While the Commission's Procedure for registration and processing of complaints of applicants for information helpfully clarified this process, it limited it to receiving written submissions in turn limiting the access of rural and largely illiterate populations to the Commission's services. In 2019, the Commission received 37 complaints alleging non-compliance with the Access to Information Law by government entities.

One of the central components of the government's access to information efforts has been the appointment of 59 Public Information Offices (PIO) in government bodies.³⁹⁸ The PIOs provide a direct conduit between the public and government bodies, promoting the public's freedom to seek

³⁹⁵ Access to Information Law, Articles 22(1), and 22(5) and (10).

³⁹⁶ Access to Information Law, Articles 22(7) and (8).

³⁹⁷ Access to Information Law, Articles 22(2), (3) and (4).

³⁹⁸ Institutions with dedicated PIOs are: The Access to Information Commission; Afghanistan Chamber of Commerce and Industry; Afghanistan Electricity Authority; Afghanistan Independent Human Rights Commission; Afghanistan Red Crescent Society; Afghanistan Telecommunications Regulatory Authority; Attorney General's Office; Capital Region Independent Development Authority; Da Afghanistan Bank; Directorate of Sports; Director General of the Secretariat of the Meshrano Jirga; High Commission of Atomic Energy; Independent Administrative Reform and Civil Service Commission; Independent Commission Overseeing the Implementation of the Constitution (two PIOs); Independent Directorate of Local Governance; Independent Directorate of Nomad Affairs; Independent Elections Commission; Independent Electoral Complaints Commission (two PIOs); Independent Joint Anti-Corruption Monitoring and Evaluation Committee; Kabul Municipality; Ministry of Agriculture, Irrigation and Livestock; Ministry of Counter-narcotics; Ministry of Defence; Ministry of National Disaster Management; Ministry of Economy; Ministry of Education; Ministry of Hajj and Religious Affairs (two PIOs); Ministry of Higher Education; Ministry of Energy and Water (two PIOs); Ministry of Information and Culture; Ministry of Interior; Ministry of Justice; Ministry of Finance (three PIOs); Ministry of Foreign Affairs; Ministry of Mines and Petroleum; Ministry of Parliamentary Affairs (three PIOs); Ministry of Public Health; Ministry of Rural Development; Ministry of Returnees and Refugees; Ministry of Telecommunications and Information Technology; Ministry of Transportation and Civil Aviation; Ministry of Trade and Industry; Ministry of Border and Tribal Affairs; Ministry of Urban Development and Land (two PIOs); Ministry of Women's Affairs; Ministry of Work, Social Affairs, Martyrs and Disabled; National Directorate of Security; National Environmental Authority; National Procurement Authority; National Standards Authority; National Statistics Office; Office of Administrative Affairs; Office of the First Deputy of the Chief Executive; Office of the President; Scientific Academy (two PIOs); Secretariat of the Council of Ministers; Secretariat of the Wolesi Jirga; Supreme Audit Office; and Supreme Court.

and receive information³⁹⁹ and ensuring effective access to that information.⁴⁰⁰ Kabul-based institutions have appointed PIOs, but there have been no appointments at the provincial level. In March 2020, the Access to Information Commission started assessing the PIOs' performance.

Observations:

In the reporting period, the Access to Information Commission consolidated its foundation and took up its functions. The Parliament's amendments to the composition of the Commission and its selection board is an example of difficulties institutions face in light of repeated changes to their legal foundation.

5.3. The Ombudsperson in the Palace

The Office of an Ombudsperson in the Palace was first mentioned in the 2017 Anti-Corruption Strategy, which scheduled its establishment in 2017 and the appointment of an Ombudsperson in March 2019.⁴⁰¹ With the general aim of increasing accountability amongst high-ranking public officials, the Strategy left the functions of this new institution and its role in the anti-corruption institutions' architecture undefined.

While the Ombudsperson's office was created by Presidential executive decree on 12 May 2018, the first incumbent, Ms. Ghizaal Haress, was only appointed on 4 August 2019 for a non-renewable term of four years. That term began on 8 October 2019.⁴⁰² The Office of the Ombudsperson is located at the Presidential palace as an independent body within the office of the Chief of Staff of the President. According to the Ombudsperson, she is independent in her technical work but is supported in administrative affairs by the Office of the Chief of Staff. The Ombudsperson is mandated to receive and investigate complaints regarding the activities of administrative units in the Office of the President and the Chief Executive Office, government high-ranking officials and heads of independent budgetary units, with the exception of the President.⁴⁰³

The founding decree did not fully regulate her duties and functions but tasked the Ombudsperson to draft her own law covering these issues within three months of taking up functions.⁴⁰⁴ While the Ombudsperson told UNAMA that she held consultations with civil society and addressed their concerns in the draft law, civil society representatives continued to argue that the process of drafting the law lacked transparency, expertise and inclusivity, and delayed the finalization of the law. As a result of not being able to reach a consensus, in late February 2020 the Cabinet's legislative committee rejected the draft law. UNAMA is not aware of any consultation on the law since. This left the Ombudsperson without a legal foundation for carrying out her functions and

³⁹⁹ UNCAC, Article 13(d).

