

AFGHANISTAN'S FIGHT AGAINST CORRUPTION

THE OTHER BATTLEFIELD



UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN

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Executive summary

Corruption affects all aspects of life in Afghanistan, undermining public trust and confidence in government institutions, and hindering the country's efforts to become self-reliant. As H.E. President Ashraf Ghani recently observed: "Government corruption has driven a three-decades-old conflict. Corruption has blocked Afghanistan from being self-reliant and free. And corruption has wasted a vast amount of precious resources that could otherwise have been spent reducing Afghanistan's crushing levels of poverty."¹ To respond to this threat, the Government committed itself to fighting corruption at all levels, regardless of individual rank or influence.

Consistent with its mandate under UN Security Council Resolution 2344, the UN Assistance Mission in Afghanistan (UNAMA) prepared this report to support the Government in its efforts to fight corruption by promoting broader public awareness of areas where progress has been made and areas where additional donor support is required to meet shared objectives. The fight against corruption requires careful planning and ongoing coordination. A national anti-corruption plan is anticipated but not yet developed or implemented. Existing anti-corruption efforts are drawn from a variety of donor commitments and policy documents; implementation is entrusted to multiple anti-corruption bodies. The creation of the High Council on Rule of Law and Anti-Corruption provides high-level leadership for the Government's anti-corruption efforts. But, stronger coordination at the operational level is still required. Operational coordination could be enhanced through creation of an independent anti-corruption body to support the High Council in developing and implementing anti-corruption efforts. The establishment of an independent body to coordinate and implement anti-corruption efforts is one of the Government's key outstanding commitments under the UN Convention against Corruption (UNCAC).

Some progress has been made in increasing planning for the Government's anti-corruption efforts. Most promising is the President's recent appointment of a high-level committee to work on a national anti-corruption plan, as well as the completion of anti-corruption plans by the five largest revenue-generating ministries and initiation of work on other ministry-level plans as well. Greater attention, however, must be paid to the specific reforms required to achieve the broad objectives outlined in these plans. Additional consideration must be paid to strategies for fighting corruption at the sub-national and local levels where most citizens interact with government officials. Major risks to implementation of ongoing reforms, such as corruption within the government institutions themselves and opposition from the cabal of corrupt individuals seeking to maintain the *status quo*, also should be factored into future strategic planning.

Any strategy to fight corruption should include efforts to rebuild and restore public confidence in the civil service. Afghanistan has implemented civil service reforms requiring merit-based recruitment of public officials and adopted codes of conduct to promote more ethical behavior. Progress in these areas, however, has been stymied by nepotism, political favoritism, and other external influences on recruitment decisions. Stronger steps should be taken to preclude attempts to assert partisan or political pressure on the recruitment process. Additionally, Afghanistan's extensive system for collecting asset declarations from thousands of public officials requires prioritized efforts to verify the content of declarations and sanction officials who fail to submit declarations or make false declarations.

Afghanistan has made substantial progress in improving control over public financial management—an area of great vulnerability for corruption. These efforts have contributed to more transparent procurement processes, as well as to increased public revenues from customs fees, and tax and non-tax revenues. Transparency in matters of budget development and performance are other areas of success. Stronger oversight and coordination, however, is still required particularly at the sub-national level. The provincial oversight regulation, currently under review, would help close this gap in the management of public finances.

Meaningful participation of civil society is a cornerstone for any successful anti-corruption policy. Professional reporting by media outlets, and independent monitoring and reporting by civil society organizations help expose corruption and educate the public as to their rights. Afghanistan's recent decision to join the Open Government Partnership, a multilateral initiative to promote transparency, empower citizens, and strengthen governance structures, is a welcome development. This partnership will enable Afghanistan to draw on the expertise of other member countries that have made significant progress in strengthening transparency in the delivery of public services and expenditure of public funds. This exchange of ideas may prove particularly useful in removing administrative barriers to full implementation of Afghanistan's Access to Information Law. Public access to reports prepared by the Supreme Audit Office and restoration of the Ministry of Finance's government-wide auditing responsibility are other practical steps to enhance transparency in the management of public finances.

To build stronger public support for the Government's anti-corruption efforts, the Government should build on its efforts to improve the delivery of basic public services, and protect vital public resources such as land and minerals from exploitation. The "one-stop-shops" or *Asan Khedmat* centres hold great promise for streamlining the delivery of public services, but care must be taken to ensure that adequate safeguards against corruption are institutionalized within these centres. Significant progress also has been made in land reform and registration, but a more streamlined and coordinated process for enforcement of court orders is required. With regard to mining, Afghanistan has continued to pursue full membership in the Extractive Industries Transparency Initiative, but increased transparency in the award of licit mining contracts is only part of the solution. Restored control over Afghanistan's mineral wealth will not be possible without a coordinated government-wide response to the substantial security threats posed by illicit mining activities, which divert Afghanistan's mineral wealth to criminal and insurgent networks.

Once corruption is exposed, the public must see that those responsible are held to account. Corruption within key justice sector institutions remains a substantial challenge to efforts to end impunity. Nevertheless, Afghanistan has incorporated the full range of anti-corruption crimes recommended by the UNCAC in its revised Penal Code. It also established a dedicated Anti-Corruption Justice Centre to focus on major corruption cases, and is exploring avenues for developing national capacity to identify and recover stolen assets. Each of these initiatives requires sustained commitment. The Government must coordinate efforts, once it decides whether to legislatively decree or to send as a proposed law to the National Assembly, to secure the Assembly's prompt review and approval of the revised Penal Code. Once approved, a strategy should be implemented to familiarise judges, prosecutors, defence counsel, and the public with the law's requirements. To build public support and understanding for the Anti-Corruption Justice Centre's efforts to end impunity, investigations and prosecutions should be undertaken in a transparent manner pursuant to pre-established case selection criteria. A comprehensive communications strategy should be developed and implemented to increase public awareness of the court's decisions and demonstrate that no one is above the law. Requests for international assistance to help build national capacity to recover stolen assets through programs like the World Bank's and UN Office of Drugs and Crime (UNODC)'s Stolen Asset Recovery Initiative should be finalized.

In many respects, the largest challenge in Afghanistan's fight against corruption is not the need to undertake additional reforms but, rather, the need to more effectively implement the reforms already undertaken. Throughout this report, UNAMA draws on expert literature and established best practices to identify approaches to implementation that have worked in other contexts and could be adapted to meet the unique circumstances confronting Afghanistan. Many of these recommendations will require continued international support. Donors play a critical role in ensuring more effective oversight of international assistance and supporting the Government's efforts to develop and implement a comprehensive, long-term strategy for fighting corruption.

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I. Introduction

The influx of international assistance with poor oversight into Afghanistan—a country whose justice and governance institutions were weakened by decades of conflict—provided fertile soil for corruption to take root and flourish.² Today, corruption affects all aspects of life in Afghanistan. Everyday experiences—applying for a driver’s license, paying taxes, or seeking access to public health or education services—become occasions for exploitation. Afghan citizens hesitate to seek redress in the courts, apply for building permits, purchase property, or invest in land or small businesses because these and countless other routine transactions with public officials are perverted to illicit ends. A survey conducted by The Asia Foundation concluded that, “[i]n 2016, nearly all Afghans say corruption is a problem in all areas of their lives, with 61.0% of Afghans saying corruption is a major problem in daily life, while 28.2% say corruption is a minor problem.”³

Corruption has fueled the ongoing conflict, hindered national efforts to become self-reliant, and “wasted a vast amount of precious resources that could otherwise have been spent reducing Afghanistan’s crushing levels of poverty.”⁴ The Kabul Bank fraud, which resulted in the theft of USD 987 million and caused the bank’s collapse, “epitomized the extent to which key sectors such as finance, mining, and transport could be plundered.”⁵ Other examples abound. As President Ghani bluntly stated: “In Afghanistan, instead of being the systems for government accountability, procurement, financial management, recruitment, audit, legislation and the administration of justice have become the drivers that explain how corruption persists.”⁶

“By any measure, Afghanistan is one of the most corrupt countries on earth. Fifty years of near constant conflict have destroyed both social and institutional controls. The flood of money that poured into the country for reconstruction after the overthrow of the Taliban in late 2001 further fragmented and reduced its systems of accountability.”

H.E. President
Ashraf Ghani, May 2016

Restating the magnitude of the problem does not translate into solutions. Corruption within government institutions is symptomatic of the broader range of external pressures confronting

Afghanistan. Chief among these external pressures are security, illicit drug trafficking, crushing poverty, money laundering, and extraction of rents from precious natural resources. All of these pressures are interlinked and each contributes to continuing cycles of violence and institutional weakness that threaten Afghanistan's long-term peace and stability.⁷ No strategy to fight corruption will succeed unless the full range of external pressures on government institutions are included in the Government's planning process. Consideration also must be given to overcoming the strong opposition that will continue to be mounted by the cabal of corrupt officials and other influential persons whose illicit fortunes and private interests are threatened by restored institutional control and stronger accountability.

The fight against corruption will not be won overnight.⁸ Remaking government institutions captured by corruption and restoring public confidence in them take time.⁹ The World Bank observed that, even in the fastest-transforming countries, approximately 15-to-30 years were required to raise institutional performance from that of a fragile state emerging from conflict to that of a functioning institutionalized state.¹⁰ In other cases, it could take a generation to transform fragile government institutions.¹¹ Or, as President Ghani observed in relation to Afghanistan: "It took decades to build up a system that systematised corruption at every level. It will be many years before the Government can claim success."¹²

A. Scope and purpose of report

UNAMA is mandated by Security Council Resolution 2344 (2017) to support the Government in its efforts to "improve governance and the rule of law including . . . [in] the fight against corruption."¹³ Entrenched corruption is one of the primary obstacles to achieving this mandate because it undermines efforts to build credible institutions, achieve political progress, encourage economic growth, consolidate security gains, and put in place the conditions for lasting stability.¹⁴ Efforts to curb corruption, therefore, are essential to not just ensuring value for donor money but also restoring confidence in the Government institutions responsible for delivering public services to the people of Afghanistan.

This report has two goals: first, to support the Government in its efforts and, second, to help inform the public and international community about the steps the Government is taking to end corruption. It summarizes key achievements made and, drawing on the United Nation's collective experience in supporting implementation of the UNCAC, identifies recommended best practices to assist the Government with continued progress and refining its long-term anti-corruption planning.

There are no "off the shelf" solutions to ending corruption. Each country or context presents its own unique challenges that must be considered in developing strategies and implementing solutions. International conventions like the UNCAC provide valuable policy guidance, but implementation of these general principles has not been easy for any country to achieve. Afghanistan is no exception.

UNAMA recognizes that there is considerable sensitivity associated with any report on the Government's anti-corruption efforts. As with any reform efforts, some initiatives succeed, some initiatives are partially successful, and some initiatives fail for reasons that may or may not be reasonably anticipated. Our hope is that this report and future reports will provide a constructive platform for sharing our collective experiences in fighting corruption—both in areas where our efforts succeeded and where our efforts fell short.

B. Overview of the Government's commitments

Afghanistan, with support from the international community and civil society, is committed to fighting corruption. It became a signatory of UNCAC in February 2004 and ratified the convention in August 2008.¹⁵ Starting at the 2010 London and Kabul conferences, the Government made a series of

commitments to fight corruption. Corruption, however, became a source of tension between the international community and administration of Afghanistan's former president, stalling implementation of many of these early commitments.

Recognizing the need for greater mutual accountability between Afghanistan and the international community, the Tokyo Conference in July 2012 set out the Tokyo Mutual Accountability Framework to help guide development activities, including anti-corruption initiatives, through the years of political and security transition.¹⁶ Following the election of the National Unity Government in September 2014, the Government presented a comprehensive reform agenda at the London Conference on Afghanistan in December 2014, captured in its paper "Realizing Self-Reliance: Commitments to Reforms and Renewed Partnerships."¹⁷ The Tokyo Mutual Accountability Framework and London reform agenda have since been replaced by the Self-Reliance through Mutual Accountability Framework (SMAF).¹⁸ SMAF broadly commits the Government to a "zero tolerance" corruption policy, and calls for improved transparency and accountability in the delivery of public services, economic development, and management of public revenues and resources.¹⁹

SMAF is not the Government's only commitment to fighting corruption; other commitments have been made in a variety of policy statements and other instruments issued over the years.²⁰ These commitments must be read cumulatively, not successively, and all are intended to be mutually-reinforcing. In many ways, commitments to international donors have driven the Government's anti-corruption efforts to date. This focus on meeting technical benchmarks reflected in SMAF and multiple other commitments, however, has contributed to an overall lack of policy coherence in Afghanistan's anti-corruption efforts.

Stronger policy coherence could be achieved by finalizing the Government's planned national anti-corruption strategy and incorporating the many practical recommendations contained in this report. As discussed in section II, Afghanistan should consider strengthening coordination among its various anti-corruption bodies through establishment of an independent, technical secretariat or commission to support the High Council on Rule of Law and Anti-Corruption. Key aspects of this national strategy include continued efforts to restore institutional integrity to a civil service plagued by corruption and weak internal controls as discussed in section III, as well as to build on Afghanistan's success in strengthening public financial management, particularly in the areas of procurement, and customs and revenue as discussed in section IV.

No strategy for fighting corruption, however, will succeed without broader civic engagement in the Government's efforts. This engagement can best be achieved through increased transparency in the delivery and management of public services and public expenditures—matters addressed in section V. Additionally, as discussed in section VI, public support for the Government's efforts would be enhanced through more effective and efficient delivery of public services, and management of vital public resources such as land and minerals.

Lastly, public officials who breach the public trust by abusing their authority or engaging in other corrupt practices must be held accountable. As corruption within government institutions is exposed, the police, prosecution, and judiciary must ensure that punishments fit the crimes.²¹ Corruption within these vital justice sector institutions, however, has hindered efforts to ensure meaningful accountability and, at the same time, deter other corrupt officials from committing similar crimes.²² Accelerating the pace of justice sector reform is "clearly the Government's next frontier."²³ Nevertheless, as discussed in section VII, the Government has made progress in closing the impunity gap for corrupt officials through reform of the Penal Code, establishment of the Anti-Corruption Justice Centre to prosecute major corruption cases, and new initiatives to recover stolen assets.



II. Improving strategic planning and oversight

The fight against corruption requires careful planning and coordination. The High Council on Rule of Law and Anti-Corruption provides high-level political leadership, but more attention needs to be paid at the operational level to ensure effective implementation of the priorities established by the High Council. The establishment of an independent body to coordinate anti-corruption efforts would help fill this gap. It also is one of the Government's key commitments under UNCAC, and a recommended best practice for fighting corruption.²⁴ Additionally, stronger coordination could be achieved by finalizing efforts to develop a national anti-corruption strategy, as well as to implement and finalize ministry-level anti-corruption plans. This section examines Afghanistan's progress in these areas. It also discusses the importance of regular reporting and monitoring of the Government's anti-corruption efforts through the Independent Joint Monitoring and Evaluation Committee (MEC) and other mechanisms to broaden public awareness and support.

A. Anti-corruption bodies

Afghanistan has a range of anti-corruption bodies. According to one recent study, there are presently 18 separate bodies tasked with implementing aspects of the Government's anti-corruption efforts from merit-based recruitment (Civil Service Commission) to tracking suspect financial transactions

(Afghanistan's Financial Intelligence Unit or FinTRACA).²⁵ The sheer number of existing anti-corruption bodies presents a significant challenge to coordination efforts.

The High Office of Oversight and Anti-Corruption (HOOAC) was established in 2008 to supervise development of an anti-corruption plan and coordinate the fight against corruption.²⁶ HOOAC was intended to serve as Afghanistan's independent UNCAC body, but presidential control over the appointment of HOOAC's director compromises its independence.²⁷ Additionally, HOOAC's attempts to investigate allegations of corruption clashed with existing constitutional structures that vest investigative and prosecutorial responsibilities in the Attorney General's Office, not HOOAC.²⁸ In practice, HOOAC's role has been largely confined to collecting asset declarations from senior officials. It does not effectively fulfil the independent coordination role Afghan law envisaged.

On 19 March 2016, the President established the High Council on Rule of Law and Anti-Corruption to improve coordination and provide greater policy guidance on anti-corruption efforts.²⁹ The High Council is chaired by the President and composed of other senior-level officials, including the Second Vice-President, Chief Executive Officer, Chief Justice, Attorney General, and various ministers. The membership comprising senior-level political leaders signals the Government's high-level resolve to fight corruption. The High Council has provided leadership in implementing key initiatives such as the establishment of the Anti-Corruption Justice Centre and review of draft anti-corruption plans submitted by various ministries. But, the High Council's long-term effectiveness may be constrained by multiple demands placed on its high-level members—all of whom are responsible for substantial portfolios.³⁰

Afghanistan recently created a small secretariat of dedicated staff to assist the High Council in discharging its mandate but, to ensure the High Council's continued effectiveness, consideration should be given to expanding the technical expertise of this secretariat and ensuring its independence.³¹ The expanded secretariat should include technical experts in all fields relevant to the Government's anti-corruption efforts,³² including budgeting, procurement, customs, and law enforcement. This approach would allow the High Council to continue setting the direction and priorities of Afghanistan's anti-corruption efforts, but leave details of implementation and coordination to its technical secretariat.

Bulgaria relied on a similar two-tiered approach in implementing its anti-corruption strategy. The work of a high-level commission, comprised of ministerial-level officials, was supported by a standing secretariat, comprised of subject-matter experts. This two-tiered approach proved effective in balancing the "political and technical aspects of coordinating effective implementation" of Bulgaria's anti-corruption strategy.³³ It is an approach worth consideration in Afghanistan.

Additionally, if structured in a way that preserves its operational independence, the technical secretariat could fulfil Afghanistan's commitment under article 6 of UNCAC to establish an independent anti-corruption body. Independence within the meaning of UNCAC does not require an anti-corruption body be separate from the government.³⁴ Rather, the body may operate within existing government structures so long as "appropriate and functioning checks and balances" are in place to ensure that "nobody and nothing is above the law."³⁵ In practical terms, this means that the "legislative framework should ensure operational independence of the body or bodies so that they may determine its or their own work agenda and how it or they perform their mandated functions."³⁶

One key attribute of operational independence is that the process for appointment, tenure, and removal of senior personnel within the UNCAC body be specified by law and not subject to the discretion of a single official.³⁷ As already noted, HOOAC lacks this independence because its director is appointed and subject to removal at the President's sole discretion. To remedy this situation, the new law should create a secretariat whose senior officials are nominated by the President and subject to confirmation by the National Assembly's *Wolesi Jirga*. Once confirmed, members of the secretariat should serve for a

specified term of years subject to removal only for demonstrable malfeasance or abuse of office.³⁸ To further insulate the secretariat from threat of reprisal for unpopular or controversial actions, its members should be protected from liability for official actions undertaken in good faith compliance with the law.³⁹

Independence also requires provision of adequate resources for the secretariat to undertake its work. If possible, funding for the secretariat's operations should be allocated on a multi-year basis to minimize attempts to leverage budget approval with improper influence over the secretariat's work.⁴⁰ To further increase operational independence, a portion of funds recovered from stolen assets (see section III.C below) could be targeted to support the secretariat's ongoing operations. This type of funding arrangement also could incentivize the secretariat's staff to vigorously pursue anti-corruption efforts. Like any other public agency, the secretariat must be subject to audits and account for all expenditures of public funds.⁴¹

To increase public understanding of its efforts, the secretariat should prepare and disseminate to the National Assembly and public regular reports of its work.⁴² While confidentiality relating to sensitive matters of public policy may sometimes limit the participation of civil society representatives,⁴³ the law should require the secretariat to solicit and consider the views of civil society in deciding how best to implement Afghanistan's anti-corruption policies. This type of consultation already is exercised informally by the High Council, which allows representatives of the international community to observe its deliberations and propose items for the council's consideration.

Afghanistan recently announced plans to draft a new anti-corruption law in consultation with key stakeholders. The draft law presents an opportunity to create an independent, technical secretariat or commission to support the High Council's work, as well as to expand opportunities for civil society engagement in the Government's anti-corruption efforts.

B. Anti-corruption plans

Afghanistan's efforts to fight corruption presently lack a comprehensive, national anti-corruption plan.⁴⁴ A short, five-page concept note summarizes the Government's current efforts to signal its commitment to fighting corruption, bring in new reformers to lead government ministries, build effective enforcement mechanisms, and set priorities for transforming ministries and restoring public trust.⁴⁵ But, these general statements lack sufficient detail to guide implementation, generate public support, or monitor progress.⁴⁶ A small working group headed by the President has been formed to develop a national plan and meet the Government's commitment under SMAF, which requires a national anti-corruption strategy to be drafted and endorsed by the High Council during the first half of 2017.⁴⁷ When developed, this national plan should help provide greater coherence for the Government's anti-corruption efforts and assist with the transition of ongoing anti-corruption efforts following Afghanistan's upcoming elections.

Given the prevalence of corruption within government institutions,⁴⁸ the Government announced a staggered approach to reform efforts.⁴⁹ This staggered approach is intended to allow senior officials to focus attention on a few ministries each year with the aim of reducing vulnerabilities and improving internal controls.⁵⁰ Consistent with Afghanistan's SMAF commitments, initial reform efforts focused attention on the five largest revenue-generating ministries, which were required to prepare ministry-specific anti-corruption plans.⁵¹ Implementation of the first five plans and drafting of other ministry plans is now underway. Lessons learned from implementation of these plans may assist in formulating the broader national plan, but implementation of ministry-specific anti-corruption plans should not wait for finalization of the broader national plan.

As the Government moves forward with drafting its national anti-corruption plan, and implementing and drafting ministry-specific plans, efforts should be made to move away from generalities. All plans would benefit from more specific, concrete steps to fight corruption within the particular area of responsibility under consideration.⁵² When reforms are anticipated to fill specific gaps, the plans should explain what the reform is intended to accomplish and how that goal will be achieved.⁵³ For each reform, the resources and costs required to achieve it should be identified, along with the means of monitoring progress. Additionally, the plans should identify priority areas and sequence reforms in a logical way.⁵⁴ The recommendations contained in the following sections of this report provide some of the details that the Government may wish to consider in bringing more specificity to its anti-corruption planning.

In addition to increased specificity, the Government's anti-corruption planning would benefit from greater attention to corruption at the sub-national and local levels.⁵⁵ This reflects the reality in Afghanistan and elsewhere that the majority of citizens trying to access public services encounter corruption in their interactions with provincial and other local officials.⁵⁶ The examples span the range of everyday life from access to education and health services to obtaining a driver's license or building permit. This reality should be reflected in ongoing and future planning efforts.⁵⁷

Additionally, Afghanistan's plans would benefit from greater attention to identifying and addressing major risks to implementation, including corruption within the ministries themselves. As presently drafted, the five ministry plans identify several common risks such as lack of resources, technical capacity, and cooperation with other ministries, but the plans do not adequately address how these perceived risks will be overcome. All five ministry plans identify lack of cooperation from other ministries as a potential risk, for instance, but none of the plans explains how better cooperation will be achieved.⁵⁸

Planning also must take into consideration likely political opposition to reform efforts, including from the corrupt patronage networks that have infiltrated many government institutions, and how to counter it.⁵⁹ Experts agree that a "principal obstacle to effective implementation of anti-corruption reforms is usually not technical or resource-based, but political. Individuals and organizations profiting from corruption will resist changes that leave them worse off, and they will therefore try to thwart the implementation of an anti-corruption strategy."⁶⁰ To counter this risk, the drafters should identify "what groups are most likely to support the strategy and what groups are most likely to resist it. Once supporters and opponents are identified, the strategy can be designed in a way that builds support for it and overcomes opposition. Phasing in controversial changes slowly while implementing popular ones quickly is one technique. Understanding the reasons for opposition is another important step."⁶¹ Civil servants, for instance, might oppose the introduction of a stringent new asset verification system for fear that they will unknowingly run afoul of its provisions. If this is the case, drafters can reduce potential opposition by including a mechanism for them to seek advice or guidance in advance of filings.⁶²

Another key consideration in drafting Afghanistan's anti-corruption plans is recognizing that corruption does not exist in a vacuum. Strategies for fighting corruption must take into account the broader security and socio-economic risks confronting Afghanistan. These risks can have a detrimental impact on the Government's anti-corruption efforts. Areas still in the grips of conflict or prone to illicit activities, such as smuggling, will be far more difficult to control than other areas. Widespread poverty and high

"The sources of corruption are deeply political. Without a political strategy for overcoming this problem, any given solution will fail. Corruption in its various forms—patronage, clientelism, rent-seeking and outright theft—all benefit existing stakeholders in the political system, who are generally very powerful players."

