Transnational Crime, Mutual Legal Assistance, and Compliance with International Obligations in the Developing World: Reforming and Enforcing Legal Mechanisms to Effectively Combat Transnational Crime in Afghanistan

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Abstract

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Technological developments have enabled very rapid advances in communication and transportation in recent decades, creating globalized commerce. The effect of these advances is not limited to legitimate commerce: criminal activity, especially by networks of organized crime, has also benefited. Traditional international law principles pose a major challenge when nation-states attempt to investigate, prosecute and punish criminal activity that extends beyond the borders of the state seeking enforcement.

The problem of transnational crime particularly impacts weaker and poorer states such as Afghanistan in two respects: the economy of such states is often particularly vulnerable, and at the same time such states often have weak administrative, prosecutorial and judicial capacity when they seek to address the problem. The UN and other international organizations have undertaken ever-increasing initiatives to organize a response to transnational crime, including multilateral UN

treaties with wide adoption. Afghanistan has undertaken to participate in and abide by a number of the efforts and treaties.

This dissertation briefly traces the background to, and effects of, transnational crime, and then details significant elements of the international response, focusing in particular on UN treaties to which Afghanistan is party. It then analyses the extent to which Afghanistan has complied with its assumed international mutual legal assistance obligations: this poses issues both of incorporation into domestic law and harmonization with other aspects of the Afghan legal system. After assessing these issues from a formal standpoint, it then summarizes the results of empirical research addressing the question of whether in fact these obligations are known and observed in Afghanistan. Finally, manifold shortcomings of the present situation are identified, and recommendations and proposals are set forth intended to improve the efficacy of Afghan legal enforcement in the area of mutual legal assistance, and to bring it into better compliance with both widely-adopted legal norms and Afghanistan's international law obligations.

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ACRONYMS

ACJC	Anti-Corruption Judicial Center
AGO	Attorney General Office
AML/CFT	Anti-Money Laundering and Counter-Terrorist Financing
APG	Asia/Pacific Group on Money Laundering
CPC	Afghan Criminal Procedure Code
ESW	Egmont Secure Web
FATF	The Financial Action Task Force
FDI	Foreign Direct Investment
Financing Convention	1999 UN International Convention for the Suppression of the Financing of Terrorism
FinTRACA	Financial Transactions and Reports Analysis Center of Afghanistan
FIUs	Financial Intelligence Units
GFI	Global Financial Integrity
ICCPR	International Covenant on Civil and Political Rights
IMF	International Monetary Fund
INTERPOL	International Criminal Police Organization
IWA	Integrity Watch Afghanistan
MEC	Independent Joint Anti-Corruption Monitoring and Evaluation Committee
MJ	Ministry of Justice
MLATs	Mutual Legal Assistance Treaties
MOFA	Ministry of Foreign Affairs

MOI	Ministry of Interior
MoUs	Memoranda of Understanding
NCB	National Center Bureau
OECD	Organization for Economic Co-operation and Development
Rome Statute	Rome Statute of the International Criminal Court
SC	Supreme Court
SIGAR	Special Inspector General for Afghanistan Reconstruction
UNAMA	United Nations Assistance Mission in Afghanistan
UNCAC	UN Convention against Corruption
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCPS	UN Convention on Psychotropic Substances of 1971
UNCTOC	UN Convention against Transnational Organized Crime
UNODC	United Nations Office on Drugs and Crime
UNSCND	UN Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol
USIP	United States Institute of Peace
Vienna Convention	UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

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CHAPTER ONE: INTRODUCTION

I. Overview

In September 2010, a complex and multi-dimensional transnational criminal case unfolded in Afghanistan. This case involved fraud, corruption, and money laundering. The affair became known as the Kabul Bank scandal. As the scandal came to light, the then-biggest private bank in the country (Kabul Bank), nearly collapsed. Hundreds of millions of dollars were stolen from the bank and laundered to foreign countries.[1] After depositors of the bank came to understand the crisis, they flooded to the bank to withdraw their savings.[2] In addition to the stolen money, over half a billion dollars was withdrawn by customers within a couple of days. This deepened the crisis and Afghanistan's tiny economy was about to crumble.[3] To control the crisis, the Afghan Central Bank had to intervene by injecting nearly a billion dollars into Kabul Bank, which it placed in receivership.[4]

It was later revealed that over the span of four years (from 2007-2011), over $873 million was transferred or laundered through fake companies or fake documents to 28 countries across the globe, including $410.1 million to the United Arab Emirates (UAE), $130.7 million to Latvia, and $117.9 million to China.[5] The Kabul Bank scandal hit Afghanistan's fragile economy very hard, undermined the functionality and legitimacy of Afghan government, and had very negative

[1] *See* Grant Mcleod, *Special Report: Responding to Corruption and the Kabul Bank Collapse*, U.S. INSTITUTE OF PEACE 2 (2016).

[2] *Id.*

[3] Jon Boone, *The Financial Scandal That Broke Afghanistan's Kabul Bank*, THE GUARDIAN (2011), https://www.theguardian.com/world/2011/jun/16/kabul-bank-afghanistan-financial-scandal.

[4] *See* Mcleod, *supra* note 1 at 2-3.

[5] *See id.* at 7.

impacts on the entire banking and financial system in the country.[6] Under mounting pressure from the public and from the international community, two Afghan administrations, under the leadership of President Hamid Karzai and President Ashraf Ghani, established special tribunals to investigate the case, hold the perpetrators accountable, and recover the stolen assets.[7] However, over the past decade the government of Afghanistan has been struggling to bring the perpetrators to justice and recover the stolen assets. A 2019 report indicates that the government of Afghanistan has only been able to recover 40% of the Kabul Bank's stolen assets to date.[8]

One of the principal challenges posed by the Kabul Bank case is that it is transnational in nature. Both the funds and many perpetrators are already in foreign jurisdictions. The government of Afghanistan, having full legal authority only within Afghan territory, cannot recover those foreign-located assets without receiving legal assistance from the relevant foreign jurisdictions. Nor can it necessarily reach perpetrators who have fled abroad or assemble all the evidence necessary to a successful prosecution. The Kabul Bank case is only one example of pervasive transnational crimes occurring in Afghanistan, but it illustrates the complexity of transnational crime and also demonstrates how the weakness and inefficiency of the legal system cost Afghanistan millions of dollars in just a single case.

In fact, a transnational crime epidemic has plagued Afghanistan over the last 18 years. Many of these crimes are not only prevalent but occur on a large-scale, including drug trafficking, corruption, terrorism, and money laundering. These crimes have seriously undermined Afghanistan's security, economy, stability, and rule of law—and continue to do so today.

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[6] *See id.* at 2.

[7] *See id.* at 3-4.

[8] *Afghanistan's Anti-Corruption Efforts: The Afghan Government Made Progress in Meeting its Anti-Corruption Strategy Benchmarks, but Serious Challenges Remain to Fighting Corruption,* SIGAR 22 (2019), https://www.sigar.mil/pdf/audits/SIGAR-20-06-AR.pdf.

Afghanistan has failed to successfully address this problem despite 18 years of efforts at law reform.

The main challenge to any state's[9] effort at combating transnational crimes is that it involves activities in a number of different countries, like the Kabul Bank case. As a result, a single state will struggle to suppress these crimes if it cannot effectively receive legal assistance from other countries. Further, under traditional international law, states cannot enforce their criminal jurisdiction beyond their national boundaries. This limitation makes it very difficult for domestic law enforcement agencies and courts to access the relevant evidence or the suspects related to alleged crimes in order to effectively investigate and prosecute them.

These barriers--combined with a rise in transnational crime globally--have led states to seek new solutions, by coordinating legal assistance among themselves. For example, states have developed and implemented various multilateral conventions and bilateral treaties that require members to provide mutual legal assistance to each other, including the United Nations (UN) Convention against Transnational Organized Crime (UNCTOC) and the UN Convention against Corruption (UNCAC). By coordinating actions among individual states' domestic legal systems, these mutual legal assistance mechanisms intend to create an avenue through which states can exchange cross-border evidence and information to fight transnational crime.

The goal of this dissertation is to situate Afghanistan's obligations and efforts in the field of mutual legal assistance within the broader context of the rampant growth of transnational crime. It will reveal shortcomings and inefficiencies of its current formal mutual legal assistance mechanisms, and also assess the extent to which Afghanistan's current international legal obligations, as well as its domestic mutual legal assistance mechanisms, have been implemented

[9] "State", "nation" and "country" are used interchangeably in this dissertation.

in the country. To achieve this goal, the central theme of this dissertation is divided into two major components: a 'formal' component, and an 'empirical' component.

For the formal component, this dissertation examines Afghanistan's international law obligations with respect to mutual legal assistance. These obligations arise from the international conventions to which Afghanistan has become a party. This dissertation examines many UN conventions, regional conventions, and inter-governmental organizations' frameworks and assesses their impact on the Afghan domestic mutual legal assistance mechanisms. In order to analyze and identify Afghanistan's obligation under international law, the dissertation focuses primarily on four UN conventions: the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention); the 1999 UN International Convention for the Suppression of the Financing of Terrorism (Financing Convention); UNCTOC (2003); and UNCAC (2005). These conventions are globally influential—widely ratified by almost all states across the globe, including Afghanistan—and they embody many mandatory and non-mandatory mutual legal assistance requirements for member states. Collectively, these four conventions are referred to here as the UN Suppression Conventions.[10]

This dissertation identifies 17 mutual legal assistance obligations and eight non-mandatory measures for Afghanistan under the four UN Suppression Conventions. The dissertation then assesses the extent of Afghanistan's statutory compliance with these obligations and non-mandatory measures. In order to do so, it identifies and analyzes the relevant provisions of Afghanistan's current domestic law and compares and contrasts those provisions with the

[10] Although there are two other Suppression Conventions: the UN Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol (UNSCND), and the UN Convention on Psychotropic Substances of 1971 (UNCPS), the primary focus of this dissertation will be the four conventions above. The idea of using the term "UN Suppression Conventions" is drawn from Neil Boister's book: AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW (2ND EDITION, 2018).

requirements of the UN conventions. This analysis reveals that, out of the 17 obligations, Afghanistan has fully complied with only seven obligations (41.2%), partially complied with 3 obligations (17.6%), and it has complied with seven obligations (41.2%) at all. The dissertation also reveals that, out of the 8 non-mandatory measures, Afghanistan has fully incorporated only two measures (25%), partially incorporated two measures (25%), and has completely failed to incorporate 4 measures (50%).

In assessing the formal component, this dissertation further explores and reveals many contradictions, inconsistencies, and shortcomings that exist in the current mutual legal assistance mechanisms in Afghanistan. These include serious problems and inconsistencies with respect to the use of legal terminology; lack of coordination between international treaties and domestic law; setting unrealistic and inconsistent time frames and deadlines for taking or completing actions; and designation of competent authorities. In some laws, mutual legal assistance has been conflated with extradition, intermingling inapposite provisions. Consistently, Afghanistan's putatively implementing domestic legislation lacks clear reference to the international obligations being addressed.

The empirical component of this dissertation reveals a substantial and disturbing gap between law on paper and law in action. The dissertation highlights the extent of Afghan officials' ignorance about current mutual legal assistance mechanisms. When officials do engage in mutual legal assistance and respond to requests, this is done as a matter of inconsistent practice, and often without reference to, or even awareness of the relevant laws and mechanisms which are to be implemented. The dissertation also reveals a lack of capacity and resources in all relevant Afghan institutions. This severely affects implementation of the laws and thus impedes meaningful utilization of mutual legal assistance mechanisms to combat transnational crime.

Drawing on this analysis of the formal and informal components of mutual legal assistance, this dissertation provides detailed recommendations on how Afghanistan can fully incorporate its obligations and non-mandatory measures under the UN conventions; resolve the contradictions and inconsistencies within the current domestic mechanisms; concentrate and enhance implementation; and take a clear and consistent approach to implementing its international law obligations. Most importantly, after an extensive analysis of the relevant laws and procedures and the role of several agencies in Afghan criminal processes, this dissertation concludes that the Attorney General's Office would be the most appropriate agency to take on the role of central authority[11] in Afghanistan.

The remainder of this chapter is devoted to literature review; the need for this research and the contribution this dissertation makes to academia, including practical recommendations; and the research objectives, research questions, research methodology, and outline of the dissertation.

II. Literature review

The literature on this subject can be broken down into four categories. The first concerns the growth of transnational crime globally. This is a vast and multidisciplinary body of literature. The second concerns the existence and impact of transnational crime in Afghanistan. This body of literature is limited and mostly produced by international organizations and practitioners. The third addresses legal efforts to combat transnational crime on the global level, such as traditional state jurisdiction norms and modern attempts like developing mutual legal assistance. This is not vast but is a rapidly growing body of literature. The final covers Afghan-specific efforts at combating

[11] The Suppression Conventions call for designation of an institution as a central authority to coordinate and facilitate effective execution of mutual legal assistance requests.

transnational crimes, such as Afghanistan's current mutual legal assistance mechanisms. Here the literature is almost non-existent.

This dissertation's focus on Afghanistan represents a first step to filling the void that is the fourth field/area and utilizes several examples from the second category. Although it may also shed some light on the first and third fields of literature, that is not its focus. This section presents a overview of the literature, but specific references to the work of many of the following scholars will come later in the main body of the literature review and throughout this dissertation.

Over the last three decades, the transnational crime phenomenon has triggered substantial debate and discussion among scholars, inspiring a vast body of literature, spread over various disciplines. Scholars have studied transnational crime from many different perspectives and through the lenses of their particular disciplines, publishing an impressive array of books and scholarly articles. For instance, scholars like Shelley, Findlay, Albanese, and Aas have studied the phenomenon from a criminological point of view. Shelley--who has been researching transnational crime over the last three decades--explains the nature of transnational crime and examines how crime, corruption, and terrorism are interconnected and transcend borders globally.[12] Findlay, Albanese, and Aas extensively study the relationship between transnational crime and globalization and the ways globalization has transformed transnational crime and provided new spaces for criminal actors.[13] From a sociological perspective, Letschert, Dijk, and Reichel explore the ways transnational crime socially impacts a society. For instance, Letschert and Dijk's

[12] *See e.g.* Louse I. Shelley, *Transnational Organized Crime: An Imminent Threat to the Nation-State?* 48 JOURNAL OF INTERNATIONAL AFFAIRS 2, 463-489 (1995); LOUISE I. SHELLEY, DIRTY ENTANGLEMENTS: CORRUPTION, CRIME, AND TERRORISM (2014).

[13] *See e.g.* MARK FINDLAY, THE GLOBALIZATION OF CRIME (2004); JAY S. ALBANESE, TRANSNATIONAL CRIME AND THE 21ST CENTURY (2011); KATJA FRANKO AAS, GLOBALIZATION & CRIME (2ND EDITION, 2013).

research focuses on trans-border victimhood and how transnational crime victimizes ordinary people in numerous ways.[14]

Zabyelina, Williams, Thachuk, and Forest have studied the problem through the lens of security, and from the perspective of international relations. For instance, Zabyelina explains the role of transnational criminal networks in eroding state power and how mainstream international relations theories do not adequately address the problem.[15] Williams identifies transnational crime as a national and international security threat and warns against the inadequacy of global and regional responses to the problem.[16] Similarly, Thachuk, Forest, and Picarelli explore the intersections between various transnational crimes like terrorism and drug trafficking and how they threaten human security.[17] Naim, and Shelley study transnational crime from an economic perspective. They reveal the devastating impacts of transnational crime and illicit commerce and how the dark commerce distorts the global economy and threatens our future.[18] Finally, Boister, Bantekas, Nash, and Currie explore transnational crime from the standpoint of international and transnational criminal law. The authors identify and explain various types of transnational crimes

[14] *See e.g.* RIANNE LETSCHERT ET AL., THE NEW FACES OF VICTIMHOOD: GLOBALIZATION, TRANSNATIONAL CRIMES AND VICTIM RIGHTS (2012).

[15] *See* Yuliya Zabyelina, *Transnational Organized in International Relations*, 1 CEJISS 1, 11-22 (2007).

[16] *See e.g.* Phil Williams, *Transnational Criminal Organizations and International Security,* 36 SURVIVAL 1, 96-113 (1994); PHIL WILLIAMS & DIMITRI VLASSIS, COMBATING TRANSNATIONAL CRIME: CONCEPTS, ACTIVITIES AND RESPONSES 321-355 (2001).

[17] *See e.g.* KIMBERLEY L. THACHUK, TRANSNATIONAL THREATS: SMUGGLING AND TRAFFICKING IN ARMS, DRUGS, AND HUMAN LIFE (2007), JAMES J. F. FOREST, INTERSECTIONS OF CRIME AND TERROR (2013); John T. Picarelli, *The Turbulent Nexus Of Transnational Organised Crime And Terrorism: A Theory of Malevolent International Relations*, 7 GLOBAL CRIME 1, 1-24 (2006).

[18] *See e.g.* MOISES NAIM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY (2006); LOUISE I. SHELLEY, DARK COMMERCE: HOW A NEW ILLICIT ECONOMY IS THREATENING OUR FUTURE (2018).

(such as piracy, human trafficking, drug trafficking, terrorism, corruption, money laundering, etc.) that are criminalized under the UN Suppression Conventions.[19]

There has been a growing body of literature in the field of international law and international relations focusing on legal responses to transnational crime. In international law, scholars have extensively explored the traditional concept of state criminal jurisdiction over transnational crime and how states have recently responded to its limitations through enhanced legal cooperation and new concepts of mutual legal assistance. Scholars including Brownlie, Shaw, Janis, and Lowe delve into the customary notion of state jurisdiction under international law, assess states' attempts to extend criminal jurisdiction, and try to determine where the current law stands.[20] Other scholars like McClean, Boister, Sornarajah, Swire, Hemmings, and Richardson focus on modern responses—such as mutual legal assistance—undertaken by states over recent years, describing how the new measures work.[21]

In the field of international relations, Slaughter has studied the ways states respond to global problems like transnational crime. In her research, she captures a wide variety of government networks that operate horizontally and vertically to cope with transnational crime and other global

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[19] *See e.g.* NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 3-239 (2ND EDITION, 2018); ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW (3RD EDITION, 2007); NEIL BOISTER & ROBERT J. CURRIE, ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 122 (2015).

[20] *See e.g.* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289-379 (7TH EDITION, 2008); MALCOLM N. SHAW, INTERNATIONAL LAW 645-776 (6TH EDITION, 2008); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 318-360 (2003); VAUGHAN LOWE, INTERNATIONAL LAW 184 (2007).

[21] *See e.g.* DAVID MCCLEAN, INTERNATIONAL CO-OPERATION IN CIVIL AND CRIMINAL MATTERS (3RD EDITION, 2012); NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 280-331 (2ND EDITION, 2018); M Sornarajah, *Globalization and Crime: The Challenges to Jurisdictional Principles*, 1999 SING. J. LEGAL STUD. 409-431 (1999); Peter Swire & Justin D. Hemmings, *Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program*, 71 N.Y.U. ANN. SURV. AM. L. 687-739(2016); L. Song Richardson, *Due Process for the Global Crime Age: A Proposal*, 41 CORNELL INT'L L. J. 2, 347-382 (2008).

issues.[22] Similarly, Jakobi explores the global responses to transnational crime and identifies the efforts as "global crime governance in the world society."[23]

In addition to scholarly literature, there is an extensive practitioner-oriented body of literature on transnational crime and governments' responses that are produced by many international organizations. These organizations have been very influential in identifying various transnational crimes and their destructive impacts, producing international standards, and shaping governments' policies. These organizations include the United Nations Office on Drugs and Crime (UNODC), Organization for Economic Co-operation and Development (OECD), The Financial Action Task Force (FATF), the World Bank, Global Financial Integrity (GFI), and the Global Initiative against Transnational Organized Crime. This dissertation specifically refers to their work and reports in the relevant sections.

A. Literature on Transnational Crime

1. Literature on Globalization of Crime

As Bantekas & Nash assert, contrary to the old understanding, it is more evident today than ever that no crimes are strictly local.[24] Many crimes increasingly cross borders and affect more than one country. Recent changes such as globalization and technological advancements have contributed to the emergence and development of transnational crime concept over the last four decades.[25] According to Albanese, a crime that violates the laws of more than one country in its

[22] *See e.g.* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1-62 (2005).

[23] *See* ANJA P. JAKOBI, COMMON GOODS & EVILS? THE FORMATION OF GLOBAL CRIME GOVERNANCE (2013).

[24] *See* ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 71 (3RD EDITION, 2007).

[25] *See* PHIL WILLIAMS & DIMITRI VLASSIS, COMBATTING TRANSNATIONAL CRIME: CONCEPTS, ACTIVITIES AND RESPONSES 13 (2001).

"planning, execution, or impact" is defined as a "transnational crime."[26] Although, some scholars like Natarajan assert that "transnational crime" is not a new offense and has a long history in the world,[27] in fact the term was first used in 1975.[28]

Despite its historical roots, recent developments in globalization have fundamentally transformed transnational crime and the ways it is carried out across the globe.[29] In fact some observers, like Shelley, believe that the rise of globalization has significantly changed the dynamics, gravity, and reach of transnational crime.[30] Other authors like Boister, Levitsky, Kelly, Levy, Godson, and Williams add that the rapid rise of transnational crime is the "dark side of globalization."[31] Findlay observes that globalization has developed "new and favourable contexts for crime"[32] and criminal groups. These changes may have many implications for our understanding of the concepts of crime and criminal justice.[33] Globalization has elevated the

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[26] Jay S. Albanese, *Transnational Crime*, OXFORD BIBLIOGRAPHIES, http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0024.xml (last viewed Oct. 26, 2017).

[27] *See e.g.* MANGAI NATARAJAN, INTERNATIONAL CRIME AND JUSTICE 3 (2011); Peng Wang & Jingyi Wang, *Transnational Crime: Its Containment through Cooperation,* 5 ASIAN SOC. SCI. 25, 25 (2009).

[28] *See* WILLIAMS & VLASSIS, *supra* note 25 at 13; NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 3-4 (2ND EDITION, 2018).

[29] *See e.g.* CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 Berkeley J. Int'l L. 53, 53-54 (2000); DAVID A. JENKS & JOHN RANDOLPH FULLER, GLOBAL CRIME AND JUSTICE 10 (2017); Louse I. Shelley, *Transnational Organized Crime: An Imminent Threat to the Nation-State?* 48 JOURNAL OF INTERNATIONAL AFFAIRS 2, 465-467 (1995).

[30] *See e.g. The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, UNODC 25 (2010); PHIL WILLIAMS & DIMITRI VLASSIS, COMBATING TRANSNATIONAL CRIME: CONCEPTS, ACTIVITIES AND RESPONSES 22 (2001); Robert J. Kelly & Sharona A. Levy, *The Endangered Empire: American Responses to Transnational Organized Crime*, 21 J. SOC. DISTRESS HOMELESS 44, 48 (2012); MANGAI NATARAJAN, INTERNATIONAL CRIME AND JUSTICE 3 (2011).

[31] *See* e.g. Melvyn Levitsky, *The Dark Side of Globalization*, 5 INTERNATIONAL STUDIES REVIEW 253-254 (2003), Robert J. Kelly & Sharona A. Levy, *The Endangered Empire: American Responses to Transnational Organized Crime*, 21 J. SOC. DISTRESS HOMELESS 44, 48 (2012), NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 6 (2012); Roy Godson & Phil Williams, *Strengthening Cooperation against Transnational Crime*, 40 SURVIVAL 66, 66 (1998).

[32] MARK FINDLAY, THE GLOBALIZATION OF CRIME 1 (2004).

[33] *See e.g.* MARK FINDLAY, THE GLOBALIZATION OF CRIME 1 (2004); RIANNE LETSCHERT & JAN VAN DIJK, THE NEW FACES OF VICTIMHOOD: GLOBALIZATION, TRANSNATIONAL CRIMES AND VICTIM RIGHTS 4 (2012).

"speed" and increased the depth and breadth of transnational crime and diversified its criminal actors.[34]

Shelley identifies transnational criminals as "the major beneficiaries of globalization",[35] enjoying the freedom and opportunity afforded by deregulation of international trade. Efforts to promote globalization and globalized trade have also made it easier for transnational criminal organizations to cross borders; carry out criminal activities; engage with their co-conspirators; extend their criminal reach; and transmit their criminal proceeds from one country to another.[36] For instance, money launderers can exploit the global financial system and transfer their dirty money to different countries within a short period of time.[37] In short, globalization has enabled localized criminals to bring their activities onto regional and global stages.

The literature indicates that the negative impacts of transnational crime go far beyond the source country. According to the UNODC reports, a transnational crime may originate in one corner of the world, but its implications can reach the other end of the world.[38] Due to this disconnected nature, a transnational crime like drug trafficking may appear victimless from one vantage point, while there may be dire consequences from another: in other words, the affected person or country may be located far away from the place where the crime occurs.[39] Although transnational crime is a global problem that challenges every nation in the world, including

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[34] Louse I. Shelley, *The Globalization of Crime* in MANGAI NATARAJAN, INTERNATIONAL CRIME AND JUSTICE 3 (2011).

[35] *Id.*

[36] *See id.* at 3-4.

[37] *See id.* at 5.

[38] *See The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, UNODC 35 (2010), https://www.unodc.org/res/cld/bibliography/the-globalization-of-crime-a-transnational-organized-crime-threat-assessment_html/TOCTA_Report_2010_low_res.pdf [hereinafter THE TOCTA REPORT] (please look at the cover of the report).