⁴⁰⁰ UNCAC, Article 13(b).

⁴⁰¹ See Anti-Corruption Strategy, Benchmarks, Pillar 1. Available at:

https://www.sacs.gov.af/uploads/strategy_pdf/Strategy_en.pdf (accessed on 28 February 2020).

⁴⁰² Presidential Decree 3 On the Establishment of an Ombudsman Office of 12 May 2018; Presidential Decree 56 on the Appointment of an Ombudsman of 4 August 2019. On 8 October 2019, the Ombudsperson was officially inaugurated.

⁴⁰³ Presidential Decree 3 On the Establishment of an Ombudsman Office of 12 May 2018, Article 7.

⁴⁰⁴ Presidential Decree 3 On the Establishment of an Ombudsman Office of 12 May 2018, Article 3.

she did consequently not take up cases but used the time and participated in anti-corruption events and contributed to policy initiatives on anti-corruption.

The Ombudsperson in the Palace risks disappointing expectations because the location of the office in an administrative unit with a direct reporting line to the President presents a potential conflict of interest. The limited scope of the nature of complaints that can be addressed do not meet the international standards and norms of national or Parliamentary Ombudspersons.⁴⁰⁵ The title of the institution could be adjusted to reflect the actual scope of the Ombudsperson's functions and its defining features such as the institutional integration into the President's office.

Observation:

The appointment of a new Ombudsperson with the power of investigating complaints against high-ranking officials was a welcome step towards more accountability. Without solid legal basis the office was yet unable to commence investigations. She meanwhile contributed to counter corruption policies.

⁴⁰⁵ Principles Relating to the Status of National Institutions (Paris Principles), adopted by General Assembly Resolution 48/134 of 20 December 1993; Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles") adopted by the Venice Commission at its 118th Plenary Session, Venice 15-16 March 2019.

6. Civil Society initiatives on anti-corruption

UNCAC requires States 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.”⁴⁰⁶ This underlying idea that enhanced transparency and civil society participation provide safeguards against corruption is reflected in Afghanistan’s 2017 National Anti-Corruption Strategy.⁴⁰⁷

Afghanistan has a vibrant civil society consisting of Social Associations (SAs) and non-governmental organizations (NGOs)⁴⁰⁸ and should continuously work on developing working conditions conducive to their effective work. Civil society contributes to anti-corruption reforms by monitoring the implementation of the government’s anti-corruption policies and the mutual commitments between the government and the international community, advocating for and monitoring service delivery by the government and partners at national and subnational levels, and working with provincial councils to hold them to account. Its advocacy on the Anti-Corruption Law and the Access to Information Law demonstrated its contribution to law-making.⁴⁰⁹

While the capacity of Afghanistan’s civil society organizations has increased steadily since 2001, the sector would benefit from greater diversity in particular in rural areas. Unfortunately, the unstable security situation, resistance of some public institutions to cooperate with civil society organizations, a weak culture of civil participation and a heavy dependence on donor funding continue to hinder the development of a diverse, autonomous and sustainable civil society sector. Civil society organizations have faced challenges in moving from project-based activities to strategic and sustainable long-term programmes.⁴¹⁰ Donors often engage civil society organizations to help compensate for their lack of access to much of the country. Democratic processes and internal governance within civil society organizations remain to be resolved through amendments to the NGO law, which are pending; according to the government they are expected to be approved in 2020.

6.1. Revisions to the legal framework on civil society organizations

Non-governmental organizations (NGOs) are regulated by the 2005 Law of Non-Governmental Organizations (NGO Law).⁴¹¹ GMAF deliverable 24 required a revision of the NGO law in 2019 and the establishment of a mutually agreed financial reporting system for civil society.⁴¹² In 2017, the

⁴⁰⁶ UNCAC, Article 13.

⁴⁰⁷ See also, 2017 Anti-Corruption Strategy, Chapter IV, Restoring Citizens’ Trust.

⁴⁰⁸ Law on Associations, OG 1114 (1392AH [2013]), Article 2; Law on Non-Governmental Organizations (NGOs), OG 857 (1384AH [2005]), Article 5.