Francis Fukuyama,
What is corruption? 2016

unemployment can likewise incentivize more persons to resort to corrupt or illicit means to meet basic needs. These and other risks should be more carefully evaluated in the Government's ongoing planning.

Whatever course is followed, the Government's plans "must strike a balance between ambition and realism."⁶³ This need for realism is particularly relevant to the time anticipated for implementation. The first five ministry plans, for instance, cover only a year of activities when, in reality, the proposed activities will take much longer to implement. Consideration should be given to drafting plans that will cover a two or three-year period so expectations of progress in anti-corruption efforts are properly managed. Balancing ambition and realism is difficult to achieve, but it is a factor that should be considered in all future planning.

C. Monitoring, evaluation, and reporting

Regular monitoring, evaluating, and reporting is essential to the success of any anti-corruption strategy.⁶⁴ It enables officials responsible for implementation to adjust and refine planning to meet changed circumstances or unanticipated challenges. Additionally, "[p]eriodic reporting helps citizens hold Government accountable for strategy results and provides opportunities for citizen input into strategy execution."⁶⁵

In Afghanistan, this role is filled by the MEC, an autonomous anti-corruption monitoring and evaluation body established with donor support in 2010.⁶⁶ On 18 September 2016, the President issued Presidential Decree No. 115 to emphasize the MEC's independence and refocus its activities on the following three areas: (1) developing anti-corruption recommendations; (2) monitoring and evaluating the anti-corruption efforts of the Afghan government and the international community; and (3) reporting on a regular basis to the President, National Assembly, and people of Afghanistan, as well as to the international community, about the state of the fight against corruption.⁶⁷ To date, the MEC has issued 432 recommendations to improve the Government's anti-corruption efforts; MEC reports that the Government has implemented more than half of these recommendations.⁶⁸

Periodic reports issued by the MEC have helped shed light on high-level corruption in key sectors. Recent reports, for instance, highlighted corruption in the delivery of health, justice, and education services.⁶⁹ These reports contribute to increased public awareness and provide a basis for citizen action to improve the delivery of essential public services. They also should trigger further investigations and possible prosecution by responsible justice sector officials (*see* section VII below).

The MEC's reports should not be the only means of communicating the Government's anti-corruption efforts to the public, civil society, and international partners. The Government's anti-corruption concept note anticipates the launch of a communications strategy.⁷⁰ Although this strategy has not yet been developed, it would greatly assist the Government in its efforts to build public trust. As the World Bank explained: "Strategic communication on the need for change and for a positive vision for the future is crucial—no one can be persuaded to support new initiatives if they do not know they exist, or their intent and content have been distorted in reporting. Common lessons on strategic communications include ensuring that different parts of government communicate consistently on the vision for change and specific plans; fostering supportive messages from civil society and international partners; and directing communications to assuage concerns while avoiding promises that cannot be kept."⁷¹

SUMMARY OF RECOMMENDATIONS TO IMPROVE PLANNING AND COORDINATION OF ANTI-CORRUPTION STRATEGIES

For the Government:

- Consider expanding the secretariat designated to assist the High Council on Rule of Law and Anti-Corruption with technical experts from all areas relevant to the Government's anti-corruption efforts so it is better able to assist the council in implementing operational aspects of the Government's anti-corruption efforts.
- To preserve operational independence, legislation establishing the technical secretariat or commission should ensure that:
 - appointment and removal of senior personnel are subject to confirmation by the *Wolesi Jirga* and not vested in a single official;
 - appointments are made for a specified term of years;
 - members are protected from liability for official actions undertaken in good faith; and
 - adequate resources are provided for the secretariat to undertake its work.
- Anti-corruption plans should include more specific, concrete steps for fighting corruption, as well as identify intended achievements. More attention should be paid to incorporating sub-national corruption strategies into the national plan, as well as to the major risks to implementation and enforcement such as political opposition, and the broader security and socio-economic risks confronting Afghanistan.
- Communications strategies should be developed to ensure effective public outreach and awareness of the Government's anti-corruption efforts.

For the international community:

- The international community should assist the Government in moving away from what has been a largely piecemeal approach to anti-corruption efforts. Rather than being driven by multiple commitments to various donors, the broad vision set out in the SMAF and other commitments should be supplemented with a comprehensive matrix, delineating specific areas for individual donor engagement in support of the Government's efforts.



III. Restoring institutional integrity

Any strategy to fight corruption must include efforts to reduce the risk of corruption through institutional and policy reforms aimed at restoring public trust in government institutions. Years of conflict and institutional weakness have allowed favoritism, nepotism, and abuse of power to infiltrate the public service and drive a wedge between government and the citizens it is intended to serve. Afghans widely believe that appointments to government positions are secured through patronage or bribes, not merit or skill.⁷² This perception coupled with rent-seeking behavior—where basic public services such as access to education and health care are exchanged for the payment of bribes—fuel high levels of public distrust.⁷³

This section reviews Afghanistan's progress in implementing key strategies for reducing the risk of corruption among public officials and promoting increased institutional integrity. Civil service reforms aimed at increasing merit-based recruitment and promoting more ethical behavior through detailed codes of conduct are in place. Their effectiveness, however, is undermined by pervasive networks of patronage and nepotism. Similarly, although progress has been made in collecting asset declarations from thousands of high-level officials, none of these declarations has been subjected to meaningful verification and only a few—but by no means all—officials have been selectively targeted for sanctions for failing to timely declare assets. Verification of declarations and uniform sanctions for non-

compliance or deception are critical to restoring public confidence in public officials. Other strategies to restore public confidence include the expanded use of integrity testing and vetting of public officials in sensitive positions.

A. Civil service reform

The “development of strong institutions, centered on a professional civil service that is sufficiently independent from both private influence and political interference,” is perhaps the most effective way of preventing corruption.⁷⁴ Afghanistan’s strategies to develop a professional civil service include merit-based recruitment, pay and grade reform, and codes of conduct to promote more ethical behavior and prevent conflicts of interest.

1. Merit-based recruitment

“Deeply embedded patronage across government institutions has meant merit or competence based selection of civil servants is not the norm, which translates into very low capacity in many core areas of government policy making and service delivery.”⁷⁵ Afghanistan’s civil service reforms started in 2003 with the introduction of improved pay scales, restrictions on the use of salary top-up schemes, merit-based mechanisms for promotion, and performance evaluations.⁷⁶ These reforms continued with the adoption of the Public Administration Reform programme in 2005, which was intended to expand merit-based appointments in the civil service through the preparation of job descriptions and terms of reference for specific openings.⁷⁷

“Remaking the public service into trusted institutions is a key challenge in building the legitimacy of the state in a country with little history of good governance.”

Islamic Republic of Afghanistan,
Afghanistan’s Road to Self-Reliance: The first mile progress report, 5 September 2015, p. 2

Although progress has been made in relation to the merit-based appointments of some deputy provincial governors, district governors, and mayors, nepotism persists in many other civil service appointments.⁷⁸ The President, for instance, recently observed that 150 civil servants in a single ministry were appointed without going through any merit-based review.⁷⁹ Ninety-five percent of these appointees turned out to be related to or from the same ethnic group as the responsible minister—suggesting that nepotism within the Afghan civil service persists on a large scale notwithstanding extensive reforms.⁸⁰ Other examples of political interference by influential persons, including members of parliament and ministers, in the recruitment process have been observed.⁸¹ In relation to the Afghan National Police, members of parliament reportedly wrote about 15,000 requests during a single year (2012-2013) to influence the hiring of friends and family members as police officers.⁸²

Many of these non-merit based appointments were made possible, in part, by Presidential Decree No. 82, which shifted responsibility for the recruitment of grade 1 and 2 senior officials from Independent Administrative Reform and Civil Service Commission (Civil Service Commission) to individual ministries under the supervision of the commission’s Appointment Board.⁸³ Although this shift in responsibility was intended to strengthen transparency in the merit-based recruitment of professional civil servants,⁸⁴ it has not had the intended effect. Instead, the shift in responsibility has merely shifted lobbying efforts by influential persons from the Civil Service Commission to individual ministries.⁸⁵ The aim of these lobbying efforts is to influence the recruitment process in favor of friends and family members and, in so doing, defeat merit-based recruitments.⁸⁶ Not surprisingly, this politicization of the recruitment process has contributed to a substantial increase (approximately 40%) in the number of complaints filed with the Civil Service Commission since the decree took effect.⁸⁷

Revoking Presidential Decree No. 82 will not alone solve this problem; it likely would only shift the focus of lobbying efforts from the ministries back to the Civil Service Commission or other decision maker. For

truly merit-based recruitments to take place, the recruitment process must be better insulated from the distorting impact of external influences. Current Afghan laws do not include any prohibition on attempts to assert partisan or political pressure on the recruitment process.⁸⁸ To fill this gap, consideration should be given to amending the Civil Service Law or existing codes of conduct (see section III.B below) to specifically preclude attempts to influence recruitment decisions.⁸⁹ Officials involved in the recruitment process also should be precluded from discussing pending recruitments with persons not directly involved in the process. References may continue to be used to ensure a candidate's suitability, but references should be checked only after the candidate has passed a qualifying merit-based test or interview.

Notwithstanding the shift in decision-making under Presidential Decree No. 82, the Civil Service Commission retains responsibility for overseeing compliance with Afghanistan's merit-based recruitment system.⁹⁰ For this oversight to be effective, the commission must insulate itself from external influence in the same manner as line recruiters within the individual ministries. Additionally, to better enable the Civil Service Commission to discharge its oversight functions, further efforts should be undertaken to standardize the civil service recruitment process across all ministries. This includes the development of and adherence to standard procedures for job postings, application materials, test administration and scoring, due diligence, selection decisions, and candidate notifications.⁹¹ Standardization of these procedures would better enable the Civil Service Commission to detect deviations and, once identified, take appropriate remedial action up to and including terminating the suspect recruitment process. Increased standardization also would reduce opportunities for subjective decision-making, thereby ensuring a more objective, merit-based recruitment process.

2. Pay and grade reform

"There is broad consensus that low salaries and weak monitoring systems are breeding grounds for corruption, as underpaid staff develop individual coping strategies to top up their income" through side business ventures that raise potential conflicts of interest, by "demanding bribes or informal payments for services that are supposed to be free of charge, or misusing public resources for private gain."⁹² Low salaries also can have an adverse impact on efforts to professionalize the civil service. After all, "[w]hen a Government fails to pay salaries roughly commensurate with responsibility, it suggests that governmental functions are not worthy of respect or professionalism and can be performed by anyone, no matter how poorly paid."⁹³ Increasing civil service salaries, however, is not alone effective.⁹⁴ To avoid the perception of corruption or patronage, all pay and grade reforms must be both transparent and meritocratic.⁹⁵

Between 2008 and 2011, Afghanistan, with the support of international consultants,⁹⁶ laid the foundation for a new pay and grade system based not on years of seniority but, rather, on the level of responsibilities assigned to the civil servant. The system was further refined so that the civil service is divided into eight grades, each with five steps corresponding to monthly salaries in the range of AFS 5,000 to AFS 32,500 per month.⁹⁷ To attract more civil servants with specialized skills, Afghanistan introduced "super-scale benefits" that increase the regular civil service salary scale by USD 300 to USD 1,500 per month for qualified professionals.⁹⁸ More recently, in December 2014, Afghanistan launched its Next Generation of Public Administration Reform Strategy with the dual goals of improving the delivery of public services and promoting fiscal sustainability, including through the implementation of salary-scale guidelines to ensure that job pay and grade are commensurate with job responsibilities.⁹⁹

One problem encountered in Afghanistan's pay and grade reform efforts is that donor efforts to rebuild the Afghan civil service have distorted the job market, making it difficult for the Government to attract and retain qualified staff and preserve institutional knowledge within line ministries. This situation manifests itself in essentially two ways: (a) government civil service positions funded by international

organizations and (b) embedded international programme positions that are performing services that should be performed by government civil servants.

The Government has made great progress in harmonizing national and international salary scales for government civil servants through adoption of a National Technical Assistance salary scale. This salary scale, which the Cabinet approved on 16 December 2015, harmonizes salaries paid to all National Technical Assistance staff in the government civil service, regardless of whether the source of funding for the post is from the national budget or an external donor.¹⁰⁰ By eliminating discrepancies in salaries paid to civil servants performing similar job functions, the Government reduced opportunities for rent-seeking behavior aimed at securing higher-paying government posts and reduced competition among various ministries. Although many international organizations have adopted the new salary scales, some have not done so as swiftly as they should because of concerns relating to their ability to attract and retain talented programme staff.¹⁰¹ For the Government's harmonization efforts to continue to succeed, all international organizations must commit to harmonizing their salary scales with National Technical Assistance salary scales. Additionally, to ensure continued capacity within government ministries, the Government must redouble efforts to ensure true merit-based recruitment of all civil service posts, regardless of the source of funding (see section III.A.1).

Progress in relation to the second type of market distortion—resulting from international programme staff embedded within ministries and performing what should be civil service functions—has been slower, creating what President Ghani regards as a parallel civil service.¹⁰² As already noted, some international organizations have been slow to adopt National Technical Assistance salary scales. This distorting effect could be eliminated through stricter adherence to National Technical Assistance salary scales for all programme staff embedded within government ministries. Additionally, to avoid duplication with government civil service functions, the terms of reference for international programme staff embedded within ministries should be reviewed to ensure that these staff are not duplicating work that can and should be performed by government civil servants. Where national capacity is found lacking, international organizations in consultation with the responsible ministry officials should develop a timeframe for gradually transitioning these responsibilities from international technical assistants to government civil servants, who are recruited through a transparent merit-based process.

An assessment of the effectiveness of National Technical Assistance and other pay and grade reforms is scheduled to take place when the Government's Capacity Building for Results project, which is currently underway, closes on 31 December 2017.¹⁰³ This project is a government-led monitoring and capacity-building project aimed at improving the performance of select line ministries responsible for implementing national priority programmes.¹⁰⁴ While the full assessment is not yet complete, early statistical indicators are positive. The number of ministries that have implemented pay and grade reforms increased from only eight ministries in January 2012 to 24 ministries in February 2017—already exceeding the target of 22 ministries set for the end of 2017.¹⁰⁵ What remains to be seen, however, is whether implementation of these reforms has yielded the desired result of attracting qualified candidates and stemming the flow of talent to international organizations.

B. Codes of conduct

Afghanistan has codes of conduct in place for a broad range of public officials, including civil servants, judges, prosecutors, police, members of parliament, and officials within the executive branch.¹⁰⁶ Codes of conduct also are in place at the sub-national level. In fact, according to one study conducted in 2013, over 72% of local government officials reported that they were subject to a code of conduct and over 80% of those officials signed the code.¹⁰⁷

Generally speaking, Afghanistan's codes of conduct for civil servants and other government officials reflect many of the elements recommended by the UN International Code of Conduct for Public Officials, including the duty of loyalty and avoidance of conflicts of interests.¹⁰⁸ The Afghan judiciary's code of conduct also is generally consistent with the Bangalore Principles of Judicial Conduct (2006), particularly in terms of ensuring judicial independence and impartiality. Similarly, the Attorney General's Office's Code of Conduct and Professional Standards for Prosecutors is consistent with the UN Guidelines on the Role of Prosecutors.¹⁰⁹

The difficulty lies not with the text or scope of Afghanistan's codes of conduct but with their implementation and enforcement. A key aspect of implementation is ensuring that codes of conduct apply at all levels of the organization. "Organizational leaders need to commit to high standards of integrity, set the tone from the top and lead by example."¹¹⁰ Codes of conduct can have little effect on the behavior of public officials if those in leadership positions signal disinterest in them.¹¹¹ Adherence to codes of conduct and ethical standards must be seen as a priority in all government institutions.

To prioritise adherence to codes of conduct, staff members and the general public should be sensitized to the ethical obligations imposed on all public officials. Ethics training programmes geared to the particular environment in which public officials work should be part of all organizational work plans and conducted regularly. In addition, consistent with the Government's commitment under UNCAC, efforts should be undertaken to educate the public about the standards of conduct and ethics intended to govern their interactions with public officials.¹¹² In Somalia, for instance, adoption of the judiciary's code of conduct coincided with the launch of a public awareness campaign to educate the public "about the ways, modalities, and process for filing a complaint against a judge."¹¹³ Billboards and panels were disseminated and displayed in public places, including courthouses, throughout the country to increase public awareness.¹¹⁴

Similar public awareness-raising efforts, including the billboard that appears on the cover of this report, have been used in Afghanistan but so far with indeterminate impact. To be effective, public awareness campaigns must be accompanied by reactive and proactive efforts to expose corruption.¹¹⁵ Additionally, once exposed, meaningful disciplinary measures must be imposed to hold those responsible accountable.

1. Complaints mechanisms

Reactive enforcement is complaints-driven. Complaints can be both from inside or outside an agency. Article 5(3) of the Afghan Code of Conduct of Civil Servants requires all civil servants to report suspected misconduct to the relevant director. Similar mandatory reporting provisions should be included in all codes of conduct. To increase the number of complaints from outside an agency, hotlines or other anonymous reporting mechanisms such as complaints boxes should be set up for all agencies.¹¹⁶ The HOOAC maintains a hotline for complaints and also provides instructions on its website for how complaints about suspected corruption can be made anonymously, if required, through a variety of means, including email, telephone, or in person.¹¹⁷ Some individual ministries also maintain public complaints boxes—although sometimes in hard-to-find locations. The Ministry of Justice, for instance, maintains a public comments box inside its secure perimeter that is partially blocked by fencing.¹¹⁸ To assist the public in better understanding the ethical standards intended to govern public officials, copies of all codes of conduct also should be made accessible on government websites.¹¹⁹

2. Whistleblower and witness protections

Whistleblower protections are another effective means of encouraging persons to come forward and report suspected violations of codes of conduct and ethics standards without fear of retaliation, and are part of the Government's commitments under UNCAC.¹²⁰ Article 14 of Afghanistan's Law on Supervision

and Implementation of Anti-Corruption Strategies provides that persons who “cooperate” in good faith with the discovery of administrative corruption as either an informant or witness at trial shall be “immune from any type of pressure, intimidation and ill-treatment and shall be rewarded.” The law further prohibits the disclosure of a witness’s identity without consent.¹²¹ In connection with the Anti-Corruption Justice Centre’s establishment, President Ghani expressed his support for enhanced whistleblower protections.¹²²

A draft whistleblower protection law is presently under consideration.¹²³ This draft law presents an opportunity to clarify and enhance the protections afforded to whistleblowers. Consistent with recommended best practices, consideration should be given to easing the burden on whistleblowers to establish a nexus between their disclosure and employment-related retaliation. South Africa’s whistleblower law, for instance, establishes a presumption that, when a whistleblower is dismissed or otherwise disciplined following a disclosure, the dismissal or discipline is retaliatory.¹²⁴ It is then incumbent on the agency to justify the adverse employment action.¹²⁵

The protections afforded to whistleblowers should extend to any good faith disclosure, even if the information provided is later shown to be false or incorrect.¹²⁶ To this end, whistleblowers should be protected from alleged defamation or breach of confidentiality claims, as well as from potential violations of official secrecy laws.¹²⁷ The only exception should be for disclosures knowingly made in bad faith. But, even then, whistleblowers should not be required to prove their good faith; rather, good faith should be assessed based on the objective circumstances surrounding the disclosure.¹²⁸

Furthermore, although protecting the whistleblower’s identity is an important objective, no guarantee of anonymity such as that contained in Afghanistan’s draft whistleblower law should be granted.¹²⁹ Under the Afghan Criminal Procedure Code, persons accused of crimes have the right to confront adverse witnesses.¹³⁰ Thus, when criminal cases proceed to the formal trial stage, anonymity from the accused and defence teams cannot and should not be guaranteed.¹³¹ What can and should be guaranteed are effective means of witness protection—a matter discussed more fully in section VII.B.5 below.

The process for obtaining compensation for good faith testimony resulting in the recovery of public funds also should be clarified so that it provides an effective incentive for whistleblowers but does not result in unjustified windfalls against the public interest.¹³² Allowing too high a percentage of recovery could “detract from the public interest principles of the legislation and pervert the whistleblower’s motives to report.”¹³³ In South Korea, for instance, the anti-corruption law allows individuals reporting corruption to share up to 20% of the recovered fraud proceeds, with the remainder of recovered funds going to the public treasury.¹³⁴ A similar approach should be considered in finalizing Afghanistan’s draft law.

3. Meaningful disciplinary measures

Lastly, there must be meaningful consequences for those found to have violated codes of conduct. A range of administrative and disciplinary measures from informal reprimand to dismissal from service should be imposed to hold public officials responsible for their misconduct.¹³⁵ Serious misconduct amounting to a criminal offence should be referred to the Attorney General for investigation and prosecution. To protect those accused of misconduct from false or unsubstantiated allegations, a formal disciplinary review process should be established, and the results of those proceedings made public.

One unfortunate consequence is that, under existing Afghan practice, officials who are removed from office may nevertheless continue to draw their salaries for up to a year. This practice is based on a misapplication of article 72 of the Afghan Labour Law, which is intended to provide six-to-12 months’ pay only for officials whose positions have been downsized or abolished. It is not intended to apply to officials who have been removed from office for misconduct. To ensure that removal from office

remains an effective deterrent for official misconduct, a formal instruction or clarification should be issued to preclude the payment of salaries in cases where official misconduct is established.

Additionally, consideration should be given to redefining the limits of immunity extended to public officials who engage in corruption. Consistent with recommended best practices, immunity should continue to protect officials engaged in carrying out official functions; immunity should not shield officials who engage in abuse of office and other corrupt practices.¹³⁶

C. Vetting

Merit-based recruitment is intended to identify those most qualified for posts. But, even qualified candidates remain prone to corruption. Vetting of personnel during the recruitment process provides a means of testing their integrity and suitability for public employment.¹³⁷ Vetting typically requires an in-depth review of the candidate's or staff member's personal and professional records, including a detailed background check and verification of all degrees and other application materials.¹³⁸ The goal of this review is to exclude from "public service persons with serious integrity deficits in order to (re-) establish civic trust and (re-) legitimize public institutions."¹³⁹

While it may be impractical for Afghanistan to thoroughly vet all public officials, vetting should be considered for those occupying highly-sensitive posts. In establishing the Anti-Corruption Justice Centre, for instance, Afghanistan committed to vetting investigators, prosecutors, and mentors assigned to work on the centre's major corruption cases. Personnel assigned to the Counter Narcotics Justice Centre, as well as the former Anti-Corruption Unit within the Attorney General's Office, also were subjected to vetting. These largely *ad hoc* vetting measures should be formalized into a standard practice and applied to all categories of personnel working on sensitive corruption matters, including, in particular, supervisors and employees of the anti-corruption secretariat or coordination body.