[39] *See id.*

developed and developing countries, it specifically poses a greater threat to developing countries and fragile states[40] for two reasons. First as some authors like Mutume assert, transnational criminals tend to establish their bases in places where the rule of law is absent and law enforcement agencies are weak.[41] Second, the accumulation of many transnational criminal groups—together with the malfunctioning of law enforcement institutions—can give criminal groups more power and immunity, perpetuate the occurrence of crimes, and turn a country into a state that is dominated or controlled by criminal elements.

2. Literature on Transnational Crime in Afghanistan

Although efforts by the international community have generated some progress in Afghanistan, they have generally failed to achieve the ultimate goal of creating a peaceful and prosperous country with a fully functioning and stable government. While there are many factors contributing to the partial failure of efforts to achieve peace, economic growth, and development, transnational crime is likely among the most destructive to security, economy, and governance.

With respect to security, in 2011 the U.S. Obama administration developed a strategy on transnational crime and identified it not only as one of the main threats to the national security of nation-states, but also as a major threat to international peace and security.[42] The Obama administration specifically confirmed that transnational crime played a major role in destabilizing Afghanistan and creating insecurity and conflict in the country.[43] Taken together, terrorism, drug

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[40] *See* Paula Miraglia et al., *Transnational Organized Crime and Fragile States*, OECD 4 (2012), https://www.oecd-ilibrary.org/docserver/5k49dfg88s40-en.pdf?expires=1536035012&id=id&accname=guest&checksum=3B353A36186C35A53D1BE233B626DCFD.

[41] *See e.g.* Gumisai Mutume, *Organized Crime Targets Weak African States*, AFRICARENEWAL (2007), https://www.un.org/africarenewal/magazine/july-2007/organized-crime-targets-weak-african-states.

[42] *See Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security*, THE WHITE House 5 (2011), https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime.

[43] *See id.* at 9.

trafficking, and corruption pose a particularly dangerous threat. Nowadays, Afghans are the target of terrorist attacks almost every day. In fact, terrorist groups have increasingly targeted civilians and specific ethnic groups like *Hazaras*.[44] In addition, a UNODC report indicates that "all actors involved in destabilizing Afghanistan are directly or indirectly linked to the drug economy."[45] Similarly, a report by The Guardian claims that "there is an intimate connection between opiate production and the ability of the Taliban and warlords to engage in long-term conflict."[46] Likewise, Shelley asserts that drug trafficking "ensures sustained funding for criminals, terrorists, insurgents, and corrupt officials."[47]

Similar to security, transnational crime harms Afghanistan's economy in many different ways. Buddenberg, Byrd, and others argue that transnational crime has created and continues to create a huge illicit and informal economy[48] while inflicting a massive economic cost on the government and society to fight back.[49] It undermines national and international investment,[50]

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[44] *See e.g.* Andrew E. Kramer, *Hazaras Protest After an ISIS Attack Kills 10 in Kabul*, THE NEW YORK TIMES (2018), https://www.nytimes.com/2018/03/09/world/asia/suicide-attack-kabul-hazaras.html; Pamela Constable, *Bombing of Student Center in Kabul Highlights Threat to Minority Shiite Youth*, THE WASHINGTON POST (2018), https://www.washingtonpost.com/world/asia_pacific/islamic-state-claims-suicide-bombing-that-killed-scores-of-students-in-kabul/2018/08/16/8762d2c2-a145-11e8-93e3-24d1703d2a7a_story.html?noredirect=on&utm_term=.edf3c49123c6.

[45] *See Addiction, Crime and Insurgency: The Transnational Threat of Afghan Opium*, UNODC 101 (2009) (hereinafter THE UNODC REPORT ON AFGHAN OPIUM 2009).

[46] Nik Crofts, *Drugs and Development-Caught in a Vicious Cycle*, THE GUARDIAN (2011), https://www.theguardian.com/global-development/poverty-matters/2011/apr/07/drugs-development-caught-vicious-cycle-policy.

[47] LOUISE I. SHELLEY, DIRTY ENTANGLEMENTS: CORRUPTION, CRIME, AND TERRORISM 244 (2014).

[48] Boris Buddenberg & William A. Byrd, *Afghanistan's Drug Industry: Structure, Functioning, Dynamics, and Implication for Counter-Narcotics Policy*, UNODC & THE WORLD BANK 157 (2006).

[49] *See e.g.* Buddenberg & Byrd*, supra* note *48* at 35.

[50] *See e.g.* Masood Saifullah, *Six Ways Corruption Undermines Afghanistan*, DW (2014), https://www.dw.com/en/six-ways-corruption-undermines-afghanistan/a-17593510 (hereinafter DW'S REPORT); *The Economic Impact of Terrorism on Developing Countries*, FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://www.stlouisfed.org/on-the-economy/2018/january/economic-impact-terrorism-developing-countries (hereinafter FRBSL'S REPORT).

distorts transparency and competitiveness among businesses and disrupts market efficiency.[51] This further causes significant revenue losses for the government of Afghanistan.[52]

In addition, transnational crime undermines public institutions and governance in Afghanistan. The "credibility, legitimacy, and accountability" of democratic institutions are threatened,[53] Studies show that corruption has had drastic effects on Afghan public institutions in many sectors including justice, education, infrastructure, investment, and security.[54] For instance, a UNODC report finds that widespread corruption has paralyzed Afghanistan's public institutions, eroded their decision making and decision implementation processes, and severely damaged public trust.[55]

B. Literature on Traditional State Jurisdiction Norms and Modern Responses to Transnational Crime

Below, this dissertation briefly reviews the literature on two topics. First, it reviews the literature on state criminal jurisdiction under international law to reveal the current status of law, as well as its loopholes. As part of this topic, it reviews the ways states have attempted to extend their criminal jurisdiction extraterritorially, particularly through mutual legal assistance. Second,

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[51] *See e.g.* Christine Jorjarth, *Money Laundering: Motives, Methods, Impact, and Countermeasures* in TRANSNATIONAL ORGANIZED CRIME: ANALYSES OF A GLOBAL CHALLENGE TO DEMOCRACY EDITED BY HEINRICH-BÖLL STIFTUNG & REGINE SCHÖNENBERG 21 (2013).

[52] *See generally* Louise Shelley, *Terrorism and International Crime: Corruption as Enabler*, TRANSPARENCY INTERNATIONAL 6 (2018).

[53] *See Corruption & Anti-Corruption Issues in Afghanistan*, CFC 6 (2012), https://reliefweb.int/sites/reliefweb.int/files/resources/CFC-Afghanistan-Corruption-Volume-Feb2012.pdf (hereinafter THE CFC REPORT).

[54] *See e.g.* THE CFC REPORT, *supra* note 53 at 9-41; *Corruption in Afghanistan: Recent Patterns and Integrity Challenges in the Public Sector*, UNODC 29-39 (2013) (hereinafter THE UNODC REPORT ON CORRUPTION 2013).

[55] *See generally Corruption in Afghanistan: Recent Patterns and Trends*, UNODC 3 (2012) (hereinafter THE UNODC REPORT ON CORRUPTION 2012).

the dissertation explores literature discussing the current status of the Afghan legal structure with respect to mutual legal assistance.

1. Literature on State Criminal Jurisdiction and Its Enforcement Means

State jurisdiction is a complex issue under international law. To understand the core concepts and rules governing state criminal jurisdiction and reveal their traditional limits, this dissertation discusses the literature in the two following sections: jurisdiction under traditional international law, and enforcing jurisdiction through modern means, principally mutual legal assistance.

a. State Criminal Jurisdiction under Traditional International law and Its limits

According to Shaw, an influential scholar, under international law, jurisdiction represents the power of states to enact and execute their domestic laws.[56] Shaw identifies state jurisdiction as an inseparable characteristic of sovereignty[57] which is exercised in three forms: legislative/prescriptive, adjudicative, and executive/enforcement.[58] According to Brownlie, a prominent international law scholar, each of the three forms of jurisdiction can be divided into civil and criminal jurisdiction.[59] While all the three forms of jurisdiction are considered to be predominantly territorial,[60] many scholars including Shaw, Bantekas, and Nash indicate that prescriptive and adjudicative jurisdiction may be established extra-territorially based on other factors such as nationality.[61] However, the same scholars argue that executive/enforcement jurisdiction remains extremely territorial and cannot be extended beyond a state's borders.[62]

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[56] MALCOLM N. SHAW, INTERNATIONAL LAW 645 (6TH EDITION, 2008).

[57] *See id.* at 645.

[58] *See id.*

[59] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300 (7TH EDITION, 2008).

[60] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 456 (8TH EDITION, 2012).

[61] *See e.g.* BANTEKAS & NASH, *supra* note 24 at 71; SHAW, *supra* note 56 at 646.

[62] *See e.g.* BANTEKAS & NASH, *supra* note 24 at 71; SHAW, *supra* note 56 at 646.

Under customary international law, generally a state can establish and exercise its prescriptive, adjudicative or enforcement jurisdiction[63] based on five principles: territorial jurisdiction, nationality/active personality or personal jurisdiction, passive personality jurisdiction, protective jurisdiction, and universal jurisdiction.[64] The territorial principle is derived from state sovereignty and recognizes the physical location of the crime as a primary basis for asserting criminal jurisdiction.[65] On the other hand, nationality is the basis for the principle which permits a state to establish its criminal jurisdiction over crimes committed by its nationals whether abroad or within its borders.[66] Similarly, nationality is also important in the passive personality principle which authorizes a state to assert its jurisdiction over foreign individuals who commit crimes against its nationals in a foreign country.[67] In contrast, the protective or security principle is based on protection of national security, and allows a state to exercise criminal jurisdiction over crimes committed by foreign individuals abroad that undermine such essential interests of the state as security or sovereignty.[68] Finally, the universality principle extends criminal jurisdiction to all states over certain crimes such as piracy and war crimes.[69] Unlike the four principles above, establishing a connection between the prosecuting state and the crimes/criminals is not necessary under the universality principle.[70] Any state can exercise its universal jurisdiction regardless of the place, nationality, or impact of the crimes.[71]

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[63] SHAW, *supra* note 56 at 652.

[64] *See id.* at 652-672.

[65] BROWNLIE, *supra* note 59 at 301.

[66] NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 3-4 (2ND EDITION, 2018)

[67] SHAW, *supra* note 56 at 664.

[68] *See* BROWNLIE, *supra* note 59 at 304; BOISTER, *supra* note 66 at 262.

[69] SHAW, *supra* note 56 at 668.

[70] *See* BANTEKAS & NASH, *supra* note 24 at 85.

[71] *See id.*

Boister, who has written extensively on transnational criminal law, indicates that although customary international law recognizes and provides guidance on state jurisdiction,[72] states often legislate and exercise criminal jurisdiction through their domestic law.[73] Afghanistan has adopted all five of these international principles of criminal jurisdiction by including them in its Penal Code.[74]

Globalization of crime and the rise of transnational crimes have undermined the utility of customary international norms on state jurisdiction in two ways. First, according to Sornarajah, globalization and the complicated nature of transnational crime have challenged the efficacy of traditional jurisdiction norms.[75] Boister similarly argues that since transnational crimes are committed in a very sophisticated way, it is increasingly difficult to apply the jurisdiction norms over the crimes that traverse boundaries, challenging states' ability to determine the place, the suspect, and the victim of the crimes. [76]

The territorial root of state jurisdiction is another serious challenge. Falk, a prominent international law scholar, expressed his concern about territoriality more than half a century ago and observed, "a rigid territorial allocation of jurisdictional competence creates an impunity umbrella for those who act from abroad to achieve their illegal domestic objectives."[77] Boister concurs with this argument and indicates that the assertation is particularly true in the current

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[72] *See* BOISTER, *supra* note 66 at 246.

[73] *See id.* at 245-246.

[74] *See Code Jaza* [Penal Code], Official Gazette, at art.16, 20, 23, 24 & 26, May 2017, No. 1260 (Afg.).

[75] *See* M Sornarajah, *Globalization and Crime: The Challenges to Jurisdictional Principles*, 1999 SING. J. LEGAL STUD. 409, 409-420 (1999).

[76] *See* BOISTER, *supra* note 66 at 247.

[77] Richard A. Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMPLE LAW QUARTERLY, 295, 303 (1959), cited in BOISTER, *supra* note 66 at 245.

situation of the world.[78] Similar to Falk, Sornarajah calls the "immunity umbrella" an "uncontrolled"[79] space which is used by criminals to evade accountability. The need to address the loophole has compelled states to seek other ways to combat transnational criminal activities.

b. Enforcing Criminal Jurisdiction Through Modern Means: Mutual Legal Assistance

Due to the territorial nature of enforcement jurisdiction and the practical challenges noted above, states have tried to establish and enforce their criminal jurisdiction through mutual legal assistance. Mutual legal assistance combats transnational crime by creating mechanisms through which states co-ordinate their domestic legal systems to exchange evidence and information based on mutual consent. Mutual legal assistance is divided into informal (law enforcement cooperation) and formal mechanisms. As Boister observes, many recent UN Suppression Conventions encourage law enforcement cooperation or informal methods among state parties.[80] He explains that states initially resort to law enforcement cooperation which primarily occurs through police-to-police contact, with increasing involvement of other law enforcement agencies such as tax authorities, security agencies, and so forth.[81] Boister further notes that, generally, law enforcement cooperation takes place in a less formal setting.[82]

With respect to formal mutual legal assistance, Boister indicates that currently two means are commonly used by states to request formal legal assistance from other states: letters rogatory (a long-standing, discretionary diplomatic process) and, more recently, mutual legal assistance

[78] *See* BOISTER, *supra* note 66 at 245.

[79] Sornarajah, *supra* note 75 at 409.

[80] *See* BOISTER, *supra* note 66 at 283.

[81] *See id.*

[82] *See id.*

treaties (MLATs).[83] Richardson notes that in recent years the use of MLATs is growing rapidly. This is because unlike discretionary letters rogatory (which proceed through formal diplomatic channels) MLATs create binding legal obligations on signatory states.[84] Richardson asserts that MLATs are usually bi-lateral treaties which ease legal cooperation and evidence collection between foreign jurisdictions, usually placing action in the hands of law enforcement professionals, rather than diplomats.[85] According to Boister, because states do not have an obligation under customary international law to provide legal assistance,[86] mutual legal assistance has been incorporated into many UN and regional conventions to promote legal assistance based on mutual consent.[87] Although conventions impose a set of detailed obligations on state parties, the ultimate application of duties can still largely depend on more detailed specific mutual agreements between states and whether they develop and implement clear enforcement mechanisms in their respective domestic laws to comply with their obligations and facilitate mutual legal assistance requests.

The ever-increasing cooperation between states to cope with global problems like transnational crime has not gone unnoticed by international relations scholars. For instance, Slaughter, a professor of politics and international affairs, has developed "government networks" theory based on the growing interaction and cooperation of states to address global threats. She believes that global problems that cross borders and threaten more than one government/nation increase the

[83] *See id.* at 312-313.

[84] *See* generally L. Song Richardson, *Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem*, 26 Berkeley J. Int'l Law. 62, 84 (2008).

[85] Richardson, *supra* note 84 at 84.

[86] *See e.g.* BOISTER, *supra* note 66 at 311; NEIL BOISTER & ROBERT J. CURRIE, ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 122 (2015).

[87] *See* BOISTER, *supra* note 66 at 311.

need for global action and urges governments to cooperate with each other and exchange information to address the shared threats.[88] She also observes that global challenges and government networks are essential attributes of the world order in the twenty-first century.[89] Among other things, Slaughter maintains that government networks have to address a wide variety of security and criminal issues such as terrorism, money laundering, drug trafficking, and trafficking in persons.[90] Slaughter explains her theory around the three units of government—regulators, judges, and legislators—and she asserts that a wide range of networks exist and operate among the respective three branches of governments in different jurisdictions and also among and between their sub-institutions.[91] She further identifies sharing information and enforcing existing national laws and rules as major activities of transnational government networks .[92]

C. Literature on Mutual Legal Assistance in Afghanistan

This section explores the severely limited literature on mutual legal assistance in the specific context of Afghanistan. The author has not been able to find even a single scholarly piece that has been written on the topic of mutual legal assistance in Afghanistan. As a result, this review focuses on the primary sources provided by current Afghan laws. As noted, despite the prevalence of transnational crimes including drug trafficking, terrorism, corruption, and money laundering; Afghanistan has been struggling to combat these crimes over the last sixteen years. While these crimes remain one of the most significant threats to peace, security, stability, and democratic

[88] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1 (2005).

[89] *Id.*

[90] *Id.*

[91] *See id.* at 36-127

[92] *See id.* at 52.

institutions of the country,[93] Afghanistan's authorities have not been able to sufficiently respond to the problem. Most of the time, these crimes cross national borders and do not take place in Afghanistan alone. For instance, terrorism and drug trafficking go far beyond Afghanistan's borders, and they are committed in very complicated ways as a result of collaboration among different criminal individuals and organizations that are located in various countries.[94] As noted previously, this cross-border attribute creates a significant barrier to obtaining evidence and legal documents related to the crimes, and enforcing criminal jurisdiction abroad presents another legal challenge under international law.

Although Afghanistan is a state party to all UN Suppression Conventions mentioned above, as well as the 2008 SAARC Convention on Mutual Legal Assistance in Criminal Matters (SAARCC), it has not yet fully complied with the requirements of the conventions either at the policy (statutory) level or at the implementation level.[95]

On a policy level, Afghanistan has enacted two relatively new laws: the Law on Extradition of the Accused, or Convicted Individual, and on Legal Cooperation,[96] and the Law on Prevention of Money Laundering and Proceeds of Crimes.[97] While the laws contain some useful provisions governing mutual legal assistance, they suffer from serious shortcomings.

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[93] *See* Neil Boister, *Transnational Crime, Transnational Criminal Law and Security in Afghanistan*, TRENDS INSTITUTION (2016), http://trendsinstitution.org/transnational-crime-transnational-criminal-law-and-security-in-afghanistan/; *Transnational Organized Crime: A Growing Threat to National and International Security,* THE WHITE HOUSE, https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/threat (last visited Jan. 01, 2019) (hereinafter THE WHITE HOUSE REPORT)

[94] *See* THE WHITE HOUSE REPORT, *supra* note 93.

[95] *See* Boister-2016, *supra* note 93.

[96] *See Qanooni Esterdade Mutahameen, Mahkomeen, Wa Hamkari Adli* [the Law on Extradition of the Accused, or Convicted Individual, and on Legal Cooperation], Official Gazette, April 2013, No. 1103 (Afg.) [hereinafter EXTRADITION AND LEGAL COOPERATION LAW]

[97] *See Qanooni Jelowgiri Az Polshoaee Wa Awayede Nashi Az Jarayem* [Law on Prevention of Money Laundering and Proceeds of Crimes], Official Gazette, July 2014, No. 1142 (Afg.) [hereinafter ANTI-MONEY LAUNDERING LAW]

Long before the enactment of these laws, Afghanistan had signed a bilateral judicial cooperation agreement with Iran in 2008[98] and a bilateral agreement on mutual legal assistance in criminal matters with United Arab Emirates in 2010.[99] These agreements are also deeply flawed and very inconsistent. For instance, Afghanistan has designated a different institution as the competent authority for legal cooperation in each agreement. The Supreme Court is designated as the central authority for the agreement between Afghanistan and Iran,[100] but the Ministry of Justice is recognized as the competent authority for the agreement between Afghanistan and United Arab Emirates.[101]

The incomplete compliance with international obligations; the drawbacks of current mutual legal assistance mechanisms; the lack of effective bilateral mutual legal assistance agreements with many foreign countries; and the lack of capacity and resources in the relevant agencies severely limit the ability of the Afghan government to effectively implement the current mechanisms and constrain transnational crimes. There is no data or report available on the implementation of the agreement between Afghanistan and Iran or how much it is used by the two governments. However, as this dissertation reveals in Chapter 7, the effectiveness of the mutual legal assistance agreement between Afghanistan and the United Arab Emirates has already been tested by the Kabul Bank scandal.

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[98] *Muwafeqathai Hamkari* [Cooperation Agreements], Official Gazette, at 55-88, March 2008, No. 941 (Afg.) (hereinafter Agreement Between Afghanistan and Iran)

[99] *Muwafeqatnama Meyane Jamhori Islami Afghanistan Wa Dawlate Emirate Mutaheda Arabi Peramone Mosa-aedate Qanooni Mutaqabel Dar Masayel Jenaee* [Agreement between Islamic Republic of Afghanistan and United Arab Emirates on Mutual Legal Assistance in Criminal Matters], Official Gazette, July 2011, No. 1029 (Afg.) (hereinafter MLA AGREEMENT BETWEEN AFGHANISTAN AND UAE)

[100] *See* JUDICIAL COOPERATION AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 98 at art. 3 (2).

[101] *See* MLA AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 99 at art. 1.

III. Academic Contribution of this Dissertation

Eliminating Afghanistan's transnational crime epidemic requires developing and implementing a comprehensive and multi-faceted strategy that addresses the root causes of the crimes. However, any new government policies or measures will not likely succeed unless the relevant Afghan authorities--including judiciary, prosecution, and police offices-- increase their efficiency in investigating and prosecuting transnational crimes and creating reasonable deterrence mechanisms. The unavailability of evidence and crime-related documents within Afghanistan makes this even more challenging, requiring legal assistance from foreign jurisdictions and developing and implementing an effective trans-border enforcement mechanism.

This dissertation investigates and assesses mutual legal assistance mechanisms in Afghanistan: their compliance with international obligations, their effectiveness, and their implementation in practice. While transnational criminal law in general, and mutual legal assistance in particular, are themselves new and emerging areas of study in global academia, the topic has been completely overlooked by Afghan legal academics, professors, researchers, and legal practitioners. Therefore, this dissertation is the first research of its kind that studies mutual legal assistance in Afghanistan. As such, it sets the foundation and invites further debate and study among Afghan academics and others interested in the area. The findings and recommendations of this research could be generally used by Afghanistan's government to amend its current relevant laws and develop an effective mutual legal assistance regime, and it will be specifically useful for policy makers, legislatures, diplomats, judges, prosecutors, lawyers, academics, and researchers.

This research will contribute to scholarship on compliance with international obligations and reforming Afghanistan's mutual legal assistance mechanisms in several ways. First, this dissertation provides an example for examining and investigating the relationship between

international law and Afghanistan's domestic law. The country has ratified many international conventions over the last two decades. Notwithstanding, little is known as to what extent Afghanistan has complied with its international obligations, or to what extent the international conventions have impacted Afghanistan's domestic law. Among the many international conventions to which Afghanistan is a state party, the four UN Suppression Conventions specifically impose mutual legal assistance obligations and requirements on Afghanistan. By examining the impacts of those four conventions in the area of mutual legal assistance, this dissertation provides important insights and explanations about a small piece of a broader relationship between international law and Afghan domestic law. Hopefully, this dissertation will inspire more scholarly studies and investigations on how international law impacts Afghan domestic law in other areas. Similarly, despite the fact that this dissertation focuses on Afghanistan, its methodology and findings can be used by other scholars in developing countries when they conduct similar studies in the area of mutual legal assistance or examining the relationship between international law and domestic law.

Second, the findings of this dissertation demonstrate the urgent need for Afghanistan to move forward quickly to reform its mutual legal assistance mechanisms in order to increase their effectiveness and efficiency and devote sufficient resources to implement the laws. As this dissertation reveals, without reforms and investment on implementation, it is very difficult to obtain cross-border evidence and thus combat transnational crime effectively. The longer the country stays with the current status quo, the more it will be negatively impacted by transnational crimes.

Third, the empirical component of this dissertation significantly contributes to the growing body of literature in the area of law and society by revealing the ways relevant laws are

implemented or not implemented by the relevant officials. It demonstrates that the impact of laws is significantly limited if the implementers do not have the required knowledge, capacity, and resources. Relatedly, it details how officials create their own strategies, albeit not very effectively, to obtain cross-border evidence when these are lacking. The contribution of this dissertation in the area of empirical legal studies is not limited to the context of Afghanistan but is relevant to the global body of literature in the area.

Finally, the detailed and concrete recommendations set out in this dissertation provide a clear framework for compliance with international obligations and mutual legal assistance in Afghanistan. Most importantly, after careful analysis of Afghanistan's relevant domestic laws, the institutional role of the relevant agencies in criminal processes, and practical consideration, this dissertation proposes that the Attorney General's office (AGO) is the appropriate central authority to effectively deal with mutual legal assistance requests in the country. The justifications and reasoning for selection of an appreciate central authority for mutual legal assistance as set out in this dissertation is relevant not only to the context of Afghanistan, but more broadly across the world.

IV. Major Objectives of the Research

This dissertation satisfies four important objectives. First, it identifies and analyzes Afghanistan's obligations under international conventions to provide or seek mutual legal assistance and assesses the extent to which Afghanistan complies with its international obligations through legislation. Second, it critically analyzes and examines the current Afghan mutual legal assistance mechanisms (law on paper) and reveals their major institutional shortcomings/discrepancies. Third, it uses empirical legal research to assess the implementation and effectiveness of the current mutual legal assistance mechanisms (law in practice). Finally, this

dissertation proposes concrete and viable recommendations to enable Afghanistan to reconfigure its compliance with international obligations, to reform and make its domestic mechanisms more effective, and enhance implementation of mutual legal assistance.