⁴⁰⁹ See *supra* 2.4.

⁴¹⁰ IWA/TI, National Integrity System Assessment 2015, p. 17. Available at: <https://iwaweb.org/wp-content/uploads/2016/07/Afghanistan-National-Integrity-System-Assessment-2015.pdf> (accessed on 10 March 2020).

⁴¹¹ Presidential Decree 28 on the Law on Non-Governmental Organizations (NGOs) of 15 June 2005.

⁴¹² Geneva Mutual Accountability Framework (GMAF), deliverable 24. See https://unama.unmissions.org/sites/default/files/gmaf_final_26_nov_2018.pdf (accessed on 2 February 2020).

government, in consultation with civil society, started to amend the law. The extensive amendments that were discussed included: further regulations of the NGOs' internal affairs such as the NGO leadership structure; the NGOs' duty to coordinate including submitting annual plans to the MoEC; and additional rules on accountability and transparency, including powers of the MoEC to conduct financial audits. The law sought to bar previous abuse of various groups that had registered as NGOs without meeting the criteria for establishment. Civil society representatives advocated that amendments to the law should create an enabling environment and protect civil society's rights. In their view this included realistic financial reporting requirements and streamlining procedures. They also advocated that registration and reporting obligations be submitted to an independent commission rather than to the MoEC. Such independent authority is seen to provide safeguards against harsh interpretation of norms regulating civil society's affairs.

The government's implementation of the existing NGO law and by-laws regarding audits was occasionally perceived to be punitive and overly restrictive. In the first four months of 2020, the MoEC conducted organizational audits of 23 out of 670 NGOs "active in 2019".⁴¹³ A significant number of cases were referred to the Attorney General for investigation. The amended law requires audit statements only from NGOs with an annual budget above USD 50,000. An online reporting database for NGOs has been operationalized to facilitate reporting and audit obligations and the MoEC continued to increase the NGO's capacity to use the database.⁴¹⁴

The International Covenant on Civil and Political Rights (ICCPR) grants freedom of association, allowing only restrictions that are "necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."⁴¹⁵ This right is enshrined in Article 35 of the Afghan Constitution. Limitation of these rights must be legal, necessary and proportional. International best practice and standards on human rights defenders mandate that States protect human rights groups and create conditions conducive for individuals or groups to exercise their rights.⁴¹⁶

6.2. Enhanced civil society engagement in policy making

Afghanistan joined the Open Government Partnership (OGP) in 2017.⁴¹⁷ Between July and December 2019, the OGP developed its new action plan covering the period between January 2020 and August 2021.⁴¹⁸ On 8 and 30 December, the OGP's Multi-stakeholder forum and the Cabinet

⁴¹³ The MoEC explained that a total of 2,167 were registered with the government in 2019, but of those only 670 conducted projects and fulfilled their legal obligations.

⁴¹⁴ MoF, Geneva Conference on Afghanistan, Third Quarterly Report July – September 2019, p. 54.

⁴¹⁵ International Covenant for Civil and Political Rights (ICCPR), Article 22.

⁴¹⁶ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, General Assembly resolution A/RES/53/144 of 8 March 1999, Article 2.

⁴¹⁷ UNAMA Anti-Corruption Report, May 2018, pp. 63-64.

⁴¹⁸ Action Plan 2 (2020-2021). Available at: https://www.opengovpartnership.org/wp-content/uploads/2020/01/Afghanistan_Action-Plan_2019-2021_EN.pdf (accessed on 17 February 2020).

respectively approved the Plan.⁴¹⁹ Some segments of civil society criticised the quality of the plan, which in their view was not thoroughly consulted.

Out of the 18 actions planned for the next two years, a number relate to advancing anti-corruption and good governance projects, with visible efforts to include subnational actors and promote women's participation. Among the actions are legislative projects, including the revision of the Attorney General's Law, the Local Self-Governance Law and the Law on Beneficial Ownerships, and institution building activities, including the establishment and operationalization of the Anti-Corruption Commission. Compared to the first Action Plan, covering activities between 2017 and 2018, which related to the operationalization of the OGP, the focus on concrete anti-corruption measures increased in 2019-2020.⁴²⁰ As of May 2019, the OGP held four general meetings, fourteen working group meetings, and 34 consultations regarding the implementation of the National Action Plan (NAP). That pace of engagement reduced as the 2019 Presidential elections approached.

The OGP engagement contributed to the extension of special courts for violence against women in provinces; civil society representation in the Ministry of Public Health Accreditation Board for the establishment of health services; the development of a policy for infrastructure transparency to foster public engagement in infrastructure planning and to minimize the influence of individual power brokers on the choice of projects; and the establishment of police councils with civil society representatives to address local security challenges and corruption in the police force.