Vetting need not be limited to new public employees. Bosnia and Herzegovina, for instance, required serving judges and prosecutors to undergo vetting as part of its reform efforts.¹⁴⁰ Afghanistan should consider a similar approach, particularly for existing staff serving in areas at high risk of corruption or essential to restoring public confidence.¹⁴¹ Where fraud or other misconduct is detected in relation to an existing staff member (*e.g.* falsified educational decrees), formal disciplinary procedures should be initiated to remove or otherwise sanction the staff member.¹⁴²

The need for these measures is amply illustrated by HOOAC's removal of nine officials, including the heads or deputy heads of key operational units such as asset registration, for falsifying academic degrees required to perform their jobs.¹⁴³ This controversy, which was disclosed in 2015, marked a low point in the Government's anti-corruption efforts. It could have been avoided or, at least, detected earlier had stronger vetting mechanisms like those recommended above been in place to hire or re-hire these officials—whose very job was to help detect and prevent public corruption.

D. Integrity testing

Integrity testing is another effective means of exposing corruption, particularly receptiveness to bribes, against suspected individuals or agencies deemed to be at risk of corruption.¹⁴⁴ Although often regarded solely as a deterrent, integrity testing also can be an effective means for identifying, and perhaps promoting, officials who resist bribes and discharge their responsibilities honestly.¹⁴⁵

Although the Government's efforts to reform the justice sector have been slower than anticipated,¹⁴⁶ Afghanistan's judiciary already is using a form of integrity testing in response to complaints of suspected corruption on the part of judges, administrative staff, and others associated with the judicial process.¹⁴⁷ When complaints are received, the Supreme Court's Judicial Surveillance Department conducts

undercover operations to test the suspect's vulnerability to a bribe or other corrupt practice. Since its creation in 2008, the Judicial Surveillance Department arrested 526 individuals, including 93 judges, 92 judicial personnel, and 341 attorneys or private parties, for corruption-related offences.¹⁴⁸ Following arrest, the department refers the cases to the Attorney General for prosecution and, if convicted, the judges or other officials are removed from office.¹⁴⁹ Other Afghan agencies, including the Major Crimes Task Force, use similar techniques to test the integrity of public officials suspected of taking bribes.¹⁵⁰

The effectiveness of these techniques is constrained by a lack of adequate resources and poor coordination with law enforcement agencies. To avoid allegations of overreaching, audio or video recordings of the actual events surrounding the solicitation of the bribe and its payment should be recorded to show that the official was acting on his or her own free will and confirm that the exchange was made.¹⁵¹ At present, however, most integrity testing in Afghanistan relies on mobile phones to record audio and video evidence. This type of technology limits effectiveness because, to preserve the covert nature of the operation, recordings usually can only begin after the exchange has been made.

Additionally, to be admissible as evidence under the Criminal Procedure Code, investigators must obtain prior court approval to covertly record conversations, including the solicitation of a bribe.¹⁵² While prior approval is not difficult to obtain where a credible suspicion exists, a more streamlined approach to Afghanistan's evidentiary rules would permit the admission of video and audio recordings obtained with one-party's consent, including the consent of the undercover agent or informant conducting the integrity testing. In cases where it is not possible to obtain a prior order authorizing recording, cooperation with other law enforcement agencies is required to ensure that sufficient witnesses can be placed in the vicinity of the test to corroborate what was heard or seen on the recording devices.¹⁵³

The Judicial Surveillance Department has expressed a desire to expand integrity testing beyond its current complaints-based approach but lacks the resources to do so.¹⁵⁴ A proactive approach that subjects public officials to randomized integrity tests is a proposal worth careful consideration—not just for the judiciary but for all government departments. Randomized testing increases the actual and perceived risk to corrupt officials that they may be detected, thereby deterring corrupt behavior and encouraging officials to report instances when they are offered bribes.¹⁵⁵ Priority for proactive testing should be given to those government officials or institutions most at risk of corruption, given the sensitivity of information handled or substantial decision-making authority, as well as to those officials whose asset declarations reveal substantial anomalies (see section III.E.1 below).¹⁵⁶ The number of officials subjected to proactive testing need not be large so long as government agencies make known their plans to conduct randomized integrity testing.¹⁵⁷ As one expert observed: "The very fact that officials know that the tests are taking place will encourage them to report approaches, as they will not know which are genuine and which are 'tests.'"¹⁵⁸

Lastly, consideration should be given to another form of integrity testing targeting areas where the public engages in direct transactions with public officials such as tax or customs officials. Cameras installed in these public areas, accompanied by clear notice that recording is being conducted, can serve as an effective deterrent for officials inclined to solicit or accept bribes in exchange for the delivery of public services.¹⁵⁹ While some corrupt officials may simply move their illicit activities beyond the range of the cameras, others may be unwilling to take the added risk of detection.

E. Asset declarations

Article 154 of Afghanistan's Constitution requires that "the wealth of the President, Vice-Presidents, Ministers, members of the Supreme Court, as well as the Attorney General, shall be registered, reviewed and published prior to and after their term of office by an organ established by law."¹⁶⁰ Since 2008, HOOAC has been directed to register asset declarations of the 38 officials identified in article 154 and

publish those declarations “when needed.”¹⁶¹ In addition to these constitutional officers, HOOAC must register on an annual basis and disclose “if needed” asset declarations filed by a broad range of other public officials.¹⁶²

Currently, HOOAC has registered approximately 8,500 asset declarations filed by senior public officials, including more than 90% of the officials constitutionally mandated to file declarations.¹⁶³ However, several high-ranking officials, including two constitutionally-mandated officials, failed to submit their declarations.¹⁶⁴ HOOAC has published only 66 declarations filed by high-level officials,¹⁶⁵ and is reportedly investigating 242 declarations—only about 3% of the total declarations filed.¹⁶⁶ HOOAC’s website contains a link where only 48 declarations are published.¹⁶⁷ HOOAC reportedly claims that security or privacy concerns preclude broader publication of declarations.¹⁶⁸

HOOAC uses a variety of means to verify the contents of asset declarations.¹⁶⁹ It checks declarations for completion and internal consistency.¹⁷⁰ It also performs some external cross-checking of information contained in declarations with previously-filed declarations and available public records such as land, bank, and tax registers.¹⁷¹ Additionally, pursuant to a recent memorandum of understanding, HOOAC shares asset declarations with FinTRACA to cross-check declared assets with banking records.¹⁷² HOOAC does not, however, seek to verify declarations relating to assets held by family members or third parties.¹⁷³

To strengthen the existing declaration scheme and meet its commitments under the IMF Extended Credit Facility Arrangement, Afghanistan recently proposed an amendment of the HOOAC law to require stronger verification of declarations and the referral of persons who submit knowingly false declarations for prosecution.¹⁷⁴ The amendment, which has not yet been enacted, also would require HOOAC to publish the names of officials who fail to submit declarations, and suspend their salary and other employment benefits until their noncompliance is remedied.

HOOAC recently submitted to the President the names of senior officials who failed to submit declarations.¹⁷⁵ So far, these names have not been publicly confirmed, but press reports identify several very senior officials as among those who failed to submit declarations.¹⁷⁶ To date, no action has been taken against these senior officials. On 3 January 2017, however, HOOAC announced that it had taken steps to suspend the salary and benefits of 15 provincial governors who had failed to declare their assets.¹⁷⁷ Although a welcome development, enforcement of Afghanistan’s asset declaration scheme must be even-handed to avoid the impression that some officials are above the law.

Enforcement also must be pursued more vigorously. To date, despite the thousands of declarations filed with HOOAC, not a single official has been prosecuted for failing to declare assets or filing a false declaration.¹⁷⁸ Submitting confidential lists of names to the President or imposing administrative sanctions against a select few provincial officials is not alone effective enforcement.¹⁷⁹ Priority should be given to: (1) targeted verification, (2) publication of declarations, and (3) sanctions for noncompliance and false declarations.¹⁸⁰ Without progress in these areas, Afghanistan’s extensive system for asset declarations risks being little more than a “window-dressing exercise.”¹⁸¹

1. Verification

Verification of asset declarations must recognize the constraints on HOOAC’s existing administrative and technical capacity.¹⁸² These constraints do not mean that verification cannot be meaningfully undertaken; instead, it means that efforts must be prioritized to maximize the use of limited resources.¹⁸³ Priority should be given to verifying the declarations of constitutionally-mandated reporters and other senior officials, particularly those in agencies, such as tax or customs, most vulnerable to corruption.¹⁸⁴ Priority also should be given to verifying declarations for which red flags have been detected (such as significant increases in wealth or major discrepancies between declarations

and legal sources of income and lifestyle) or allegations of misconduct have been made.¹⁸⁵ Verification of other declarations should be conducted on a randomized basis on a pre-defined percentage or absolute number of declarations filed.¹⁸⁶ Random sampling has the added benefit of spreading the “likelihood of verification evenly across all categories of public officials, preventing the arbitrary or politically motivated selection.”¹⁸⁷

In a post-conflict environment like Afghanistan where many public records have been destroyed or simply do not exist, verification cannot reliably be based only on official databases such as tax or property records.¹⁸⁸ The reliability of HOOAC's existing verification procedures would be enhanced by including lifestyle checks not only for public officials but family members as well.¹⁸⁹ The goal of these checks is to determine whether officials are “living beyond” the means they have declared.¹⁹⁰ Comparisons of declared wealth with lifestyle are particularly effective in disclosing ill-gotten wealth from bribes or kick-backs that are unlikely to be declared but may be revealed by a lifestyle check.¹⁹¹ In Kosovo, for instance, a lifestyle check revealed that a public official's home, which was declared at only a modest value, was in fact a large mansion of significantly greater value than declared.¹⁹²

Lifestyle checks should include visual inspection of physical assets such as homes and cars, as well as interviews with relatives, neighbors, or business associates who may have information relevant to the public official's lifestyle.¹⁹³ If resources are not sufficient to permit on-site visual inspections of an official's home, office, and other physical assets,¹⁹⁴ consideration should be given to using existing national security apparatus, including video surveillance cameras, such as those deployed around Kabul and other areas, to obtain visual images to assist HOOAC in determining whether the lifestyle of public officials is consistent with their declared wealth.

Another easily-obtainable source for lifestyle checks is travel records for the official and family members. Travel records, including passport stamps, relating to personal travel should be reviewed to identify the frequency, estimated expense, and destination of travel. A high level of travel carries significant costs, the source of which should be explained. Additionally, travel records may reveal frequent trips to destinations suspected of sheltering assets or locations of second homes or educational institutions for family members. All of these areas could reveal substantial unexplained sources of income that should be verified. Similarly, interviews with friends and family members may reveal other significant lifestyle expenditures such as elaborate wedding parties or other celebrations that merit explanation.¹⁹⁵

Lifestyle checks like these do not require formal investigative authority. Under Afghan law, detection is the responsibility of the police, and criminal investigations related to prosecution are the responsibility of the Attorney General.¹⁹⁶ HOOAC need not and should not intrude into these established arenas.¹⁹⁷ Its responsibility is to verify or audit the information contained in declarations to ensure accuracy. When discrepancies are found, HOOAC should refer the matter to the appropriate officials for formal detection or investigation. As discussed in section VII.E, to assist HOOAC in making these referrals, memoranda of understanding should be negotiated with the Ministry of Interior and Attorney General's Office.

In the long-term, Afghanistan should consider automating its asset declaration system to ease administrative burdens. “Countries across the world rely on technology to varying degrees for performing . . . core functions of asset declaration schemes.”¹⁹⁸ Argentina, for instance, uses an automated online submission and management system to handle approximately 36,000 declarations from public officials. The system enables electronic verification of the top 5% of senior officials as well as targeted audits of declarations filed by the remaining 95% of declarations.¹⁹⁹ It also provides safeguards for the protection of personal and sensitive data, such as addresses, bank account numbers, and copies of tax declarations, by using a dual submission process that splits data into two files corresponding to public and private annexes.²⁰⁰ Although the initial investment for this technology was

substantial, it significantly improved the effectiveness of Argentina's asset declaration scheme.²⁰¹ In the year following implementation, submission compliance rates increased from 67% to 96%, and the estimated cost to the government of processing individual declarations decreased from USD 70, before automation, to only USD 8 after automation.²⁰² Other countries such as Thailand and Ethiopia have customised database tools to help streamline their asset declaration and verification systems.²⁰³ Consideration should be given to gradually transitioning Afghanistan's largely manual declaration system to a more automated system.

2. Publication

Public disclosure of declarations is another means of ensuring accuracy and transparency. "Making disclosure public . . . allows investigative journalists, media, scholars and civil society groups to play an important role in monitoring the accuracy of publicly available declarations and documented assets (farms, villas, apartments, cars . . .) through photos, public registers and interviews with neighbors and tenants."²⁰⁴ HOOAC's assertion that security or privacy concerns preclude broader publication of declarations is not credible. Afghanistan's Constitution expressly requires publication of the constitutionally-mandated declarations required to be filed by senior officials. Furthermore, as part of its IMF Benchmark commitments, the Government committed to making these declarations (and those of heads and deputies of law enforcement agencies, customs and tax administrations)²⁰⁵ available in a searchable format on a public website.²⁰⁶

Moreover, any truly sensitive personal information such as home addresses, account numbers, or vehicle registration numbers, can be redacted or removed from the declaration prior to publication, thereby protecting any legitimate privacy or security concerns that may exist.²⁰⁷ Similarly, declarations relating to assets held by family members or close associates may likewise be redacted or stored in a separate non-public database as has been the practice in South Africa and Niger.²⁰⁸

All of this suggests that HOOAC should reconsider its practice of not publishing declarations for privacy or security concerns. Indeed, a recent survey of Western Balkan countries did not "identify a single case in practice where a public official was exposed to any threat because a declaration was made public."²⁰⁹

3. Sanctions

Lastly, sanctions are an "important tool to promote disciplined compliance with the requirements of declaration systems, especially when such systems cover a large range of public officials."²¹⁰ A survey of countries requiring asset declarations revealed that sanctions for failing to file were imposed in over 80% of the countries, while false declarations were penalized in approximately 65-75% of the countries.²¹¹ Afghanistan's Penal Code makes it a crime to fail to submit a declaration or to submit a knowingly false declaration.²¹² If enacted, the proposed amendment of the HOOAC law would add a range of other administrative sanctions for false or incomplete declarations and require HOOAC to refer these cases for prosecution.²¹³

Existing criminal penalties, however, only provide for a fine against officials who fail to submit declarations and imprisonment of up to one year for false declarations.²¹⁴ "To deter corrupt officials from trying to avoid liability for corruption by committing less serious disclosure and reporting offences, sanctions for non-disclosure or false reporting should be severe."²¹⁵ If the consequences for noncompliance with asset declarations are not made as severe as the corrupt behavior the disclosures are intended to target, "corrupt officials may refuse disclosure as the lesser penalty."²¹⁶ Consideration, therefore, should be given to increasing the penalties applicable to non-disclosure and false reporting to ensure that they effectively deter violations of the asset declaration scheme.

SUMMARY OF RECOMMENDATIONS TO RESTORE INSTITUTIONAL INTEGRITY

For the Government:

- To ensure merit-based recruitments, consideration should be given to amending the Civil Service Law or existing codes of conduct to expressly preclude attempts to assert partisan or political pressure on the recruitment process. Officials responsible for recruitment decisions should likewise be precluded from discussing any pending recruitments with persons not directly involved in the recruitment process.
- Efforts to increase civil service salaries should be both transparent and meritocratic, and conditioned on effective controls such as codes of conduct and disciplinary procedures to prevent corruption.
 - Strategies should be developed to better educate the public and civil servants about standards of conduct.
 - Existing complaint mechanisms, including mandatory reporting, should be expanded to encourage more individuals to come forward.
 - Existing whistleblower protections should be expanded to include all categories of corruption not just administrative corruption. In finalizing the draft whistleblower law, consideration should be given to expanding protections for suspected employment retaliation and civil liability. A viable procedure for obtaining compensation for good faith testimony resulting in the recovery of public funds should be developed.
- Violations of codes of conduct should be met with appropriate discipline. Consideration should be given to ending the practice of allowing officials who are removed from office for misconduct from continuing to draw a salary and other employment benefits.
- HOOAC should prioritize the verification of asset declarations for all constitutionally-mandated reporters and officials occupying positions of particular trust or vulnerability, as well as declarations raising red-flags. In all other cases, a system for randomized verification should be developed. All verifications should include life-style checks for the official and family members.

For the international community:

- The international community should support Afghanistan's efforts to expand existing means of vetting of personnel, integrity testing, and verification of asset declarations through prioritization of programmes aimed at developing national capacity, including technical skills, in each of these areas.
- To assist the Government in harmonizing salary scales for all civil servants, the international community should more uniformly implement National Technical Assistance pay scales for all merit-based, civil service positions, as well as for programme staff embedded in line ministries.
- The international community should review terms of reference for all embedded programme staff to eliminate duplication of core government functions that can and should be performed by the national civil service. Where national capacity requires further development, a timeframe should be agreed upon for the gradual transition of functions from international programme staff to merit-based, civil service positions.



IV. Strengthening public financial management and revenue controls

Responsible stewardship in the management of public finances is critical to restoring Afghanistan's credibility to its citizens and international donors. "Afghanistan has accomplished, in a difficult post-conflict situation, remarkable progress on the fiscal front."²¹⁷ Fiscal discipline has been imposed at the national level and efforts are underway to increase fiscal discipline at the sub-national level, as well.²¹⁸ Significant progress also has been made in increasing fiscal transparency, particularly in the budget process.²¹⁹ Additionally, new institutional controls have been introduced to prevent public expenditures and revenues from customs and taxes from being diverted to private gain. This section examines each of these areas.

A. Public financial management

Public financial management processes are critical to revenue mobilization (*e.g.* taxation and customs), budget preparation and resource allocation, budget execution (*e.g.* procurement and payroll), and the accounting and auditing of government expenditures. If left unchecked, corruption in these processes can have a detrimental impact on economic growth and delivery of essential public services.²²⁰

To address the threat of corruption in public financial management, the Ministry of Finance launched a five-year, rolling plan called the Public Financial Management Roadmap II (PFMR-II). PFMR-II is a team-based performance management plan aimed at introducing more transparency and accountability in the management of public finances. Implementation of the plan started in February 2016, with a focus on sequenced reforms targeting three main areas: (1) improving performance of government investments leading to better economic outcomes; (2) promoting more accurate and transparent budgeting; and (3) building the Ministry of Finance's capacity through investments in human resources management, administration and finance, and information technology and communications. The first-mid-year assessment of PFMR-II revealed progress in completing preliminary internal assessments of resources and capacities. Future assessments will hopefully build on this foundation by focusing on more results-based progress linked to specific reform goals aimed at reducing vulnerabilities to corruption and promoting greater transparency in public finances. If successful, PFMR-II could serve as a useful model for other ministries.

In addition to PFMR-II, the Government announced plans to invest significantly in the Afghanistan Financial Management System with the aim of improving the management of public expenditures.²²¹ This system will introduce new web-based management tools, including data sharing capabilities with other revenue and budgeting systems, as well as increased capacity for contract management and procurement both at the national and sub-national levels, as well as to Afghan embassies abroad.²²²

Similar efforts are being directed to improve the accuracy and transparency of the budgeting process through adoption of more systemic and rule-based costing of budget proposals.²²³ Among other things, the new budgeting process will implement better forecasting of projected revenues and expenditures by rolling forward estimates based on real data. This innovation would help address what has been a recurrent problem with national budgets over the past several years where budgets have reflected inaccurate estimates of revenues and expenditure. Additionally, new controls will be put in place to ensure that budget allotments are used for their intended purposes. The Ministry of Finance will test out this new budgeting process before rolling it out to other ministries.

The Government's control over planning of public spending and reporting on its execution is made more difficult by the large portion of off-budget development assistance.²²⁴ Donor agreements often do not require development assistance to be planned, reported, or operated in line with national budget procedures.²²⁵ This situation makes it difficult for national authorities to accurately manage and predict the disbursements for approved programmes, such as, the procurement of goods and services for major public works projects (see section IV.C). More consistent and rigorous reporting by donors to national authorities on disbursements from off-budget development assistance funds would assist the Government in better projecting and monitoring public expenditures.²²⁶

The Government also made progress in improving the transparency of the budget process by regularly reporting public expenditures and financial position in an understandable format subject to legislative review.²²⁷ It made key budget documents for 2016 and preparatory budget documents for 2017 publicly available on 30 June 2016.²²⁸ This increased transparency in the publication of key budget documents likely will contribute to a continued positive trend in Afghanistan's ranking on the Open Budget Index, which attempts to measure transparency in government budget processes.²²⁹ In 2010, Afghanistan scored 27 out of 100 in terms of budget transparency.²³⁰ By 2012, Afghanistan's budget transparency score jumped to 59. Despite a small drop in ranking (to 42) in 2015, Afghanistan's progress to date in disclosing information about the

"Making budgets transparent and using community and civil society capacity to monitor them are key."

The World Bank, World Development Report 2011: Conflict, Security, and Development, 2011, p. 258.

2016 budget and preparations for the 2017 budget signal that its score for budget transparency will not decline further but likely continue to improve.²³¹

B. Sub-national governance

Afghanistan's commitments under SMAF require it to implement reforms to improve sub-national governance.²³² Afghanistan set forth its vision of a more transparent and accountable system of subnational governance in its Sub-national Governance Policy.²³³ The policy contains guidelines to clarify the roles and responsibilities of the national and sub-national governments in improving local development. It also provides guidance to sub-national officials on the application of relevant laws and policies. The guidelines address issues such as transparency in decision making, accountability in the exercise of delegated authority, and independence of oversight mechanisms.²³⁴ Overall, the technical guidance is intended to promote more consistent and stricter application of national laws and policies, thereby strengthening sub-national governance and reducing opportunities for corruption.

While progress has been seen in relation to the appointment of some sub-national officials such as deputy provincial governors, district governors, and provincial municipal mayors, the roles of these officials and their interaction with other officials at the sub-national levels requires clarification to ensure proper oversight in the delivery of public services. Provincial councils are intended to fulfil this oversight role by acting as a check on the provincial governors' exercise of authority. In practice, however, aggressive or powerful provincial governors are often unchecked by passive or weak provincial councils.²³⁵

Greater accountability in the conduct of sub-national governance is required to avoid the risk of corruption. The Provincial Council Oversight Regulation, currently under review by the Afghanistan's Cabinet, is a step in the right direction. It would clarify the provincial council's role in monitoring and evaluating the performance of provincial officials, including the governor. This clarification would help ensure that provincial councils better fulfil their intended oversight role.

The need for stronger oversight at the sub-national level is particularly important in relation to budgetary matters.²³⁶ Confusion currently exists as to who is responsible for this oversight. To improve implementation of the national budget at the sub-national level, the Provincial Budgeting Policy delegated responsibility over provincial budget administration from individual line ministries to the Provincial Public Finance Management Committee led by the Ministry of Finance. The Sub-National Governance Policy, in contrast, envisions that provincial governors are responsible for administering provincial budgets. The pending Provincial Council Oversight Regulation provides an opportunity to harmonize these seemingly conflicting directives and ensure stronger accountability in the expenditure of public funds at the sub-national level.