V. Research Questions

This dissertation attempts to answer three categories of questions regarding Afghanistan's compliance with international obligations, exploring the shortcomings of the current mutual legal assistance mechanisms, and assessing implementation.

- What are Afghanistan's obligations for mutual legal assistance under the UN Suppression Conventions? To what extent has Afghanistan already complied with its obligations? How can Afghanistan improve compliance with these obligations?
- What are the major gaps and institutional shortcomings in Afghanistan's current mutual legal assistance mechanisms? How can these gaps be resolved?
- To what extent have the current domestic mechanisms and the relevant provisions of the UN Suppression Conventions been implemented? What are the factors that challenge implementation? Which institutions play a major role in processing mutual legal assistance requests in Afghanistan? Among these, which institution should be designated as the central authority?

VI. Research Methodology

A. Research Method

To answer the research questions and incorporate the formal and empirical components of this research, this dissertation uses a mix of legal doctrinal research and qualitative case study methods. The mixed method is extremely useful to analyze and reveal shortcomings of the written laws as well as assess the laws' effectiveness in practice. For the formal component, the author

conducted doctrinal research to analyze the many relevant international conventions and domestic laws (law on paper) that govern the Afghan context.

For the empirical component, the author conducted a qualitative case study, which is useful for building understanding about the Afghan context for several reasons. First, the main goal of this research is to understand and provide an in-depth description of the current status of mutual legal assistance mechanisms and their compliance with international law in Afghanistan and explore ways to reform and improve them. Since the case study approach is an in-depth understanding of a problem,[102] it is an appropriate approach to be used in this research project.

Second, since this dissertations attempts to answer some "how" questions considering the context of Afghanistan without manipulating the behavior of the subjects (informants), the case study approach is appropriate because it allows the author to use tools such as interviews to obtain real world responses to help answer the "how" questions.[103]

Third, the case study approach allows the author to choose a process as his unit of analysis. Accordingly, this dissertation studies mutual legal assistance, a process through which states exchange evidence and legal documents on criminal matters. This dissertation studies this process in Afghanistan in order to understand how Afghan agencies such as courts and prosecutions exchange legal assistance with foreign jurisdictions and how the process can be improved and become more efficient and effective. According to Baxter and Jack, a process can be a unit of analysis and a unit of analysis can determine a case study.[104]

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[102] *See* JOHN W. CRESWELL & CHERYL N. POTH, QUALITATIVE INQUIRY RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES 98 (2018).

[103] *See* Pamela Baxter & Susan Jack, *Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers*, 13 THE QUALITATIVE REPORT 4, 544, 545 (2008).

[104] *See id.* at 545-546.

Finally, the case study approach requires researchers to use various sources of data in order to be able to look at a phenomenon from different perspectives.[105] This method is particularly useful for this research because the author was able to obtain two important types of data to answer the research questions. For this dissertation, the author interviewed government officials who work with the relevant institutions and used relevant reports and data provided by government agencies and international organizations. As discussed previously, there is very limited information available about mutual legal assistance in Afghanistan.

Although the research findings presented in this dissertation will hopefully be useful beyond the context of Afghanistan, its qualitative case study approach involves a single case study, trying to understand the problem of mutual legal assistance in Afghanistan's context.

B. Sample

The sampling strategy chosen is designed to achieve the goals of the empirical component of the research. Considering that a process is the unit of analysis, the author selected a non-probability, purposive, snowballing sampling strategy for the several reasons. First, as Bernard et al. explain, non-probability is very useful in capturing experience and expert views.[106] The author chose to interview government officials to capture their experience and knowledge with mutual legal assistance practices; understand their views on what works or does not work in practice; what institutional challenges they face; and what reforms they recommend. A non-probability sampling was therefore useful for this research.

Second, the sampling is purposive because the author intentionally chose officials working in the relevant institutions and who have first-hand experience and knowledge about the research

[105] *See id.* at 544.

[106] See H. RUSSELL BERNARD ET AL., ANALYZING QUALITATIVE DATA: SYSTEMATIC APPROACHES 39 (2ND EDITION, 2017).

topic. For the purpose of this research, there are seven institutions that could be involved or provide data on mutual legal assistance process in Afghanistan. The institutions include the Supreme Court, AGO, the Ministry of Justice (MOJ), the Ministry of Foreign Affairs (MOFA), the Ministry of Interior (MOI), the Central Bank, and the Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC).

Lastly, the author used a snowballing sampling strategy because it was not easy to find people with experience and knowledge about the research topic. The author has practiced law for several years in Afghanistan and already knew a few people in all the above institutions. He started his interviews by contacting people he already knew and used them as seeds in his sampling. He used a less formal method of snowballing and asked his seeds following each interview about whether they would be willing to introducing other officials that have experience with the mutual legal assistance process or transnational crime cases. This method was chosen so his seeds would have full understanding of the types of questions and purpose of the interview so they could introduce him to the right people.

The sampling population was Afghan government officials; the subpopulation was officials in the seven institutions who had experience or knowledge of mutual legal assistance in Afghanistan. Interviewing 50 officials in seven institutions and 34 sub-departments enabled the author to discover the core themes of his research.

C. Data Collection

For the two components of this research, the author collected and analyzed two types of data for each. For the formal component, the author collected and analyzed two types of data. First, he analyzed primary sources of law in Afghanistan which include international and regional conventions, statutes, regulations, bilateral agreements, and memoranda of understanding (MoUs).

The author had to analyze and examine the relevant provisions of a large number of international conventions, laws, and agreements because the process of mutual legal assistance intersects with many laws and procedures internationally and domestically. For instance, the author analyzed and examined the relevant provisions of many UN conventions including the Vienna Convention, the Financing Convention, the UNCTOC, and UNCAC. Similarly, he analyzed the SAARCC, a regional convention to which Afghanistan is a state party. In addition to the conventions, the author analyzed the relevant FATF recommendations (37 and 38). Although these recommendations are not obligatory for states, they are very influential and aggressively enforced by the FATF.

The author also analyzed the relevant provisions of the Afghan Constitution[107] and many Afghan statutes including the Law on Extradition of the Accused, Convicted Individual and Legal Cooperation;[108] Law on Money Laundering and Proceeds of Crime;[109] Law on Prevention of Financing Terrorism;[110] Penal Code,[111] Criminal Procedure Code,[112] Law on Organization and Authority of Courts,[113] Law on Organization and Authority of Prosecutions,[114] and Law on International Treaties and Conventions.[115] Since Afghanistan is a civil law country and court

[107] *Qanooni Asasi Afghanistan* [The Constitution of Afghanistan], Official Gazette, Extraordinary Issue, January 2004, No. 818 (Afg.).

[108] *Qanooni Esterdade Mutahameen, Mahkomeen, Wa Hamkari Adli* [Law on Extradition of Accused and Convicted Persons and Legal Cooperation], Official Gazette, April 2013, No. 1103 (Afg.).

[109] *Qanooni Jelowgiri Az Polshoaee Wa Awayede Nashi Az Jarayem* [Law on Prevention of Money Laundering and Proceeds of Crimes], Official Gazette, July 2014, No. 1142 (Afg.).

[110] *Qanooni Jelawgiri Az Tamweele Terrorism* [Law on Prevention of Financing Terrorism, Official Gazette, September 2014, No. 1146 (Afg.).

[111] *Code Jaza* [Penal Code], Official Gazette, May 2017, No. 1260 (Afg.).

[112] *Qanooni Ejra'at Jazaee* [Criminal Procedure Code], Official Gazette, May 2014, No. 1132 (Afg.).

[113] *Qanooni Taskheel Wa Salaheyate Quwae Qazaeya Jumhori Islami Afghanistan* [Law on Organization and Jurisdiction of the Judiciary of the Islamic Republic of Afghanistan], Official Gazette, June 2013, No. 1109 (Afg.).

[114] *Qanooni Tashkeel Wa Salaheyate Saranwali* [Law on Structure and Authority of the Attorney General's Office], Official Gazette, October 2013, No. 1117 (Afg.).

[115] *Qanooni Maahedat Wa Mesaqhai Bainalmelallli* [Law on International Treaties and Conventions], Official Gazette, Extraordinary Issue, November 2016, No. 1236 (Afg.).

decisions are neither published nor authoritative, the author was not able to find and analyze any relevant case law. In addition to the statutes, the author critically analyzed and compared two bilateral agreements: the Agreement Between Afghanistan and Iran[116] and the Agreement Between Afghanistan and UAE.[117] Furthermore, he analyzed two MoUs: a MoU Between the Afghan and Russian AGOs[118] and a MoU Between Afghanistan's and Turkmenistan's Ministries of Finance.[119]

In addition to the primary sources of law, the author extensively read and analyzed innumerable secondary sources of law, including books, articles, treatises, commentaries, UN guides, and agency reports. The agency reports consists of countless reports from very influential international and national agencies and organizations including the UN, UNODC, FATF, the Council of Europe, OECD, the World Bank, International Monetary Fund (IMF), the Egmont Group, the International Criminal Police Organization (INTERPOL), Asia/Pacific Group on Money Laundering (APG), GFI, U.S. Department of Justice, United States Institute of Peace (USIP), the Afghan Central Bank (FinTRACA), MOFA, MOJ, and MEC.

For the empirical component, as noted previously, the author conducted face-to-face semi-structured interviews with 50 government officials in seven agencies and 34 departments in Kabul.

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[116] *Muaafeqatnamaee Hamkari Qazaee Bain Jamhori Islami Afghanistan Wa Jamhori Islami Iran* [Judicial Assistance Agreement Between Islamic Republic of Afghanistan and Islamic Republic of Iran], Official Gazette, March 2008, No. 941 (Afg.)

[117] *Muaafeqatnama Meyane Jamhori Islami Afghanistan Wa Dawlate Emarate Mutahedae Arabi Peramone Musaedate Qanooni Mutaqabel Dar Masaele Jenaee* [Agreement Between Islamic Republic of Afghanistan and the United Arab Emirates on Mutual Legal Assistance in Criminal Matters], Official Gazette, July 2010, No. 1029 (Afg.).

[118] *Yaddashte Tafahum Hamkari Mutaqabel Fimabaine Edaraee Loysaranwali Dawlate Jamhori Islami Afghanistan Wa Edaraee Loysaranwali Fedraseyone Russia* [Memorandum of Understanding on Mutual Assistance Between the Attorney General's Office of Afghanistan and the Attorney General's Office of Russian Federation], (Sep. 20, 2018).

[119] *Yaddashte Tafahume Hamkari Peramone Tabadulae Estekhbarate Mali Dar Ertebat Ba Polshoee Wa Tamweele Terrorism Bain Wezarate Maleya Jamhori Islami Afghanistan Wa Wezarate Maleya Jamhori Turkmenistan* [Memorandum of Understanding on Exchange of Financial Intelligence Information Between the Islamic Republic of Afghanistan's Ministry of Finance and the Republic of Turkmenistan's Ministry of Finance], Official Gazette, March 2017, No. 1249 (Afg.).

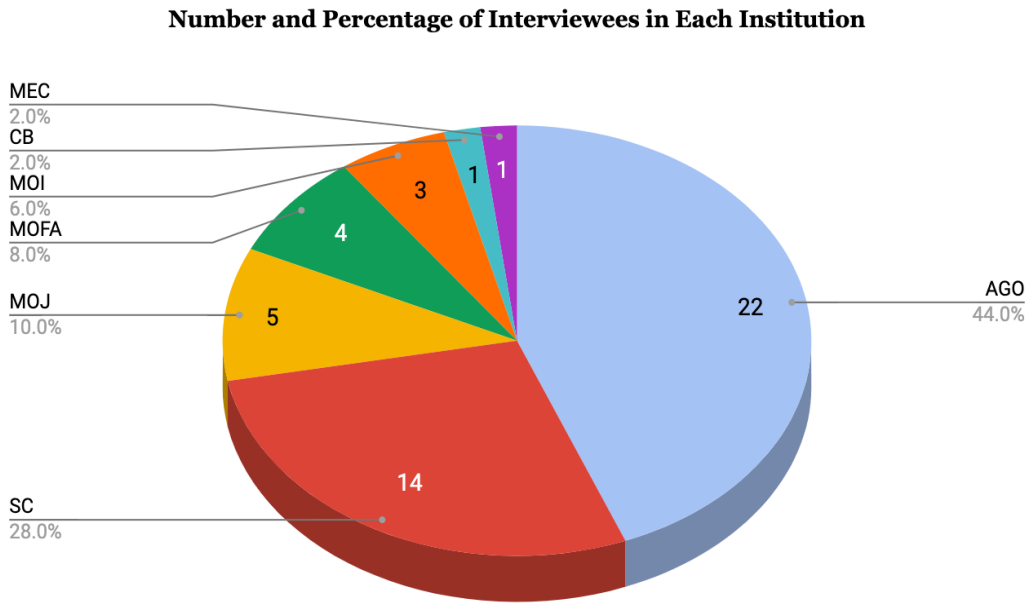
The interviews took place between April 1-July 31, 2019. There are two important reasons why the author only conducted interviews in Kabul. First, Afghanistan has an extremely centralized administration and government system. Everything is planned and controlled by the flagship and central institutions in Kabul. Local or provincial institutions have little or no say in planning/designing programs and activities. They simply implement the instructions they receive from the center. With respect to mutual legal assistance, this situation gets even more extreme because the provincial or local courts or prosecutions are not permitted to directly exchange any documents or information with foreign jurisdictions. Everything related to mutual legal assistance is supposed to be processed through the central institutions in Kabul. For these reasons, even if provincial prosecutions or courts might initiate a mutual legal assistance request, it could be traced in the central institutions. Additionally, the government of Afghanistan has created special courts and prosecutions for combating severe drug trafficking and corruption cases in Kabul. Those courts and prosecutions have country-wide jurisdiction over the relevant crimes. Second, given the fact that central institutions have relatively more capacity and are equipped with more resources than local agencies, the central institutions that would initiate or execute mutual legal assistance requests should ostensibly have more knowledge about the subject than local governments. As one interviewee correctly said, "if you cannot find data and information about mutual legal assistance here in Kabul, you would not find anything in provinces."[120]

As illustrated in Figure 1, a large number of interviewed officials worked in the AGO (44%) and SC (28%). There are two reasons for that. First, the AGO and the SC have constitutional authority to be involved in the process of mutual legal assistance. Specifically, the AGO has the authority to investigate and prosecute all crimes in the country. Accordingly, collection of evidence

[120] Informant—SC 8 (interview with author, June 11, 2019).

is done by the AGO. Due to the constitutional authority of the institutions, it is expected and normal that judges and prosecutors would know more about the topic of mutual legal assistance compared to other officials in other institutions. Second, as the author's snowballing selection expanded, the research showed that prosecutors have more familiarity and experience with mutual legal assistance than judges or other officials. As the author interviewed more prosecutors, he was introduced to even more prosecutors who might be knowledgeable about mutual legal assistance. The second most knowledgeable group of officials (after prosecutors) was judges. However, although judges have the authority to get involved in investigations and initiate mutual legal assistance requests, in practice they do not directly exercise their authority. The officials in the other government institutions knew little or nothing about the topic.

Figure 1. Total number of interviewees in each agency



It should be noted that the author only interviewed or reached out to those judges, prosecutors or officials who worked in the relevant departments in the AGO, SC, MOFA, MOI, MOJ, and

Central Bank. Departments in the AGO and SC were primarily selected based on their jurisdiction over the specific types of crimes (such as drug trafficking, corruption, terrorism, and money laundering) and the fact that interviewees in those departments were introduced by the author's seeds because they either have been involved in in mutual legal assistance or have general knowledge about the topic. Departments in the MOFA, MOI, MOJ, and Central Bank were selected based on preliminary research about the structure of the agencies and after speaking with primary seeds in those agencies. The 34 departments in which officials were interviewed include 13 departments in the AGO, 10 departments in the SC, 4 departments in the MOJ, 3 departments in the MOFA, 2 departments in the MOI, 1 department in the Central Bank, and 1 department in MEC. Additional details about the interviewees and departments in contained in Annex I.

The interview process consisted of the author starting with a set of general questions. More follow-up and specific questions were asked based on the interviewees' responses (see Annex II for more information). Interviews were conducted in the local language (Dari/Farsi; the author is a native speaker). The duration of each interview varied considerably depending on the interviewee's knowledge or information about the research topic. For instance, some interviews took 15 minutes, some 30 minutes, some one hour, and some took 90 minutes. Most of the interviews took place at the office of the officials except in few cases where some interviewees suggested another place that was more convenient for them. At the beginning of each interview, the author obtained the oral consent of the interviewee (see Annex III).[121] The author only took notes of interviews. The notes are maintained on a secure computer file. To make sure all interviewees feel safe and free to speak their mind and share their experience and thoughts, the

[121] As per the University of Washington Human Subject Division (HSD) requirements, the author developed a Consent Talking Points and obtained HSD approval. The author followed the requirements and guidelines of the HSD throughout the interviews. The consent form was provided in Dari and English.

author agreed to not disclose their identity (such as name or position) in this research. As such, the author coded interviewees by their institutions and a sequential digit starting from 1 for each institution. For instance, the code for the number one interviewee in AGO is "Informant—AGO 1," the code for the second interviewee in AGO is "Informant—AGO 2," and the digit number continues until the last interviewee in AGO.[122] The same approach is applied on other interviewees in other institutions.

VII. Dissertation Outline

This dissertation is organized in four parts. The first part consists of three chapters (Chapters Two, Three, and Four) and provides contextual and foundational information and analysis concerning transnational crime and state criminal jurisdiction. Chapter Two explores and explains globalization of crime and how transnational crime has rapidly grown across the globe. The chapter particularly focuses on the problem of transnational crime in Afghanistan and examines four types of transnational crimes that are widespread and take place on a large scale in the country: drug trafficking, terrorism, corruption, and money laundering. The chapter also explains the relationship among the four crimes and how they reinforce one another and create a vicious circle. Chapter Three delves into impacts of transnational crime in developing countries with a specific focus on Afghanistan. The chapter explains how the four types of transnational crime severely undermine the functionality of the government and negatively impact many aspects of life in Afghanistan, including security and stability; economy; public institutions and governance; rule of law; developmental efforts; and sovereignty. Chapter Four addresses the challenge of state jurisdiction over transnational crime. The chapter explains forms and principles of state jurisdiction under international law. It reveals how traditional international law limits the ability of states to enforce

[122] *See* footnotes in Chapter Seven for the coding method for interviewees in other institutions.

their jurisdiction extraterritorially and combat transnational crime effectively. The chapter also explains how states have developed new tools in international law for enforcing jurisdiction extraterritorially and demonstrates the need for creating and using mutual legal assistance mechanisms.

The second part of this dissertation examines the formal legal framework of both international law and national law (law on paper). Chapters Five and Six are devoted to this component. Chapter Five analyzes and studies mutual legal assistance obligations of Afghanistan under international law. The chapter explains various types of mutual legal assistance and explores many international and regional conventions to determine Afghanistan's international obligations. The chapter specifically focuses and examines the relevant provisions of many UN conventions that impose mutual legal assistance obligations on Afghanistan. It identifies and analyzes the many obligations and non-mandatory measures related to mutual legal assistance that are required or strongly recommended by the UN Suppression Conventions. In addition, the chapter explores the relevant recommendations of FATF and how they are connected with the requirements of the UN Suppression Conventions. Chapter Six examines the current Afghan mutual legal assistance mechanisms on paper and assesses their statutory compliance with the obligations under the UN Suppression Conventions. The chapter analyzes many domestic laws of Afghanistan and reveals the extent to which they have or have not incorporated the relevant mutual legal assistance obligations and non-mandatory measures of the UN Suppression Conventions. It also examines and analyzes two bilateral agreements between Afghanistan and Iran and UAE respectively and assesses their similarities and differences. The chapter reveals many contradictions, inconsistencies, and shortcomings of the current domestic mutual legal assistance mechanisms.

The third part of this dissertation presents the findings of empirical legal research conducted by interviewing government officials in Afghanistan. Chapter Seven reveals a huge gap between law on paper and law in action. It also reveals the extent to which these officials know or do not know the relevant laws and procedures or have experience engaging in mutual legal assistance practices. In addition, the chapter sheds light on how the relevant institutions are involved in mutual legal assistance process or exercise their authority in using the available mutual legal assistance tools. It uncovers many practical problems arising from a lack of a central authority in the country. Furthermore, the chapter identifies lack of capacity and insufficient resources as two of the main challenges that significantly impede implementation of the law. Finally, it captures and explains many variations regarding interactions between Afghan authorities and their counterparts with respect to mutual legal assistance.

The final part of this dissertation is devoted to recommendations. Informed by the findings of the formal and empirical components, Chapter Eight provides extensive and comprehensive recommendations for reforming mutual legal assistance mechanisms in Afghanistan. The chapter proposes constructive and detailed recommendations in four areas. First, the chapter explains how Afghanistan can reform its domestic laws to fully comply with its international obligations. Second, it provides suggestions for resolving the many contradictions, inconsistencies, and shortcomings of the current mechanisms. Third, the chapter addresses the problem of the gap between law on paper and law in practice and presents proposals on how Afghanistan can implement the relevant laws effectively. Finally, the chapter recommends rethinking Afghanistan's approach for compliance with international law. This suggestion is not only relevant to mutual legal assistance, but it is also related to the general approach of Afghanistan with respect to any sort of international law or international obligations.

CHAPTER TWO: AFGHANISTAN AND TRANSNATIONAL CRIME IN THE AGE OF GLOBALIZATION

I. Globalization of Crime: Transnational Crime as A Global and Regional Problem

Transnational crime has a long history and is not actually a new phenomenon in the world.[1] What is today called "transnational crime" has always existed in some forms but because its volume and severity was not at the current level, it did not demand the close attention of nations and governments.[2] For instance, during the nineteenth and twentieth centuries, traditionally pirates, Chinese criminal groups, and Italian mafia families crossed various states' borders in order to accomplish their offenses.[3] However, the number and size of those crimes were not huge and thus did not deeply concern states The main factor that today makes transnational crime different from the past is the "globalization" process.[4]

Regardless of controversies over the precise definition of globalization, it is a multi-dimensional process that influences almost every aspect of human life on earth.[5] Globalization has fundamentally changed commerce and revolutionized business transactions.[6] Today, globalization facilitates the fast and efficient movement of people and flow of ideas, information, culture,

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[1] *See e.g.* MANGAI NATARAJAN, INTERNATIONAL CRIME AND JUSTICE 3 (2011); Peng Wang & Jingyi Wang, *Transnational Crime: Its Containment through Cooperation,* 5 ASIAN SOC. SCI. 25, 25 (2009).

[2] *See e.g. The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, UNODC 25 (2010); PHIL WILLIAMS & DIMITRI VLASSIS, COMBATING TRANSNATIONAL CRIME: CONCEPTS, ACTIVITIES AND RESPONSES 22 (2001); Robert J. Kelly & Sharona A. Levy, *The Endangered Empire: American Responses to Transnational Organized Crime*, 21 J. SOC. DISTRESS HOMELESS 44, 48 (2012).

[3] *See* MANGAI NATARAJAN, INTERNATIONAL CRIME AND JUSTICE 3 (2011).

[4] *Id.* "Globalization" refers to "the growing interdependence of the world's economies, cultures, and populations, brought about by cross-border trade in goods and services, technology, and flows of investment, people, and information." *See* What Is globalization? PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (last visited Jan. 8, 2020).

[5] *See* JORGE HEINE & RAMESH THAKUR, THE DARK SIDE OF GLOBALIZATION, UNU 2 (2011); David O Friedrichs & Jessica Friedrichs, *The World Bank and Crimes of Globalization: A Case Study*, 29 SOCIAL JUSTICE 13, 14 (2002); SUSANNE KARSTEDT & DAVID NELKEN, CRIME AND GLOBALIZATION 233 (2nd Series 2013).

[6] *See e.g.* JORGE HEINE & RAMESH THAKUR, THE DARK SIDE OF GLOBALIZATION, UNU 2 (2011); Gregg Barak, *Crime and Crime Control in an Age of Globalization: A Theoretical Dissection,* 10 CRITICAL CRIMINOLOGY 57, 57 (2001).

science, goods, money, services, investment, and communications across states' borders.[7] Rapid technological innovations and the invention and rapid spread of the internet have contributed extraordinarily to the rise of cross-border activities and have accelerated interaction and communication between societies, governments, organizations, and ordinary people from different countries.[8]

Globalization has made the world very small, a "global village," so that no matter who we are or where we live, we may influence or be influenced by others thousands of miles away from us or even on the other side of the world.[9] Scholars like David Harvey and Katja Franko claim that globalization has compressed time and space[10] and created an interdependent and interconnected world to an unprecedented degree.[11] Despite many posited advantages of globalization, including advancing living standards, accelerating economic growth and development, and encouraging competition and innovation,[12] there are several negative impacts. These include exacerbating economic inequalities,[13] aggravating poverty,[14] and opening a nearly unlimited and unregulated

[7] *See* H. Srikanth, *Combating Transnational Crimes in the Era of Globalization: Strategies for India and The ASEAN*, 53 INTERNATIONAL STUDIES 91, 92 (2017); DAVID A. JENKS & JOHN RANDOLPH FULLER, GLOBAL CRIME AND JUSTICE 10 (2017).