Throughout 2019, civil society organizations retained an important role in anti-corruption related policy making outside the OGP as well. While their participation in High Council meetings declined, civil society organizations closely monitored the implementation of the Anti-Corruption Strategy and provided expert advice to the Anti-Corruption Secretariat, which works closely with civil society. Civil society continued its regular participation in the National Procurement Commission and assessed its contribution to this forum as more impactful than its contribution to the High Council.

Observations:

Civil society continues to be actively engaged in Afghanistan's anti-corruption efforts. Its 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. The further consolidation of the legal framework for civil society in a consultative manner is a welcome step.

⁴¹⁹ Action Plan 2 (2019-2021), p. 5.

⁴²⁰ National Action Plan-1 2018-2019; Open Government Partnership Afghanistan. Available at: <https://www.opengovpartnership.org/wp-content/uploads/2018/09/Afghanistan-Action-Plan-2017-2019-EN-UPDATED.pdf> (accessed on 17 February 2020).

7. Conclusions and recommendations

After a noticeable slow-down in anti-corruption reforms in 2019 and early 2020, Afghanistan's new government will need to signal a strong commitment to tackle corruption early in its mandate. A new and impactful anti-corruption strategy should be developed to serve as a coordination tool for comprehensive anti-corruption efforts and provide the required political backing for reform-minded public officials to build and consolidate a culture of integrity and accountability. The swift establishment of an independent Anti-Corruption Commission and demonstrated respect for its independence in line with UNCAC is another opportunity to show resolve in tackling corruption.

Afghanistan's legal framework already provides a solid basis for anti-corruption measures and whereas it may require finetuning and adjustment in some areas, the focus should remain on advancing its implementation. Resolute and persistent action to address corruption offences is required from the justice and law enforcement sector, which must yet demonstrate that anti-corruption norms are applied equally to all offenders regardless of their wealth and power. Increased transparency of corruption trials and publication of verdicts is required for them to have a deterrent effect. These transparency measures must be accompanied by robust security measures for specialized justice and law enforcement officials, which continued to be subject to targeted attacks in the reporting period. As a priority effective use of asset recovery tools should ensure the return of funds stolen from Afghanistan's citizens.

The National Assembly has not yet engaged in significant anti-corruption reforms. While integrity, transparency and accountability remain to be strengthened internally, the National Assembly should partner with the government in anti-corruption reforms externally. More transparency is in particular required in the National Assembly's legislative work.

Civil society and donors should continue to support anti-corruption reforms. The review of commitments tied to international support should highlight the importance of continuing anti-corruption efforts and result in a mutual accountability framework that contributes to Afghanistan's anti-corruption reforms.

The UN will continue to support Afghanistan's anti-corruption reforms and plans to issue its next annual anti-corruption report in 2021.

recommendations to the government:

Demonstrate commitment to anti-corruption reforms by developing a realistic all-government anti-corruption strategy for the new administration, which builds on past experience and successes in anti-corruption reforms and addresses identified shortcomings, in a consultative process.

Revitalize the High Council for Rule of Law and Anti-Corruption in periodic, predictable and impactful meetings and establish the Anti-Corruption Commission, while rectifying overlaps in mandates of other anti-corruption bodies in proposed amendments to the Anti-Corruption Law.

Boost the law enforcement capacity dedicated to corruption prosecutions and trials (including at the Anti-Corruption and Justice Centre (ACJC)) ensuring appropriate investigative support and execution of orders, summons and warrants.

Create a conducive work environment for a strong, independent and persistent Attorney General's Office, which may take on corruption cases against powerful and well-connected individual and prioritize judicial reforms, strengthening judicial independence and allowing for the co-existence of formal and informal actors using each respective strength.

Manage and use financial resources (including those provided by donors) diligently while allowing for oversight and requiring accountability and transparency.

recommendations to the judiciary:

Consolidate the ability to effectively and independently adjudicate corruption cases in accordance with the law and report publicly about corruption prosecutions and adjudications.

Uphold transparency and accountability to regain public trust.

recommendations to the National Assembly:

Demonstrate commitment to anti-corruption reforms in collaboration with the executive and the legislative branch.

Exercise legislative, oversight and representation functions transparently and free from personal interests and foster accountability.

recommendations to civil society:

Continue to constructively collaborate in anti-corruption reforms and monitoring.

recommendations to the international community:

Continue to support anti-corruption reforms and demand accountability for public funds, whether national or international, that are misused.