C. Procurement

"Procurement is one of the government sectors most vulnerable to corruption, due to the important financial flows involved as well as the complexity of contracting processes that provide both incentives and opportunities for rent-seeking behaviors. Corruption in procurement can take many forms and can occur at all stages of the procurement cycle from the decision to contract, the identification of needs, the specifications of the contract, the tendering process, to the contract implementation and final evaluation."²³⁷

Afghanistan's procurement system traditionally exhibited all of these vulnerabilities. As President Ghani explained: "Forensic reviews repeatedly show[ed] a systematic rigging of competitive bidding, usually through the inclusion of non-existent companies to give the appearance of competition when there is in fact none. For a fee, cost estimates [we]re shared between corrupt officials and corrupt bidders. Rules

to block conflicts of interest [we]re routinely subverted by companies owned by relatives of high-ranking officials whose only 'business' [wa]s to provide access."²³⁸

To restore institutional control, Afghanistan established the National Procurement Commission in October 2014 to "oversee procurement activities in the public sector with a stated policy of zero tolerance for corruption."²³⁹ The Commission is chaired by the President and its membership includes other senior officials—including the Chief Executive Officer and ministers of justice, finance, and economy—a composition intended to convey strong political will for its work. The Commission undertakes a review of all contracts for goods and services with a value over the threshold limits of the government awarding entities.²⁴⁰ Since its inception, the Commission has reviewed approximately 2,000 contracts with a combined value of nearly AFS 200 billion.²⁴¹

Transparency is built into the Commission's review process by allowing representatives from civil society, international donors, and a rotating member of the National Assembly's Caucus on Integrity to attend weekly procurement review meetings.²⁴² Additionally, minutes of the Commission's meetings and decisions taken are posted on its website, and periodic briefings are provided to the media and donors.²⁴³

To further improve transparency, Afghanistan has committed to publishing more than 75% of high-value contracts by the end of 2017,²⁴⁴ including information about the "ownership and control of all companies involved in property purchase and public contracting."²⁴⁵ To achieve this goal and, simultaneously, improve financial controls, Afghanistan plans to introduce electronic payment and e-procurement systems.²⁴⁶ These systems would permit electronic publication of notices, bids, awards, and final contracts. They also would help standardize procedures and facilitate internal audits. Consideration should be given to ensuring that the proposed e-procurement system is compatible with other Government systems, particularly budgeting and auditing systems, to ensure coordinated financial control over public contracting.

By centralizing procurement processes, Afghanistan has been able to tackle some of the structural issues that allowed corruption to thrive.²⁴⁷ Based on a tip provided by civil society and whistleblowers, the Commission reviewed a USD 400 million fuel contract awarded by the former administration's Ministry of Defence.²⁴⁸ The review detected widespread corruption resulting in the bid being reopened and contracts renegotiated on a sole-source basis.²⁴⁹ The Commission reviewed each new contract to confirm compliance with procedural and value-for-money standards, and posted the review on its public website.²⁵⁰ Despite this strong response action, NATO reportedly plans to take over review and approval of future fuel contracts from the Ministry of Defence.²⁵¹

A similar review process was conducted for 900 contracts awarded by the Ministry of Interior. The Commission's review showed that compliance with procurement law and best practices was the "rare exception rather than the rule."²⁵² After restructuring the bids to comply with the law, the Commission estimates that it saved USD 350 million in the first year.²⁵³

Although the Commission's high-level review of contracts is promising, future planning efforts should address the risks of relying on a highly-centralized procurement review process, including the risk of potential delays that may result from a backlog of large contracts requiring detailed technical review. This backlog in review of procurement contracts contributed to an estimated 10% reduction in development spending during the first half of 2016, which adversely impacted the Government's efforts to improve budget planning and management (see section IV.A).²⁵⁴ Additionally, any centralized review process poses a risk of external pressure being focused on a few decision-makers. Mechanisms to

insulate current and future decision-makers from external pressure should be developed to ensure that the review process continues to work as a safeguard against corruption.

The National Assembly's approval of the National Law on Procurement is another important achievement.²⁵⁵ This law, which underwent several amendments, reflects many recommended best practices for public procurement.²⁵⁶ It requires that all bids be opened in the presence of bidders or their legal representatives and submitted to the unit in a sealed envelope prior to the deadline.²⁵⁷ It also provides for objective criteria for bid selection and requires the Evaluation of Bids Committee to prepare a written report, comparing the advantages and disadvantages of all bids.²⁵⁸ Based on this evaluation, the responsible ministry then awards the contract.²⁵⁹

In a break with recommended best practices, however, Afghanistan does not require any separation between the contract award and contract oversight functions within the individual ministries.²⁶⁰ This deviation from best practices should be remedied.²⁶¹ The National Procurement Authority has taken a step in this direction by establishing a new directorate to monitor all contract awards in relation to costs, schedule, and quality of performance.²⁶² An online platform and training manual have been developed to assist in these monitoring efforts.²⁶³

The National Law on Procurement also establishes a process for administrative review of procurement decisions. So far, the National Procurement Authority has reviewed more than 350 cases, resulting in more than 80 firms being debarred for violations of fair bidding rules.²⁶⁴ Information about these cases is maintained on the National Procurement Authority's website.²⁶⁵

D. Customs and revenue

The Government's efforts to impose increased control over public financial management must consider key revenue sources. Critical sources of revenue for any country include customs fees imposed on trade, taxes imposed on individual and business income or transactions, and collection of non-tax revenues. Weak institutional controls have allowed these vital revenue streams to be diverted for corrupt ends, thereby hindering Afghanistan's ability to utilize this revenue for the public benefit. To address this situation, the Government committed to a range of administrative reforms aimed at reducing red-tape, streamlining processing, and introducing new electronic-based payment and control mechanisms.²⁶⁶

These reforms contributed to increased revenue collections. In 2015, Afghanistan experienced a total revenue increase of around 22%, mainly as a result of its successful collection of arrears payments and the removal of corrupt or incompetent revenue officials.²⁶⁷ Afghanistan's ongoing anti-corruption efforts also contributed to higher than expected revenues for 2016, with actual revenues reported at AFS 164.17 billion in comparison to IMF target revenues of AFS 132.62 billion.²⁶⁸ This more than 20% increase in target versus actual revenues was achieved in the midst of a challenging economic environment characterized by low economic growth, currency devaluation, worsening security, and deteriorating trade relations.²⁶⁹

The sustainability of this revenue stream is highly dependent on continued efforts to curb corruption and restore institutional controls in all revenue generating sectors, including customs and revenue from tax and non-tax sources. Afghanistan's efforts in these areas are summarized in the following subsections.

1. Customs

President Ghani recognized the need to root out corruption in the customs department: "Afghanistan has always relied on customs fees. But deliberately weakened customs management has been a major

driver of corruption. Afghanistan's Central Statistics Office records approximately USD 1.1 billion in imports from Pakistan—but statistics from Pakistan report USD 2.32 billion in exports to Afghanistan. Nor does the bribery stop at the border. Studies of transport routes reveal that over a 100-mile stretch there can be as many as 12 posts, each demanding bribes."²⁷⁰

Afghanistan's early efforts to restore institutional controls to customs focused on infrastructure improvement, automation of customs procedures, and clarifying roles and responsibilities of the various government agencies operating at the border.²⁷¹ These initiatives resulted in large increases in revenue collection, a decrease in truck release times, and increased transparency.²⁷²

The threat posed by corruption in Afghanistan's customs service, however, went beyond financial loss to security issues associated with terrorism and drug trafficking.²⁷³ To address this expanded threat, the Afghan Customs Department developed the Governance Analysis Tool, tailored to Afghanistan's unique border situation.²⁷⁴ This tool broke down individual elements of the border management process into a series of procedural steps and mapped the points most vulnerable to corruption, along with potential strategies for addressing those vulnerabilities.²⁷⁵ Among other things, the tool established that the arrival, landing, and reporting of goods were the most vulnerable stages of the import process.²⁷⁶ Moreover, it found that customs officials were only directly responsible for controlling 30% of the environment they were mandated to control.

To help improve border control management, the Government shifted management of the customs police from the Ministry of Interior to the Ministry of Finance, where the Customs Department is based.²⁷⁷ This consolidation of customs operations is a positive development but stronger coordination between the Ministry of Finance and Ministry of Interior is still needed to ensure effective anti-corruption measures at the border. Ministry of Finance customs police are stationed at fixed-location customs houses, whereas Ministry of Interior border police are required to patrol all parts of Afghanistan's borders. Cooperation between the two ministries is essential to preventing illegal smuggling, particularly in areas where customs police are not stationed.²⁷⁸ Yet, no formal mechanisms exist to achieve that cooperation or ensure that no gaps in border control arise due to confusion over responsibilities. To address this situation, the two ministries should prioritize regular dialogues with specific, action-oriented plans to ensure a clear division of responsibilities along Afghanistan's informal and formal border crossings. Care must be taken to ensure that future reform efforts do not consider customs administration in isolation but, rather, as part of the broader system of border administration.²⁷⁹

To further strengthen internal control, in 2015, Afghanistan introduced several modules of the UN-designed Automated System for Customs Data (ASYCUDA) processing system.²⁸⁰ Afghanistan's ASYCUDA system now covers "more than 95% of international trade, including exportation, importation, inland and international transit across the country."²⁸¹ Its automated customs processes have contributed to a substantial increase in Afghanistan's annual customs revenues from "50 million USD in 2005 to almost 1 billion USD in 2013."²⁸²

ASYCUDA's automation also helped streamline processing by eliminating the need for five paper forms, and reducing the number of steps and signatures required for processing from 14 to only three.²⁸³ By reducing the number of interactions between traders and customs officials, the system also reduced opportunities for bribes. Additionally, the ASYCUDA system enables increased controls by allowing centralized management access to statistical and operational data in real time.²⁸⁴ It also reduces opportunities for collusion between traders and customs officials by permitting automated (*i.e.*, random) assignment of custom officials to conduct inspections.²⁸⁵

Despite this progress, compliance with customs regulations by customs brokers who process consignments on behalf of traders remains low. Instances of collusion between brokers and customs officials to manipulate the ASYCUDA system have been detected, particularly in relation to efforts to evade paying the correct revenue on imported goods.²⁸⁶ To counter this threat, Afghanistan has taken further steps to limit interactions between brokers and customs officials by now requiring biometric access to all ASYCUDA terminals utilized by customs brokers.²⁸⁷ ASYCUDA terminals can only be accessed by licensed brokers who successfully complete a training course on customs rules and regulations; brokers found to be non-compliant with customs rules and regulations can be automatically denied access.²⁸⁸

Other innovations include the introduction, during 2015, of a risk management system in three provinces.²⁸⁹ This system allows for three levels of inspection (high, medium, and low), depending on the declared value of the goods.²⁹⁰ The ASYCUDA system automatically directs vehicles with high priced goods to the red line, average priced goods to the yellow line, and low priced goods to the green line.²⁹¹ Pakistan experienced positive results from a similar risk management tool at the port of Karachi.²⁹² Risk assessments at the port were based on the traders' past records of compliance; traders with high compliance ratings were considered less risky and, therefore, subject to fewer inspections. This process helped Pakistani customs officials expedite the clearance process and could serve as a model for the expansion of Afghanistan's existing risk management system. Particular consideration should be given to utilizing more criteria than just the declared value when assessing risk. As in Pakistan, Afghanistan's ASYCUDA system would permit it to also consider past records of compliance or non-compliance. Additionally, consideration should be given to utilizing a system of spot or random inspections even for those considered low risk to confirm the validity of trader declarations and possibly expose new risks.

In a further effort to improve professionalism, the customs department has announced plans for a Professional Standards Unit to tackle allegations of corruption and promote more ethical behavior.²⁹³ A similar unit is planned for the revenue department.²⁹⁴ The primary objective of these units will be to investigate cases of suspected misconduct. If the suspicions are confirmed, the units will have the authority to impose a range of disciplinary measures, including the suspension or dismissal of staff found guilty of misconduct, and referral of suspected criminal conduct to the Attorney General's Office for prosecution.²⁹⁵ Additional oversight will be provided by a new Internal Compliance Unit to audit compliance with internal customs and revenue procedures and policies.²⁹⁶ Based on these internal audits, the compliance unit may recommend system-wide changes in policies and, when illegal or corrupt activities are suspected, refer the matter to the Professional Standards Units for further action.²⁹⁷

2. Revenue from tax and non-tax sources

In addition to customs, Afghanistan's two other major sources of revenue are taxation and non-tax revenues from administrative fees and public enterprises. Tax administration is particularly prone to corruption due to the complexity of many tax laws and the high discretionary power granted to tax officials.²⁹⁸ Overly complicated tax administration often results in high rates of tax evasion.²⁹⁹ Similarly, unfair or arbitrary tax assessments weaken overall compliance and reduce revenue.³⁰⁰ The challenge for every government is to carefully balance the level of tax rates and ease of tax administration against the need for revenue and voluntary tax compliance.³⁰¹

Corruption in tax administration generally manifests itself in four ways: tax evasion by taxpayers, *e.g.*, underreporting; extortion by tax officials, *e.g.*, bribes or demands for payment for services; collusion between tax officials and tax payers, *e.g.*, issuing unjustified exemptions; and fraud by tax officials without direct involvement of taxpayers, *e.g.*, falsification of records.³⁰² When present, corruption

renders it more likely that taxpayers will not voluntarily pay taxes, thus decreasing government revenues.³⁰³ Afghanistan has implemented, or is in the process of implementing, legal and structural reforms to mitigate these risks.

a. Legal reforms

The two most significant legal reforms relating to taxes are the adoption of the Tax Administration Law and the proposed revised Income Tax Law. The Tax Administration Law contains a number of provisions intended to increase the fairness and transparency of Afghanistan's tax administration system.³⁰⁴ It includes a detailed list of taxpayer rights, including the right to receive information about assessments, and imposes corresponding obligations on tax administrators, including to provide written information regarding the taxpayers' situation.³⁰⁵ Taxpayers have the right to object to decisions taken by tax administrators through a multi-layered review scheme before the Ministry of Finance, Tax Disputes Resolution Board, and judicial review.³⁰⁶

Aspects of the new administrative review scheme, however, raise concerns about fairness. Tax administrators have broad discretion to pursue a range of draconian enforcement actions, even if the assessment is later shown to be incorrect.³⁰⁷ The only remedy available to a taxpayer is to seek an extension of time for payment from the tax administrators.³⁰⁸ Absent an extension of the time, the taxpayer is immediately subject to a range of enforcement actions, notwithstanding any pending administrative review. These enforcement actions include collection of the taxpayers' unpaid taxes from third parties who may be holding or owe money to the taxpayers,³⁰⁹ suspension of the taxpayers' financial accounts,³¹⁰ and closure of the taxpayers' business.³¹¹ All of these enforcement actions can be initiated without any review or approval by the Tax Disputes Resolution Board or court.

This concentration of power in the hands of tax administrators presents a vulnerability to corruption—taxpayers with legitimate claims may be coerced by the threat or use of aggressive enforcement actions to forfeit or compromise their right to review. To avoid this prospect, consideration should be given to requiring tax administrators to seek approval from the Tax Disputes Resolution Board or court before implementing highly-coercive enforcement actions such as seizure of taxpayers' funds held by third parties, suspension of taxpayers' financial accounts, and closure of the taxpayers' businesses. Alternatively, taxpayers should have the right to promptly challenge the necessity of the enforcement action and seek an order rescinding it pending resolution of their underlying tax dispute. Either of these approaches would assist in leveling the playing field between taxpayers and tax authorities.

The process surrounding adoption of the Tax Administration Law raises different concerns. Its adoption in November 2015 came as a surprise to most stakeholders who lacked adequate opportunity to comment on the draft prior to adoption. This lack of transparency stands in contrast to the consultations usually undertaken in relation to other draft legislation, particularly laws under the stewardship of the Ministry of Justice's Legislative Department. The lack of transparency surrounding preparation of the Tax Administration Law regrettably has fueled concerns about the law's fairness.

Fortunately, the second major tax law reform does not raise the same concerns relating to transparency. Consultations with civil society representatives and other stakeholders relating to the draft Income Tax Law have been extensive and are ongoing. Overall, the draft law is an improvement on the existing 2009 Income Tax Law. It adds new incentives for specific investments,³¹² and reduces the tax burden for small and mid-sized privately-owned enterprises.³¹³ There are, however, concerns relating to some of its provisions, including those related to taxes imposed on not-for-profit organizations engaged in economic activities incidental to their charitable activities. As with other aspects of tax administration, to

encourage stronger voluntary compliance and deter corruption, the final drafting process should ensure fairness and predictability when imposing new tax obligations.

In the wake of the 2015 tax increase, the Government shifted attention to efforts to ensure that more individuals and businesses pay taxes.³¹⁴ The Revenue Department is increasing efforts to register all small businesses and provide them with a unique tax registration number to facilitate increased compliance with tax obligations.³¹⁵ Additionally, the Revenue Department is attempting to cross-check taxpayer filings with information on file with other Government agencies, such as the National Procurement Commission, to uncover under-reporting.³¹⁶

To ensure that the tax burden does not fall too heavily on business owners,³¹⁷ consideration should be given to expanding Afghanistan's existing tax revenues so the tax burden is more diversified. A small tax base results in a higher tax burden for taxpayers, which, in turn, contributes to increased tax evasion.³¹⁸ Adopting a value-added tax is one way to reduce this burden and expand tax revenues, but care must be taken to ensure that the inclusion of this new tax does not have an adverse impact on price inflation or the purchasing power of Afghan citizens, many of whom are already struggling with poverty.

"Property taxes are widely regarded as an efficient and equitable means of raising revenue."³¹⁹ In 2009, Afghanistan introduced property registration fees calculated at a rate of 2%-to-3% of the estimated value of the property.³²⁰ To increase tax revenues, Afghanistan could consider implementing a system for levying a uniform tax on immovable property. Experts agree that this form of taxation is more efficient and less disruptive to economic growth than other forms of taxation (such as taxes on consumer goods and services, personal and corporate taxes) that tend to stifle job creation and innovation.³²¹

b. Structural reforms

Contemporaneously with its reform of tax laws, Afghanistan has undertaken a number of structural reforms to increase revenue collections. Most significantly, Afghanistan has attempted to streamline and consolidate the number of tax filings, and reduce the overall tax burden on filers.³²² According to the World Bank's 2017 Doing Business Indicators survey, Afghanistan ranked 163 out of 190 economies in terms of ease of paying taxes.³²³ On average, Afghanistan required 20 tax payments per year that took 275 hours to complete and applied a 48% total tax rate.³²⁴ The regional average for South Asia required 32 tax payments per year that took 284 hours to complete and applied nearly a 41% total tax rate.³²⁵ The draft Income Tax Law presently under consideration would not increase the number of tax filings beyond that already required under current law.

	Number of filings	Time to complete	Total tax rate
Afghanistan	20	275 hours	48%
South Asia Average	32	284 hours	41%

Although Afghanistan compares favorably in terms of ease of tax administration to other countries in the region, it has not yet experienced an overall increase in taxpayer compliance rates. In fact, from 2016 to 2017, Afghanistan's ranking for taxpayer compliance rate decreased.³²⁶ In 2016, Afghanistan was ranked 150 out of 190 countries, meaning that its tax compliance rate was better than 40 other countries.³²⁷ In 2017, Afghanistan's ranking for taxpayer compliance dropped to 163, meaning that its tax compliance rate was better than only 28 other countries.³²⁸ This drop in ranking was most likely a reaction to Afghanistan's 2015 increase in tax rates, which may have spurred higher levels of tax avoidance than in previous years.³²⁹ Data from the Ministry of Finance confirms a decrease in tax collections from large and small taxpayers between 2015 and 2016.³³⁰ Large tax payer collections

decreased by 8%; small tax payer collection decreased by 5%.³³¹ At the same time, however, tax collections from medium taxpayers increased by 16% over the same period.³³²

Reforms to improve voluntary taxpayer compliance have been implemented. Consistent with recommended best practices, Afghanistan permits tax self-assessments, whereby taxpayers are allowed to calculate their own liabilities and, based on that calculation, file and pay their taxes.³³³ Self-assessments help reduce disputes over tax assessments and lessen the danger of arbitrary assessments.³³⁴

Afghanistan also reorganized tax administration structures to reduce opportunities for corruption.³³⁵ A positive step in this direction was the establishment of a new client service office in Kabul for all taxpayers.³³⁶ Similar client service offices are planned for five key provinces to be followed by ten other provinces.³³⁷ These offices are intended to serve a dual function: first, providing a resource for taxpayers in need of assistance; second, consolidating control over taxpayer interactions with tax administrators and, thus, reducing opportunities for corruption. Additionally, approximately 20 senior tax officials were reassigned to better reflect the particular management and technical skills required for their job functions.³³⁸

Consideration also should be given to streamlining the process for obtaining tax clearance certificates, which are required for annual renewal of trading and business licenses, by providing those services at the planned *Asan Khedmat* centres (section VI.A).³³⁹ Additionally, there are presently “no precise, uniform rules on the pre-requisites for obtaining this tax clearance, thus allowing too much discretion to tax officials” and presenting a vulnerability for corruption.³⁴⁰ The draft Income Tax Law presents an opportunity to close this gap by streamlining the process for obtaining tax clearance certificates.

With the introduction of the Standard Integrated Government Tax Administration System (SIGTAS) in Kabul and five provinces (Herat, Balkh, Nangarhar, Kunduz, and Kandahar), Afghanistan started implementation of some automated tax control measures.³⁴¹ SIGTAS, which will gradually be extended to all provinces, is an integrated information platform that better enables tax administrators to oversee and monitor tax assessments and collections.³⁴² This new tool will assist tax administrators to detect suspect transactions and monitoring service delivery.³⁴³

Afghanistan's current tax laws do not allow for electronic filing or payment. Experts recommend electronic tax filing and payment mechanisms as a means of streamlining administration, promoting voluntary compliance, and reducing opportunities for corruption that result from frequent interaction with tax administrators.³⁴⁴ But, in Afghanistan, where internet-based services are presently available to only approximately 40% of the population,³⁴⁵ further infrastructure development will be required before this this recommended best practice can be fully implemented.

One non-technology based method for improving voluntary compliance is to provide incentives for taxpayers to pay on time. Mexico City, for instance, encouraged citizens to pay taxes on time by giving them a discount for early filing.³⁴⁶ A similar programme could assist Afghanistan in increasing tax compliance rates, particularly for small and large taxpayers whose compliance declined after the 2015 tax increases. At the other end of the spectrum, tax compliance may be increased through more vigorous enforcement of criminal laws against those who intentionally evade or misstate their tax obligations.³⁴⁷

c. *Non-tax revenues*

Non-tax revenues are another major source of Afghanistan's revenues. Non-tax revenues are recurring revenues from sources other than taxes (*e.g.*, fees from various services such as documentation-licenses, passports, identification, as well as revenue from public enterprises such as power utilities, transport providers, police and health services provided by the Government). Apart from customs revenue, non-tax revenue comprised the second largest portion of Afghanistan's total revenue increase in 2016. Compared to 2015, non-tax revenues increased by 37%, explaining almost half of the overall revenue increase realized in 2016.³⁴⁸ Other major non-tax sources of the 2016 revenue increase were arrears and one-off payments from the sale of government assets and recoveries from the Ministry of Urban Development and Housing; Ministry of Agriculture, Irrigation and Livelihoods; and Da Afghanistan Bank.³⁴⁹

While these non-tax and one-off sources of revenue can be substantial, as they were in 2016, they are generally unreliable and unsustainable sources of revenue. To ensure self-reliance through progressive revenue sustainability, the Government's efforts to identify more reliable income streams from customs and tax-derived revenues should be intensified, including through the means already discussed.

SUMMARY OF RECOMMENDATIONS TO STRENGTHEN PUBLIC FINANCIAL MANAGEMENT AND REVENUE CONTROLS

For the Government:

- Consider addressing potential risks to the high-level contract review mechanism by developing mechanisms to insulate members of the National Procurement Commission from external influence and enhance capacity for technical contract review.
- Consider ensuring separate contract award and contract oversight functions within individual ministries responsible for contracting to further reduce opportunities for collusion or other corrupt practices.
- Consider using memoranda of understanding or other coordination mechanisms to clarify roles and responsibilities among the ministries responsible for border control and security, and avoid potential gaps in border control.
- Consider leveling the playing field surrounding taxpayer challenges to administrative decisions by limiting the ability of tax administrators to commence coercive enforcement actions without need for prior administrative or judicial approval.
- Consider providing taxpayers with incentives for early compliance and increasing enforcement actions against those who misstate or fail to comply with tax obligations.