[8] *See id.;* Wang & Jingyi Wang, *Transnational Crime: Its Containment through Cooperation,* 5 ASIAN SOC. SCI. 25, 26 (2009); KATJA FRANKO AAS, GLOBALIZATION & CRIME 7 (2ed ed. 2013); Emilio C.Viano, *Globalization, Transnational Crime and State Power: The Need for a New Criminology*, 3 RIVISTA DI CRIMINOLOGIA 63, 64 (2009); JORGE HEINE & RAMESH THAKUR, THE DARK SIDE OF GLOBALIZATION, UNU 3 (2011).

[9] *See* KATJA FRANKO AAS, GLOBALIZATION & CRIME 7 (2nd ed. 2013).

[10] *See* DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL Change (1991) (cited in KATJA FRANKO AAS, GLOBALIZATION & CRIME 7 (2ed ed. 2013)).

[11] *See* FRANKO AAS*, supra* note 9 at 7.

[12] *See* e.g. David O Friedrichs & Jessica Friedrichs, *The World Bank and Crimes of Globalization: A Case Study*, 29 SOCIAL JUSTICE 13, 14 (2002); *Globalization Benefits and Challenges*, VELOCITY GLOBAL (Dec. 4, 2017), https://velocityglobal.com/blog/globalization-benefits-and-challenges/.

[13] *See* NATARAJAN, *supra* note 3 at 4.

[14] *See* JORGE HEINE & RAMESH THAKUR, THE DARK SIDE OF GLOBALIZATION, UNU 3 (2011).

space for criminal organizations.[15] Many authors call the rapid rise of transnational crime the "dark side of globalization."[16]

Some scholars argue that globalization has fundamentally transformed transnational crime and the ways it is carried out across the globe.[17] Globalization has developed "new and favourable contexts for crime"[18] and criminal groups. These transformations have implications for our understanding and concepts of crime and criminal justice.[19] Globalization has elevated the "speed" and increased the depth and breadth of transnational crime and diversified its criminal actors.[20] Transnational criminals are sometimes identified among "the major beneficiaries of globalization."[21] Globalization and the deregulation of international trade have opened many doors and provided many opportunities for transnational criminals. It has made it easier for transnational criminal organizations to cross borders, carry out criminal activities, engage with co-conspirators, extend the reach of their crime, and transmit their criminal proceeds from one country to another.[22] Globalization has enabled localized criminals to extend their activities onto regional and global stages.

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[15] *See* Austen L. Parrish, *Domestic Responses to Transnational Crime: The Limit of National Law*, 23 CRIMINAL LAW FORUM 275, 277 (2012).

[16] *See* e.g. Melvyn Levitsky, *The Dark Side of Globalization*, 5 INTERNATIONAL STUDIES REVIEW 253-254 (2003), Robert J. Kelly & Sharona A. Levy, *The Endangered Empire: American Responses to Transnational Organized Crime*, 21 J. SOC. DISTRESS HOMELESS 44, 48 (2012), NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 6 (2012); Roy Godson & Phil Williams, *Strengthening Cooperation against Transnational Crime*, 40 SURVIVAL 66, 66 (1998).

[17] *See e.g.* CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 Berkeley J. Int'l L. 53, 53-54 (2000); DAVID A. JENKS & JOHN RANDOLPH FULLER, GLOBAL CRIME AND JUSTICE 10 (2017).

[18] MARK FINDLAY, THE GLOBALIZATION OF CRIME 1 (2004).

[19] *See e.g. id*.; RIANNE LETSCHERT & JAN VAN DIJK, THE NEW FACES OF VICTIMHOOD: GLOBALIZATION, TRANSNATIONAL CRIMES AND VICTIM RIGHTS 4 (2012).

[20] NATARAJAN, *supra* note 3 at 3.

[21] *Id.*

[22] *See id.* at 3-4.

Transnational criminals have been quicker and more adept than governments in taking advantage of opportunities provided by globalization to advance their capabilities, learn and utilize sophisticated methods and the latest technology in their operations, and collaborate and forge close ties with their co-criminals/counterparts beyond their home base.[23] Criminal organizations have agilely adapted to new changes and developments and embraced new approaches that help them achieve their illegal goals.[24] Traditional criminal groups usually operated inside a single country[25] where they did not pose a serious threats to the state's existence and territory. But today's transnational criminals have become so powerful that they sometimes can challenge state sovereignty and pervasively threaten law and order and the functioning of a country's government institutions.[26] Recognizing the serious threat of transnational crime, some world leaders have dubbed transnational criminal groups as "quasi-superpowers."[27]

Generally, transnational criminal groups establish their base in one country and then extend their illegal activities beyond borders and across the globe.[28] The threat of transnational crime to weak states and developing countries is enhanced for two reasons. First, transnational criminal groups often choose to set up their base within the territory of those states that are weak and do not have well-functioning legal systems.[29] Second, the expansion of many transnational criminal

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[23] *See e.g.* Guymon, *supra* note 17 at 53-54; Peng Wang & Jingyi Wang, *Transnational Crime: Its Containment through Cooperation,* 5 ASIAN SOC. SCI. 25, 26 (2009).

[24] Mark Galeotti, *Introduction: Global Crime Today*, 6 GLOBAL CRIME 1, 1 (2004).

[25] *Crime and Instability: Case Studies of Transnational Threats*, UNODC III (2010) [hereinafter THE TRANSNATIONAL THREATS REPORT]

[26] *See* Roy Godson & Phil Williams, *Strengthening Cooperation against Transnational Crime*, 40 SURVIVAL 66, 67 (1998).

[27] CarrieLyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 Berkeley J. Int'l L. 53, 53-54 (2000).

[28] H. Srikanth, *Combating Transnational Crimes in the Era of Globalization: Strategies for India and The ASEAN*, 53 INTERNATIONAL STUDIES 91, 93 (2017).

[29] *See* Godson & Williams, *supra* note 26 at 67.

groups together with the malfunctioning of law enforcement institutions potentially gives the criminal groups more power and immunity, and increases the prevalence of crimes. In the most extreme case, this can lead to a country becoming a 'failed state', or, perhaps even worse, being a partially functioning state in which criminal elements control the state apparatus. The problem does not end with one country because the negative effects of transnational criminal activities will likely soon reach other countries[30] and threaten their national interests such as security, sovereignty, and their legal and financial systems.

It is not surprising that *A More Secure World: Our Shared Responsibility* report from the United Nations' High-level Panel on Threats, Challenges and Change indicates that "many of the most serious threats to international peace and security"[31] are derived from transnational crimes.[32] The report emphasizes that the world is facing global threats that cross national boundaries and it strongly encourages states to undertake collective action and effective cooperation to deal with these pressing threats.[33] The report identifies six "threats without boundaries"[34] that the world is facing in the twenty-first century.[35] The six are comprised of economic and social threats such as poverty, infectious disease and environmental degradation; inter-state conflict; internal conflict such as civil war and genocide; nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime.[36] The report demonstrates that these threats seriously endanger

[30] *See* John R. Wagley, *Transnational Organized Crime: Principal Threats and U.S. Responses*, THE LIBRARY OF CONGRESS 1 (2006), https://fas.org/sgp/crs/natsec/RL33335.pdf.

[31] *A More Secure World: Our Shared Responsibility*, UNITED NATIONS 20 (A/59/565) (2004), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/602/31/PDF/N0460231.pdf?OpenElement.

[32] *Id.*

[33] *Id*. at 15.

[34] *Id*. at 19.

[35] *Id*. at 25.

[36] *Id.* at 12.

international security and the legal order.[37] Listing transnational organized crime and terrorism among traditional and serious threats such as inter-state or internal conflicts highlights the magnitude of transnational crime and indicates how grave a menace it is to international security and human prosperity. In addition, the report acknowledges that these perils are intertwined and that "a threat to one is a threat to all"[38] no matter how weak or strong a state is.[39] The report criticizes states for not realizing the magnitude of the peril of transnational crime and for being too slow in responding to the threat.[40]

Similarly, in 2010, the UNODC published an assessment report on transnational crime which Ronald Noble, then Secretary General of INTERPOL, characterized as "a ground-breaking assessment of transnational organized crime activities."[41] The assessment covers nine types of transnational crime: heroin trafficking; human trafficking; migrant smuggling; cocaine trafficking; firearms trafficking; environmental resources trafficking; counterfeit goods trafficking; maritime piracy; and cybercrime.[42] The assessment's findings admit that the flow of most transnational crime "begin[s] on one continent and end[s] on another."[43] In the report's preface, the Executive Director of the UNODC identifies transnational crime as "a threat affecting all Member States"[44] and emphasizes the "shared responsibility" of all states to address the problem.[45]

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[37] *Id*.

[38] *Id*. at 19.

[39] *Id*.

[40] *Id*. at 49.

[41] *See The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, UNODC 25 (2010), https://www.unodc.org/res/cld/bibliography/the-globalization-of-crime-a-transnational-organized-crime-threat-assessment_html/TOCTA_Report_2010_low_res.pdf [hereinafter THE TOCTA REPORT]

[42] *Id*. at 1.

[43] *Id*. at v.

[44] *Id*. at iii.

[45] *Id*.

Transnational crime has the potential to be an extraordinarily devastating threat to the international financial system, chiefly because most transnational crimes have a "profit-driven" nature[46] and money is the primary reason for commission of the crimes.[47] *Transnational Crime and the Developing World,* GFI's comprehensive 2017 report ,[48] describes transnational crime as a "business."[49] The GFI report analyzes eleven types of transnational crime and estimates that crimes generate staggering revenue of "between US$1.6 trillion and $2.2 trillion per year."[50] This estimation seems consistent with the UNODC's calculation of illicit financial flows which is approximately US$2.1 trillion in 2009 or 3.6% of global GDP.[51] The following table shows the crimes and their estimated revenue:

[46] *See id*. at 25.

[47] Channing May, *Transnational Crime and the Developing World*, GLOBAL FINANCIAL INTEGRITY xi (2017), https://www.gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf.

[48] GFI is a non-profit, Washington, DC-Based Research and advisory organization, which produces high-caliber analyses of illicit financial flows, advises developing country governments on effective policy solutions, and promotes pragmatic transparency measures in the international financial system as a means to global development and security." (For more information please visit GFI website: http://www.gfintegrity.org/)

[49] May, *supra* note 47 at xi.

[50] *Id*.

[51] *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes*, UNODC 9 (2011), https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf [hereinafter THE ILLICIT FINANCIAL FLOWS REPORT]. This illegal global economy would rank somewhere around the eight largest economy in the world (comparable to Italy's GDP which was $1.99 trillion in 2018). *See* Caleb Silver, *The Top 20 Economies in World*, INVESTOPEDIA, https://www.investopedia.com/insights/worlds-top-economies/ (last updated Mar. 18, 2020).

Figure 2. The retail value of transnational crime

Transnational Crime	Estimated Annual Value (US$)
Drug Trafficking	$426 billion to $652 billion
Small Arms & Light Weapons Trafficking	$1.7 billion to $3.5 billion
Human Trafficking	$150.2 billion
Organ Trafficking	$840 million to $1.7 billion
Trafficking in Cultural Property	$1.2 billion to $1.6 billion
Counterfeiting	$923 billion to 1.13 trillion
Illegal Wildlife Trade	$5 billion to $23 billion
IUU Fishing	$15.5 billion to $35.4 billion
Illegal Logging	$52 billion to $157 billion
Illegal Mining	$12 billion to $48 billion
Crude Oil Theft	$5.2 billion to $11.9 billion
Total	**$1.6 trillion to $2.2 trillion**

* This table is adapted from GFI's report.[52]

The GFI report indicates that the generated revenue greatly benefits criminals and funds violence, corruption, and other illegal activities around the world.[53] The report predicts that the activities of transnational criminals will increase in the foreseeable future.[54]

As explained earlier, transnational crime is very complex and involves many actors from different countries and across the world.[55] The findings of the reports from the UNODC, the GFI, and many reports from the World Bank demonstrate the magnitude of these crimes; emphasize the need for strong cooperation between states; and recommend developing and implementing multilateral, innovative, and comprehensive strategies for tackling the threat.[56]

In the age of globalization, no single state is able to escape the negative impacts of transnational crime. For instance, drug trafficking impacts every country, whether it is a "source,

[52] May*, supra* note 47 at xi. (The table is taken from the GFI's report).

[53] *Id*.

[54] *See id*.

[55] *See* Jharna Chatterjee, *The Changing Structure of Organized Crime Groups*, ROYAL CANADIAN MOUNTED POLICE 7-8 (2005).

[56] *See e.g.* Kevin M. Stephenson et al., *Barriers to Asset Recovery*, THE WORLD BANK 11-99 (2011), https://star.worldbank.org/sites/star/files/Barriers%20to%20Asset%20Recovery.pdf.

processing, transit, and/or market country."[57] In addition, a country as strong as the United States has identified transnational crime as "a significant and growing threat" to its national security.[58] In 2010, the Obama administration completed a comprehensive review of transnational crime – the first since 1995[59] – and subsequently announced a strategy for combating transnational crime in 2011.[60] The review's findings (which are reflected in the strategy) show a dramatic increase "in size, scope, and influence" of transnational crime.[61] The review indicates that the "expanding" and "diversifying" of transnational criminal activities led to a "convergence of threats"[62] which could endanger "public safety, public health, democratic institutions, and economic stability across the globe."[63] Transnational crime is thus/therefore a clearly established global problem which can only be addressed through global action. Although the effects of transnational crime might be more severe for developing countries than the developed world, no country is immune.

II. The Transnational Crime Epidemic in Afghanistan

As discussed above, developing countries are more vulnerable to transnational criminals' activities and provide a more hospitable location and opportunity for criminal networks to establish their bases and expand their activities across borders. The criminal groups take advantage of developing countries' weak institutions and law enforcement agencies and carry out their illegal

[57] May, *supra* note 47 at 3.

[58] *Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security*, THE WHITE House 5 (2011), https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime.

[59] *Id.* at 3.

[60] *Id.* at 1.

[61] *Id.* at 3.

[62] *Id.* at 5.

[63] *Id.*

activities without fearing prosecution. It is argued that "transnational crime and underdevelopment have a mutually perpetuating relationship."[64]

As a developing country, Afghanistan has been one of the key victims of transnational crime, especially over the last two decades. Although Afghanistan was a poor country before the Soviet invasion and the ensuing wars, three decades of war have destroyed everything the country had, from state institutions and infrastructure to human capital.[65] Not surprisingly, the ongoing conflict and lack of formal state structures and governance systems provided a haven for a large variety of criminal and illegal activities and a revenue source for groups competing to control the country.[66] Consistent with global trends, the amount of transnational crime has been growing sharply over the last two decades in Afghanistan. After the Taliban lost power in 2001, transnational crime has never been taken seriously into account by Afghan authorities and is still a significant challenge to the development of the country although many measures have been taken and billions of dollars have been spent to rebuild the country and reform its legal system.

Many types of transnational crime occur in Afghanistan: weapons smuggling; migrant smuggling; mineral smuggling; trafficking of antiquities; cybercrime, and more. This chapter intends to focus only on the four major transnational crimes which fundamentally threaten Afghanistan's economy, legal and judicial system, and its development and state-building efforts. These four crimes are drug trafficking, terrorism, corruption, and money laundering. This chapter

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[64] Jeremy Haken, *Transnational Crime in the Developing World*, GLOBAL FINANCIAL INTEGRITY v (2011), https://www.gfintegrity.org/wp-content/uploads/2014/05/gfi_transnational_crime_high-res.pdf.

[65] "During the decade of war following the Soviet invasion in 1979, Afghanistan lost an estimated 1.8 million killed, 1.5 million disabled (among whom were more than 300,000 children), and there were 7.5 million refugees." M. Siddieq Noorzoy, *Afghanistan's Children: The Tragic Victims of 30 Years of War*, MIDDLE EAST INSTITUTE (Apr. 20, 2012), https://www.mei.edu/publications/afghanistans-children-tragic-victims-30-years-war.

[66] Not only do weak institutions facilitate the conduct of criminal activity, they may be further weakened by it. Separatist or terrorist groups may finance activities through criminal activity. Some of the proceeds are then used to corrupt state institutions and officials. And the corruption further weakens public trust in and support for the government that the insurgents are seeking to displace. These synergisms are discussed further below.

will attempt to explain the extent and magnitude of each of these crimes their transnational nature. Furthermore, it will illustrate the relationship between these four crimes and how they are intertwined with and impacted by each other.

A. Drug Trafficking

Drug trafficking is defined as "a global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws."[67] According to a recent UNODC report, the illegal drug market remains one of the main fields within which transnational criminal groups carry out their illegal activities around the globe.[68] The report estimated that between one-fifth to one-third of transnational criminal groups' revenues derived from the worldwide drug market in 2014.[69]

In addition to being a lucrative market, drug trafficking is an area in which a great level of cooperation, but also rivalry, exists among transnational criminal groups "across national, linguistic and ethnic" lines.[70] According to another report by GFI, drug trafficking is the second most profitable illicit business for transnational criminals.[71] GFI's report estimates that the illicit drug market generated between US $426 billion and $652 billion in 2014.[72] Depending upon the substance trafficked, the nature and location of drug trafficking could be very different.[73] For example, opium is primarily trafficked in Asia, but cocaine trafficking largely occurs between

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[67] *Drug Trafficking*, UNODC, https://www.unodc.org/unodc/en/drug-trafficking/index.html (last visited Jul. 25, 2018).

[68] *The World Drug Report 2017: The Drug Problem and Organized Crime, Illicit Financial Flows, Corruption and Terrorism*, UNODC 18 (2017) [hereinafter THE DRUG PROBLEM REPORT]

[69] *Id.* at 9.

[70] *Id.* at 18.

[71] May, *supra* note 47 at 3.

[72] *Id.*

[73] DAVID A. JENKS & JOHN RANDOLPH FULLER, GLOBAL CRIME AND JUSTICE 98 (2017).

South America and North America.[74] It is estimated that the value of the global opium market constitutes between US $65 billion and $68 billion per annum[75] and transnational criminal groups are recognized as the main beneficiaries of the market.[76]

Drug trafficking has been one of the most serious and devastating transnational crimes in Afghanistan since the beginning of the twenty-first century. Although Afghanistan has been a major producer of global opium over the last two decades (2000-2020),[77] drug production and trafficking is considered a new phenomenon in the country.[78] Historically, Afghanistan was not a significant location for cultivating, growing, and producing the opium poppy compared to neighboring countries.[79] Most of the "opium culture" in the country has developed over the last two decades.[80] Only after the Soviet Union invaded Afghanistan and the country fell into war[81] did an economic system called "drugs for arms trade" begin to flourish.[82] It is reported that *mujahidin* factions started to use drug money to buy some of their arms to continue battling the Soviet Union's invasion.[83] Later, after the withdrawal of the Soviet Union and a significant decrease in foreign aid to *mujahidin* factions, the opium economy continued to grow and opium

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[74] *Id.*

[75] *See Addiction, Crime and Insurgency: The Transnational Threat of Afghan Opium*, UNODC 17 (2009), https://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghan_Opium_Trade_2009_web.pdf [hereinafter THE UNODC REPORT ON AFGHAN OPIUM 2009]; *The Global Afghan Opium Trade: A Threat Assessment*, UNODC 5 (2011).

[76] *The Global Afghan Opium Trade: A Threat Assessment*, UNODC 8 (2011) https://www.unodc.org/documents/data-and-analysis/Studies/Global_Afghan_Opium_Trade_2011-web.pdf [hereinafter THE OPIUM THREAT ASSESSMENT REPORT]

[77] THE UNODC REPORT ON AFGHAN OPIUM 2009, *supra* note 75 at 21.

[78] *Id*. at 22.

[79] *The Opium Economy in Afghanistan: An International Problem*, UNODC 87 (2003) https://www.unodc.org/pdf/publications/afg_opium_economy_www.pdf [hereinafter THE OPIUM ECONOMY]

[80] *Id.*

[81] THE UNODC REPORT ON AFGHAN OPIUM 2009, *supra* note 77 at 22.

[82] *Id.* at 88.

[83] *Id.*

became one of the main sources of income in the country.[84] In 2003, a report by the UNODC estimated that the annual growth of opium production between 1980 and 2000 was 15%.[85] The report further indicated that there was a negative correlation between the economic situation and opium production, meaning that as Afghanistan's economic situation worsened, farmers tended to cultivate more opium poppy.[86]

Opium production continued to grow during the Taliban regime[87] until 2000 when the Taliban leadership completely banned poppy cultivation and opium production due to sanctions and pressure by the international community.[88] While the Taliban's ban, in combination with a severe drought,[89]caused a sharp decline in opium production,[90] the 2001 collapse of the Taliban regime and a subsequent dramatic increase in opium production proved that the Taliban approach was not sustainable due to a lack of good alternatives for farmers.[91]

Despite the international community, particularly the United States, spending billions of dollars to fight and constrain opium production,[92] it has constantly increased over the past 17 years.[93] According to some reports, the opium poppy is planted in approximately 50 countries

[84] *Id.* at 90.

[85] *Id.* at 89.

[86] *Id.* at 90.

[87] *Id.* at 92.

[88] *Id.* at 93.

[89] During the years the Taliban was trying to ban poppy cultivation, Afghanistan was experiencing a severe drought (*See id*.).

[90] *Id*. at 93.

[91] *Id.*

[92] *Counternarcotics, Lessons from the U.S. Experience in Afghanistan*, SIGAR 1-2 (2018), https://www.sigar.mil/pdf/lessonslearned/SIGAR-18-52-LL.pdf.

[93] *See e.g. id.;* THE TOCTA REPORT *supra note 41* at 109; THE OPIUM THREAT ASSESSMENT REPORT, *supra* note 76 at 5.

around the world,[94] but Afghanistan is the primary locale for opium cultivation, producing roughly 73 percent of the world's opium.[95] In 2016 alone, Afghanistan experienced a 10 percent increase in opium poppy cultivation.[96] In addition, over 90 percent[97] of the global supply of heroin[98] is produced from Afghan opium.[99] Transnational drug traffickers collect most of the Afghan heroin proceeds (roughly US $55 billion per year).[100] According to a UNODC estimate in 2010, heroin generated US $1.9 billion in revenue for Afghan traffickers alone, tantamount to one fifth of Afghanistan's then lawful GDP.[101] However, Afghan farmers and criminal actors such as traffickers, the Taliban, and other insurgent groups have benefited much less from the heroin market than the non-Afghan transnational criminal groups involved.[102]

The Afghan heroin market is run by transnational criminal groups in close coordination with corrupt officials in Afghanistan and its neighboring countries.[103] These transnational criminal groups have been trafficking Afghan heroin to almost all regions of the world except Latin America.[104] Various transnational criminal groups from across the world are involved in Afghan

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[94] May, *supra* note 47 at 7.

[95] *See id.; The World Drug Report 2017: Market Analysis of Plant-Based Drug, Opiates, Cocaine, Cannabis,* UNODC 13 (2017).

[96] *The World Drug Report 2017: Market Analysis of Plant-Based Drug, Opiates, Cocaine, Cannabis,* UNODC 13 (2017).

[97] Neil Boister, *Transnational Crime, Transnational Criminal Law and Security in Afghanistan*, TRENDS (2016), http://trendsinstitution.org/transnational-crime-transnational-criminal-law-and-security-in-afghanistan/.

[98] The UNODC reports recognize heroin as the most problematic and deadly drug substance and more users of heroin die every year compared to other users of substances (*See e.g.* THE TOCTA REPORT, *supra* note 41 at 109; THE TRANSNATIONAL THREATS REPORT, *supra* note 25 at 25).

[99] THE UNODC REPORT ON AFGHAN OPIUM 2009, *supra* note 75 at 25.

[100] THE TRANSNATIONAL THREATS REPORT, *supra* note 25 at 25.

[101] *Id.* at 28.

[102] THE OPIUM THREAT ASSESSMENT REPORT, *supra* note 76 at 21.

[103] *See* THE TRANSNATIONAL THREATS REPORT, *supra* note 25 at 29.

[104] *See Afghan Opiate Trafficking Through the Southern Route*, UNODC 12 (2015) https://www.unodc.org/documents/data-and-analysis/Studies/Afghan_opiate_trafficking_southern_route_web.pdf [hereinafter THE SOUTHERN ROUTE REPORT]

heroin trafficking.[105] Some UNODC reports indicate that the rapid increase in opium production caused a diversification of destinations for drug trafficking.[106] UNODC has conducted extensive research into routes of Afghan heroin trafficking and found that transnational criminal networks have been using a variety of routes to traffic.[107] Most trafficking routes emanate from Afghanistan because it is the main producer of opium in the world.[108] These routes connect the producer, Afghanistan, to the global consumer markets.[109]

In 2014, the UNODC published *The Illicit Drug Trade Through South-Eastern Europe*" report to explain the ways various illicit drugs such as heroin, cocaine, and cannabis are trafficked to Western and Central Europe.[110] The report examines all the countries located along the opium trade route and identifies whether they are a transit country, a consumer country, or both.[111] The report particularly concentrates on the illicit heroin trade and how it is trafficked from Afghanistan to European countries.[112]

The UNODChas identified three major routes: the Balkan route, the southern route, and the northern route.[113] It is estimated that transnational drug traffickers earn most of their heroin funds through the Balkan and northern routes.[114] According to the UNODC's report, the Balkan route is

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[105] *See id.*

[106] *See* THE UNODC REPORT ON AFGHAN OPIUM 2009, *supra* note 75 at 9.