For the international community:

- International donors should exercise stronger oversight in disbursing assistance and awarding contracts to assist the Government in its efforts to monitor public expenditures and prevent nepotism in the contract review process.
- More consistent reports from donors on disbursements from off-budget development assistance should be provided to the Ministry of Finance to assist it in better planning, implementing, and controlling total public spending in accordance with national budget procedures.



V. Enhancing transparency and civic engagement

“Effective involvement of the civil society is universally regarded as a cornerstone of successful anti-corruption policy. . . . The importance of the engagement of non-governmental actors is recognized in Article 13 of the UNCAC, which calls for 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 and the threat posed by corruption.’”³⁵⁰

President Ghani recognized the importance of deepening and strengthening the Government’s partnership with non-governmental actors in fighting corruption, observing: “Our experience shows that, to have any real chance of success fighting corruption in a post-conflict society, top-level engagement and strong accountability are needed to signal that the necessary local and national will to fight corruption exists. The more that Afghanistan’s people believe that the Government is taking reform seriously, the more the Government can count on whistleblowers and an investigative media to end the atmosphere of impunity on which a culture of corruption thrives.”³⁵¹

In December 2016, Afghanistan declared that it will join the Open Government Partnership (OGP)—a multilateral initiative to promote transparency, empower citizens, and strengthen governance

structures.³⁵² In announcing Afghanistan's membership to the OGP, the President outlined four major commitments: to increase access to information concerning government activities, support civil society participation, enforce world-class standards of integrity in government offices, and improve the use of new technologies to strengthen governance.³⁵³ As an OGP member, Afghanistan will be able to draw on the expertise of other OGP member countries that have succeeded in strengthening transparency in the delivery of public services.

Initiatives like the OGP, however, can only succeed when citizens and civil society organizations have access to information relating to government operations, including the delivery of public services and expenditure of public funds. This section explores Afghanistan's progress in these critical areas.

A. Access to information law

Afghanistan's Constitution recognizes that access to information is essential to good governance and, thus, bestows a right on all citizens to obtain information from the government unless disclosure would harm rights of others or threaten public security.³⁵⁴ To implement this broad constitutional right, Afghanistan adopted the Law on Access to Information in November 2014.³⁵⁵ The law provides every Afghan the right to request information from government agencies about their operations and delivery of public services subject to essentially the same exceptions relating to privacy and national security outlined in the Constitution.³⁵⁶ To facilitate these requests, the law requires government agencies to provide standard forms upon which citizens may submit requests for information.³⁵⁷ Additionally, government agencies are required to proactively disclose information at least once a year relating to their structure, budgets, operations, policies, and work plans.³⁵⁸ The Access to Information Oversight Commission, assisted by provincial commissions, is intended to oversee the law's implementation, conduct training programmes to strengthen the culture of information delivery throughout the country, and monitor and respond to complaints relating to information requests.³⁵⁹

The promise represented by the Access to Information Law has not yet been fully realized. A field study conducted by UNAMA in 2016 revealed a lack of awareness among the public and government offices about their rights and obligations under the law. Government offices did not have forms on which requests for information could be made. And, even more concerning, many government offices responded to requests for information by demanding to know the reasons for the request or a formal written request signed by a recognized institution. In other cases, broad categories of information were deemed to be inaccessible on grounds of confidentiality or national security. All of this suggests that substantial barriers to access to information remain to be overcome.

To coincide with the first International Day for Universal Access to Information Day, President Ghani announced new initiatives to improve access to information. First, the President directed ministries to proactively categorize sensitive and confidential information so that requests for information can be processed more efficiently. Second, the President directed all ministries to make their spokespersons available seven days a week to answer media questions.³⁶⁰ Over time, President Ghani pledged: "more and more ministry decisions and actions on budgets, contracts and expenditures will be made public and actively disseminated through traditional and modern media. Accepting citizen feedback and monitoring must become a core part of how the government conducts its business."³⁶¹ Similar efforts to expand the proactive dissemination of information to the public and media have proven effective in fighting corruption in other countries.³⁶² In Brazil, for instance, the government proactively publishes budgetary information online. Media outlets used this information to investigate and expose corruption on the part of several politicians, leading to their resignations from office.³⁶³

The Access to Information Law identifies several categories of information, including annual reports, work plans, budgets, and relevant laws, regulations, and codes of conduct that likewise are meant to be

proactively disclosed. UNAMA's field study revealed, however, that most government agencies are not consistently complying with this directive, even though much of this information could be easily uploaded to existing government websites or made available through social media.

Between 2013 and 2015, the Ministry of Communication and Information Technology developed more than a hundred public websites to make "information more accessible, consistent and reliable."³⁶⁴ With a few notable exceptions, like FinTRACA and Afghanistan's Independent Land Authority (Arazi), most government websites remain sparsely populated or contain outdated information.³⁶⁵ This largely untapped technological resource for proactively sharing information should be better utilized so the Government's vision of expanding civic participation in governance can be fully achieved. In a country where only an estimated 40% of the population have internet access,³⁶⁶ consideration also should be given to making greater use of social media sites, such as Facebook, YouTube, and Twitter, which studies confirm have become the "primary vehicles for disseminating information" in Afghanistan.³⁶⁷

The Access to Information Oversight Commission should consider finalizing the regulations that have been proposed to clarify aspects of the access to information law. Most critical are regulations aimed at more clearly defining the categories of information, including judicial decisions, as accessible or not accessible to the public, and the process for requesting and obtaining information.

1. Clarifying categories of accessible information

"According to international standards, any request of information should be considered on a case-by-case basis and access may not be denied just because a certain category of information is concerned (e.g. classified or official information)."³⁶⁸ The denial of access to information should be based on a narrow list of restrictions where allowing access would be against the broader public interest.³⁶⁹ Restrictions should be limited to those necessary in a democratic state and proportionate to the legitimate interest at stake.³⁷⁰ When a public body seeks to deny access, it should justify the restriction based on satisfaction of the following three criteria: (a) information requested falls within a legitimate interest protected by law; (b) disclosure would cause real and substantial harm to that interest; and (c) harm to the interest is greater than the public interest in obtaining access to the information.³⁷¹ Only when all three requirements are fulfilled should access be denied. "Even then, only the specific information that passed the test should be withheld (redacted)—not the entire document."³⁷²

Restrictions on access to information imposed by other Afghan laws such as national security should be harmonized with the access to information law. One way of achieving this harmonization is to include an article in the Access to Information Law or any future amendment establishing its primacy over other laws dealing with information.³⁷³

2. Expanding access to judicial decisions

Judicial decisions are an area that merits particular attention. Despite constitutional provisions allowing access to information and the access to information law, Afghan practice traditionally shrouds judicial decisions in secrecy, allowing them to be disclosed only to the parties and only upon issuance of a final decision entered by the Supreme Court.³⁷⁴ Lower court decisions, including judgements and reasoning, typically are not made publicly available. This secrecy raises substantial concerns over the transparency of judicial proceedings.

It also breeds public distrust and unnecessary criticism of the judiciary. The *Farkhunda* case is but one of many examples where this occurred. *Farkhunda* involved the brutal mob killing of a young woman and the desecration of her body. The case generated significant public interest, but none of the reasoning underlying the judgements was publicly released. Instead, to coincide with International Women's Day, the Supreme Court released only a summary of its decision to the media.³⁷⁵ Without

benefit of the court's full reasoning and access to the lower court decisions under review, the media and other observers criticized the Supreme Court's reversal of several convictions and sentences.³⁷⁶ A review of the full decision, however, revealed that the Supreme Court's judgement was more favorable to victims because it opened the door to a range of additional convictions carrying the possibility of increased sentences for multiple accused, including several police officers who failed to prevent the underlying attack.

The explanation commonly provided for the secrecy surrounding Afghan judicial decisions is that articles 117 and 120 of the Penal Code preclude releasing anything but final decisions. But, this assertion is based on a misreading of the articles, which relate to a narrow issue of complementary punishment in cases such as insult and defamation where the court orders publication of the verdict as a remedy to mitigate the harm of the crime.³⁷⁷ It also is inconsistent with the right to a public trial enshrined in article 128 of the Afghan Constitution, and other provisions of Afghan law that require the reasoning supporting court decisions to be publicly stated.³⁷⁸ These provisions broadly reflect the prevailing international standard that the right to a public trial includes not just physical access to the courtroom but also access to court judgements and the reasons supporting them.³⁷⁹ Limitations on this right should be recognized only where legitimate privacy or safety concerns are demonstrated.³⁸⁰ In all other circumstances, the public should have access to court judgements and reasoning so it can better understand the basis for court rulings. The Chief Judge of Afghanistan's Anti-Corruption Justice Centre recently endorsed similar reasoning in an oral ruling, denying a defence request to prevent media access to the court's judgement.³⁸¹

The Indonesian judiciary has been a leader in efforts to promote transparency as a means of fighting corruption. Based on recommendations prepared by a judicial reform team, the Chief Justice issued a decree mandating that all court information be made available to the public (except for issues of domestic violence, sexual abuse, family law, taxation, and trade secrets).³⁸² Before the decree, copies of Indonesian court judgements "were rarely accessible," usually containing only limited excerpts relating to the punishment or penalty without developed legal reasoning.³⁸³ Following the decree, Indonesia published complete copies of court judgements on line, along with the type of case, name of the judge hearing the case, and lawyers involved.³⁸⁴ Afghanistan should consider allowing a similar level of public access to its judicial decisions and reasoning to promote broader public understanding of the judiciary's role in the fight against corruption and satisfy each citizen's right to access information.

3. Clarifying procedures for requests

Additionally, standard forms such as those anticipated by the law should be distributed and made available for those seeking access to information. But, given high illiteracy rates among some segments of the Afghan population, requests for access to information should not be limited to written forms. Rather, all government offices should designate trained focal points to assist those seeking information with processing all forms of requests whether they be made verbally, in writing, or electronically.³⁸⁵ Procedures also should be put in place to track all incoming requests and ensure that they are processed within the time periods established by law.³⁸⁶

Artificial barriers such as demands for explanations about why information is being requested or submission of written authorization before processing requests should be eliminated.³⁸⁷ Efforts to promote transparency through access to information will not work "if state officials use intimidation and threats to keep ordinary people from engaging in oversight and political action."³⁸⁸ As Afghanistan's law requires, a meaningful dispute resolution mechanism should be implemented to address abuses like these, as well as other complaints about delayed, denied, or incomplete responses. Public officials who fail to discharge their obligations under the access to information law or attempt to frustrate the objective of the law by destroying or altering documents should be sanctioned.³⁸⁹

India has a very progressive access to information law that could serve as a model for many of the recommendations made in this report.³⁹⁰ Of concern, however, are reports of violence or threats of violence against users of the law, particularly against those exercising their right to “information related to corruption in four main categories: land and natural resources, development and welfare programmes, bureaucratic and administrative matters, and delivery of public services.”³⁹¹ Nearly one third of these reprisals related to attempts to expose “corruption in the illegal sale of land for mining and in illegal construction and land scams.”³⁹² It has triggered debate about the need for a new form of whistleblower protection to reach those who exercise their access to information rights.³⁹³ Given the sensitivity of these same issues in Afghanistan, consideration should be given to including protections against reprisal for individuals exercising access to information rights in the draft whistleblower law.

Lastly, it must be remembered that expanding access to information will be an effective tool in fighting corruption only if the information is provided in a user-friendly and comprehensible format.³⁹⁴ Civic engagement will not be advanced if the public does not understand the information that is released. Regular media briefings and access to ministry spokespersons coupled with the appointment of information focal points in each ministry are all practical measures to ensure that information is conveyed in an understandable and usable way.

B. Internal auditing mechanisms

Civic engagement in relation to the efficiency and effectiveness of public spending and management of public services is a particularly effective tool in fighting corruption.³⁹⁵ Internal auditors with access to the records of government institutions and authority to publish the results of their findings play a key role in ensuring that the public and civil society have access to detailed information about the expenditure of public funds and performance of government institutions.³⁹⁶

Afghanistan has three different auditing mechanisms for public finances. Two mechanisms—ministry-level auditing units and controllers—are internal.³⁹⁷ The third mechanism, the Supreme Audit Office, is intended to function autonomously.³⁹⁸ The three mechanisms are intended to complement each other and provide an effective safeguard against the misuse of public finances.³⁹⁹

Each ministry has its own internal audit unit that is intended to report directly to the responsible minister and individual ministry audit committees.⁴⁰⁰ The main task of these units is to ensure compliance, throughout the fiscal year, with internal ministry rules and procedures governing the expenditure of public funds.⁴⁰¹ In the past, these internal ministry-level audit units were appointed by and required to report to the Ministry of Finance’s Internal Audit Department, allowing the Ministry of Finance to exercise government-wide auditing control over all ministries.⁴⁰² The National Assembly removed this check on line ministries in 2012 by an amendment that restricted the Internal Audit Department to conducting audits only within the Ministry of Finance.⁴⁰³ This amendment weakened Afghanistan’s internal auditing system because it introduced a lack of uniformity in standard government-wide auditing practices and failed to take account of the widely disparate capacities of ministry-level auditing units, some of which were observed to be “remarkably weak.”⁴⁰⁴ This potential vulnerability to corruption should be removed by restoring Ministry of Finance oversight and control over government-wide internal audits.⁴⁰⁵

The other internal mechanism to control public finances is the appointment of controllers from the Ministry of Finance’s Treasury Department to each ministry.⁴⁰⁶ Unlike internal auditors, controllers focus only on expenditures not compliance with government-wide policies and procedures. Controllers are responsible for ensuring that every expenditure made by the concerned ministry is justified and supported by proper documentation.⁴⁰⁷ Without the controller's signature no payment can be made at the ministry level.⁴⁰⁸

The third mechanism to control the expenditure of public funds is intended to be external. The Supreme Audit Office is charged with preparing annual audits for all government institutions to ensure the proper expenditure of public funds and prevent misuse.⁴⁰⁹ The Supreme Audit Office reviews reports prepared by ministry-level audit units and has the power to request any additional information it may need to investigate financial irregularities and corruption.⁴¹⁰ Additionally, the office reviews the effectiveness of existing controls over government revenues and expenditures to guard against fraud and avoid over-expenditure. It also prepares regular reports on the Government's use of development funds.⁴¹¹ Unlike internal audits conducted by the Ministry of Finance and individual ministries, Supreme Audit Offices are only prepared once a year and do not review compliance with internal policies or procedures.⁴¹²

Since its formation in 2003, the Supreme Audit Office uncovered numerous instances of suspected fraud—over 200 cases of which were referred to the Attorney General's Office for investigation and prosecution.⁴¹³ Follow-up, however, was only conducted in relation to a handful (10-12) of these cases,⁴¹⁴ suggesting that stronger mechanisms should be put in place to ensure that referrals of suspected corruption cases from the Supreme Audit Office are properly logged and tracked by the Attorney General's Office—a point discussed more fully in section VII.E below.

Additionally, to increase transparency in the Government's use of development funds, the Supreme Audit Office's reports should be made publicly accessible. These reports are supported through donor assistance to the World Bank-managed Afghanistan Reconstruction Trust Fund.⁴¹⁵ They contain useful assessments of the Government's progress in achieving national development and growth.⁴¹⁶ Public access to these reports would enhance the political process and potentially shed more light on corrupt practices.

Other recommendations for improving the Supreme Audit Office's overall effectiveness and transparency of operations are detailed in its five-year development plan,⁴¹⁷ as well as in observations included in the MEC's report.⁴¹⁸ Most critical is the lack of any mechanism for the Supreme Audit Office to ensure that government institutions implement its recommendations. Some form of administrative sanction or compulsion is required to ensure that recommendations aimed at improving the management of public spending and preventing misuse of public funds are not ignored.

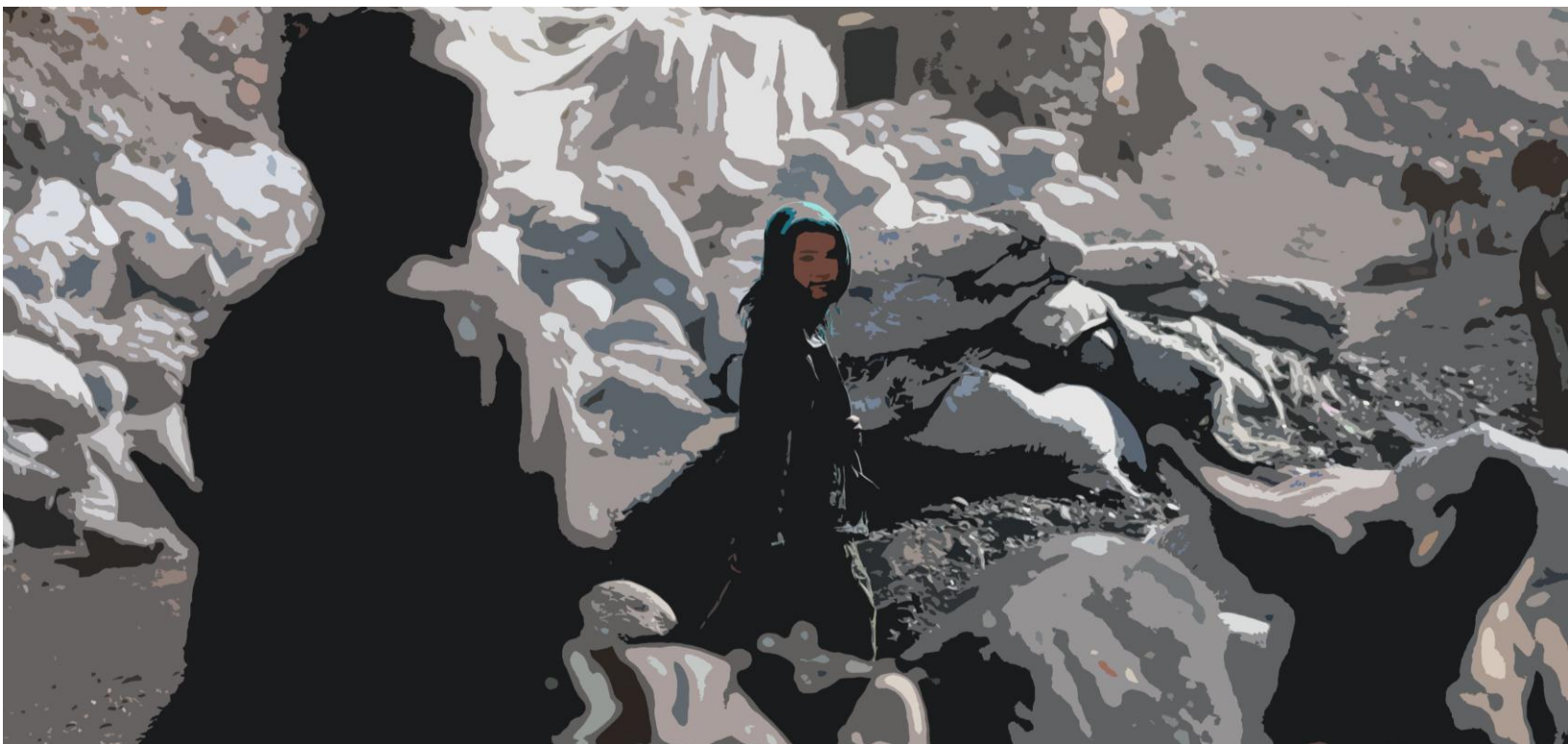
SUMMARY OF RECOMMENDATIONS TO ENHANCE TRANSPARENCY AND CIVIC ENGAGEMENT

For the Government:

- The Access to Information Oversight Commission should consider clarifying the categories of information presumptively available under the Access to Information Law in a way that promotes disclosure and prevents overly-broad application of exceptions to disclosure.
- Categories of information subject to proactive disclosure should be expanded to include all matters of substantial public interest, including judicial decisions, and government budgets and work plans as Afghan law anticipates.
- Standard request forms should be developed and designated focal points within each government office should be appointed to help facilitate requests for access to information.
- Artificial barriers to access, such as demands for explanations about why information is requested, should be precluded, and disciplinary sanctions imposed against officials who impermissibly restrict access.
- Consider restoring the Ministry of Finance's Internal Audit Department's oversight over and control of ministry-level auditing units to guard against improper influences.
- Consider making the Supreme Audit Office's reports publicly accessible, and developing a mechanism to ensure implementation of its recommendations to improve public financial management.

For the international community:

- The international community should assist Afghanistan in forging effective partnerships with other members of the Open Government Partnership to share lessons learned and best practices to improve its implementation of the Access to Information Law and other key transparency initiatives.



VI. Streamlining public services and safeguarding public resources

President Ghani observed that “corruption is, at its core, a failure of individual and institutional accountability that allows officials to divert public resources from the intended users,” that is, the citizens of Afghanistan.⁴¹⁹ Decades of conflict weakened existing institutional controls, enabling corruption to siphon off a “vast amount of precious resources that could otherwise have been spent reducing Afghanistan’s crushing levels of poverty.”⁴²⁰ This situation was exacerbated by the development of complex, multi-layered bureaucratic regimes that reduced efficiency and created new opportunities for corruption to divert public resources.⁴²¹ The combined effect has been detrimental not only to efforts to fight corruption but also to national economic growth and development. Businesses and investors are reluctant to work in a country where government rules and policies are uncertain, applied in an arbitrary manner, or where government services such as business or import licenses can only be obtained through a cumbersome bureaucratic process—each step of which subjects the applicant to increased opportunities for rent-seeking behavior in the form of bribes or kick-backs.⁴²²

To promote greater institutional accountability and stimulate business growth, Afghanistan has committed to a range of administrative reforms aimed at streamlining administrative procedures, and tightening control over the registration of land and exploitation of vital public resources.⁴²³ With these new institutional controls and procedures comes an increased need for checks on the exercise of regulatory power, including transparency of decision-making and judicial review of administrative decisions. This section explores Afghanistan's progress in each of these areas.

A. Administrative streamlining

SMAF committed the Government to preparing “a business simplification roadmap covering business registration, construction permits, tax registration and payment, accessing electricity, and adjudicating land disputes.”⁴²⁴ On 13 March 2016, Afghanistan's High Economic Council of Ministers⁴²⁵ approved the *Asan Khedmat* initiative, which is intended to provide a one-stop shop for a variety of government services (e.g., issuance of passports, birth certificates, work permits, and business licenses) with an eye towards increasing efficiency, reducing corruption, and enhancing service quality.⁴²⁶ The private sector also will be encouraged to provide auxiliary services within the *Asan Khedmat* centres, including the availability of telecommunications, internet, banking, insurance, health, and legal services.⁴²⁷

Pursuant to a memorandum of understanding, the Government of Azerbaijan agreed to provide Afghanistan with technical support to implement this initiative, as well as access to its training facilities for *Asan Khedmat* staff.⁴²⁸ Training to build the capacity and expertise of staff assigned to the centres is central to the success of the initiative.⁴²⁹ Training programmes will emphasize service delivery, transparency, and anti-corruption.⁴³⁰ To reinforce these training programmes, the centres will include a call centre to receive and respond to citizen complaints.⁴³¹ These call centres promise to be another step towards increased transparency in the delivery of public services.

Land for the first *Asan Khedmat* administrative office based in Kabul was dedicated in August 2016.⁴³² Four additional branches are planned for Kabul, followed by establishment of centres in six other regions.⁴³³ In its last phase of implementation, additional centres are planned for the provincial level.⁴³⁴

Although the *Asan Khedmat* centres hold promise, care must be taken to ensure that there is no duplication of functions among the multiple agencies that will be co-located at the centres. Preventive measures also are required to ensure that the centres are not perverted into hubs of corruption.⁴³⁵ In addition to the preventive measures already discussed in section III above, the centres should be equipped with a document tracking system to log requests and store information relating to its processing. This system should enable intra-agency exchanges of necessary information and documentation among relevant government ministries throughout the country. Additionally, to reduce opportunities for bribery, schedules of all fees for services, including expedited processing, should be made public and posted in all centres. Standardized timelines and forms for processing requests should likewise be developed and made available to the public. Lastly, to ensure accountability, notice of decisions, including the reasons for any denial of a request, should be provided within specified timeframes, along with information about available avenues for administrative or judicial review (see section VI.D below).