[107] THE OPIUM THREAT ASSESSMENT REPORT, *supra* note 76 at 17.

[108] *Id.*

[109] *Id.*

[110] *The Illicit Drug Trade Through South-Eastern Europe*, UNODC 8 (2014), https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_DT_through_SEE_REPORT_2014_web.pdf.

[111] *See id.*

[112] *See id.*

[113] May, *supra* note 47 at 7.

[114] THE TRANSNATIONAL THREATS REPORT, *supra* note 25 at 25.

the main pathway for Afghan heroin to reach Western and Central Europe.[115] The Balkan route originates from Afghanistan's borders, traverses Iran and Turkey, then Southeastern Europe before finally reaching Western and Central Europe including the four major consumer countries: the United Kingdom, Germany, France, and Italy.[116] In addition to Iran and Turkey, the Balkan route travels across many countries including Greece, Bulgaria, Romania, Macedonia, Albania, Serbia, Montenegro, and Croatia.[117] Transnational criminal networks transport the heroin by land, water, and air.[118]

The northern route originates from Afghanistan's borders with Tajikistan, Uzbekistan, and Turkmenistan and extends up to the Russian Federation.[119] A UNODC report found that transnational criminal groups trafficked around 90 tons of heroin to Central Asia and the Russian Federation in 2010.[120] Tajikistan plays a central role in the northern route.[121] According to the UNODC's findings, transnational drug traffickers on the northern route primarily use roads for their illegal activities:[122] it is estimated that the drug traffickers transport about two-thirds of their opiates via truck or other road vehicle[123] and use trains or planes to carry less than one-third of their illicit opiates.[124]

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[115] *Id.*

[116] *Id.*

[117] *Id.* at 8-9.

[118] *Id.* at 11.

[119] *Opiate Flows Through Northern Afghanistan and Central Asia: A Threat Assessment*, UNODC 9 (2012), https://www.unodc.org/documents/data-and-analysis/Studies/Afghanistan_northern_route_2012_web.pdf.

[120] *Id*. at 45.

[121] *Id.*

[122] *Id.* at 48.

[123] *Id.*

[124] *Id.*

The southern route begins from Afghanistan's borders with Iran and Pakistan and reaches the broadest number of destinations around the globe including Asia, Africa, and Western and Central Europe.[125] The route traverses and reaches many countries including:

- In the Middle East: the United Arab Emirates, Saudi Arabia, and Bahrain
- In South Asia: India, Bangladesh, Sri Lanka, Nepal, and Bhutan
- In East and South-East Asia: China, Singapore, Indonesia, Malaysia, and Thailand
- In Oceana: Australia;
- In Africa: Mauritius, Kenya, Nigeria, South Africa, Somalia Tanzania, and Egypt[126]
- And in Europe: the United Kingdom, Germany, and Italy.[127]

This route is more complicated than the two previous ones because it includes destinations on multiple continents.[128] The UNODC's report indicates that southern route transnational criminal groups traffic their illicit opiates through four mediums: post (mail), sea, air, and land.[129] The report further reveals that nationals of more countries are now engaging in the drug trade.[130]

The hundreds of billions of dollars generated by the drug trafficking, especially Afghan opium, and the fact it is carried out by a wide variety of transnational criminal networks, demonstrate the seriousness and great magnitude of the crime. The UNODC recognized the Afghan opium economy was "an international problem" back in 2003.[131] As indicated, drug trafficking is less

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[125] THE SOUTHERN ROUTE REPORT, *supra* note 104 at 10.

[126] *The Afghan Opiate Trade and Africa: A Baseline Assessment*, UNODC 32-34 (2016), https://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghan_Opiate_trade_Africa_2016_web.pdf.

[127] *See* THE SOUTHERN ROUTE REPORT, *supra* note 104 at 56-104.

[128] *Id.* at 10.

[129] *Id*. at 18

[130] *Id.*

[131] *See* THE OPIUM ECONOMY, *supra* note 79.

profitable for Afghan farmers and drug traffickers compared to foreign traffickers (however it is the most profitable crop for Afghanistan's subsistence farmers). However, many factors contribute to the growth of the drug market and failure of Afghan and the international community's efforts to constrain the opium problem in the country. These factors include high global market demand; lack of sufficient cooperation among affected countries; lack of efficient border controls; presence of corrupt officials in Afghanistan and its neighboring countries; lack of lucrative alternatives for farmers; and the sophistication of transnational criminal networks. The Afghan illicit opium market is a regional and global problem. The problem will never be tackled effectively unless all of the affected countries understand and acknowledge the problem as theirs, collaborate, and provide each other with every possible assistance to overcome this intractable obstacle.

B. Terrorism

The concept of terrorism has always been complex and controversial.[132] Although the term "terrorism" was used for the first time during the French Revolution over two centuries ago,[133] there remains no perfect consensus on what the word means.[134] Due to disagreements over the meaning of terrorism, many international conventions that address terrorist activities and operations do not provide a definition for the crime.[135] Most of these conventions identify certain acts as terrorist activities and require member states to criminalize those acts in their domestic law depending on the target, means, or funding methods.[136] Internationally recognized terrorist crimes

[132] *See* JENKS & FULLER, *supra* note 73 at 135-139.

[133] *Id*. at 140.

[134] *See e.g. id*. at 135-139; ILLIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 195 (3RD EDITION, 2007).

[135] *See* NEIL BOISTER & ROBERT J. CURRIE, ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 396-98 (2015).

[136] *Id*. at 402.

include hijacking; hostage taking; crimes against internationally protected persons; nuclear terrorism; terrorist bombings; and terrorist financing.[137] The 9/11 terrorist attacks in the United States were considered a turning point in terrorism and counterterrorist activities.[138] Shortly after 9/11, the United Nations Security Council issued Resolution 1373 (2001) which requires all member states to criminalize terrorism and punish anyone who commits a terrorist act or financially supports terrorist activities.[139] Some scholars argue that terrorist activities that are carried out by non-state actors should be recognized as transnational crimes, but state-sponsored terrorism should be classified as international crimes.[140]

Irrespective of controversies over the definition of terrorism and what political, military, or religious motives might exist behind terrorist activities, this chapter focuses on terrorism as a crime and how various transnational criminal actors are involved in committing such crimes in Afghanistan. To comply with international conventions, Afghanistan has criminalized terrorism in its penal code. The 2017 Penal Code of Afghanistan has adopted the relevant international conventions and identifies a list of illegal activities as terrorist acts.[141] Some of the terrorist crimes in the code include suicide attacks; hostage taking; attacking infrastructure; aviation crimes; establishing terrorist organizations; having membership in a terrorist organization; crimes against internationally protected persons; and financing terrorism.[142] The Penal Code considers these acts terrorism if they are committed for the purpose of influencing the policy of the Afghan state,

[137] *See* NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 64-68 (2012).

[138] Max Roser et al., *Terrorism*, OUR WORLD IN DATA (last updated Jan. 2018), https://ourworldindata.org/terrorism.

[139] *See generally Resolution 1373*, SECURITY COUNCIL (2001).

[140] BOISTER, *supra* note 137 at 72.

[141] *Code Jaza* [Penal Code], Official Gazette, at art. 263, May 2017, No. 1260 (Afg.) [hereinafter THE PENAL CODE]

[142] *See id*. at art. 265-279.

foreign states, national or international organizations, or destabilizing Afghanistan or a foreign country.[143]

Afghanistan has been a primary victim of terrorism over the past two decades.[144] After the 9/11 incidents, although thousands of international troops were deployed and billions of dollars poured into the country to combat and eradicate terrorist groups like Al-Qaida and the Taliban,[145] the problem of terrorism has actually increased in the country.[146] In addition to its many other catastrophic consequences, terrorism has taken the lives of thousands of innocent people in Afghanistan over the last eighteen years.[147] Beginning in 2000, the number of terrorist related incidents and casualties has been constantly increasing in the country.[148] It is estimated that the Taliban was responsible for more than 90% of the terrorist attacks in 2016.[149]

In 2017, it was reported that approximately 20 to 21 transnational terrorist groups were active along the Durand Line[150] to carry out their terrorist activities against the government of Afghanistan.[151] In addition to the Taliban, Daesh (also known as ISIS/ISIL), and Al-Qaida, these

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[143] *Id*.

[144] Sayed Sharif Amiri, *Afghanistan Still a Victim 16 Years After 9/11*, TOLONEWS (2017), https://www.tolonews.com/afghanistan/afghanistan-still-victim-16-years-after-911.

[145] *See* Vanda Felbab-Brown, *Afghanistan's Terrorism Resurgence: Al-Qaida, ISIS, and Beyond*, BROOKINGS (2017), https://www.brookings.edu/testimonies/afghanistans-terrorism-resurgence-al-qaida-isis-and-beyond/.

[146] *See e.g. id.;* Amiri *supra* note 144.

[147] *Roser* et al., *supra* note 138.

[148] *Id*.

[149] *Annex of Statistical Information: Country Reports on Terrorism 2016*, START 8 (2017), https://www.state.gov/documents/organization/272485.pdf.

[150] "The Durand Line is the 2,640-kilometer (1,640-mile) border between Afghanistan and Pakistan. It's the result of an agreement between Sir Mortimer Durand, a secretary of the British Indian government, and Abdur Rahman Khan, the emir, or ruler, of Afghanistan." Mary Schons, *The Durand Line*, NATIONAL GEOGRAPHIC (Jan. 21, 2011), https://www.nationalgeographic.org/article/durand-line/.

[151] *See e.g. Rebel Groups in Afghanistan: A Run-Through*, PAJHWOK (2017), http://peace.pajhwok.com/en/armed-group/rebel-groups-afghanistan-run-through; Abdul Wali Arian, *20 Terrorist Groups Fighting Against Afghan Government*, TOLONEWS (2017), https://www.tolonews.com/afghanistan/20-terrorist-groups-fighting-against-afghan-government.

terrorist groups include the Haqqani Network, *Jamatud Dawa Ehli Quran*, Al-Qaeda South Asia Network, *Hizbul Mujahidin*, Taliban groups led by Mullah Nazir, *Tahreek-i-Taliban Pakistan* (TTP), *Harakat-ul-Jihad Islami*, *Harakat-ul-Jihad Bangladesh*, *Lashkar-i-Janghavi*, *Harakat-ul-Mujahidin*, *Jaeshi Mohammad*, *Lashkar-i-Tayyiba*, *Tariq Gedar Group*, *Jamat-ul-Ahrar*, *Jundullah*, the Islamic Movement of Uzbekistan, *Junbish-i-Islami* Turkmenistan, the *Qodus* Force, and *Itehad Jahad Islami*.[152] Each of these terrorist organizations is globally recognized and blacklisted by the U.S. government.[153] Some of these terrorist groups have established their bases in Afghanistan but most of them organize their operations from Pakistan.[154] The Taliban, Daesh, and Al-Qaida are the most well-known terrorist organizations in the world. Their activities do not recognize any borders; they conduct terrorist attacks across the globe, including in North America, Africa, Europe, and Asia. The 9/11 incidents and the numerous terrorist attacks in Europe demonstrate that no matter where the terrorist groups establish their bases, they pose a serious threat to international security and the global order.

To understand the transnational nature of some of these terrorist organizations, it is worth briefly examining the Haqqani Network. It is one of the most dangerous transnational terrorist groups and has been responsible for conducting many attacks, including some of the deadliest attacks on Afghan soil. The Haqqani Network was established by an Afghan mujahidin leader, Jalaluddin Haqqani, in the late 1970s.[155] Haqqani's militia conducted its first attack against Afghan

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[152] *Rebel Groups in Afghanistan: A Run-Through*, PAJHWOK (2017), http://peace.pajhwok.com/en/armed-group/rebel-groups-afghanistan-run-through.

[153] *Id.*

[154] Abdul Wali Arian, *20 Terrorist Groups Fighting Against Afghan Government*, TOLONEWS (2017), https://www.tolonews.com/afghanistan/20-terrorist-groups-fighting-against-afghan-government.

[155] *Mapping Militant Organizations: Haqqani Network*, STANFORD UNIVERSITY, http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/363#note3 (last updated Nov. 8, 2017) [hereinafter THE MILITANT ORGANIZATIONS]

President Daoud Khan in 1975.[156] Later, after the Soviet invasion, Haqqani fighters consistently organized attacks against Soviet troops and the Afghan communist regime of that time.[157] Haqqani played a prominent role in the formation of the Taliban and bringing them to power in Kabul[158]. The network currently has a strong relationship with Al-Qaida.[159] The main base of the Haqqani Network is located in Northern Waziristan, Pakistan.[160] It trains and equips its fighters in Miram Shah, Waziristan,[161] and carries out its cross-border terrorist activities across Afghanistan—especially in the Eastern provinces and Kabul.[162]

The Haqqani Network is financially supported by a wide array of sources including taxation of local people in Pakistan and Afghanistan; donations from wealthy individuals from Arab countries; financial aid from Al-Qaida; and, allegedly, the financial support of Pakistan's Inter-Services Intelligence (ISI) directorate.[163] In 2009, the New York Times estimated that the Haqqani Network had between 4,000 - 12,000 militants.[164] It has been argued that the network is one of the most sophisticated and strongest terrorist organizations conducting terrorist attacks against the Afghan government and international troops.[165] The network has conducted at least 16 major

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[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *See* Jeffrey Dressler, *Haqqani Network Influence in Kurram and Its Implications for Afghanistan*, 4 CTC SENTINEL 11, 11 (2011).

[160] *Terrorist Groups: Haqqani Network*, COUNTER TERRORISM GUIDE, https://www.dni.gov/nctc/groups/haqqani_network.html (last visited Aug. 1, 2018) [hereinafter THE TERRORIST GROUPS]

[161] Jeffrey A. Dressler, *The Haqqani Network: From Pakistan to Afghanistan*, INSTITUTE FOR THE STUDY OF WAR 11 (2010), http://www.understandingwar.org/sites/default/files/Haqqani_Network_0.pdf.

[162] THE TERRORIST GROUPS, *supra* note 160.

[163] *See e.g.* THE MILITANT ORGANIZATIONS, *supra* note 155; Dressler, *supra* note 161 at 11.

[164] Jane Perlez, *Rebuffing U.S., Pakistan Balks at Crackdown*, THE NEW YORK TIMES (2009), https://www.nytimes.com/2009/12/15/world/asia/15haqqani.html?_r=0.

[165] THE TERRORIST GROUPS, *supra* note 160.

attacks across Afghanistan from 2006 to 2017.[166] The network has allegedly been responsible for organizing one of the most deadly terrorist attacks in Afghan history in 2017 when a truck bomb was detonated in the center of Kabul, killing over 150 people and injuring hundreds more.[167]

Transnational terrorist groups do not carry out their criminal activities solely for political or religious reasons; rather, they are motivated by financial earnings as well.[168] Some empirical studies establish a nexus between terrorism and drug trafficking in Afghanistan and demonstrate that the drug market is more a cause for terrorist activities than an effect.[169] According to one report, of 44 transnational terrorist groups in the world, 19 are engaged in drug trafficking.[170] The UNODC estimates that the Taliban earns almost 50% of their revenue through drug trafficking.[171] A study found that in Afghan provinces where poppy cultivation and opium production take place, terrorist groups are more likely to be active and carry out attacks which in turn cause more causalities.[172] This suggests a direct causal relationship between drug trafficking and terrorism in Afghanistan.

Terrorist activities have had overwhelmingly negative consequences in Afghanistan. In addition to taking innocent lives, undermining state sovereignty and the legal system, and harming the economy, terrorists have disrupted Afghans' daily life. The fear of being killed in a terrorist

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[166] *See* THE MILITANT ORGANIZATIONS, *supra* note 155

[167] *Afghanistan: Deadly Kabul Truck-Bomb Toll Rises*, ALJAZEERA (2017), https://www.aljazeera.com/news/2017/06/afghanistan-deadly-kabul-truck-bomb-toll-rises-170606060815177.html.

[168] Keith Cozine et al., *From Local to Global: Comparing Network Approaches to Addressing Terrorism and Transnational Crime*, 9 JOURNAL OF POLICING, INTELLIGENCE AND COUNTER TERRORISM 117, 117 (2014).

[169] JAMES J. F. FOREST, INTERSECTIONS OF CRIME AND TERROR 61 (2013).

[170] Liana Eustacia Reyes & Shlomi Dinar, *The Convergence of Terrorism and Transnational Crime in Central Asia*, 38 STUDIES IN CONFLICT & TERRORISM 380, 383 (2015).

[171] THE DRUG PROBLEM REPORT, *supra* note 68 at 34.

[172] FOREST, *supra* note 169 at 53.

attack and the feeling that a terrorist attack may occur at any moment traumatizes Afghans and causes feelings of insecurity regardless of whether a terrorist incident actually occurs.

Very few of the terrorist organizations active in Afghanistan are purely local. They harbor connections outside Afghanistan, whether through receiving financial support, obtaining weapons/bombs, or fighting alongside foreign terrorists. Although it is necessary to fight terrorist groups through military operations in the battlefield and combat terrorist groups with strong contributions from intelligence agencies, an effective legal system is also very important to bring terrorists to justice. The legal system can only prosecute transnational terrorists effectively when it has the tools and ability to collect relevant and admissible information, including evidence from foreign jurisdictions, and use it effectively in trial.

C. Corruption

Transparency International defines corruption as "the abuse of entrusted power for private gain."[173] Based on where the corruption takes place and how much money is lost, generally three categories of corruption are specified: "grand corruption," "petty corruption," and "political corruption."[174] While corruption has always existed, the concept of transnational corruption is newer[175] and dates back to the last few decades.[176] Corruption and anti-corruption efforts were

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[173] *What Is Corruption*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/what-is-corruption#define (last visited Aug. 3, 2018).

[174] *Corruption*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/glossary/term/corruption (last visited Aug. 3, 2018).

[175] *See* Adndrew Marshall, *What's Yours Is Mine: New Actors and New Approaches to Asset Recovery in Global Corruption Cases*, CENTER FOR GLOBAL DEVELOPMENT 4-5 (2013), https://www.cgdev.org/publication/what%E2%80%99s-yours-mine-new-actors-and-new-approaches-asset-recovery-global-corruption-cases.

[176] Ana Peyro Llopis, *Transnational Corruption*, OXFORD BIBLIOGRAPHIES, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0091.xml (last updated Nov. 2, 2017).

considered solely a domestic issue of individual states until recently.[177] The first inter-state effort that specifically addressed corruption at the regional level was the adoption of the Inter-American Convention Against Corruption in 1966.[178] Following the convention against transnational organized crime, the UN General Assembly took a landmark step in fighting global corruption when it adopted the UNCAC in 2003.[179] The convention has been widely ratified by states and now 187 states are party to the convention.[180] The UNCAC requires state parties to criminalize certain actions in their domestic law including bribery of national and foreign public officials; embezzlement; abuse of power; illicit enrichment; and obstruction of justice.[181] To comply with its treaty obligations as a state party, Afghanistan recently criminalized the specified corrupt actions under UNCAC.[182]

Historically, corruption did not have any base/origin in Afghan culture and it has been considered as going against Afghan values.[183] The Asia Foundation found that most Afghans believe that the scale of corruption has been much larger after 2001 than they perceived in pre-2001 regimes.[184] However, as many surveys show, corruption has become a pervasive and endemic

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[177] *Id.*

[178] *Id.*

[179] *See United Nations Convention against Corruption*, UNODC, https://www.unodc.org/unodc/en/corruption/uncac.html (last visited Apr. 3, 2020).

[180] *Id.*

[181] United Nations Convention against Corruption (UNCAC), at art. 15-25 (entered into force Dec. 14, 2005).

[182] *See e.g.* THE PENAL CODE, *supra* note 141 at art. 370-418; *Afghanistan's Fight Against Corruption: From Strategies to Implementation*, UNAMA 3 (2018).

[183] Yama Torabi, *The Growing Challenge of Corruption in Afghanistan: Reflection of on A Survey of the Afghan People: Part 3 of 4*, THE ASIA FOUNDATION 2 (2012), https://asiafoundation.org/resources/pdfs/FNLcorruptionchapterOccasionalPaperJuly30.pdf.

[184] *Id.*

problem in Afghanistan[185] and has affected every aspect of life in the country.[186] Afghanistan has consistently been ranked one of the most corrupt countries in the world in Transparency International's annual corruption perceptions index over the last decade.[187] According to another report by the Special Inspector General for Afghanistan Reconstruction (SIGAR), Afghanistan has been one of the worst countries in terms of corruption from 2002 to 2016.[188] A recent survey by the Asia Foundation found that almost all Afghans consider corruption to be a problem in the provinces where they live.[189] More than 80% of Afghans think that corruption is a major problems in the country.[190] The report shows that this perception of corruption by Afghans remained consistent between 2006 and 2017.[191] Similarly, a UNODC report indicates that Afghans consider corruption the country's second most important and urgent problem, after insecurity.[192]

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[185] *Afghanistan's Fight Against Corruption: From Strategies to Implementation*, UNAMA 6 (2018) https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_from_strategies_to_implementation-14_may_2018.pdf [hereinafter THE UNAMA REPORT ON CORRUPTION 2018]

[186] *See* Adele Harmer et al., *Collective Resolution to Enhance Accountability and Transparency in Emergencies: Afghanistan Report*, TRANSPARENCY INTERNATIONAL 9 (2017), https://www.humanitarianoutcomes.org/sites/default/files/team/2017_create_afghanistan_en.pdf.

[187] *Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/research/cpi/cpi_2008/0 (last visited Aug. 4, 2018).

[188] *Afghanistan's Anti-Corruption Efforts: The Afghan Government Has Begun to Implement an Anti-Corruption Strategy, But Significant Problems Must Be Addressed*, SIGAR 1 (2018), https://www.sigar.mil/pdf/audits/SIGAR-18-51-AR.pdf.

[189] *Afghanistan in 2017: A Survey of Afghan People*, THE ASIA FOUNDATION 99 (2017), https://asiafoundation.org/wp-content/uploads/2017/11/2017_AfghanSurvey_report.pdf [hereinafter THE ASIA FOUNDATION SURVEY 2017]

[190] *Id.*

[191] *Id.* at 100.

[192] *Corruption in Afghanistan: Recent Patterns and Trends*, UNODC 3 (2012) https://www.unodc.org/documents/frontpage/Corruption_in_Afghanistan_FINAL.pdf [hereinafter THE UNODC REPORT ON CORRUPTION 2012]

According to many surveys, among other corrupt practices, bribery is the most prevalent type of corruption in Afghanistan.[193] Despite spending millions of dollars fighting corruption,[194] Afghanistan has not made any tangible progress in controlling corruption over the past few years,[195] and recent trends suggest that corruption, especially bribery, has actually been increasing both in frequency and amount.[196] A UNODC report estimates that "the frequency of bribery has increased from 4.7 bribes to 5.6 bribes per bribe-payer and the average cost of a bribe has risen from US $158 to US $214, a 29 percent increase in real terms"[197] between 2010 and 2012.[198] Although the UNODC report was developed almost six years ago, more recent reports indicate that the situation may have further worsened. For example, in 2016, a national survey conducted by Integrity Watch Afghanistan (IWA) estimated that Afghanistan economically lost approximately $2.8 billion due to widespread bribery in 2015.[199] This loss is significantly greater than the estimated Afghan licit revenue which was $2.17 billion for the same year.[200]

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[193] *See e.g. National Corruption Survey 2016: Afghan Perceptions and Experiences of Corruption*, INTEGRITY WATCH AFGHANISTAN 30 (2016), https://iwaweb.org/wp-content/uploads/2016/12/NCS__English__for-web.pdf; THE ASIA FOUNDATION SURVEY 2017, *supra* note 189 at 100; *Corruption in Afghanistan: Bribery as Reported by the Victims*, UNODC (2010).

[194] *See e.g.* Adam Weinstein, *The US Spent $78 Million on an Afghan Anti-Corruption Scheme That Failed in Epic Fashion*, BUSINESS INSIDER (2017), https://www.businessinsider.com/us-spent-78-million-on-afghan-anti-corruption-scheme-that-failed-2017-8.

[195] Maira Martini, *Corruption and Governance Indicators in Selected Asian Countries*, TRANSPARENCY INTERNATIONAL 6 (2016), https://www.u4.no/publications/corruption-and-governance-indicators-in-selected-asian-countries.pdf.

[196] *See e.g.* THE UNODC REPORT ON CORRUPTION 2012, *supra* note 192 at 5; *Corruption in Afghanistan: Recent Patterns and Integrity Challenges in the Public Sector*, UNODC 5 (2013).

[197] *Corruption in Afghanistan: Recent Patterns and Integrity Challenges in the Public Sector*, UNODC 5 (2013), https://www.unodc.org/documents/data-and-analysis/statistics/corruption/Corruption_Afghanistan_2013.pdf.

[198] *Id.*

[199] *National Corruption Survey 2016: Afghan Perceptions and Experiences of Corruption*, INTEGRITY WATCH AFGHANISTAN 24 (2016), https://iwaweb.org/wp-content/uploads/2016/12/NCS__English__for-web.pdf.

[200] *Id*.

Corruption has dominated Afghanistan's public and private sectors. In the public sector, Afghans believe that courts, prosecution offices, and law enforcement agencies are the most corrupt institutions in the country.[201] Without bribing public officials, Afghans would barely receive any public services from the relevant institutions.[202] In 2010, the UNODC estimated that in 2009 more than half of Afghanistan's population were exposed to bribery at least once when they needed to obtain a service from a public official.[203] Other forms of corruption in the public sector include patronage;[204] nepotism/clientelism; position buying and selling; embezzlement; and grand corruption.[205] The widespread corruption has also affected the private sector. It is very difficult for businesspeople to meeting with an official holding a high-level position to win a contract[206] or compete in the market without paying a bribe (gift).[207] Business firms have identified corruption as the third most salient barrier that hinders investment in Afghanistan.[208]

Although petty corruption is also prevalent in Afghans' daily life, grand or large scale corruption poses a greater threat to the country's development, rule of law, and the integrity and legitimacy of its institutions.[209] Large scale corruption usually involves high level officials and

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[201] *Id*. at 27.

[202] *Corruption in Afghanistan: Bribery as Reported by the Victims*, UNODC 4 (2010), https://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghanistan-corruption-survey2010-Eng.pdf.

[203] *Id*. at 9.

[204] *Fighting Corruption in Afghanistan: Summaries of Vulnerabilities to Corruption Assessment*, THE WORLD BANK 6 (2009) http://siteresources.worldbank.org/AFGHANISTANEXTN/Resources/305984-1237085035526/5919769-1249254211329/VCAsSummaryReportFinalJuly172009.pdf [hereinafter THE WORLD BANK REPORT 2009]

[205] *Corruption & Anti-Corruption Issues in Afghanistan*, CFC 7-8 (2012), https://reliefweb.int/sites/reliefweb.int/files/resources/CFC-Afghanistan-Corruption-Volume-Feb2012.pdf [hereinafter THE CFC REPORT]

[206] THE WORLD BANK REPORT 2009, *supra* note 204at 85.

[207] Martini, *supra* note 195 at 4.

[208] THE CFC REPORT, *supra* note 205 at 33.

[209] THE WORLD BANK REPORT 2009, *supra* note 204 at 1.

significant amounts of money.[210] Even though it has been argued that petty corruption is directly connected to grand corruption,[211] perpetrators of grand corruption are more likely to commit infractions that cross borders and thus would be considered transnational crimes. The interaction between transnational drug traffickers' networks and corrupt officials constitutes an example of transnational corruption. In a report issued in 2009, the UNODC found that transnational drug traffickers pay bribes to high-level corrupt Afghan officials in order to secure passage of their opium convoys across the borders.[212]

High-level corrupt officials do not only take bribes, but they also typically transfer the criminal proceeds to foreign countries. Afghanistan's most high-profile corruption case in the last two decades was the Kabul Bank crisis. In September 2010, fraud and theft by powerful and high-level corrupt officials led to the collapse of Kabul Bank, at that time the largest private bank in Afghanistan.[213] After depositors became aware of the crisis, they flooded the bank to withdraw their savings.[214] Within a couple of days, over a half billion dollars was withdrawn and the crisis deepened; Afghanistan's tiny economy was about to crumble.[215] After years of investigation, the Afghan government found that much of Kabul Bank's stolen money had been transferred to Dubai through the creation of loan files in the name of sham companies.[216] A report estimated that the

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[210] *Corruption in Conflict: Lessons from The U.S. Experience in Afghanistan*, SIGAR 3-4 (2016) https://www.sigar.mil/pdf/LessonsLearned/SIGAR-16-58-LL.pdf [hereinafter THE CORRUPTION IN CONFLICT]

[211] *Id.* at 5.

[212] *See* THE UNODC REPORT ON AFGHAN OPIUM 2009, *supra* note 75 at 139.

[213] Grant Mleod, *Responding to Corruption and the Kabul Bank Collapse*, USIP 2 (2016), https://www.usip.org/sites/default/files/SR398-Responding-to-Corruption-and-the-Kabul-Bank-Collapse.pdf.

[214] *Id.*

[215] Jon Boone, *The Financial Scandal That Broke Afghanistan's Kabul Bank*, THE GUARDIAN (2011), https://www.theguardian.com/world/2011/jun/16/kabul-bank-afghanistan-financial-scandal.

[216] *See* Mleod, *supra* note 213 at 2; THE CORRUPTION IN CONFLICT, *supra* note 210 at 44.

stolen funds amounted to approximately $982 million.[217] From the start of the crisis through today, the government of Afghanistan has been struggling to bring the perpetrators to justice and fully recover the stolen assets. The Kabul Bank crisis hit Afghanistan's fragile economy extremely hard, undermined the functionality and legitimacy of the Afghan government, and negatively impacted the country's entire banking system.[218]

As explained above, the pervasive corruption in Afghanistan has had significant negative consequences on the country's citizens, severely constrained national and international development efforts, and hampered the promotion of good governance in the country. Widespread grand corruption also diverts public funds from development projects to the pockets of individuals, especially powerful and influential government officials. The Kabul Bank example shows how millions of dollars can be stolen and laundered using sophisticated methods by criminals in close coordination with corrupt officials, and how it would be difficult to investigate such a case without the assistance of foreign governments. Unfortunately, although the Afghan government has consistently issued strong statements about combating corruption, it has not taken practical and serious steps to combat the types of large-scale corruption that has been carried out by high-level officials over the last 17 years. SIGAR recently criticized the government of Afghanistan, especially the Attorney General's Office, and labeled its anti-corruption efforts "weak and ineffective."[219] SIGAR's report claims that the Attorney General has failed to prosecute prominent and powerful corrupt officials.[220] Such officials have great leeway, both within and outside the

[217] *See* THE CORRUPTION IN CONFLICT, *supra* note 210 at 45.

[218] *See* Mleod, *supra* note 213 at 2.

[219] *Enteqade SIGAR Az Karkarde Loysaranwali Afghanistan Dar Mobareza Ba Fasad* [SIGAR's Critique of the Afghanistan Attorney General Office's Efforts in Combating Corruption], DARIVOA, https://www.darivoa.com/a/sigar-report-creticized-afghan-atorny-general-office-action-against-corruption-/4507670.html (last visited Aug. 6, 2018).

[220] *Id*.

government, to commit corrupt activities with impunity and easily transfer any illegally begotten monies and assets to foreign countries. Any efforts to combat corruption will continue to fail unless the government targets the corrupt officials at the top, and any measures to fight transnational crime will fail unless they include an effective and comprehensive strategy and legal framework for recovering the proceeds of corruption from the foreign countries used by the corrupt officials as safe havens.

D. Money Laundering

Money laundering is another serious and growing challenge facing the world in the twenty-first century. The UNODC defines money laundering as "the method by which criminals disguise the illegal origins of their wealth and protect their asset bases, so as to avoid the suspicion of law enforcement agencies and prevent leaving a trail of incriminating evidence."[221] In other words, money laundering is a way for bad actors to conceal the criminal origins of their dirty money by using various techniques to integrate the money into the legitimate financial system. Money laundering is a very new crime and the term was used for the first time in 1973 during the Watergate scandal in the United States.[222] Initial efforts to combat money laundering were focused on preventing drug traffickers from integrating the proceeds of their crimes into the legal economy.[223] In 1986 the United States, as the modern pioneer in conceptualizing and combating money laundering,[224] enacted the Money Laundering Control Act which broadened the scope of money laundering and criminalized any transactions that involved the proceeds of illegal

[221] *Introduction to Money-Laundering*, UNODC, https://www.unodc.org/unodc/en/money-laundering/introduction.html?ref=menuside (last visited Aug. 9, 2018).

[222] *The Early History of Money Laundering*, LAWYERTEACHER, https://www.lawteacher.net/free-law-essays/commercial-law/the-early-history-of-money-laundering-commercial-law-essay.php#ftn3 (last visited Aug. 10, 2018).

[223] *See e.g.* BOISTER & CURRIE, *supra* note 135 at 332; BOISTER, *supra* note 137 at 102.

[224] *See* BOISTER, *supra* note 137 at 102.

activities.[225] Consequently, the Act covers the proceeds of any crime including corruption, fraud, and human trafficking.[226] Money laundering is recognized as a distinct but ancillary crime[227] which is carried out as a subsequent step after perpetration of other crimes that generate income.[228]

The global response to combat transnational crime began with the adoption of the 1988 Vienna Convention.[229] Later global efforts were bolstered and extended by UNCTOC in 2003 and UNCAC in 2005.[230] With the rise of terrorism, the UN took further steps to address the financing of terrorism and adopted the Financing Convention in 1999.[231] This convention entered into force in 2002[232] and prohibits funding of terrorism, regardless of whether the origin of the moneys is legal or illegal.[233] Despite many collective and individual measures taken by the international community and individual states, the threat posed by money laundering to national and international financial systems remains as strong as ever.

The UNODC estimates that transnational criminals laundered roughly US $1.6 trillion in 2009 which is tantamount to 2.7% of the world's GDP.[234] This number falls within the range estimated by the IMF for the same year – between US $1.2 trillion and US $2.9 trillion, equivalent to 2%-

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[225] *See e.g.* Genny Ngai, *Money Laundering*, 49 Am. Crim. L. Rev. 1011, 1012 (2012); JAY S. ALBANESE, TRANSNATIONAL CRIME AND THE 21ST CENTURY 110 (2011).

[226] Ngai, *supra* note 225 at 1013.

[227] BOISTER, *supra* note 137 at 103.

[228] *See* BANTEKAS & NASH, *supra* note 134 at 247.

[229] *UN Instruments and Other Relevant International Standards on Money-Laundering and Terrorist Financing*, UNODC, http://www.unodc.org/unodc/en/money-laundering/Instruments-Standards.html?ref=menuside (last visited Aug. 10, 2018) [hereinafter THE UN INSTRUMENTS]

[230] *Id*.

[231] Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, THE WORLD BANK I-4 (2ed edition 2006), http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/Reference_Guide_AMLCFT_2ndSupplement.pdf.

[232] THE UN INSTRUMENTS, *supra* note 229.

[233] *See* The International Convention for the Suppression of the Financing of Terrorism, at art. 2 (enter into forced Apr. 10, 2002).

[234] THE ILLICIT FINANCIAL FLOWS REPORT, *supra* note 51 at 7.

5% of global GDP.[235] The proceeds of drug trafficking constitute the primary source of money laundering globally, almost half of the proceeds of all transnational crime.[236]

Considering the prevalence of drug trafficking and other transnational crimes in Afghanistan, it is not surprising that money laundering is a major issue in the country.[237] Although Afghanistan has taken some steps both at the policy and practical level to combat money laundering, it is reported that money laundering is on the rise.[238] During the last five years, Afghanistan has enacted two new laws against money laundering[239] and the financing of terrorism[240] and amended some legal provisions in the 2017 penal code to further regulate the crime of money laundering and its punishment.[241] In 2006, Afghanistan also established a specialized unit within Da Afghanistan Bank (the Central Bank of Afghanistan) named the Financial Transactions and Reports Analysis Center of Afghanistan (FinTRACA).[242] The primary mission of FinTRACA is to protect Afghanistan's financial system from money laundering and

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[235] *Id*. at 19.

[236] *Id*. at 7.

[237] *Islamic Republic of Afghanistan: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, IMF 8 (2011) https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Islamic-Republic-of-Afghanistan-Detailed-Assessment-Report-on-Anti-Money-Laundering-and-25330 [hereinafter THE IMF REPORT ON MONEY LAUNDERING]

[238] *See e.g.* Farid Shinwari, *The Rise of Money Laundering Across The Afghanistan-Pakistan Border*, GANDHARA (2015), https://gandhara.rferl.org/a/money-laundering-afghanistan/27316377.html; *Afghanistan Sees an Increase in Money Laundering Activity*, TOLONEWS (2013), https://www.tolonews.com/index.php/business/afghanistan-sees-increase-money-laundering-activity.

[239] *See Qanooni Jelowgiri Az Polshoaee Wa Awayede Nashi Az Jarayem* [Law on Prevention of Money Laundering and Proceeds of Crimes], Official Gazette, July 2014, No. 1142 (Afg.) [hereinafter ANTI-MONEY LAUNDERING LAW]

[240] *See Qanooni Jelawgiri Az Tamweele Terrorism* [Law on Prevention of Financing Terrorism, Official Gazette, September 2014, No. 1146 (Afg.) [hereinafter ANTI-FINANCING TERRORISM LAW]

[241] THE UNAMA REPORT ON CORRUPTION 2018, *supra* note 185 at 47.

[242] *Overview*, DA AFGHANISTAN BANK, https://www.fintraca.gov.af/Overview.html (last visited Aug. 10, 2018) [hereinafter THE FINTRACA WEBSITE]

the financing of terrorism.[243] This unit has authority to analyze suspicious transactions and work closely with the AGO to detect and investigate money laundering-related crimes.[244] Based on available information, for five consecutive years (from 2012 to 2017) the FATF has put Afghanistan on the list of countries with Improving Global Anti-Money Laundering and Counter-Terrorist Financing (AML/CFT) Compliance: Ongoing Process, and identified Afghanistan as a jurisdiction with strategic AML/CFT deficiencies.[245] However, the country's most recent institutional changes convinced FATF to remove Afghanistan from the list of countries tied to the on-going global compliance process, beginning from June 23, 2017 onward.[246] This might be one of Afghanistan's few achievements in fighting money laundering.

The Basel Institute of Governance consistently ranked Afghanistan as one of the two countries with the highest risk of money laundering in the years from 2013 through 2017.[247] In its 2017 annual anti-money laundering index of 146 countries, the Basel Institute identified Afghanistan as the second most risky country with regard to money laundering and financing terrorism.[248] It has been estimated that only 35% of financial flows in Afghanistan in 2016 were licit.[249] Although it is not possible to give an exact number, due to the existence of many informal

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[243] *Mission,* DA AFGHANISTAN BANK, https://www.fintraca.gov.af/Vision&Mission.html (last visited Aug. 10, 2018).

[244] THE FINTRACA WEBSITE, *supra* note 242.

[245] *See e.g. Improving Global AML/CFT Compliance: Ongoing Process*, FATF (2017), http://www.fatf-gafi.org/countries/a-c/afghanistan/documents/fatf-compliance-february-2017.html.

[246] *See Improving Global AML/CFT Compliance: Ongoing Process*, FATF (2017), http://www.fatf-gafi.org/countries/a-c/afghanistan/documents/fatf-compliance-june-2017.html.

[247] *See Basel AML Index 2017: Report*, BASEL INSTITUTE ON GOVERNANCE 1 (2017), https://index.baselgovernance.org/sites/index/documents/Basel_AML_Index_Report_2017.pdf.

[248] *See id.; Iran and Afghanistan Top 2017 Basel AML Index,* ALJAZEERA (2017), https://www.aljazeera.com/news/2017/08/iran-afghanistan-top-2017-basel-aml-index-170818175234677.html.

[249] *Afghanistan's Fight against Corruption: The Other Battlefield*, UNAMA 63 (2017), https://unama.unmissions.org/sites/default/files/afghanistans_fight_against_corruption_-_the_other_battlefield_-_april_2017-english.pdf.

and underground transactions, it is estimated that Afghanistan has lost billions of dollars annually through illicit financial flows and money laundering.[250] In 2011 alone, about USD $4.5 billion dollars in cash was transferred out of Afghanistan through Kabul Airport.[251] SIGAR claims that transfers of money in cash at this magnitude automatically increase the likelihood of money launderers' involvement.[252]

Some reports by the IMF and IWA indicate that drug trade, corruption, illicit payments for movement of goods, kidnapping,[253] and tax evasion[254] are the primary sources for money laundering in Afghanistan. Generally, money launderers use three methods to launder their illicit money: checks or wire transfers, physical circulation of cash or banknotes, and injecting dirty money into the trade system by buying and selling goods.[255] As a transnational crime, money laundering channels the inflows and outflows of crime proceeds from Afghanistan to foreign countries and vice versa. It is reported that warlords, high-level corrupt officials, and other transnational criminals launder their dirty money across the world to "purchase elaborate houses, cars, and weapons, pay salaries for militias and criminal gangs, and buy their way to immunity for their crimes."[256] According to some reports, money launderers, especially high level corrupt officials, transfer their illegal money through the Very Important Persons' (VIP) doors at airports,

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[250] Azizullah Hamdard, *Billions of Dollars Lost to Illicit Financial Flows: IWA*, PAJHWOK (2016), https://www.pajhwok.com/en/2016/04/21/billions-dollars-lost-illicit-financial-flows-iwa.

[251] *Curbing Illicit Financial Flows in Afghanistan: Money Laundering, Terrorist Financing, and Hawala*, INTEGRITY WATCH AFGHANISTAN 9 (2015), https://iwaweb.org/wp-content/uploads/2016/04/IFF-report-English-2-for-screen.pdf [hereinafter THE IWA REPORT ON ILLICIT FINANCIAL FLOWS]

[252] *Id*.

[253] THE IMF REPORT ON MONEY LAUNDERING, *supra* note 237 at 27.

[254] THE IWA REPORT ON ILLICIT FINANCIAL FLOWS, *supra* note 251 at 6.

[255] *Id*. at 5.

[256] *Id*. at 1.

enabling them to bypass the standard checking and security screenings.[257] Similarly, illegal financial cargo can easily cross Afghanistan's borders due to the existence of widespread corruption at the customs borders.[258] For instance, it was reported that in 2009 the first vice president of Afghanistan was caught in Dubai bringing USD $52 million in cash from Afghanistan.[259]

The formal banking system is a new development in Afghanistan and the country's traditional financial system relies heavily upon informal methods.[260] For instance, it has been reported that more than 90% of Afghans use the *hawala* (money-service providers*)* system as the primary vehicle for their financial transactions.[261] This itself makes Afghanistan particularly vulnerable to financial crimes and money laundering.[262] Unsurprisingly, the *hawala* system is the main engine for national and transnational money launderers to channel their illicit monies in and out of Afghanistan.[263]

The *hawala* system helps drug traffickers, terrorist organizations, corrupt officials, and other financial criminals conduct their transactions and facilitates their money laundering in all three phases of the crime: placement, layering, and integration.[264] According to a FATF report, one of the main reasons that criminals use the *hawala* system is it helps them disguise the proceeds

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[257] *Id*. at 9.

[258] *Id*.

[259] Jonathan Steele & Jon Boone, *Wikileaks: Afghan Vice-President 'Landed in Dubai with $52m in Cash*, THE Guardian (2010), https://www.theguardian.com/world/2010/dec/02/wikileaks-elite-afghans-millions-cash.

[260] THE IWA REPORT ON ILLICIT FINANCIAL FLOWS*, supra* note 251 at 13-14.

[261] *Id*. at 14.

[262] *See FATF Report: The Role of Hawala and Other Similar Service Providers in Money Laundering and Terrorist Financing*, FATF 27 (2013), http://www.fatf-gafi.org/media/fatf/documents/reports/Role-of-hawala-and-similar-in-ml-tf.pdf [hereinafter THE FATF REPORT ON HAWALA]

[263] *See* THE IWA REPORT ON ILLICIT FINANCIAL FLOWS*, supra* note 251 at 29.

[264] *See id.* at 29-30.

of their crime and side-step oversight by the relevant authorities.[265] The informality of the *hawala* system contributes to the flow of illicit money without being properly inspected by the government.[266] In 2006, a joint investigation by European and U.S. authorities revealed that approximately four jurisdictions were involved in a complicated money laundering case through the *hawala* system including the United Arab Emirates, Afghanistan, Turkey, and Italy.[267]

Pakistan is one of the neighboring countries where much illegal money flows out and in from Afghanistan. It is reported that the flow of illicit money has been increasing at the Afghanistan - Pakistan border.[268] Among other reasons, the massive number of people and vehicles crossing the border every day makes it hard for both countries' authorities to adequately check for flows of illicit money.[269] As "a drop in the ocean," within only three months in 2015, more than USD $2 millions of illicit funds were caught by customs authorities at the Torkham border crossing.[270]

Another report reveals that transnational criminal groups have been smuggling and laundering millions of illicit riyal (Saudi currency) each month through Pakistan and Afghanistan to Central Asian countries like Uzbekistan and then to the United Arab Emirates and other countries.[271] This is another way criminals use Afghanistan's weak financial system as a corridor

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[265] THE FATF REPORT ON HAWALA, *supra* note 262 at 18.

[266] THE TRANSNATIONAL THREATS REPORT, *supra* note 25 at 29.

[267] Rhys Jones, *The Money Changers: International Police Are Investigating a Complex Drug-Money Laundering Operation Based on the Ancient Hawala Money Transfer System, Which Has Links in Dubai, Turkey, Afghanistan, and Italy*, THE MIDDLE EAST (2007), https://www.thefreelibrary.com/The+money+changers%3A+international+police+are+investigating+a+complex...-a0157590316.

[268] Shinwari, *supra* note 238.

[269] *Id.*

[270] *Id.*

[271] *Guzareshe Shasho Neem: Barrasi Saraazer Shodan Polhai Seyahi Arabistani Saudi Ba Afghanistan* [6:30 Report: A Study of Saudi Black Currency Circulation in Afghanistan], TOLONEWS (2018), https://www.youtube.com/watch?v=SgLTo2CJaok&t=1024s.

to disguise the sources of illegal foreign currency and finally integrate it back into the licit global financial system.

Like other transnational crimes, money laundering is not only a challenge to Afghanistan, but also to many neighboring countries and beyond. As transnational criminals become more sophisticated through trying new methods and using more advanced technologies for transferring illegal money, transnational money laundering could become even more complicated and extraordinarily difficult to overcome. While Afghanistan has arguably made some, albeit miniscule, progress in the form of enacting new laws and policies. further action and bold steps will be required to effectively combat transnational money laundering and to keep up with new criminal developments at the international level to constrain the flow of illegal money from and to Afghanistan.

III. How Transnational Crimes Are Intertwined and Mutually Reinforcing

As already noted in this chapter, the relationship between transnational crimes can be mutually reinforcing. In particular, the four transnational crimes discussed above lend themselves to close cooperation and intertwined activities. These crimes create a vicious circle: each crime reinforces and intensifies the other and contributes to the recurrence and continuance of the cycle of crime. Widespread drug trafficking is facilitated by pervasive corruption and requires money laundering to conceal the profits. Similarly, the lucrative drug market feeds corrupt officials' pockets and entices other officials to engage in corruption, making them more vulnerable to expansive bribery practices. It is worth exploring in more detail how each of these crimes relates to the other three and how they contribute to and bolster the occurrence of each other. This chapter briefly explains in succession the relationship of each crime to the others.

A. Drug Trafficking and Other Crimes

Reports suggest drug trafficking is likely the foundational transnational crime in Afghanistan, fueling other crimes like terrorism, corruption, and money laundering. For instance, it has been reported that the Taliban and other terrorist groups have significantly benefitted from the Afghan opium trade. Terrorist groups take advantage of the opium trade in two ways. First, they levy and collect taxes from farmers, heroin manufacturers, and traffickers.[272] Farmers and others who live in areas controlled by terrorists are required to pay taxes to the Taliban and other insurgents. Since the drug trade is very profitable, terrorists pay special attention to this market, taxing and otherwise capturing money from it. Second, the Taliban and other terrorist groups directly engage in drug trafficking themselves and carry out drug-related criminal activities.[273] According to one report, the Taliban earn 50% of their revenue from the drug market.[274]Arguably the most important evidence confirming the relationship of drug trafficking with terrorism is the UN Security Council's sanctions against the Taliban, punishing them for their involvement in drug trafficking.[275] Without drug funds, the Taliban and other insurgent groups would presumably struggle to finance their activities and continued efforts to wreak trouble in Afghanistan.

Drug trafficking also has a direct relationship with corruption in Afghanistan. The UNODC defines the relationship between drug trafficking and corruption as "mutually reinforcing."[276] Drug trafficking fuels and fortifies corruption; the UNODC asserts that "the wealth and power of some drug trafficking organizations can exceed that of local governments, allowing them to buy

[272] THE DRUG PROBLEM REPORT, *supra* note 68 at 35.

[273] *Id*.

[274] *Id*. at 34.

[275] *Id*. 35.

[276] *Id*. at 30.

protection from law enforcement agents, criminal justice institutions, politicians and the business sector."[277] Drug traffickers try to corrupt or influence anyone who may impede or bar their activities, including customs officers, police, prosecutors, judges, and even witnesses.[278] The abundant illicit money earned through the drug market can make many individuals vulnerable to bribery and other forms of corruption, and therefore increase the extent and magnitude of corruption in the country.

Finally, the relationship between drug trafficking and money laundering is very strong and two-sided. Drug traffickers tend to channel their illicit money into the licit global economy and financial system. The FATF estimated that drug traffickers laundered over two-thirds of their illicit income in the late 1980s.[279]A similar and more recent report by the UNODC estimated that drug trafficking organizations laundered roughly 62% of their gross profits in 2009.[280] Considering the size of the profits the drug market has created for traffickers, 62% could amount to billions of dollars. Indeed, money laundering can be considered a natural consequence of drug trafficking, given that traffickers may not have many opportunities to take advantage of their drug money unless they launder it.

B. Terrorism and Other Crimes

Terrorism is closely connected with drug trafficking, corruption, and money laundering, and the presence of terrorism in a country can consolidate and perpetuate the occurrence of these other crimes. Terrorists typically provide safe havens for the drug market in the areas under their control. The need for financing encourages terrorist groups to facilitate the drug market in their

[277] *Id*.

[278] *Id*. at 31.