Additionally, as the Government moves forward with implementation of its business simplification roadmap, it should consider broader engagement with the business community and Afghan Chamber of Commerce. In Bosnia and Herzegovina, the government mobilized the local business community to identify impediments to business development. This initiative “delivered 50 reforms aimed at eliminating excessive bureaucratic steps in 150 days, improving the investment climate”⁴³⁶ and, concurrently, reduced vulnerabilities to corruption in the regulatory scheme.

B. Land reform

Similar progress has been seen in Afghanistan's efforts to strengthen controls over land registration and transfers. Although traditional Afghan society and Islamic law recognized strong protections for property rights, the practice of land usurpation has turned property rights into a "source of discord, distrust and exclusion. As a result of land grabs, the private sector was denied access to property for investment, while the poor were driven into substandard and insecure housing."⁴³⁷ Arazi, Afghanistan's Independent Land Authority, is charged with restoring property rights and combatting land usurpation.

In its five year (2014-2018) strategy paper and its five year (2015-2019) strategic plan on preventing land usurpation, Arazi outlined its plans to combat land usurpation by supporting and strengthening existing laws, establishing procedures for the restitution of usurped land, and starting a programme to map and register state land.⁴³⁸ Progress has been made in meeting each of these commitments.

Arazi has identified and listed the names of over 15,000 suspected land usurpers and submitted the names to the relevant justice mechanisms.⁴³⁹ By registering a total of 1.2 million jeribs of state land, it has reduced the amount of unregistered land vulnerable to usurpation.⁴⁴⁰ Arazi also contributed to revising the Penal Code's definition and punishment of the crime of land usurpation and ensuring that the new Land Management Law, legislatively decreed in early March 2017, which will replace the 2008 Land Management Law, will similarly include criminal provisions prohibiting land usurpation. Additionally, Arazi published a restitution policy on how victims may reclaim usurped land and is developing a practical procedure to implement this policy countrywide.⁴⁴¹

To prevent corrupt practices that have facilitated land usurpation—such as bribery, forged land titles, and intimidation—Arazi established a customer service department at its headquarters and is in the process of establishing similar departments at the provincial level.⁴⁴² These dedicated departments provide the public with one-stop access to services, thereby reducing opportunities for corruption.

Afghanistan's increased efforts to combat land usurpation and its public statements condemning this practice appear to have motivated some land usurpers to voluntarily vacate the land or request a lease from Arazi to regularize their use of the land. As a result, Arazi succeeded in reclaiming 400,000 jeribs of usurped land that can now be used for the public's benefit.⁴⁴³ To further encourage public awareness of and participation in the fight against land usurpation, Arazi is planning to establish a hotline for members of the public and businesses to securely report suspected incidents of land usurpation.⁴⁴⁴ The hotline should be supported by an established mechanism whereby Arazi can refer credible allegations of land usurpation to the Attorney General for investigation and prosecution.

One obstacle to ensuring accountability for land usurpation under existing practice is the lack of effective enforcement of orders restoring land ownership. This has reportedly resulted in convicted land usurpers ignoring court orders and refusing to vacate land that they usurped. To ensure effective enforcement, the relevant judicial and enforcement authorities could consider establishing a dedicated enforcement unit to execute court orders. This unit could ensure that, in accordance with court orders, land usurpers vacate usurped land so it can be returned to the lawful owner. Consideration also should be given to streamlining the process for enforcing court orders to ensure more efficient and effective coordination among all parties in the enforcement process.

Arazi also made progress in streamlining the administrative process for private investors to obtain a lease from 52 steps to only nine steps. As a result of this streamlined process, the opportunity for officials to demand bribes or collect unpublished fees has been significantly reduced. In addition, the total estimated time for processing proposed leases dropped from between six to twelve months to only

four to eight weeks. This streamlined administrative process contributed to an increase in land lease revenues from what was previously only USD 140,000 to approximately USD 3.4 million today.⁴⁴⁵

To uphold the integrity of its own staff members, Arazi is developing a five-year strategy paper on combatting corruption. This strategy commits Arazi to establishing a code of conduct for all staff members, adopting disciplinary procedures to punish corrupt acts, and requiring staff members to declare their assets.⁴⁴⁶ To promote broader awareness of its efforts to curb corruption, consideration should be given to making these policies and procedures available on Arazi's website and at its offices. Greater public awareness will help ensure that Arazi's planned hotline and other initiatives such as customer service departments function effectively.

C. Mining sector reform

Afghanistan is rich in natural resources but much of this potential wealth has been siphoned off from the public treasury through corruption and weak control of licit and illicit mining activities. Other resource-rich countries experienced a similar "resource curse" and explored ways to prevent or ameliorate its negative impacts on economic growth, fiscal accountability, and security.⁴⁴⁷ President Ghani recognized this threat: "Afghanistan is developing the early symptoms of the resource curse, the syndrome whereby rich natural resources, which could in principle make a poor country well off, instead end up becoming a locus for corruption and the capture of natural wealth by small elites. The worst manifestation is in mining, where corrupt licensing and procurement produce rapacious and destructive mining practices."⁴⁴⁸

1. Licit mining activities

According to one study, corruption and mismanagement of Afghanistan's licit mining sector results in the loss of an estimated USD 100 million per year.⁴⁴⁹ While the precise figure may be difficult to calculate, most commentators agree that corruption and ineffective resource management within the licit mining sector have deprived the Government of substantial sources of public revenue.⁴⁵⁰

"The real threat to minerals fueling economic growth in Afghanistan is corruption and conflict, not transparency or community consultation. The Afghan government should take this chance to create world-class governance for a world-class mining sector"

Stephen Carter, Afghanistan Campaign

The Minerals Law, as revised in 2014, includes new anti-corruption prohibitions. It prevents government officials from being granted mining licenses and prohibits any applicant from directly or indirectly providing "any money or any other in-kind payments . . . to any Afghan Government employee or any third party for the purpose of making that person grant any License, Authorization or Contract."⁴⁵¹ Similar prohibitions are contained in the accompanying regulations, which reaffirm that all contracts for mineral rights shall be awarded through an open and transparent process.⁴⁵²

Under the Minerals Law, the Minister of Mines and Petroleum was responsible for approving contracts. As a result of changes in the procurement process (*see* section IV.C above), this authority has shifted to the High Economic Council and the National Procurement Authority.⁴⁵³ The new process has resulted in delays in the approval of large mining contracts, resulting in complaints from applicants.⁴⁵⁴ Additionally, the National Procurement Authority lacks technical expertise in the extractives industry, making substantive review of mining contracts difficult.⁴⁵⁵ One consequence of these delays in the review of mining contracts is an increase in illicit or unlicensed mining activities.⁴⁵⁶

Even within the formal regulatory process, corruption in the form of nepotism, abuse of position, and undisclosed interests pervert the existing contract review system.⁴⁵⁷ Influential persons, including

ministers and members of parliament, assert pressure to bypass or short-circuit the contract review and approval process established by law.⁴⁵⁸ These external pressures subvert transparency and institutional controls, providing fertile ground for corruption to take root.

To date, Afghanistan's efforts to bring more transparency to the mining sector have coalesced around pursuit of membership in the global Extractive Industries Transparency Initiative (EITI).⁴⁵⁹ "The EITI was officially launched in 2002 as a coalition of government actors, extractive companies, civil society groups, energy investors, and international organizations to demand that companies publish what they pay and governments disclose what they receive from the extraction and export of natural resources. Member countries pledge to follow and enforce contract disclosure and revenue transparency criteria and seek "validation" status through compliance."⁴⁶⁰ Part of the validation process requires member countries to disclose beneficial ownership information (*i.e.*, identity, level of ownership, and details about how ownership or control is exerted) by 1 January 2020.⁴⁶¹

Afghanistan's most recent reconciliation report was completed in February 2016.⁴⁶² The report highlighted significant improvements by the Government, including on the initiative to include reporting on small-scale mining activities.⁴⁶³ The reconciliation report, however, raised concerns relating to existing accounting processes, data recording, and a lack of capacity within responsible ministries. Discrepancies, for instance, were observed between company payments and government receipts from the extractive industries. These discrepancies amounted to more than AFS 22 million in 2012, alone.⁴⁶⁴ Discrepancies like these have led EITI to question the validity of data supplied by the Ministry of Mines and Petroleum, and Ministry of Finance.⁴⁶⁵ To resolve these discrepancies and ensure the accuracy of data supporting EITI validation, consideration should be given to improving data collection and management, particularly in relation to fundamental questions relating to the value of Afghanistan's mining resources and contracts.

Additionally, information relating to government revenues and company payments has not been consistently disclosed as the EITI requires, resulting in many mining projects proceeding with little to no transparency.⁴⁶⁶ The Ministry of Mines and Petroleum has introduced a database containing some relevant information about the commodity to be exploited, name of the contractor, amount of the royalty, and area of exploitation.⁴⁶⁷ It also published 488 small mining contracts concluded between 1970 and 2016.⁴⁶⁸ But, other contracts have not been published or published only with much delay. For instance, the contract granted in May 2008 to a Chinese consortium for exploitation of the Mes Aynak site—the world's second largest copper deposit—was not published until May 2015.⁴⁶⁹ Another large mining contract awarded in October 2013 to Pamir Badakhshan International Mining Company still has not been published.⁴⁷⁰

To ensure the fairness of transactions and monitor the conduct of government officials and private contractors, more consistent disclosure of extractive resources contracts and licenses is recommended.⁴⁷¹ Consideration should be given to modeling the practice followed by countries like Liberia, Guinea, and Mexico, which post contracts and related resource materials on dedicated websites to ensure timely and accurate public disclosure.⁴⁷²

Similarly, despite Afghanistan's repeated commitment to disclose beneficial ownership information,⁴⁷³ little progress has been shown in meeting this core EITI requirement. A beneficial owner is the "natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement."⁴⁷⁴ Disclosure of this information helps prevent conflicts of interest and illicit enrichment of public officials.⁴⁷⁵

The use of shell companies and fictitious names make it difficult for countries to determine true beneficial ownership. To address this challenge, Ukraine enacted a law mandating that all legal persons (with the exception of some non-profit associations) disclose their beneficial owners when registering the entity and to update this information in case of changes. The information is entered in the unified state company register and published automatically on-line and is accessible to anyone (for a fee).⁴⁷⁶ In 2016, the United Kingdom made available the “world’s first fully open register of beneficial ownership” based on corporate registration records.⁴⁷⁷ Honduras collected beneficial ownership information gradually, on a case-by-case basis as new applications were processed.⁴⁷⁸ In Myanmar, a partnership with the civil society organization Global Witness helped uncover true beneficial ownership.⁴⁷⁹ As Afghanistan moves forward with implementing its EITI commitments, it should consider utilizing similar initiatives and resources to determine and register true beneficial ownership information.

2. Illicit mining activities

While Afghanistan’s success in obtaining full EITI membership would be a significant development in the fight against corruption, EITI membership will only address licit mining activities. To be truly effective, EITI reforms must be accompanied by reinvigorated efforts to fight illicit mining, which represents perhaps the greatest threat to Afghanistan’s vast but nevertheless finite natural resources.⁴⁸⁰

A wide range of reports document that illicit mining activities in Afghanistan have flourished due to a combination of an insecure environment allowing non-state actors to unilaterally exploit natural resources and corrupt practices allowing public officials to unlawfully divert precious public resources for personal gain.⁴⁸¹ A former member of Afghanistan’s Natural Resources Oversight Network estimated that there could be as many as 2,500 to 3,000 illicit mining sites currently operating in the country.⁴⁸² Other estimates of the scale of illicit mining activities are lower but no less significant in terms of the overall impact on public trust and confidence in the mining sector.⁴⁸³

Illicit mining activities are not a management problem; they are a security problem. These activities are closely linked to large criminal or insurgency networks that seize control of mine sites and divert profits to fund their operations.⁴⁸⁴ To respond to this security threat, Afghanistan has adopted a government-wide approach whereby security forces under the leadership of the Ministry of Interior and National Security Council are responsible for securing mine sites and stopping unlawful exploitation by unauthorized actors.⁴⁸⁵ These efforts, however, are largely dependent on the overall security situation and the Government’s ability to regain control over disputed parts of the country.⁴⁸⁶

As the security in these districts is restored, the Ministry of Mines and Petroleum will start bringing illicit mine sites back under its legal control. Concerns, however, have been expressed about the involvement of the Ministry of Interior’s Afghan Local Police in these efforts, given allegations, especially in Badakhshan and Kunar, of the local police being implicated in the illegal exploitation of mines.⁴⁸⁷ Additionally, even if honest and well intentioned, many of these local police forces are too small and ill-equipped to hold off the sort of large and well-armed private militias and armed groups that have perpetrated most of the illicit mining activities to date.⁴⁸⁸ A comprehensive review of the mining sector security initiatives is needed to ensure that they deliver effective and sustainable protection against illicit exploitation.

D. Review of administrative decisions

One byproduct of Afghanistan’s efforts to restore institutional controls to prevent the diversion of public resources is the creation of new administrative rules and procedures governing the assessment of taxes and fees, issuance of licenses and permits, and approval of bids and contracts. Various dispute resolution or review mechanisms have been established to resolve disputes relating to a wide-range of

administrative matters. Yet, there are no established rules or procedures governing the right to judicial review of agency decisions. Without an established process for judicial review of agency decisions, a risk exists that agency abuses of authority will go unchecked. UNODC explained: “Judicially-supervised administrative procedures, involving the citizens’ right to a hearing, notice requirements, and a right to a statement of reasons for public official’s decision are all effective mechanisms for preventing and controlling corrupt practices because they give civil society a tool to challenge abuse of authority.”⁴⁸⁹

To fill this gap, Afghanistan committed to providing persons affected by administrative decisions with a right to seek further review.⁴⁹⁰ A draft administrative procedures law has been proposed but not yet circulated for comment.⁴⁹¹ Until this legislation is reviewed and approved, the procedure applicable to judicial review of agency decisions will remain unclear. Fundamental questions such as what standard of review (*e.g.* arbitrary and capricious) or burden of proof should govern challenges to agency decisions will remain unclear. To ensure a meaningful mechanism for judicial review of agency decisions and prevent potential abuses of authority, consideration should be given to circulating the draft administrative procedures act for public comment and approval by the National Assembly.

SUMMARY OF RECOMMENDATIONS FOR STREAMLINING PUBLIC SERVICES AND SAFEGUARDING PUBLIC RESOURCES

For the Government:

- To ensure effective enforcement of judicial orders resolving land ownership disputes, including land usurpation, consideration should be given to establishing a dedicated enforcement unit to execute court orders, as well as streamlining the process for enforcing court orders to ensure more efficient and effective implementation.
- Afghanistan should continue to pursue full membership in the global Extractive Industries Transparency Initiative and, to that end, take steps to improve data management and compilation to resolve discrepancies identified in the course of validation.
- A comprehensive review of mining sector security should be undertaken to ensure implementation of the government-wide approach to securing mine sites and bringing them under the Ministry of Mines and Petroleum’s lawful control.
- To ensure the fairness of all administrative decisions and protect citizens from potential abuses of power, Afghanistan should complete work on the draft administrative procedures law by providing the public and international community with an opportunity to review and comment on the law prior to submission.

For the international community:

- The international community should support efforts to improve transparency in the award of mining contracts by facilitating the exchange of beneficial ownership information.
- The international community should assist the Government in forging stronger partnerships with the private sector to support the development of *Asan Khedmat* centres in Kabul and the provinces, as well as building the capacity of these service centres to fulfil the goal of more efficiently and effectively delivering day-to-day public and private services to Afghan citizens.



VII. Ending impunity through increased accountability

Increased transparency cannot alone win the fight against corruption. Once corruption is exposed, the public must see that those responsible are not allowed to escape with impunity but held to account. Accountability is essential to building public confidence in government institutions and dissuading other officials who would engage in similar corrupt practices from doing so.

Afghanistan's progress in undertaking meaningful reform of the justice sector has been slower than expected but, as President Ghani indicated, this sector will be the next frontier of the Government's anti-corruption efforts.⁴⁹² A draft justice sector reform plan is under consideration but not yet adopted. As with other planning efforts, this draft plan would benefit from greater specificity and consideration of the various risks to implementation (see section II.B). Nevertheless, as shown in this section, progress has been made in Afghanistan's efforts to promote increased accountability, including through criminal law reform, establishment of a dedicated Anti-Corruption Justice Centre, enhanced witness protection, proposals to encourage cooperating witnesses to come forward, and increased capacity to locate and recover misappropriated assets.

A. Revised Penal Code

On 29 September 2016, Afghanistan's Cabinet of Ministers provided its preliminary approval to the revised Penal Code. On 2 March 2017, the Cabinet legislatively decreed the Code, but the President declined to endorse it. Thus, after final technical review by the Ministry of Justice and Office of the Second Vice President, the revised Penal Code is now cleared for the President to submit to the National Assembly, either as a proposed law or as a legislative decree in July with the Assembly's summer recess.⁴⁹³ Submission of the revised Penal Code to the National Assembly is one of the Government's key commitments under the SMAF, ANDPF, and IMF Benchmarks, and a milestone on the Government's four-year long path to criminal law reform.

Work on the revised Penal Code began in 2012 under the leadership of the Ministry of Justice's Legislative Department. One of the core objectives was to consolidate all national substantive criminal laws with their punishments into one modern penal code. Afghanistan's substantive criminal laws are now scattered among over 50 separate laws, legislative decrees, and the 1976 Penal Code, posing substantial difficulty for judges, prosecutors, and other lawyers seeking to find relevant criminal provisions. The revised Penal Code resolves this problem by incorporating all substantive criminal offences into a uniform code provided to all prosecutors, judges, and attorneys.

In support of the fight against corruption, the revised Penal Code—for the first time—incorporates all of the mandatory provisions of the UNCAC (bribery, extortion, embezzlement, theft, fraud, abuse of power, etc.), and strengthens the optional crimes of illicit enrichment⁴⁹⁴ and bribery of private companies. It also more clearly defines the crime of land usurpation and provides new sentence enhancements for the most serious offenders. Another important development is the removal of the crime of insult from Afghan law. This crime can sometimes be used to suppress free speech, particularly speech deemed critical of public officials.⁴⁹⁵ Under Afghanistan's revised Penal Code, no one can be prosecuted for insulting or criticizing public officials—a significant step toward a freer and more open forum for public debate and media scrutiny.

Two significant hurdles remain. Most daunting is the need to gain support in the National Assembly for adoption of the revised Penal Code. Some conservative members of parliament have expressed opposition to the revised Penal Code because of its treatment of crimes against women and other aspects that they fear are contrary to traditional Afghan values. The Government must be united in its support for the revised Penal Code. International partners, who supported the reform process for years, should likewise advocate for the Assembly's approval (if a legislative decree) or adoption (if an approved proposed statute) of the revised Penal Code and, where necessary, support outreach and other efforts to gain necessary parliamentary support. Once adopted, substantial efforts also will be required to implement the new law, including efforts to publish, disseminate, and educate lawyers and the general public on the revised Penal Code's new provisions.

Contemporaneously with revisions to the Penal Code, Afghanistan's Ministry of Justice has been leading efforts to compile a detailed commentary on the Code of Criminal Procedure. This commentary, which is presently undergoing substantive review by key stakeholders, will provide another valuable tool for judges and practitioners seeking to correctly and consistently interpret and apply procedures governing all aspects of the criminal process from initial detection to appeal.

B. Anti-Corruption Justice Centre

A key component of Afghanistan's fight against corruption was the establishment of a dedicated Anti-Corruption Justice Centre to investigate and prosecute major corruption cases.⁴⁹⁶ The Government delivered on that commitment by establishing the Anti-Corruption Justice Centre by Presidential Decree issued on 30 June 2016.⁴⁹⁷

The national Anti-Corruption Justice Centre, based in Kabul, is not a separate institution; rather, it is a secure location that exists within Afghanistan's existing legal and judicial structures, and is staffed by dedicated chambers of judges, police investigators from the Ministry of Interior's Major Crimes Task Force, and prosecutors from the Attorney General's Office. All investigators and prosecutors assigned to the Anti-Corruption Justice Centre will be subject to vetting, including periodic polygraphing, to ensure their suitability for the post. The Supreme Court's High Council selected each of the Anti-Corruption Justice Centre's judges based on the judge's individual reputation for integrity and competence. The investigation and prosecution of other corruption cases not meeting the Anti-Corruption Justice Centre's high jurisdictional thresholds will continue before Afghanistan's ordinary provincial courts.

The centre has jurisdiction over the broad range of corruption offences specified in the current Penal Code, as well as money laundering offences, destruction or selling of cultural and historical relics, crimes against internal and external security, illegal extraction of mines, and land usurpation.⁴⁹⁸ To ensure that it is not overwhelmed with too many cases, the centre's mandate requires it to focus on cases meeting one or more of the following jurisdictional thresholds: (1) corruption cases involving more than 10 million Afghanis; (2) bribery, money laundering, destruction or selling of cultural and historical relics, crimes against internal or external security, illegal extraction of mines, and land usurpation involving more than AFS 5 million; or (3) cases involving high-level government officials (deputy ministers, generals, governors, director-level officials, etc.), regardless of the amount involved.⁴⁹⁹

Additionally, as a matter of policy, the High Council requested the Anti-Corruption Justice Centre to focus initial—but not exclusive—attention on cases arising since the formation of the National Unity Government in September 2014.⁵⁰⁰ Older cases involving allegations made prior to the formation of the National Unity Government are slated for independent review by the Attorney General and, if sufficient evidence is found, prosecuted in the same manner as other cases. To date, the Anti-Corruption Justice Centre has prosecuted nine cases before the Primary Court and seven cases have all been affirmed before the Appeals Court, resulting in the convictions of 25 individuals including several senior government officials.⁵⁰¹

Current and former ministers are not necessarily within the Anti-Corruption Justice Centre's jurisdictional scope. Afghanistan's Constitution and the Law on Special Courts requires that special procedures be followed in relation to the investigation or prosecution of ministers.⁵⁰² These special procedures require, among other things, that cases involving ministers be prosecuted under the personal direction of the Attorney General, not one of his deputies.⁵⁰³ Additionally, cases involving ministers must be heard by a special panel composed of three Supreme Court High Council judges.⁵⁰⁴

These special provisions applicable to ministers could be accommodated within the Anti-Corruption Justice Centre by the Chief Justice appointing a special panel of High Council judges to hear any case against a minister at the Anti-Corruption Justice Centre and by the Attorney General personally directing the prosecution. The only difficulty that may arise were this procedure to be followed is that a mechanism for appeal from the Anti-Corruption Justice Centre special panel's decision would need to be created to preserve the accused minister's right to at least one-level of appeal. This right is provided for in the Criminal Procedure Code and required by Afghanistan's commitments under the International Covenant on Civil and Political Rights.⁵⁰⁵ One mechanism would be for the Chief Justice to establish a special appeals panel composed of the remaining members of the High Council (*i.e.*, those not designated as the trial panel) to consider the minister's appeal. Consideration should be given to clarifying this aspect of the Anti-Corruption Justice Centre's jurisdiction to ensure that ministers are also held accountable for any corruption-related offences.

The Anti-Corruption Justice Centre decree includes several other important features intended to promote greater transparency and accountability. The decree reaffirms that all proceedings shall be conducted in public and recognizes the need to publicly disclose the court's judgements and reasoning. As noted in section V.A.2, this right should attach not just to the Supreme Court's final decision but to all intermediate decisions as well.