[279] *Id*. at 25.

[280] *Id*. at 26.

locales and even employ further violence to extend and maintain their presence in drug-cultivation areas in order to increase revenues.[281] According to a UNODC report, in 2009 almost all opium in Afghanistan was produced in seven provinces where terrorists and insurgent groups had greater control than the government.[282] However, it should be noted the influence of terrorists on drug trafficking can occasionally go in the opposite direction. A report by the UNODC indicated that the Taliban and other terrorists' anti-drug measures did temporarily reduce drug production in the areas they controlled in the years 2001 and 2016.[283]

Terrorism can also intensify corruption. In order to fund their activities, terrorists locate and utilize both legal and illegal avenues to channel their money. Since terrorists generally circulate their funds through illegal pathways, they often attempt to bribe officials and other authorities. It has even been claimed that some Afghan officials abet terrorist organizations with conducting their terror operations and transporting suicide bombers into the cities.[284] Whether that claim is true or not, it is evident that terrorists employ whatever opportunities they have to carry out their activities. As a result, attempts by terrorists to lure officials and law enforcement authorities further expose public officers to corrupt practices and may propagate corruption.

The relationship between terrorism and money laundering is so strong that the international community and individual states had to enact conventions and laws to prevent terrorists from laundering money and thereby financing their activities. Terrorists need to buy supplies, goods,

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[281] May, *supra* note 47 at 8.

[282] THE TRANSNATIONAL THREATS REPORT, *supra* note 25 at 30.

[283] THE DRUG PROBLEM REPORT, *supra* note 68 at 36.

[284] *Parluman: Barmak Naami Enteqal Dehandagane Terroristan Ra Hamagani Kunad* [Parliament: Barmak Should Disclose the Names of Those Who Transport Terrorists], MIDDLE EAST PRESS (2018), https://middleeastpress.com/international/afghanistan/%D9%BE%D8%A7%D8%B1%D9%84%D9%85%D8%A7%D9%86-%D8%A8%D8%B1%D9%85%DA%A9-%D9%86%D8%A7%D9%85-%D8%A7%D9%86%D8%AA%D9%82%D8%A7%D9%84-%D8%AF%D9%87%D9%86%D8%AF%DA%AF%D8%A7%D9%86-%D8%AA%D8%B1%D9%88%D8%B1%DB%8C/.

weapons, and other necessary tools for their terrorist operations. They would not be able to easily purchase their essential needs without laundering their illicit money. In addition, terrorists are intricately connected across the world and must transfer and launder their funds from one country to another in order to purchase weapons and support their co-criminals around the globe.[285] Terrorist groups exploit the formal and informal financial systems to launder their funds,[286] which can consequently increase money laundering in Afghanistan and across the world.

C. Corruption and Other Crimes

Corruption facilitates the commission of all other transnational crimes. Corruption weakens the rule of law and incentivizes transnational criminals to carry out criminal activities without fear of legal consequences. Corruption perpetuates impunity and allows a diversity of criminals to commit their illicit acts with minimal fear of prosecution and punishment. For instance, corruption has a substantial and mutual relationship with drug trafficking. Corruption can significantly contribute to drug production and trafficking. Examining the countries that produce the bulk of illicit drugs in the world, almost all of them suffer from endemic corruption. It is not surprising that Afghanistan is both one of the most corrupt countries and the largest producer of opium in the world. Similarly, it has been estimated that almost all the world's cocaine is produced in countries where corruption is widespread.[287] It is reported that corruption facilitates the trafficking of Afghan opium throughout the transportation routes described earlier in this

[285] *See Money Laundering and Terrorist Financing: A Global Threat*, U.S. DEPARTMENT OF STATE (2004), https://www.state.gov/j/inl/rls/nrcrpt/2003/vol2/html/29843.htm.

[286] *See id.*

[287] Ricardo Soberón Garrido Soberon, *Corruption, Drug Trafficking and the Armed Forces*, TNI (1997), https://www.tni.org/en/article/corruption-drug-trafficking-and-the-armed-forces.

chapter.[288] In addition, as previously noted, the relationship between corrupt officials and drug traffickers is quite intimate, and they usually collude in both drug production and trafficking.

Corruption also reinforces terrorism.[289]As Kofi Annan, the former UN Secretary General, once said, "corruption allows terrorism to flourish."[290] Because corruption allows terrorists to go unpunished, it encourages and increases terrorism.[291] In addition, corruption can equip terrorist groups when officials commandeer government military weapons and hand them over or sell them to the terrorists.[292] It has been reported that corrupt Afghan officials have sold modern U.S.-supplied weapons and even government buildings to the Taliban.[293] Finally, pervasive government corruption frustrates ordinary citizens and thus lends legitimacy to terrorist groups.[294]

Lastly, corruption fuels money laundering. The perpetrators of corruption need to legitimatize the proceeds of their crime. Corrupt officials typically use money laundering as "a means to an end."[295] Corruption (especially bribery) is one of the most profitable transnational crimes and it can generate a significant amount of money for its perpetrators.[296] The only way to disguise the source of illegal money is to launder it. Corruption not only reinforces money

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[288] THE TRANSNATIONAL THREATS REPORT, *supra* note 25 at 30.

[289] *Tackle Instability and Terrorism by Fighting Corruption*, TRANSPARENCY INTERNATIONAL (2015), https://www.transparency.org/news/feature/tackle_instability_and_terrorism_by_fighting_corruption.

[290] Ben Saul, *The Legal Relationship Between Terrorism and Transnational Crime*, 17 INTERNATIONAL CRIMINAL LAW REVIEW 417-428 (2017).

[291] *Id.*

[292] *Id.*

[293] *See e.g.* Austin Bodetti, *How the US Is Indirectly Arming the Taliban*, THE DIPLOMAT (2018), https://thediplomat.com/2018/06/how-the-us-is-indirectly-arming-the-taliban/; *While Afghanistan Raises $15B to Stop Taliban Control, Corrupt Leaders Are Selling Weapons to Them on the Side*, NATIONAL POST (2016), https://nationalpost.com/news/world/while-afghanistan-raises-15b-to-stop-taliban-control-corrupt-leaders-are-selling-weapons-to-them-on-the-side.

[294] *See e.g. id.;* Saul, *supra* note 290 at

[295] Norman Mugarura, *Uncoupling the Relationship Between Corruption and Money Laundering Crimes*, 24 JOURNAL OF FINANCIAL REGULATION AND COMPLIANCE 74, 74 (2016).

[296] *See generally* Paolo Mauro et al., *The Cost of Corruption*, 56 FINANCE & DEVELOPMENT 3, 26-27 (2019).

laundering, but also facilitates the process of the crime by allowing money launderers to get away with their crime.[297] As described above, the Kabul Bank case displayed the connection between corruption and money laundering. The corrupt officials who stole the bank's money laundered it to the United Arab Emirates. Without committing the crime of money laundering, they would not have been able to make use of the money or integrate it into the formal financial system.

D. Money Laundering and Other Crimes

It is not difficult to understand the relationship between money laundering and other transnational crimes. Money laundering has a central role in the commission of all other profit-driven transnational crimes. Whether it is drug trafficking, terrorism, or corruption, money laundering plays a complementary role in the perpetuation of the crimes by enabling criminals to use the funds they have obtained illegally. All the transnational crimes addressed so far are completely or partially money-driven. For instance, although criminal groups may carry out violent and aggressive activities, drug trafficking is motivated purely by financial gain. Similarly, most corrupt practices involve money or other pecuniary benefit. Regardless of their ideology, terrorists need to conduct various illegal profit-driven activities in order to survive and fund their harmful activities. Money laundering is an inevitable step for full realization of the crime for all these criminal acts. Lack of effective anti-money laundering laws and mechanisms and the existence of weak financial institutions may encourage drug traffickers, corrupt officials, and terrorist groups to advance their criminal activities because the increased ability to launder their criminal proceeds helps them achieve their ultimate goal. Such vulnerabilities also encourage

[297] Nadim Kyriakos-Saad et al., *The Incestuous Relationship Between Corruption and Money Laundering*, 83 REVUE INTERNATIONALE DE DROIT PÉNAL 161, 161 (2012).

transnational criminals from other countries to pour their illicit money into the weak country as was true with the flow of Saudi illicit funds into Afghanistan.

This chapter has analyzed the relationships among these four transnational crimes in order to demonstrate how each crime can influence the others and how their connection/interdependence can complicate the development of effective means to combat these crimes. The mutual and reinforcing relationships between these crimes reveal that only a comprehensive strategy that recognizes this complexity and treats all the crimes as inextricably intertwined and thus equally important might succeed in controlling and ultimately eradicating these crimes. Combatting these crimes individually, and failing to recognize their interconnection, is not sufficient to create the deterrence that is needed. Efforts to combat transnational crime must consider the complex relationship between these crimes and their transnational nature.

IV. Conclusion

Globalization has transformed and contributed to the growth of transnational crime across the globe. Transnational crime inflicts a tremendous annual financial loss to the global economy and harms developing countries with weak institutions more than any other states. The networks of transnational criminal groups and the negative impacts of transnational crimes know no boundaries. Accordingly, transnational crime is a global and regional problem. A coordinated global and regional response is required to combat these crimes. As discussed in this chapter, the existence of a fragile state like Afghanistan has been severely threatened by a transnational crime epidemic. Particularly, major transnational crimes such as drug trafficking, terrorism, corruption, and money laundering have been widespread in the country over the last two decades. These crimes have reinforced one another and established a vicious circle which contributes to the continuance and reoccurrence of the crimes. Also, these crimes have negatively impacted many

aspects of life in Afghanistan including security, economy, rule of law, and state building efforts. The impacts of the crimes will further be explored in the next chapter.

CHAPTER THREE: TRANSNATIONAL CRIME AND ITS IMPLICATIONS FOR DEVELOPING COUNTRIES-AFGHANISTAN

The negative impacts of transnational crimes go far beyond the source country. A transnational crime may originate in one country but its implications can reach the other end of the world.[1] Similarly, a transnational crime may appear victimless, while in actuality the affected person or country may be located far from the place where the crime occurred.[2] Although transnational crime is a global problem that challenges every nation in the world, including developed and developing countries, it poses a greater threat to developing countries and fragile states.[3] As previously explained, transnational criminals tend to establish their bases in places where the rule of law is deficient and law enforcement agencies are weak.[4] Therefore, it is more likely that transnational criminal groups will target developing countries and take advantage of the countries' frail institutions to shield themselves from prosecution and accountability. There are many factors that encourage transnational criminals to choose and operate in developing and fragile or post-conflict states, including global criminal expansion, institutional fragmentation, social fragmentation, and a poorly functioning state.[5]

Generally, developing countries face many challenges in governance and provision of public services to their citizens. Their public institutions are marginally able to manage their

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[1] *See The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, UNODC 35 (2010), https://www.unodc.org/res/cld/bibliography/the-globalization-of-crime-a-transnational-organized-crime-threat-assessment_html/TOCTA_Report_2010_low_res.pdf [hereinafter THE TOCTA REPORT] (please look at the cover of the report).

[2] *See id.*

[3] *See* Paula Miraglia et al., *Transnational Organized Crime and Fragile States*, OECD 4 (2012), https://www.oecd-ilibrary.org/docserver/5k49dfg88s40-en.pdf?expires=1536035012&id=id&accname=guest&checksum=3B353A36186C35A53D1BE233B626DCFD.

[4] *See e.g.* Gumisai Mutume, *Organized Crime Targets Weak African States*, AFRICARENEWAL (2007), https://www.un.org/africarenewal/magazine/july-2007/organized-crime-targets-weak-african-states.

[5] *See* Miraglia et al., *supra* note 3 at 8-10.

political, social, economic, and developmental challenges. Moreover/additionally, transnational crime further impairs already weak and inefficient public institutions[6] and erodes state authority and control.[7] Transnational crime contributes to the perpetuation of poverty in developing countries, diverts public funds to private and corrupt individuals' pockets, and impedes countries' ability to prosper and follow the path of development.[8] Large scale and widespread corruption is one of the main challenges to developing countries throughout the world, from Africa to Asia and Latin America.

The consequences of transnational crime are far-reaching and their direct and indirect impacts affect every aspect of life, not only in the source country but far beyond its borders. Depending upon the type of transnational crime and the location, the extent of the negative impacts of the crime vary substantially from one country to the next. Therefore, understanding the implications of transnational crimes requires a comprehensive study that considers the type of crime as well as the local and global contexts in which they take place. This chapter focuses on important implications that these crimes have for Afghanistan.

After the fall of the Taliban regime, the U.S. and the international community poured billions of dollars into fighting terrorism, securing peace, and rebuilding Afghanistan. Although the international aid and efforts supported real progress in the country, they failed to achieve the ultimate goal of creating a peaceful and prosperous country with a fully functioning and stable government. While many factors are to blame for the partial failure of Afghan and international efforts to achieve peace, economic growth, and development, transnational crime is arguably one

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[6] *Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security*, THE WHITE House 5 (2011), https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime [hereinafter THE WHITE HOUSE STRATEGY]

[7] THE TOCTA REPORT, *supra* note 1 at 36.

[8] *See generally* Miraglia et al., *supra* note 3 at 4.

of the major factors contributing to the creation and deterioration of the current troubled situation. This chapter will specifically examine how the four transnational crimes detailed in Chapter Two undermine stability and security in Afghanistan and in turn threaten the prospects for a lasting peace in the country. In addition, it will explain how transnational crime has increasingly fostered an illicit economy and has been hindering state building and development efforts over the last eighteen years. Finally, the chapter will explore the ways transnational crime impedes rule of law in Afghanistan and undermines the efficiency and credibility of its public institutions by exposing their inability to deliver proper governance and basic public services to the people.

I. Security and Stability

Transnational crime is recognized not only as a meaningful threat for the national security of states, but is also a major challenge to international peace and security.[9] Transnational crime plays a significant role in destabilizing developing countries and reinforcing their insecurity and conflicts. This is particularly true in Afghanistan which has suffered instability and conflict over the past four decades. Terrorism, drug trafficking, and corruption together significantly contribute to and perpetuate the state of conflict and chaos in the country.

The relationship between terrorism and insecurity and instability is particularly easy to observe in Afghanistan. Terrorism has a direct relationship with insecurity and has been one of the main causes of conflict and instability. As discussed above, many terrorist groups operate in Afghanistan. Their main goal is to conduct military operations against the Afghan government and international forces. Terrorist groups have been intensifying their activities over the past five years. As they conduct more terrorist attacks, more civilians and innocents are killed, the security situation worsens, and the country becomes more unstable. Currently, Afghans are the target of

[9] *See e.g.* THE WHITE HOUSE STRATEGY, *supra* note 6 at 5.

terrorist attacks almost every day. More recently, terrorist groups have been increasingly targeting civilians and specific ethnic groups like *Hazaras*.[10] It is presumed that, by attacking specific ethnic groups, the terrorists want to divide Afghan society and spark a sectarian conflict between religious sects (such as Shiite versus Sunni) and Afghan ethnic groups.[11] Increased division and conflict between ethnic and religious communities creates more instability and chaos which further weakens the government of Afghanistan. Consequently, terrorist and criminal groups are the principal beneficiaries of this intensifying chaos and conflict because it enables them to promote their malicious agenda with less scrutiny.

The rise of terrorism has had a major impact on civilians which has made them distrustful of the government. Civilians are easier targets than armed forces; targeting the former is thus an efficient way for terrorists to expose the inadequacy of the Afghan government's military and security forces. Attacks on civilians trigger frustration and increased anger among the Afghan people against their government. As a result of the terrorist groups' activities, Afghanistan has become increasingly unstable, to the extent that Afghans do not feel secure anywhere in the country. This reduces trust in the country's leadership, and thus decreases the legitimacy of the government.

Drug trafficking is another transnational crime that promotes insecurity and instability in the region and in the world. The UNODC acknowledges that there is a correlation between the

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[10] *See e.g.* Andrew E. Kramer, *Hazaras Protest After an ISIS Attack Kills 10 in Kabul*, THE NEW YORK TIMES (2018), https://www.nytimes.com/2018/03/09/world/asia/suicide-attack-kabul-hazaras.html; Pamela Constable, *Bombing of Student Center in Kabul Highlights Threat to Minority Shiite Youth*, THE WASHINGTON POST (2018), https://www.washingtonpost.com/world/asia_pacific/islamic-state-claims-suicide-bombing-that-killed-scores-of-students-in-kabul/2018/08/16/8762d2c2-a145-11e8-93e3-24d1703d2a7a_story.html?noredirect=on&utm_term=.edf3c49123c6.

[11] *See* Scott Worden, *ISIS Attack on Afghan Voting Center Aims to Sow Ethnic Division: Will Security Concerns Lead to a Delay of October Elections?* USIP (2018), https://www.usip.org/publications/2018/04/isis-attack-afghan-voting-center-aims-sow-ethnic-division.

drug market and insecurity, but it is very hard to unravel the cause and effect.[12] In addition, the overlapping and strong connection between the illicit drug market and insurgency makes it difficult to differentiate drag traffickers from insurgents.[13] As described in Chapter, the security and stability of all of the countries used as trafficking routes are threatened by transnational drug traffickers.[14]

Turning the focus to Afghanistan, as the largest producer of opium and heroin in the world, it is most likely to be severely affected and destabilized by the illegal activities of transnational criminals and drug traffickers. A UNODC report indicates that "all actors involved in destabilizing Afghanistan are directly or indirectly linked to the drug economy."[15] According to a report by The Guardian, "there is an intimate connection between opiate production and the ability of the Taliban and warlords to engage in long-term conflict."[16]

The illicit Afghan drug economy fuels and perpetuates insecurity and instability in Afghanistan in different ways. First, the drug industry plays a major financial role in supporting and funding the agents of insecurity and instability. The insurgent and terrorist groups take advantage of the profitable drug economy to fund their operations, enhance their military capabilities, and continue their armed attacks against the government.[17] Second, conflicts may arise among insurgent groups over the illicit drug market, which in turn contribute to the

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[12] *See Addiction, Crime and Insurgency: The Transnational Threat of Afghan Opium*, UNODC 101 (2009), https://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghan_Opium_Trade_2009_web.pdf [hereinafter THE UNODC REPORT ON AFGHAN OPIUM 2009]

[13] *Id.*

[14] Niklas Swanstrom, The Narcotics Trade: A Threat to Security? National and Transnational Implications, 8 GLOBAL CRIME 1, 3-4 (2007).

[15] *See* THE UNODC REPORT ON AFGHAN OPIUM 2009, *supra* note 12 at 101.

[16] Nik Crofts, *Drugs and Development-Caught in a Vicious Cycle*, THE GUARDIAN (2011), https://www.theguardian.com/global-development/poverty-matters/2011/apr/07/drugs-development-caught-vicious-cycle-policy.

[17] *See id.*

intensification of insecurity in the country. The UNODC asserts that criminal and insurgent groups reinforce and intensify insecurity by fighting against each other to gain more control over routes and territories.[18] Finally, drug trafficking can contribute to political instability. Many high-ranking officials are involved in drug trafficking.[19] If they perceive their illegal interests to be threatened by legitimate government actions or policies, they have incentive to rally the people against the government and attempt to delegitimize the government's programs and actions.

Several actors recognized as agents of insecurity and instability in Afghanistan have benefited from the drug market. The UNODC has identified some of these agents and calls them "anti-government elements."[20] These elements include Pakistani/Afghan Taliban, Al-Qaeda, warlords, tribal leaders, religious leaders (mullahs), foreign jihadists, mercenaries/semi-private militias, criminal organizations,[21] and most recently ISIS. All of these elements have been shown to significantly benefit from the Afghan drug market except Al-Qaeda and ISIS (the involvement of Al-Qaeda and ISIS in drug trafficking has not been confirmed yet). Some of these elements, like the Taliban, fight against the government, undermine security, and create chaos in the country. Furthermore, the elements that are beneficiaries of the drug economy make significant efforts to preserve drug production and their illegal drug revenues. For instance, the UNODC reports that criminal organizations in Afghanistan tend to employ violent and brutal tactics, including suicide

[18] *See id.*

[19] Vanda Felbab-Brown, *High and Low Politics in Afghanistan: The Terrorism-Drugs Nexus and What Can Be Done about It*, THE BROOKINGS (2016), https://www.brookings.edu/articles/high-and-low-politics-in-afghanistan-the-terrorism-drugs-nexus-and-what-can-be-done-about-it/; Trevor Sutton, *To Stem the Flow of Illicit Drugs from Afghanistan, Follow the Money*, CENTER FOR AMERICAN PROGRESS (2015), https://www.americanprogress.org/issues/security/reports/2015/03/17/108943/to-stem-the-flow-of-illicit-drugs-from-afghanistan-follow-the-money/.

[20] Crofts*, supra* note 16 at 102.

[21] *Id.*

bombings, in order to achieve their illegal goals.[22] It has been reported that a powerful drug trafficker organized terrorist attacks "to hamper the will of ISAF [the International Security Assistance Force] and local police forces to target the drug business."[23] There is strong evidence that drug trafficking has been and continues to be one of the main factors behind insecurity and instability in Afghanistan.

Finally, corruption is viewed as a serious threat to national and international security.[24] Corruption has had an especially strong negative impact on security and stability in Afghanistan. Corruption feeds terrorism,[25] conflict, and instability in the country.[26] The relationship between corruption and conflict is mutual: "corruption increases the risk of conflict and conflict increases the risk of corruption."[27] Conflict in turn disrupts security and stability. This cycle is very evident in Afghanistan. As explained above, corrupt Afghan officials collude with transnational criminals, terrorists, and drug traffickers. For instance, a high-ranking corrupt official in a law enforcement agency may be less concerned about the peoples' security than about protecting his own illegal interests in helping drug traffickers or terrorists.[28]

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[22] *Id.* at 105.

[23] *Id.*

[24] *James Cohen, The Impact of Corruption on Security Sector Effectiveness, and What to Do About It*, CENTER FOR SECURITY GOVERNANCE (2014), http://secgovcentre.org/2014/12/the-impact-of-corruption-on-security-sector-effectiveness-and-what-to-do-about-it/.

[25] *Tackle Instability and Terrorism by Fighting Corruption*, TRANSPARENCY INTERNATIONAL (2015), https://www.transparency.org/news/feature/tackle_instability_and_terrorism_by_fighting_corruption [hereinafter TACKLE INSTABILITY AND TERRORISM]

[26] Mark Pyman et al., *Corruption as a Threat to Stability and Peace*, TRANSPARENCY INTERNATIONAL 17 (2014), http://ti-defence.org/wp-content/uploads/2016/03/2014-01_CorruptionThreatStabilityPeace.pdf.

[27] *Id*. at 9.

[28] David Bayley & Robert Perito, *Police Corruption: What Past Scandals Teach about Current Challenges*, UNITED STATES INSTITUTE OF PEACE 2 (2011), https://www.usip.org/sites/default/files/SR%20294.pdf.

In addition, corruption weakens a state's capacity to provide security for the people.[29] The weakened state provides more opportunities for terrorist and insurgent groups to carry out their activities[30] which exacerbate insecurity and instability. Corruption delegitimizes and discredits government institutions[31] and paves the way for insurgent groups like the Taliban to gain more legitimacy and power among the people.[32] There have been many reports that citizens in southern Afghanistan prefer to take their disputes to Taliban courts rather than face widespread corruption in the Afghan judicial system.[33] Similarly, the Taliban and insurgent groups can use social and political grievances created by corruption as a motivating tool for recruiting more soldiers and turning the people against the government and political processes in the country.[34]

II. Economy

Transnational crime has devastating impacts on both the international and national economy. While some transnational crimes, like drug trafficking, can generate revenue, provide jobs and livelihoods, and financially support many people in a poor country like Afghanistan;[35] the negative effects of transnational crime on Afghanistan's economy could be long-lasting and catastrophic. Transnational crime harms Afghanistan's economy in a variety of ways. First, transnational crime has created and continues to create a huge illicit and informal economy which

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[29] Pyman et al., *supra* note 26 at 17.

[30] *See id.* at 5.

[31] Shima D. Keene, *Corruption, Legitimacy, and Stability: Implications for the U.S. Army*, SSI 1 (2017), https://www.globalsecurity.org/military/library/report/2017/ssi_keene_170606.pdf.

[32] *See* Pyman et al., *supra* note 26 at 15.

[33] *See e.g.* Jami Forbes, The Significance of Taliban Shari'a Courts in Afghanistan, 6 CTC SENTINEL 5, 13, 14-15 (2013), https://ctc.usma.edu/app/uploads/2013/05/CTCSentinel-Vol6Iss57.pdf.

[34] *See e.g. id.* at 17; Michael Kugelman, *Corruption's Destablizing Effects in Afghanistan*, WILSON CENTER (2016), https://www.wilsoncenter.org/article/corruptions-destabilizing-effects-afghanistan.