1. International mentors

International mentors are intended to be co-located with national investigators and prosecutors on Anti-Corruption Justice Centre cases. National investigators and prosecutors are responsible for all decision-making relating to pending cases; international mentors support their work by providing technical advice and sharing practical experiences in the investigation and prosecution of complex corruption cases. Two international prosecution mentors already are in place, and several international investigation mentors are supporting the Major Crimes Task Force in its investigations. All mentors are subject to polygraphing to test their integrity, as well as strict confidentiality provisions to govern access to sensitive information contained in case files. Similar mentorships will be useful in supporting the capacity of defence counsel, particularly those responsible for providing publicly-funded legal aid services.

2. Case selection criteria

There also is a need to ensure consistency in decision-making relating to the selection of cases for investigation and prosecution, as well as to promote public understanding of the prosecutor's role.⁵⁰⁶ Even in a mandatory-prosecution jurisdiction like Afghanistan, not every suspected corruption case can be fully investigated and prosecuted. "Given the extent of corruption, the range of cases likely to exist, the variety of possible outcomes, and the limits imposed by human and financial resource constraints," there is a need for prioritization as to the cases to pursue and the outcomes to seek. Prioritizing necessarily involves the exercise of considerable discretion.⁵⁰⁷ This discretion must be managed carefully to ensure consistency, transparency, and the credibility of both the decision-making process and its outcomes.⁵⁰⁸

One way of doing this is to publish formal statements of prosecution policies setting forth the criteria or guidelines for case selection.⁵⁰⁹ More transparency in this regard would promote greater public understanding of why one case is selected for prosecution by the Anti-Corruption Justice Centre but another case is not.⁵¹⁰ By helping ensure that like cases are dealt with alike, case selection guidelines also "reassure those who make complaints, as well as members of the general public, that a decision not to pursue a particular reported case is based on objective criteria and not on improper or corrupt motives."⁵¹¹ While there is no universal standard, some commonly cited factors to consider in establishing case selection guidelines are identified in the table below.

RECOMMENDED CASE SELECTION CRITERIA

- Seriousness and prevalence of the type of corruption
 - Prioritize cases involving the most common forms of corruption or those involving widespread or longstanding corrupt practices
 - Prosecution of these cases could help establish new ethical standards and assist in training officials on new legal obligations
- Availability of other sanctions to curb violation
 - Prosecute criminal behavior
 - Discipline misconduct not amounting to crimes through available administrative sanctions such as dismissal or demotion
- Opportunities to establish precedent
 - Select cases that will highlight areas likely to change public perceptions about the seriousness of anti-corruption efforts
 - Select cases that will help close a gap in the law or settle open questions
- Likelihood of success
 - Evidence must drive any prosecution decision; it must be sufficient to establish all of the elements of the offence
 - Weak cases should not be prosecuted unless further investigation reveals sufficient evidence to discharge the prosecution's burden
- Availability of financial, human, and technical resources
 - Cases may require specialized forensic or other expert skills to develop evidence that may be difficult or expensive to obtain
 - Cases may require substantial staffing that could compromise efforts to pursue other cases

3. Media and communications strategy

To promote greater public understanding of the Anti-Corruption Justice Centre's work, consideration should be given to developing a stronger media and communications strategy. Communications relating to the Anti-Corruption Justice Centre's work, to date, have been delivered in an inconsistent manner, generating unnecessary confusion and, in some cases, criticism.

UNODC explained the importance of developing a clear communications strategy in relation to the investigation and prosecution of corruption: "Ensuring that accurate, timely and appropriate information is passed to the media is important for ensuring the transparency and the credibility of investigations. More fundamentally, media scrutiny and publicity are essential for gaining cooperation from the public, as well as for raising public awareness of the corruption phenomenon and for generating public will. Ensuring that the media have access to accurate and authoritative information may also help reduce any tendency to report information that is incorrect or harmful to the investigation. On the other hand, it is essential that information is not made available that might jeopardize a fair trial being given to a suspect."⁵¹² Thus, any information released to the media relating to Anti-Corruption Justice Centre investigations and prosecutions must be reviewed carefully to ensure accuracy and guard against

disclosures that could be harmful to the investigation or a suspect's right to the presumption of innocence.⁵¹³

Any media and communications strategy should consider the need to avoid the perception that the Anti-Corruption Justice Centre creates a two-tiered justice system for corruption cases: one for high-level officials and another for lower-level officials. To dispel this perception, the Attorney General and other responsible officials should continue to pursue lower-level corruption cases contemporaneously with the Anti-Corruption Justice Centre's investigation and prosecution of high-level corruption cases. The prosecution of these lower-level corruption cases—many of which arise at the sub-national or local levels—in Afghanistan's ordinary courts is necessary to reinforce the Anti-Corruption Justice Centre's intended message that no one is above the law. As a practical matter, these lower-level prosecutions also may uncover information relevant to the detection of corruption committed by higher-level officials.

4. Cooperating witnesses

Developing evidence against higher-level officials is another area that should be considered in strengthening national capacity to prosecute major corruption cases. High-level officials often hide their own corrupt practices behind a network of lower-level subordinates who directly solicit bribes or engage in other corrupt practices. To reach the high-level officials, it may be necessary to obtain evidence from lower-level officials.

Article 37 of UNCAC recommends that signatory states, like Afghanistan, consider adopting procedures to allow the prosecution to request a reduced or suspended sentence for a cooperating witness who gives truthful testimony. "The concept comes from the experience that law enforcement authorities have with organized crime cases. Cooperating witnesses and the means to encourage such cooperation have proved useful in helping law enforcement authorities penetrate, understand, and deal with the often complex and multilayered or compartmentalized structures of organized criminal groups."⁵¹⁴ The information provided by the cooperating witness must be useful to the investigation and relevant to the prosecution or recovery of assets.⁵¹⁵ In other words, the cooperation must be substantial.⁵¹⁶

A cooperating witness is usually a person involved in the criminal behavior and, thus, in a position to reveal the sort of insider information necessary to link more senior officials, including those who orchestrate the criminal scheme, to the crimes. In common law legal systems, prosecutors are able to encourage these insiders to cooperate by offering immunity from prosecution or plea agreements to reduced charges.

These procedures, however, are not recognized in Afghanistan. As a mandatory prosecution jurisdiction, Afghanistan requires prosecution of any crime that is detected. The draft Anti-Corruption Law provides an opportunity to give Afghan prosecutors an alternative means of obtaining crucial information from cooperating witnesses. In exchange for providing truthful testimony leading to further prosecutions, prosecutors should be allowed to request a reduced or suspended sentence for cooperating witnesses. This practice would be consistent with existing Afghan sentencing practice, which recognizes cooperation with authorities as a mitigating factor in sentencing.⁵¹⁷ It also would be consistent with the principle of mandatory prosecutions because the cooperating witness would still be subject to prosecution in relation to all charges detected. If convicted, however, the prosecution would recommend that the court impose a lighter sentence in consideration for the cooperating witness's truthful and significant testimony.

5. Witness protection

The Presidential Decree establishing the Anti-Corruption Justice Centre recognized the need for stronger witness protection measures to encourage witnesses (not necessarily insiders implicated in the criminal conduct) to come forward with evidence. These protections when combined with incentives for cooperating witnesses and whistleblowers (sections III.B.2 and VII.B.4 above) are necessary to ensure the safety of persons willing to testify and present crucial evidence at trial.

The level of protection will vary depending on the nature and extent of the individuals' cooperation with law enforcement authorities and the degree of risk to which they are exposed.⁵¹⁸ Many may require little or no protection after reporting acts of petty corruption. Others, unfortunately, may need much. The most cost-effective means of providing protection is to keep the identity of the witness confidential for as long as possible. However, at the extreme end of the scale, more substantial witness protection programmes may be needed, including temporary or permanent relocation, close protection, or the use of screens to conceal identity.⁵¹⁹

Afghanistan's Criminal Procedure Code provides some measure of protection by shielding the identity of witnesses.⁵²⁰ Additional protection is afforded, as already noted, by article 14 of the Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy. But, by its terms, the protections afforded under article 14 apply only to witnesses in administrative corruption cases (*e.g.*, bribery) and, even then, it is not clear who is responsible for ensuring that the witness receives protection from "pressure, intimidation and ill-treatment." The Presidential Decree establishing the Anti-Corruption Justice Centre likewise provides no details as to how witnesses will be protected in practice.

To fill this gap in existing law, a dedicated and trained witness protection service should be established within the judiciary to ensure the protection and safety of all witnesses (prosecution and defence) in criminal cases. Where a credible threat is detected, the court should impose protective measures proportional to the threat posed. The Anti-Corruption Justice Centre presents an opportunity to develop a model witness protection programme. Once established, this programme can be used as the basis for an expanded programme applicable to all criminal cases.

6. Safety of Anti-Corruption Justice Centre personnel

The Anti-Corruption Justice Centre is located at the site of a former military base with a secure perimeter. Targeted attacks on Afghan justice-sector institutions and personnel, however, continue to be perpetrated. Indeed, the number of targeted attacks on justice-sector institutions and officials doubled from 2014 to 2015.⁵²¹ In May 2015 alone, anti-government elements deliberately targeted staff of the Ministry of Justice and Attorney-General's Office in three separate incidents, killing four prosecutors and three ministry staff.⁵²² This disturbing trend continued into 2016. During the first half of 2016, UNAMA documented 23 incidents targeting judges, prosecutors, and judicial staff, resulting in 104 civilian casualties.⁵²³

Accountability cannot be achieved in an environment where judges, prosecutors, and police are targets for assassination. The rule of law is placed at risk when justice sector officials or their family members are threatened with death, kidnapping, or serious bodily harm for carrying out their duties. All personnel assigned to the Anti-Corruption Justice Centre (and other Afghan courts and justice-sector institutions) require enhanced security so they can perform their official responsibilities free from threat. Reasonable protective measures should include secure transport to and from courthouses and other places of work, as well as close protection in situations where an elevated risk exists. Consideration should be given to expanding the existing protection provided to judges by the Ministry of Interior's judicial police unit to all Anti-Corruption Justice Centre personnel.

C. Asset recovery efforts

Afghanistan's experience with the Kabul Bank fraud highlighted the need for greater capacity to recover assets transferred abroad, including through stronger bi-lateral and multi-lateral arrangements for mutual legal assistance. Kabul Bank involved the theft of US \$987 million in assets. Many of these assets were transferred to third parties and moved outside Afghanistan.⁵²⁴ The Kabul Bank Receiver succeeded in recovering approximately US \$285 million (29%) in cash and other tangible assets,⁵²⁵ but it had difficulty securing the assistance required to identify and seize other assets that had been transferred abroad.⁵²⁶

The establishment of the Anti-Corruption Justice Centre has reinvigorated discussion of Afghanistan's asset recovery efforts in the Kabul Bank and other cases. One proposal currently under discussion is to establish a dedicated office of asset recovery within the Attorney General's Office that would be composed of staff from the different institutions involved in recovery efforts. This office would focus on efforts to locate and seize stolen assets in corruption and other cases such as illegal trafficking cases. A percentage of assets recovered could be allocated to funding future Anti-Corruption Justice Centre or related law enforcement operations, including witness protection and victim compensation programmes.

Afghanistan's Anti-Money Laundering Law, adopted in 2014, provides the legal framework applicable to the recovery of stolen assets.⁵²⁷ This law authorizes proceeds of crimes to be identified, frozen, seized, and confiscated. It also provides a process for obtaining a preliminary court order to freeze assets suspected of being the proceeds of crime but where criminal charges have not yet been proven.⁵²⁸ At the prosecutor's request or on the court's own initiative, the court can freeze any funds or property linked to the investigation of certain predicate offences such as money laundering and financing of terrorism.⁵²⁹

To assist Afghanistan in developing its asset recovery capacity, the Ministry of Finance submitted, in May 2016, an official request to the World Bank and UNODC's Stolen Asset Recovery Initiative.⁵³⁰ This initiative provides technical assistance and capacity building support to countries seeking to strengthen asset recovery efforts, including advice on how to prepare requests for mutual legal assistance. Discussions are underway to finalize Afghanistan's request for assistance from the Stolen Asset Recovery Initiative in relation to current and future asset recovery efforts.

The Anti-Money Laundering Law also established FinTRACA—a specialized financial investigation unit within Da Afghanistan Bank—to identify and evaluate suspicious financial transactions.⁵³¹ In emergency situations, FinTRACA can impose a temporary freeze on suspects' assets pending further investigation by prosecutors.⁵³² Since January 2016, FinTRACA has frozen 42 bank accounts, issued 60 warning letters, and imposed AFS 5 million in administrative fines against banks to ensure compliance with banking regulations.⁵³³ These efforts demonstrate a substantial increase in enforcement compared to the previous year, when FinTRACA imposed no fines. Additionally, during 2016, FinTRACA reported approximately 67 suspicious transactions to the Attorney General, resulting in the prosecution of 20 money-laundering cases.⁵³⁴

The flow of illicit money derived from corruption, money laundering, tax evasion, and other illegal activities poses a particular difficulty for Afghanistan. According to the Ministry of Finance, approximately 65% of the financial flows in Afghanistan are illicit.⁵³⁵ Transfers pursuant to the traditional *hawala* system have facilitated this illicit flow and made it more difficult for sources of funding to be confirmed.⁵³⁶ To address this threat, FinTRACA stepped up enforcement actions against licensed *hawalas*. Since January 2016, FinTRACA cancelled the licenses of 95 *hawalas* engaged in suspicious

transactions, representing a 100% increase in enforcement actions since the preceding year when it suspended no *hawala* licenses.⁵³⁷

During 2016, FinTRACA also streamlined the process for freezing the assets of individuals, entities, and organizations added to the UN sanctions list⁵³⁸ from an average of four months to almost real time.⁵³⁹ Rather than seeking a separate instruction for each name added to the sanctions list, FinTRACA obtained a standing instruction from the Attorney General allowing it to freeze assets simultaneously whenever a name is added. By obtaining instant alerts from the sanctions team's website, FinTRACA can now freeze assets within minutes of new names being added to the list.

Other efforts to control the flow of large sums of hard currency out of Afghanistan have not been as successful. The Government, for instance, installed bulk currency counters at four of Afghanistan's international airports (Kabul, Mazar, Herat, and Kandahar) with the goal of requiring persons travelling with more than USD 10,000 cash or its equivalent to prepare a declaration, explaining the source of funds.⁵⁴⁰ The counters, however, have had limited effectiveness as few suspected money smugglers voluntarily report to the counters. And, even when money smuggling is suspected through luggage scans or other inspections, the counters are not connected to any central database or internet server that could be used to facilitate external verification of the source of the suspect funds.⁵⁴¹ FinTRACA, with support from UNODC, has started a series of training programmes to improve the effectiveness of bulk currency counter personnel in detecting illicit financial transactions.⁵⁴²

D. Civil asset forfeiture provisions

As Afghanistan recognized in its 2016 Country Statement at the London Anti-corruption Summit, efforts to pursue stolen assets should not be limited to criminal laws such as criminal forfeiture of ill-gotten gains or prosecution for the crime of illicit enrichment—both of which require proof of the underlying crime beyond reasonable doubt. Civil laws can be used to reduce the burden of proof in relation to the recovery of suspected ill-gotten gains.⁵⁴³

Civil forfeiture laws, for instance, allow confiscation of assets suspected to be derived from certain criminal activities when a balance of probabilities exists that the assets were derived from illicit activities and the owner is unable to prove the contrary.⁵⁴⁴ Italian Law No. 575 is one example. It provides that property owned directly or indirectly by a person suspected of participating in a Mafia-type association may be seized where the property is out of all proportion to the person's legitimate sources of income or economic activity, or when it can be reasonably identified as the proceeds of unlawful activities.⁵⁴⁵ Ireland's Proceeds of Crime Act 1996 similarly provides for seizure of assets without prior conviction or proof of criminal activity when assets are suspected to be profits of illicit activities and the individual is unable to establish the innocent origins of his unexplained wealth.⁵⁴⁶ Afghanistan should consider similar civil legislation to strengthen its asset recovery regime and meet its commitment at the 2016 London Summit.

The European Human Rights Commission and European Human Rights Court have held that these types of civil forfeiture provisions do not offend the presumption of innocence given that the proceedings do not imply a judgement of guilt but rather that of social danger based on a well-founded suspicion of criminal activity.⁵⁴⁷ Additionally, the confiscation applies only to such properties that, on a balance of probabilities, are shown to have been derived from illicit sources.⁵⁴⁸

E. Case referral procedures

One challenge already encountered in relation to the Anti-Corruption Justice Centre is the need to ensure that cases involving suspected corruption reach the appropriate authorities. To this end, the Attorney General issued an instruction advising all ministries of the Anti-Corruption Justice Centre's

jurisdiction over major corruption cases.⁵⁴⁹ The instruction does not, however, explicitly require the mandatory referral of suspected cases to the Attorney General. To ensure that major corruption cases are not “lost” within individual ministries, the Attorney General should consider clarifying this instruction by requiring mandatory referral of all major corruption cases to the Attorney General’s Office. Moreover, the Government should ensure that all original documents and testimony from witnesses and suspects previously held by a number of high-ranking Presidential Commissions have been provided to the ACJC prosecutors; *e.g.*, the Professor Farooqi Report on the SIGAR-assisted fuel bid collusion fraud case originating in 2014, which resulted in the President nullifying and re-starting the bidding process.

Existing laws already require the referral of suspected corruption cases from the Supreme Audit Office, FinTRACA, and HOOAC to the Attorney General’s Office.⁵⁵⁰ However, no mechanism exists to track the referral of cases or apprise referral agencies of case progress. Practical steps should be taken to better implement the existing laws requiring case referral.

Memoranda of understanding similar to that recently entered into with the Ministry of Interior in relation to ordinary criminal cases are one way to clarify the process for referring suspected corruption cases from anti-corruption bodies to the Attorney General. These memoranda should identify the standards governing selection of cases for referral and explain what specific information and supporting materials should be included in the referral request. Additionally, all requests should be recorded in Afghanistan’s existing case management database. This electronic system allows quick access to statistical and other case-related information for justice-sector institutions. Information relating to referred cases should be entered into this database to promote better tracking and responsiveness. Statistical data relating to the number of cases referred, nature of cases, and other relevant information also should be made available to the public on a regular basis to promote greater transparency and understanding of efforts to fight corruption.

SUMMARY OF RECOMMENDATIONS FOR ENDING IMPUNITY

For the Government:

- To improve public understanding of the Anti-Corruption Justice Sector's work, consideration should be given to adopting a comprehensive communications strategy and developing transparent case selection guidelines. Additionally, to ensure effective prosecution of cases, consideration should be given to the following:
 - Expanding witness protection measures for witnesses subject to threats and providing incentives in the form of possible sentence reductions for cooperating witnesses to come forward with truthful evidence.
 - Ensuring the safety of all court personnel, including through the provision of secure transport to and from the court and close protection for officials subject to elevated threats.
 - Expanding international mentors or twinning arrangements for investigators, prosecutors, and defence counsel lacking substantial practical experience in handling the sort of complex cases arising before the court.
- To strengthen Afghanistan's capacity to recover stolen assets, consideration should be given to finalizing two proposals already under review: establishment of a dedicated asset recovery unit under the authority of the Attorney General, and finalizing expert support from the World Bank and UNODC's Stolen Asset Recovery Initiative. Additionally, consideration should be given to adopting civil asset forfeiture provisions to recover suspected ill-gotten gains.
- To improve coordination among various agencies involved in the Government's anti-corruption efforts, the process for referring potential cases to the Attorney General should be clarified through the development of clear case referral guidelines and procedures for case tracking, follow up, and public reporting of case statistics.

For the international community:

- The international community should support the Government's efforts to secure National Assembly approval of the revised Penal Code, which includes all major corruption-related offenses. If approved, the international community also should support the Government in efforts to develop an implementation strategy to raise public awareness of the Penal Code's new requirements, particularly among judges, prosecutors, and defence counsel.
- The international community should support the Government's efforts to build the capacity of Anti-Corruption Justice Centre personnel by providing experienced mentors with expertise in investigating and prosecuting the type of complex corruption cases within the court's jurisdiction to work side-by-side with Afghan investigators, prosecutors, and defence counsel.
- The international community should prioritize domestic enforcement of money laundering laws aimed detecting and preventing illicit transfers of assets, and provide clear guidance and technical support to assist Afghan authorities in complying with national standards and procedures governing asset recovery efforts.
- The international community should strengthen bi-lateral and multi-lateral arrangements for mutual legal assistance to better support Afghanistan's efforts to locate and recover stolen assets transferred abroad.
 - Stronger channels of communication with the relevant embassies in Afghanistan and national law enforcement agencies should be developed to promote the efficient and expeditious exchange of information required for the successful identification and recovery of stolen assets.
 - National focal points in Afghanistan and the receiving state should be appointed to coordinate these efforts.



VIII. Conclusion

The fight against corruption cannot be won overnight. It requires sustained commitment on the part of the Government, public, civil society, and international community.

The Government has made notable progress through: high-level leadership signaling a shift away from the culture of corruption; development of ministry-level anti-corruption plans and initiation of a national plan; efforts to professionalize the civil service through merit-based recruitment and collection of asset declarations from senior officials; transparent and effective public financial management, including in procurement and budgeting; efforts to streamline the delivery of public services and safeguard vital public resources; and legislative reform and establishment of a dedicated court to ensure increased accountability in major corruption cases. The Asia Foundation's recent survey indicated that, since 2015, the rate of corruption experienced by Afghans who had contact with government authorities decreased in all areas.⁵⁵¹ If this trend continues, it could suggest that the Government's efforts are starting to take hold and changing longstanding public perceptions of corruption in Afghan society.⁵⁵²

Yet, despite this progress, corruption remains a substantial obstacle to Afghanistan's long-term peace and prosperity, and continues to impact all aspects of daily life in Afghanistan. To better focus and streamline the Government's anti-corruption efforts, a comprehensive strategy is needed. Implementation should be vested in an independent secretariat comprised of subject matter experts with a mandate to broaden public and civil society engagement in the Government's efforts. In developing the Government's comprehensive strategy, consideration also should be given to the many

practical recommendations contained in this report, all of which are drawn from the international community's collective experience in implementing the UNCAC and other anti-corruption reform initiatives.

Many, if not, most of these recommendations will require continued donor support and technical assistance. UNAMA stands ready to assist the Government in coordinating any required donor support and providing technical assistance to ensure stronger policy coherence in the implementation of Afghanistan's ongoing efforts to fight corruption and restore integrity to the delivery of public services.

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¹⁶³ See HOOAC website, available at: <http://anti-corruption.gov.af/en/news/200956> (accessed on 26 January 2017);

TI 2016, p. 24; Interview with Director General of the HOOAC, Sayed Ghulam Hussain Fakhri, December 2016; HOOAC comments on draft report, 27 February 2017.

¹⁶⁴ Interview with Director General of the HOOAC, Sayed Ghulam Hussain Fakhri, February 2016; SIGAR, *Afghanistan's High Office of Oversight: Personal Asset Declarations of High Ranking Afghan Government Officials are not Consistently Registered and Verified*, September 2016, pp. 11-12, available at: <https://www.sigar.mil/pdf/special%20projects/SIGAR-16-60-SP.pdf> (SIGAR Personal

Asset Declarations 2016); *see also* HOOAC data, available at: <http://anti-corruption.gov.af/en/news/200956> (accessed on 26 January 2017); HOOAC comments on draft report, 27 February 2017.

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¹⁷⁷ SHAHEED, Anisa, *15 governors have not registered their assets: HOOAC*, 4 January 2017, Tolo news, available at: <http://www.tolonews.com/afghanistan/15-governors-have-not-registered-their-assets-hooac> (accessed on 20 January 2017).

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¹⁸² MARTINI 2013, pp. 2, 5; OECD 2011, pp. 98-100; HOPPE 2014, p. 4

¹⁸³ HOPPE 2014, p. 4.

¹⁸⁴ OECD 2011, pp. 15, 71-72; CHÊNE 2008, p. 3. **68**

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¹⁸⁷ CHÊNE, Marie, *The use of technology for managing income and asset declarations*, U4 Expert Answer No. 2015:4, 18 September 2015, p. 6, available at: <http://www.u4.no/publications/the-use-of-technology-for-managing-income-and-asset-declarations/downloadasset/3921> (CHÊNE September 2015).

¹⁸⁸ OECD 2011, p. 76.

¹⁸⁹ See MARTINI 2013, p. 2; UNODC 2004, p. 75.

¹⁹⁰ UNODC 2004, p. 148.

¹⁹¹ UNODC 2004, p. 76.

¹⁹² HOPPE 2014, pp. 2-3.

¹⁹³ UNODC 2004, p. 75.

¹⁹⁴ See UNODC 2004, p. 80.

¹⁹⁵ UNODC 2004, p. 76.

¹⁹⁶ Article 134 of the Afghan Constitution.

¹⁹⁷ See UNODC 2001, pp. 50-51 (noting that “to avoid unnecessarily discrediting the other governmental bodies, in particular the police and the office of the public prosecutor, the appropriateness of an [anti-corruption agency] should be evaluated carefully.”).

¹⁹⁸ CHÊNE September 2015, p. 2.

¹⁹⁹ CHÊNE September 2015, p. 7.

²⁰⁰ CHÊNE September 2015, p. 8.

²⁰¹ CHÊNE September 2015, p. 8.

²⁰² CHÊNE September 2015, p. 8.

²⁰³ CHÊNE September 2015, p. 7.

²⁰⁴ CHÊNE 2008, p. 5.

²⁰⁵ The International Monetary Fund, *The Islamic Republic of Afghanistan, Request for a three-year arrangement under the extended credit facility*, IMF Country Report No. 16/252, July 2016, p. 61, available at: <https://www.imf.org/external/pubs/ft/scr/2016/cr16252.pdf> (IMF 2016).

²⁰⁶ IMF 2016, p. 65.

²⁰⁷ HOPPE 2014, p. 3.

²⁰⁸ CHÊNE 2008, pp. 5-6.

²⁰⁹ HOPPE 2014, p. 4.

²¹⁰ OECD 2011, p. 16.

²¹¹ OECD 2011, p. 80.

²¹² Article 7 of Appendix No. 4 of the Penal Code, 1976 (1355) (approved by the National Assembly and enacted with immediate effect the President's endorsement on 30 January 2017 (20/10/1365)).

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²¹⁸ *See* Word Bank 2013, p. 1.

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²²⁰ ZAUM, Dominic, *PFM and Corruption*, Professional Development Reading Pack, June 2016, p. 1, available at: http://www.gsdrc.org/wp-content/uploads/2016/06/PFM-and-corruption_RP.pdf.

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²²² UNDP 2011, p. 17.

²²³ *See* Word Bank 2013, p. 25 (noting the Ministry of Finance's reforms to "improve budgeting processes and budget execution, which are likely to have contributed to a more realistic budget and higher spending in accordance with plans.").

²²⁴ Word Bank 2013, p. 87.

²²⁵ Word Bank 2013, p. 87.

²²⁶ Word Bank 2013, pp. 86-87.

²²⁷ Word Bank 2013, pp. 1, 3.

²²⁸ International Budget Partnership (IBP), *Open Budget Index (OBI) 2016 Update*, available at: <http://www.internationalbudget.org/opening-budgets/open-budget-initiative/open-budget-survey/country-info/?country=af> (accessed on 20 January 2017) (OBI 2016).

²²⁹ OBI 2016; IBP, OBI 2015, available at: <https://iwaweb.org/wp-content/uploads/2015/09/Open-Budget-Survey-2015.pdf> (OBI 2015); IBP, OBI 2012, available at: <http://www.internationalbudget.org/wp-content/uploads/OBI2012-AfghanistanCS-English.pdf> (OBI 2012); IBP, OBI 2010, available at: <http://www.internationalbudget.org/wp-content/uploads/2010/10/OBI2010-Afghanistan1.pdf> (OBI 2010).

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²⁴² GHANI 2016.

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²⁴⁴ Deliverable 15 of the Self-Reliance Through Mutual Accountability Framework Smart Deliverables 2017-2018, agreed upon the Brussels Conference on Afghanistan, held on 4 and 5 October 2016, para. 12, available at: http://mfa.gov.af/Content/Media/Documents/agreed_smaf_smart_deliverables_final26102016113033613553325325.pdf; Administrative Office of the President, National Procurement Authority, *Reflection of Key Reforms in Public Procurement in Transparency International's New Report*, 11 July 2016, available at: <http://www.ppu.gov.af/Beta/English/NewsMaster.aspx?code=132> (accessed on 1 February 2017).

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²⁵⁷ Articles 21(2) and 22(1) of the Law on Procurement.

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- ²⁸² See ASYCUDA User Countries, Territories and Regions, Afghanistan, available at: <https://www.asycuda.org/dispcountry.asp?name=Afghanistan> (accessed on 1 February 2017).
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- ²⁸⁶ Ministry of Finance, *Anti-Corruption Strategy and Plan*, November 2015, p. 9.
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³⁷² OECD 2016, p. 226.

³⁷³ MARTINI 2014, p. 8.

³⁷⁴ Article 128 of the Afghan Constitution.

³⁷⁵ Islamic Republic of Afghanistan, Supreme Court, Division on Duty Crimes of Military Personnel and Crimes against Internal & External Security, Judicial Ruling Number 4041, 31 January 2016 (11/11/1394).

³⁷⁶ Women Living Under Muslim Laws, *Let Farkhunda's Death Not Be in Vain: the Movement Continues*, 7 August 2016, available at: <http://www.wluml.org/media/let-farkhundas-death-not-be-vain-movement-continues> (accessed on 26 January 2017); AKBA, Noorjahan, *A Year Later, Still No Justice for Farkhunda*, Foreign Policy The South Asian Channel, 1 April 2016, available at: <http://foreignpolicy.com/2016/04/01/a-year-later-still-no-justice-for-farkhunda/> (accessed on 26 January 2017).

³⁷⁷ See articles 117(3) and 120(3) of the 1976 Penal Code.

³⁷⁸ Article 129 of the Afghan Constitution (“In issuing decision, the court is obligated to state the reason for its verdict”); article 243(3) (7) of the Criminal Procedure Code (a decision must contain “[t]he evidence based on which the court came to a conclusion” and “the reasons based on which the court excludes some of the evidence of accusation.”); article 12 of the Law on Organizational Structure, Duties and Authorities of the Judiciary (“The court shall mention the ground for decision in its ruling”).

³⁷⁹ *Rayakib Biryukov v. Russia*, European Court of Human Rights, No. 14810/02, 17 January 2008 (*Biryukov v. Russia*), available at: [http://hudoc.echr.coe.int/eng#{"ap-pno":\["14810/02"\],"itemid":\["001-84452"\]}](http://hudoc.echr.coe.int/eng#{); Article 14(1) of the UN General Assembly International Covenant on Civil and Political Rights, 16 December 1966, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (ICCPR).

³⁸⁰ *Biryukov v. Russia*; article 14(1) of the ICCPR.

³⁸¹ *Attorney General v. Abdul Hai*, ACJC Appeals Court, 27 December 2016. Chief Judge Rasooli cited the Presidential Decree establishing the Anti-Corruption Justice Centre, which ensures the right to public access to the Anti-Corruption Justice Centre, to deny a defence argument that article 120 of the Penal Code precluded the media from gaining access to the Primary Court's trial verdict. The Chief Judge held that article 120 related only to an issue of complementary punishment and, further, that public dissemination of the verdict promoted transparency.

³⁸² SCHÜTTE *et al.* April 2016, p. 38.

³⁸³ SCHÜTTE *et al.* April 2016, p. 38.

³⁸⁴ SCHÜTTE *et al.* April 2016, p. 39.

³⁸⁵ OECD 2016, p. 228; MARTINI 2014, p. 4.

³⁸⁶ Article 6 of the Law on Access to Information.

³⁸⁷ See OECD 2016, p. 227 (“The right of access should not be conditioned on the existence of a legitimate interest in obtaining information.”).

³⁸⁸ ROSE-ACKERMAN 2004, p. 22.

³⁸⁹ MARTINI 2014, p. 5.

³⁹⁰ MARTINI 2014, p. 3.

³⁹¹ See PANDE, Suchi, *Dying for information: Right to information and whistleblower protection in India*, U4 Brief No. 2015:3, March 2015, p. 2, available at: <http://www.u4.no/publications/dying-for-information-right-to-information-and-whistleblower-protection-in-india/downloadasset/3778> (PANDE 2015).

³⁹² PANDE 2015, p. 2.

³⁹³ PANDE 2015, p. 3.

³⁹⁴ See STANDING, Andre and HILSON, Gavin, *Distributing mining wealth to communities in Ghana: Addressing problems of elite capture and political corruption*, U4 Issue No. 5, May 2013, p.12, available at: <https://www.cmi.no/publications/file/4791-distributing-mining-wealth-to-communities-in-ghana.pdf>.

³⁹⁵ CORNEJO, Carolina, *et al.*, *When supreme audit institutions engage with civil society: Exploring lessons from the Latin American Transparency Participation and Accountability Initiative*, U4 Practice Insight No. 2013:5, 2013, p. 3, available at: <http://www.u4.no/publications/when-supreme-audit-institutions-engage-with-civil-society-exploring-lessons-from-the-latin-american-transparency-participation-and-accountability-initiative/downloadasset/3435>.

³⁹⁶ EVANS, Alastair, *The role of supreme audit institutions in combating corruption*, U4 Expert Answer, 18 June 2008, p. 2, available at: <http://www.u4.no/publications/the-role-of-supreme-audit-institutions-in-combating-corruption/downloadasset/400>.

³⁹⁷ Information supplied by Afghan Ministry of Finance, 18 January 2017.

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⁴⁰¹ Information supplied by Afghan Ministry of Finance, 18 January 2017.

⁴⁰² Information supplied by Afghan Ministry of Finance, 18 January 2017; Word Bank 2013, p. 21.

⁴⁰³ Word Bank 2013, pp. 4, 21, 73.

⁴⁰⁴ Word Bank 2013, pp. 4, 21, 73-74.

⁴⁰⁵ Information supplied by Afghan Ministry of Finance, 18 January 2017.

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⁴⁰⁹ Articles 2, 4 and 5 of the Supreme Audit Institution Law (Official Gazette No. 1101), 30 March 2013 (10/01/1392) (Audit Law).

⁴¹⁰ Articles 11(2) and 15(2) of Audit Law.

⁴¹¹ SAO Strategic Plan, p. 9; see also article 2 of the Audit Law.

⁴¹² Article 9(6) of the Audit Law.

⁴¹³ TI 2015, p. 107.

⁴¹⁴ TI 2015, p. 107.

⁴¹⁵ TI 2015, p. 101.

⁴¹⁶ TI 2015, pp. 106-107.

⁴¹⁷ Supreme Audit Office, SAO Strategic Plan 2013 – 2017, available at: <http://sao.gov.af/Content/files/Strategic%20Plan%20Final.pdf> (SAO Strategic Plan).

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- ⁴¹⁹ GHANI 2016.
- ⁴²⁰ GHANI 2016.
- ⁴²¹ See IWA November 2016, p. 14; ROSE 2015, p. 6.
- ⁴²² TURNER, Nicholas. AGINAM, Obijiofor, POPOVSKI, Vesselin, *Post-Conflict Countries and Foreign Investment*, United Nations University, Policy Brief, 8 November 2008, p. 6, available at: http://collections.unu.edu/eserv/UNU:3066/pb08_08.pdf; Afghanistan Investment Support Agency, *Summary of Challenges and Recommended Solution*, January 2016, pp. 4, 8, 9, 12, available at: <http://www.aisa.org.af/Content/Media/Documents/AICES2016-SummaryofChallengesRecommendations73201692210254553325325.pdf>.
- ⁴²³ GHANI 2016.
- ⁴²⁴ Indicator No. 23, Area 5, Annex of deliverables by 2016 of the SMAF.
- ⁴²⁵ The High Economic Council of Ministers is chaired by the President and includes, as members: the Ministry of Economy, the Ministry of Commerce and Industries, the Economic Advisor of President, three board members of the Afghan Chamber of Commerce and Industry, the Chief Executive Officer of the Afghanistan Investment Support Agency (AISA), the chancellors of three universities and representatives of the industrial sector. Information available at: <http://www.acci.org.af/home/38-news/305-n.html> (accessed on 6 January 2017).
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- ⁴²⁷ About *Asan Khedmat*, available at: <http://asan.gov.af/en/index.php> (accessed on 26 January 2017).
- ⁴²⁸ *Asan Khedmat* Planning Team, *The Concept of Asan Khedmat*, p. 4, (*The Concept of Asan Khedmat*).
- ⁴²⁹ *The Concept of Asan Khedmat*, p. 7.
- ⁴³⁰ *The Concept of Asan Khedmat*, p. 7.
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- ⁴³² *Asan Khedmat, 5 acres of Land Formally Handed-Over to Afghanistan Asan Khedmat*, 9 August 2016, available at: <http://asan.gov.af/en/view.php?view=NQ==> (accessed on 26 January 2017).
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⁴⁸⁶ See Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress*, 30 October 2016, pp. 104, 105, available at: <https://sigar.mil/pdf/quarterlyreports/2016-10-30qr.pdf>.

⁴⁸⁷ Global Witness 2016, pp. 27-28, 76.

⁴⁸⁸ Global Witness 2016, pp. 16-17.

⁴⁸⁹ UNODC 2001, p. 79.

⁴⁹⁰ See World Trade Organization, *Overview of Afghanistan's commitments*, available at: https://www.wto.org/english/news_e/news15_e/afgancommitmentsmc10_e.pdf ("Afghanistan's laws and regulations will provide individuals or enterprises affected by any administrative action subject to WTO provisions, the right to appeal such action to a higher authority or to the courts, or other independent tribunal in conformity with WTO obligations.", p.2); see also World Trade Organization, Accession Commitments Database, Afghanistan, para. 64, available at: <http://acdb.wto.org/tabs.aspx> (accessed on 27 January 2017) ("from the date of accession, Afghanistan's laws would provide for the right to appeal administrative rulings on matters subject to WTO provisions to the courts or other independent tribunal in conformity with WTO obligations.").

⁴⁹¹ HASHIMI and LAUTH 2016, p. 15.

⁴⁹² GHANI 2016.

⁴⁹³ On 5 March 2017, the President had reportedly signed a Legislative Decree, pursuant to his authority under article 79 of the Constitution, enacting the revised Penal Code. However, UNAMA Rule of Law confirmed with the Ministry of Justice that the President declined to endorse the decree, on the grounds that it did not meet the Article 79 standard of "immediate need." No public announcement of the decree was available at the time this report was released.

⁴⁹⁴ The crime of illicit enrichment occurs when there is a significant increase in the assets of public officials or immediate family members in proportion to their declared assets. If the official cannot provide a reasonable explanation for the divergence, the court will presume that the assets were

illicitly acquired, and the official subject to conviction for the crime of illicit enrichment. Article 41 of the Revised Penal Code.

⁴⁹⁵ See OECD 2016 (“The existence of criminal liability for libel, insult and other similar acts has a chilling effect on freedom of speech and activity of the mass media, which leads to self-censorship and hinders investigative journalism that can expose corruption.” P. 231).

⁴⁹⁶ Article 5.3.b of the ANPDF; EU Kabul Conference; Afghanistan’s Country Statement at London Summit 2016.

⁴⁹⁷ Presidential Decree on the Establishment of the ACJC (Decree No. 53), 30 June 2016 (10/04/1395).

⁴⁹⁸ High Council of the Supreme Court, Directive No. 385, 19 July 2016 (29/04/1395) (High Council of the Supreme Court Directive).

⁴⁹⁹ High Council of the Supreme Court Directive.

⁵⁰⁰ UNAMA minutes from the High Council on Rule of Law and Anti-Corruption meeting, Camp Falcon, Kabul, 2 October 2016.

⁵⁰¹ ACJC comments on draft report, 2 March 2017, and UNAMA Rule of Law Unit meeting with ACJC Chief Prosecutor, Chief Primary and Appellate Judges, and Executive Director. The convicted include a former Ministry of Interior major general; a senior prosecutor with the Attorney General’s Office holding the rank of general; and five Ministry of Finance Tax Department employees, including the former head of the Middle Income Tax Unit; and the chairperson of the Herat Provincial Council, . See ACJC comments on draft report, 2 March 2017.

⁵⁰² Article 78 of the Afghan Constitution; article 2 of the Law on the Structure and Authority of Special Courts (Official Gazette No. 1130), 12 April 2014 (23/02/1393) (Law on Special Courts).

⁵⁰³ Article 5 of the Law on Special Courts.

⁵⁰⁴ Article 11 of the Law on Special Courts.

⁵⁰⁵ Article 246 of the Criminal Procedure Code; article 7 of the Afghan Constitution; article 14(5) of the ICCPR.

⁵⁰⁶ UNODC 2004, p. 17.

⁵⁰⁷ UNODC 2004, p. 36.

⁵⁰⁸ UNODC 2004, p. 36.

⁵⁰⁹ UNODC 2004, p. 17.

⁵¹⁰ UNODC 2004, p. 17.

⁵¹¹ UNODC 2004, p. 36.

⁵¹² UNODC 2004, pp. 39-40.

⁵¹³ UNODC 2004, p. 47.

⁵¹⁴ UNODC 2009, p. 118.

⁵¹⁵ UNODC 2009, pp. 119-120.

⁵¹⁶ UNODC 2009, p. 120.

⁵¹⁷ Article 141 of the Penal Code. This existing practice does not, however, sufficiently encourage cooperation because the promised mitigation or deferred prosecution will not be known until the cooperating witness is sentenced.

⁵¹⁸ UNODC 2004, p. 65.

⁵¹⁹ UNODC 2004, p. 65.

⁵²⁰ Articles 53-55 of the Criminal Procedure Code.

⁵²¹ UNAMA, Human Rights Unit, Afghanistan Annual Report on Protection of Civilians in Armed Conflict: 2015, p. 45, available at: https://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf (UNAMA 2015 Protection of Civilians Report).

⁵²² UNAMA 2015 Protection of Civilians Report, p. 15.

⁵²³ UNAMA, Human Rights Unit, Afghanistan Midyear Report on Protection of Civilians in Armed Conflict: 2016, p. 61, available at: https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_midyear_report_2016_final_rev.1-9sept.pdf.

⁵²⁴ McLEOD, Grant, *Responding to Corruption and the Kabul Bank Collapse*, United States Institute of Peace, Special Report No. 398, December 2016, p. 7, available at: <http://www.usip.org/publications/2016/12/27/responding-corruption-and-the-kabul-bank-collapse> (McLEOD 2016).

⁵²⁵ As part of its recovery estimates, the Kabul Bank Receiver includes an additional USD111.7 million in reduced or waived interest incentives. These incentives were used as leverage to recover cash and other assets. President Ghani stated that Kabul Bank resulted in a loss of USD 850 million (apparently excluding interest and fines imposed by the Supreme Court's judgement) of which "more than a third" or USD 283 million has been recovered; GHANI 2016; McLEOD 2016, p. 7.

⁵²⁶ McLEOD 2016, p. 7.

⁵²⁷ Comparable provisions for asset recovery exist under the 2005 Counter-Narcotics Law, 2005 Law on Combating the Financing of Terrorism, and 2015 Counter Financing of Terrorism Law.

⁵²⁸ Article 37(1) and (3) of the Law on Money Laundering and Crime Proceeds (Official Gazette No. 1142), 23 July 2014 (01/05/1393), (Anti-Money Laundering Law).

⁵²⁹ Article 38(1) of the Anti-Money Laundering Law.

⁵³⁰ World Bank 2011, p. 284.

⁵³¹ SIGAR 2016.

⁵³² Article 37(2)-(3) of the Anti-Money Laundering Law. The freezing order can be extended to ten days by the prosecutor, to sixty additional days by the court after submission of a request by the prosecutor, and by an additional nineteen days after elapse of this period through a written request of FinTRACA.

⁵³³ See FinTRACA's statistics for 2016, available at: <http://www.fintraca.gov.af/Enforcement.html> (accessed on 20 January 2017); FinTRACA's comments on draft report, 26 February 2017.

⁵³⁴ See FinTRACA's Disseminations to law enforcement agencies and Attorney General's Office, available at: <http://www.fintraca.gov.af/Disseminations.html>; see also IWA, *Curbing Illicit Financial Flows in Afghanistan, Money Laundering, Terrorist Financing and Hawala*, 2015, p. 15, available at: <https://iwaweb.org/wp-content/uploads/2016/04/IFF-report-English-2-for-screen.pdf> (IWA 2015).

⁵³⁵ IWA 2015, p. 34.

⁵³⁶ SIGAR, *Afghanistan's banking sector: The Central Bank's capacity to regulate commercial banks remain weak*, January 2014, p. 4, available at: <https://www.sigar.mil/pdf/audits/SIGAR%2014-16-AR.pdf>.

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⁵³⁸ UN Security Council, Security Council resolution 1267 (1999) (Afghanistan), 15 October 1999, S/RES/1267 (1999), available at: <https://documents-dds-ny.un.org/doc/UN-DOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement> (UNSCR 1276) and UN Security Council, Security Council resolution 1988 (2011) (on establishment of a new Sanctions Committee focusing on the threat from those associated with the Taliban), 17 June 2011, S/RES/1988(2011), available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1988%20%282011%29 (UNSCR 1988). These resolutions are imposing a sanction regime targeting entities and individuals associated with the Taliban, Al-Qaida and/or Osama bin Laden. They are issued by the United Nations Security Council acting under Chapter VII of the United Nations Charter.

⁵³⁹ FinTRACA's comments on draft report, 26 February 2017.

⁵⁴⁰ IWA 2015; McLEOD 2016, pp. 12-13; FinTRACA's comments on draft report, 26 February 2017.

⁵⁴¹ IWA 2015; McLEOD 2016, pp. 12-13.

⁵⁴² FinTRACA's comments on draft report, 26 February 2017.

⁵⁴³ UNODC 2004, p. 50.

⁵⁴⁴ UNODC 2004, p. 57.

⁵⁴⁵ UNODC 2004, p. 57.

⁵⁴⁶ UNODC 2004, p. 57.

⁵⁴⁷ European Human Rights Commission, No. 12386/1986.

⁵⁴⁸ European Human Rights Commission, No. 12386/1986.

⁵⁴⁹ Attorney General Directive on ACJC Referrals, 2016.

⁵⁵⁰ See, e.g., art. 13 of Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy (HOOAC); articles 10-11, 16, 21 of Audit Law (Supreme Audit Office); articles 36-37 of Anti-Money Laundering Law (FinTRACA).

⁵⁵¹ Asia Foundation 2016, pp. 10, 103, 108.

⁵⁵² Asia Foundation 2016, pp. 10, 108. There is, of course, an inherent danger in relying exclusively on perception data to gauge a country's progress in fighting corruption as perceptions do not always reflect reality; nevertheless, the perceptions surveys provide useful insights particularly when corroborated by other sources. UNODC 2015, pp. 17-18.

Cover artwork by ArtLords, a grass roots art for social change movement - Around Kabul, defensive walls have been put up around high-profile buildings. The ArtLords have used these walls as canvases, painting a series of eyes, which are accompanied by the slogan 'I See You' – a warning to corrupt officials.

Photos: UNAMA/Fardin Waezi