[35] Christopher Ward & William Byrd, *Afghanistan's Opium Drug Economy*, The World Bank 34 (2004), http://documents.worldbank.org/curated/en/158651468767124612/pdf/311490PAPER0AF100SASPR0no051Dec0171.pdf.

is run and controlled by transnational criminals, corrupt officials, terrorists, and warlords. For instance, the illicit drug market and drug trafficking alone generate around half of Afghanistan's annual GDP.[36] The longer this informal, illegal economy persists, the deeper the country's dependency on illicit revenue grows, and it will only become more difficult to counter the drug industry and its operators.[37]

One of the key negative impacts of the drug market is that it contributes to and is a source of "macroeconomic volatility" in the country.[38] If drug production is hampered due to natural causes like drought or inaccessibility of water, or government efforts to eradicate drug production, it causes fluctuations and injects shocks in opium prices,[39] affecting the overall economy. The World Bank estimated that Afghan farmers experienced reductions of $400-$600 million in their incomes in 2004 due to an abrupt decrease in opium prices.[40] Similarly, the World Bank asserted that if an effective program of opium eradication had been put in place, it could have led to a "$1 billion plus shock to [the] rural economy."[41] This estimate is huge for an economy which is largely dependent on drug production and drug trafficking.

According to the World Bank, another negative impact of the drug industry on the economy is the "natural resource curse" or "Dutch disease" issue.[42] The inflows of large amounts of foreign exchange generated from drug sales into Afghanistan's economy increase the real exchange rate

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[36] Boris Buddenberg & William A. Byrd, *Afghanistan's Drug Industry: Structure, Functioning, Dynamics, and Implication for Counter-Narcotics Policy*, UNODC & THE WORLD BANK 157 (2006), https://www.unodc.org/pdf/Afgh_drugindustry_Nov06.pdf.

[37] *See* Ward & Byrd, *supra* note 35 at 85.

[38] *Id*. at 34.

[39] *Id.*

[40] *Id.* at 34-35

[41] *Id.*

[42] *Id.*

in the country and reduce competitiveness in the remaining economic activities.[43] More specifically, the high rate of real exchange can disincentivize and harm the production of "non-opium tradable goods."[44] The domestic production of legal goods becomes very costly, making it very expensive for those in other countries to buy Afghan products. In addition, domestic products may not be able to compete with imported goods from foreign countries because of the high cost of domestic goods. According to data provided by the World Bank, "Afghanistan's real exchange rate appreciated by an estimated 24% in 2001/02, 0% in 2002/03, and 13% in 2003/04."[45] These statistics evince a significant fluctuation in the real exchange rate. The World Bank indicated that while the drug economy could be one of the main factors creating the Dutch disease, foreign aid and remittances may also significantly foster the problem.[46] The World Bank asserted that opium is "capitalized" in the Afghan rural economy,[47] stimulating "overall price levels, affecting agricultural sharecropping and tenancy arrangements, land prices, urban real estate, bride prices in opium producing areas, etc., with the result that reversing this growing opium dependence will become ever more difficult."[48]

Second, combating terrorism and other transnational crimes is very expensive and inflicts a massive economic cost to the government and society.[49] As noted above, over the last two decades the international community has spent billions of dollars to combat terrorism, opium production and drug trafficking, and corruption. The economy of Afghanistan continues to suffer

[43] *Id.*

[44] *Id.*

[45] *Id.* at 35.

[46] *Id*.

[47] *Id*. at 85.

[48] *Id*.

[49] *See e.g. id.* at 35.

from the costs of transnational crime. The government of Afghanistan has created many special institutions and courts and taken several measures to increase the capacity of its officials to effectively combat the problem. Irrespective of the effectiveness or ineffectiveness of these efforts, the economic costs have been tremendous. These funds could have been used to advance education and public health systems, reduce poverty, and increase social welfare. And combating transnational crime carries indirect costs. As the World Bank warned, even the implementation of a successful strategy to combat opium production may disrupt Afghanistan's economy and generate political confrontations.[50]

Third, transnational crime has negative consequences for both national and international investment in Afghanistan. Rampant corruption and terrorism make it practically unfeasible for Afghan and foreign funders to invest money in the country.[51] Terrorism is a direct threat to trade and foreign direct investment (FDI).[52] It has been argued that "foreign nations always have a choice of conducting business with less-terror-prone nations."[53] The greater the threat of terrorism the greater the risk that foreign investors will lose earnings from their investments.[54] Consequently, foreign investors are more likely to invest in countries that are safer and more secure.[55] In addition, research found that it is more costly to conduct business and trade in "terror-affected" countries because terrorism raises the price of products and decreases exports and imports for those

[50] *See generally id*. at 36.

[51] *See e.g.* Masood Saifullah, *Six Ways Corruption Undermines Afghanistan*, DW (2014), https://www.dw.com/en/six-ways-corruption-undermines-afghanistan/a-17593510 [hereinafter DW'S REPORT]; *The Economic Impact of Terrorism on Developing Countries*, FEDERAL RESERVE BANK OF ST. LOUIS (2018), https://www.stlouisfed.org/on-the-economy/2018/january/economic-impact-terrorism-developing-countries [hereinafter FRBSL'S REPORT]

[52] FRBSL'S REPORT, *supra* note 50.

[53] *Id*.

[54] *See id.*

[55] *Id.*

countries.[56] Similar to the plague of terrorism, corruption has discouraged Afghan and foreign investors from funding businesses in Afghanistan.[57] Due to widespread corruption, Afghan investors are not only unwilling to invest in the country, but many have moved their money and assets abroad.[58] Corruption has had the same impact on FDI. Foreign investors do not want to risk investing in a country like Afghanistan[59] where bribery and other forms of corruption are prevalent. The World Bank reported that corruption is one of the three main obstacles in the way of trade and investment.[60] FDI is more likely to grow when a country has an effective, reliable, and transparent legal and judicial system that can resolve potential disputes arising from investment activities. Unfortunately, corruption has considerably undermined the Afghan legal and judicial systems.

Fourth, transnational crime is one of the primary sources of outflows of money from Afghanistan to foreign countries. Afghanistan loses billions of dollars each year due to widespread money laundering, corruption, drug trafficking, and terrorism. As described in Chapter Two, the proceeds of lucrative crimes are usually laundered through transactions in foreign countries. Most illegal funds are generated by the drug economy, but corruption also plays a significant role. Money launderers transfer and integrate the illegal money into the licit global economy. These massive outflows of money can be devastating to Afghanistan's economy and may force it to crumble. As illustrated by the Kabul Bank scandal discussed above, Afghanistan lost

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[56] *Id.*

[57] Saifullah, *supra* note 50.

[58] *Id*.

[59] *Id*.

[60] *Corruption & Anti-Corruption Issues in Afghanistan*, CFC 33 (2012), https://reliefweb.int/sites/reliefweb.int/files/resources/CFC-Afghanistan-Corruption-Volume-Feb2012.pdf [hereinafter THE CFC REPORT]

approximately US $850 million.[61] This loss was immense for Afghanistan's tiny economy. The Guardian reported that U.S. authorities called the scandal "the biggest per capita fraud in history."[62] On the other hand, rampant money laundering and weak institutions have led to foreign donors and institutions placing increased scrutiny on Afghanistan, making legitimate inflows of money into the country more difficult to accomplish.[63] Due to the fact that Afghanistan is considered a money laundering haven, it may impede financial growth if it becomes unduly burdensome for legal businesses in Afghanistan to access foreign banks, other financial institutions, and the global market.[64]

Fifth, transnational crime can hinder transparency and competitiveness among businesses and disrupt the effectiveness of markets.[65] For example, if drug traffickers, money launderers, and criminals try to invest some of their illegal funds in legitimate businesses,[66] they typically make their decisions based not on a proper "commercial basis," but rather on the basis of diminishing the probability of being caught by authorities.[67] Since making a profit is not a necessity for these criminals, they may undercut legitimate businesses that are active in the same sector, forcing the

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[61] Jamil Danish, *Afghanistan's Corruption Epidemic Is Wasting Billions in Aid*, THE GUARDIAN (2016), https://www.theguardian.com/global-development-professionals-network/2016/nov/03/afghanistans-corruption-epidemic-is-wasting-billions-in-aid.

[62] *Id*.

[63] Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, THE WORLD BANK II-3 (2ed edition 2006), http://siteresources.worldbank.org/EXTAML/Resources/396511-1146581427871/Reference_Guide_AMLCFT_2ndSupplement.pdf.

[64] *Id*.

[65] *See e.g.* Christine Jorjarth, *Money Laundering: Motives, Methods, Impact, and Countermeasures* in HEINRICH-BÖLL STIFTUNG & REGINE SCHÖNENBERG, TRANSNATIONAL ORGANIZED CRIME: ANALYSES OF A GLOBAL CHALLENGE TO DEMOCRACY 21 (2013).

[66] *See EU Drug Markets Report: In-depth Analysis*, EUROPOL 32 (2016), http://www.emcdda.europa.eu/system/files/publications/2373/TD0216072ENN.PDF [hereinafter EU DRUG MARKETS REPORT]

[67] *See e.g. id.*; Jorjarth, *supra* note 51 at 21.

latter out of the market.[68] Money launderers may also utilize and integrate their illegal strategies into lawful businesses such as "rigging tendering processes"[69] or "using violence to obtain competitive advantage or discourage competition."[70] In addition, corruption may offer an immense advantage to those who bribe officials or take advantage of their connections. Such corruption disrupts a healthy and competitive environment for conducting business and investment and harms the overall economy.

Finally, transnational crime, especially corruption in Afghanistan's customs office, can cause significant revenue loss for the government.[71] According to the UNODC report, customs officials are among the four most corrupt categories of officials in the country.[72] A SIGAR report indicated that Afghanistan loses millions of dollars each year due to rampant corruption in customs.[73] It is also evident that customs offices typically have greater exposure to transnational criminal activities and corrupt practices due to their location at remote borders and their significant interactions with foreigners.

III. Public Institutions and Governance

Transnational crime undermines public institutions and governance in Afghanistan. Transnational crime negatively affects democratic institutions and threatens their "credibility,

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[68] EU DRUG MARKETS REPORT, *supra* note 66 at 33.

[69] *Id*.

[70] *Id*.

[71] Louise Shelley, *Terrorism and International Crime: Corruption as Enabler*, TRANSPARENCY INTERNATIONAL 6 (2018), https://www.transparency.de/fileadmin/Redaktion/Publikationen/2018/Terrorism_and_International_Crime_Corruption_as_the_Enabler_2018_WEB.pdf.

[72] THE *Corruption in Afghanistan: Recent Patterns and Integrity Challenges in the Public Sector*, UNODC 30 (2013) https://www.unodc.org/documents/data-and-analysis/statistics/corruption/Corruption_Afghanistan_2013.pdf [hereinafter THE UNODC REPORT ON CORRUPTION 2013]

[73] *Afghan Customs: U.S. Programs Have Had Some Successes, But Challenges Will Limit Customs Revenue as a Sustainable Source of Income for Afghanistan*, SIGAR 14 (2014), https://www.sigar.mil/pdf/audits/SIGAR-14-47-AR.pdf.

legitimacy, and accountability."[74] Indeed, the widespread corruption in Afghanistan has paralyzed the country's public institutions, eroded their decision making and decision implementation processes, and severely damaged the public trust.[75] Studies show that corruption has had drastic effects on Afghan public institutions in many sectors including justice, education, infrastructure, investment, and security.[76] The problem is so severe, it jeopardizes the very idea and fabric of governance and democratic institutions in Afghanistan. Corruption weakens public institutions and impedes them from providing necessary and basic services equally and fairly to all Afghan citizens.[77] The widespread corruption affects the distribution of public services by unfairly favoring wealthy citizens and depriving the poor of access to necessary services.[78] In addition, public trust is eroded by corruption so that Afghans no longer have faith in their public institutions.[79] One study revealed that over 70% of Afghans do not trust their government.[80] This number is staggering and has serious implications for the future of governance and public services in Afghanistan.

Similarly, drug trafficking and the drug industry have serious adverse effects on governance in Afghanistan. The drug industry threatens government institutions by contributing to "a vicious circle whereby the drug industry financially supports warlords and their militias, who

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[74] THE CFC REPORT, *supra* note 60 at 6.

[75] *See generally Corruption in Afghanistan: Recent Patterns and Trends*, UNODC 3 (2012), https://www.unodc.org/documents/frontpage/Corruption_in_Afghanistan_FINAL.pdf [hereinafter THE UNODC REPORT ON CORRUPTION 2012]

[76] *See e.g.* THE CFC REPORT, *supra* note 60 at 9-41; THE UNODC REPORT ON CORRUPTION 2013, *supra* note 72 at 29-39.

[77] *See* THE UNODC REPORT ON CORRUPTION 2012, *supra* note 75 at 6.

[78] *Id*.

[79] *National Corruption Survey 2016: Afghan Perceptions and Experiences of Corruption*, INTEGRITY WATCH AFGHANISTAN 43 (2016), https://iwaweb.org/wp-content/uploads/2016/12/NCS__English__for-web.pdf [hereinafter THE IWA REPORT ON CORRUPTION]

[80] *Id*.

in turn undermine the government."[81] As explained above, terrorists, warlords, tribal leaders, and other transnational criminals are directly or indirectly engaged in the drug market and drug trafficking.[82] They strive to weaken government institutions and create an insecure environment where they can continue their illegal enterprises in the country with impunity.[83] Money laundering has similar effects and can also undermine democratic processes and institutions.[84] The illegal inflow and outflow of money can lead to violations of election and campaign law and impact the results for candidates competing for public positions.[85]

Finally, the negative effects of transnational crime do not merely result in weakening and undermining public institutions; they create a vacuum for governance. If the state is not able to provide security, justice, and services to the people, two possible consequences could follow, both of which would be advantageous to transnational criminals. First, criminals may attempt to fill the vacuum and provide services and governance to the people.[86] After all, criminals do not want to only be seen as bad and evil people.[87] By providing basic services, they can ensure their control over their profitable illegal activities as well as gain "the good will of citizens" and their "future impunity."[88] Second, in the absence of a well-functioning state, ethnic groups and kinship or tribal lines may be incentivized to militarize to ensure group members' safety and security.[89] These

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[81] *See* William Byrd & Christopher Ward, *Drugs and Development in Afghanistan*, THE WORLD BANK 11 (2004), http://siteresources.worldbank.org/INTCPR/214578-1111996036679/20482462/WP18_Web.pdf.

[82] *See id.*

[83] *See id.*

[84] Jorjarth, *supra* note 51 at 24.

[85] *Id*.

[86] Shelley, *supra* note 52 at 6.

[87] *Id.*

[88] *Id.*

[89] Florian P. Kühn, "*Afghanistan"* in HEINRICH-BÖLL STIFTUNG & REGINE SCHÖNENBERG, TRANSNATIONAL ORGANIZED CRIME: ANALYSES OF A GLOBAL CHALLENGE TO DEMOCRACY 87 (2013).

groups may also fund their organization and operations through mineral smuggling, drug trafficking, and other profitable illegal activities.[90] Regardless of whether they participate in illegal activities, these sub-state groups undermine the national authority of the state, however their informal organizations will be very vulnerable to criminals and provide a conducive environment for illegal enterprises. These loose organizations lack a decisive and competent institution like a "state" to "define what is legal and illegal in a socially accepted way."[91]

IV. Rule of Law

Rule of law is a broad concept and covers the application of a wide variety of principles in a society including equality; transparency; accountability; due process; justice; and fairness. Rule of law simply means that only the law should govern the society and every person and entity should abide by the law. The UN has defined rule of law as:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[92]

The assurance of rule of law in a country is directly related to the effectiveness and performance of law enforcement agencies and judicial institutions.[93] Studies show that the existence of an independent judiciary and competent prosecution and police is determinant to the

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[90] *See e.g. id.*

[91] *Id.*

[92] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN 4 (2004), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616.

[93] *See Generally* Jan Van Dijk, *Mafia Markers: Assessing Organized Crime and Its Impact Upon Societies*, 10 TRENDS IN ORGANIZED CRIME 4, 39, 46 (2007).

assurance of rule of law and containment of transnational crimes.[94] Subject to some exceptions, it is argued that transnational crime could be "more prevalent in countries where rule of law is less well assured and vice versa."[95] The most important factor that can maintain rule of law in a country is a strong, independent, and transparent judiciary.[96] Studies have found that there is a direct relationship between the extent of judicial independence and transnational crime rates.[97] It is difficult to imagine the prevalence of transnational crime in the presence of strong law enforcement agencies, an independent and efficient judiciary, and sustained rule of law.[98]

Unfortunately, rule of law has been severely undermined by transnational crime in Afghanistan. The prevalence of transnational crimes might indicate that rule of law is barely achievable in the country. While Afghanistan already had a weak and corrupt judiciary and corrupt prosecution offices and police, the rampant transnational crime in the country – including drug trafficking, terrorism, and corruption – have further deepened the problem. Afghanistan's judiciary is one of the most corrupt institutions in the country.[99] The country's prosecution and police departments are in a similar predicament.[100] The rampant corruption in the courts and law enforcement agencies alone is sufficient to completely undermine rule of law in the country. The impact of other transnational crimes such as terrorism and drug trafficking, and the existence of a reinforcing relationship between them, portend an even more dire image for rule of law in

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[94] *See id.*

[95] *See id.*

[96] *See id.*

[97] *See id.*

[98] *See id.*

[99] *Corruption in Afghanistan: What Needs to Change,* TRANSPARENCY INTERNATIONAL (Feb. 16, 2016), https://www.transparency.org/news/feature/corruption_in_afghanistan_what_needs_to_change.

[100] *National Corruption Survey 2016: Afghan Perceptions and Experiences of Corruption*, INTEGRITY WATCH AFGHANISTAN 30 (2016), https://iwaweb.org/wp-content/uploads/2016/12/NCS__English__for-web.pdf.

Afghanistan.

Transnational crime undermines rule of law and threatens efforts to establish it. The international community and the U.S. have spent billions of dollars and implemented a variety of projects to advance rule of law in Afghanistan.[101] Yet, their efforts have not met their objectives and rule of law is still very fragile in the country.[102] Among other challenges, corruption together with a lack of political will in Afghan government leadership have been the major problems hindering the furtherance of rule of law.[103] According to one scholar's view, "the problem of corruption and impunity throughout the current government of Afghanistan, including the judiciary, prosecution and police, is both a major symptom of the absence of the rule of law and a serious impediment to establish it."[104] Another scholar analyzed the negative effects of the drug market on the rule of law in Afghanistan and how the international community has ignored these impacts throughout the last decade of supporting and spending on rule of law efforts.[105] He identified the illicit drug economy and its corrupting impacts as a main factor in undermining rule of law and the efforts to advance it.[106] It has been argued that the international community and donors misunderstood the relationship between drug trafficking, terrorism, corrupt officials, and insurgent groups when they supported and funded rule of law projects.[107] They focused their attention and funding on terrorist and insurgent groups as the main players in the illegal drug trade

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[101] *See generally* Geoffrey Swenson, *Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed*, 42 INTERNATIONAL SECURITY 1, 114-151; *see also Rule of Law in Afghanistan: U.S. Agencies Lack a Strategy and Cannot Fully Determine the Effectiveness of Programs Costing More Than $1 Billion*, SIGAR 7-8 (2015), https://www.sigar.mil/pdf/audits/SIGAR-15-68-AR.pdf.

[102] *See id.*

[103] *See id.* at 134.

[104] WHIT MASON, THE RULE OF LAW IN AFGHANISTAN: MISSING IN ACTION 6 (2011).

[105] *See id.*

[106] *See id.*

[107] *See id.* at 7.

but neglected even more important actors – corrupt officials.[108] As explained above, the links between corrupt officials and drug trafficking are more evident and important than the linkage between terrorist-insurgent groups and the drug market.[109] Therefore, "[t]he consequence of this reality is that individuals whom the international community expected to play leading roles in establishing rule of law instead have compelling incentives to undermine it."[110] In light of these challenge, it should not be surprising that efforts to promote rule of law have not been particularly successful in Afghanistan.

V. State-building/Development Efforts

After the 2001 Taliban defeat the international community, under the leadership of the United States, implemented a variety of state-building and development activities which have poured billions of dollars into the country. These state-building efforts aim "to increase the capacity of a government to accomplish goals like alleviating poverty, increasing security, deterring crime, increasing economic growth, or strengthening rule of law."[111] According to one report, as of 2015, the United States had spent around US $109.9 billion for the relief and reconstruction of Afghanistan.[112] While more than two-thirds of the funds have been spent on the security sector,[113] as of 2013, roughly US $25 billion has been devoted to governance and

[108] *See id.*

[109] *See id.*

[110] *Id.*

[111] Alana Renee Querze, *Can You Spend Your Way to Victory? The Case of State Building in Afghanistan*, PROQUEST 6-7 (2011).

[112] Catherine Lutz & Sujaya Desai, *US Reconstruction Aid for Afghanistan: The Dollars and Sense*, WATSON INSTITUTE 2 (2015), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2015/US%20Reconstruction%20Aid%20for%20Afghanistan.pdf.

[113] *Id*. at 3.

development in the country.[114] Considering the immense sums spent and extensive development activities undertaken in Afghanistan, it is useful to examine how transnational crime has impacted those efforts.

First, transnational crime, such as large-scale corruption and money laundering, wastes foreign aid dollars.[115] Afghanistan is heavily dependent on foreign aid and donor countries give billions of dollars annually to improve the country's security, economy, and governance,[116] however the funds are seldom spent on the intended projects and rarely achieve the desired goals.[117] It has been claimed that "much of the hundreds of billions of dollars in aid to Afghanistan has ended up in the pockets of a corrupt political elite."[118] This widespread grand corruption has enabled corrupt officials and the political elite to use foreign aid for their private gain by diverting the money that should have been spent in much-needed areas such as education, public health, and other basic services that primarily benefit the poor.

In addition to diverting funds, corruption and outflows of billions of dollars through money laundering have a severe adverse effect on the willingness and confidence of donor countries to continue their financial support of Afghanistan.[119] If the current level of corruption and money laundering continues or grows, there is a genuine risk that foreign donors will no longer be willing to grant funds for projects in Afghanistan. Although major donors, like the United States and some European countries, conditioned their state-building/development aid on the commitment of the

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[114] *Id*. at 5.

[115] *See e.g.* Saifullah, *supra* note 50.

[116] Danish, *supra* note 61.

[117] *Id*.

[118] *Id*.

[119] *Curbing Illicit Financial Flows in Afghanistan: Money Laundering, Terrorist Financing, and Hawala*, INTEGRITY WATCH AFGHANISTAN 11 (2015), https://iwaweb.org/wp-content/uploads/2016/04/IFF-report-English-2-for-screen.pdf [hereinafter THE IWA REPORT ON ILLICIT FINANCIAL FLOWS]

Afghan government to seriously combat the country's rampant corruption and other crimes, there has been no apparent improvement in the situation in recent years. Furthermore, corruption and lack of oversight has resulted in the implementation of development projects with very poor quality and no significant results.[120] International donor organizations usually subcontract the implementation of development projects, with a markup, and then the subcontractors typically subcontract the projects again, with another markup.[121] This process wastes a sizeable amount of foreign aid and often involves corruption.[122]

Second, transnational crimes, such as the illicit drug economy, may have an additional adverse impact on the overall situation of poverty in the country and challenge development efforts undertaken to reduce or alleviate the problem. Most of the revenues generated by opium production and trafficking are not distributed equally in society,[123] normally going to the privileged, powerful, elite, and corrupt, as well as to transnational traffickers.[124] Although the drug market is often the sole source of income for many poor farmers and workers in the rural areas where opium poppy is cultivated,[125] any sudden decrease in production or price of the drugs will hit the poor the hardest, deepening their state of poverty.[126] Consequently, it can be argued that the drug economy has a mixed result on poverty.[127] On the one hand, it may help poor people in rural areas find livelihoods for themselves and alleviate their poverty.[128] On the other hand, such a method of poverty

[120] Saifullah, *supra* note 50.

[121] *Id*.

[122] *See id.*

[123] *See* Byrd & Ward, *supra* note 81 at 10.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

alleviation is unsustainable, and makes the poor vulnerable to the volatility of the drug economy.[129] Moreover, the greater the number of people involved in the drug economy, the greater the consequences of any collapse of the drug market on the rural economy. The poor's dependency on the drug economy and its unpredictable consequences are a significant challenge for development efforts that aim to reduce poverty in Afghanistan.

Similarly, corruption can also perpetuate poverty in the country. Corruption has at least two negative impacts. First, corruption can negatively affect the overall functioning of the economy and thus increase poverty; if an economy does not work properly, the first consequence would be an increase in poverty. Second, as discussed above, corruption causes a direct loss of public funds that are intended to provide basic services and alleviate poverty. Corruption can undermine and threaten all foreign aid and development activities that attempt to reduce or eliminate poverty. Any reduction in aid and development efforts due to corruption increases poverty and the resulting struggles for the poor.

Finally, transnational crimes like corruption threaten economic development and economic growth in Afghanistan.[130] The goal of many international development activities is to enhance the performance of Afghanistan's economy. Economic development and economic growth are the only ways through which Afghanistan can establish a healthy economy, increase its national income, level of employability, and living of standards, and finally become self-sufficient.[131] The development and growth of the economy is dependent on many factors, including those discussed

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[129] *Id.*

[130] *See generally* Bryan B. Coleman, *The Impacts of Corruption on Economic Development in Afghanistan: A Study of the Effects of Nepotism and Bribery*, Indiana University of Pennsylvania 52-54 (2012) (Masters Thesis).

[131] *See* Prateek Agarwal, *What Is Economic Growth*, INTELLIGENT ECONOMIST (2017), https://www.intelligenteconomist.com/economic-growth/; Abdul-Qayum Mohmand, *The Prospects for Economic Development in Afghanistan*, THE ASIA FOUNDATION 7 (2012), https://asiafoundation.org/resources/pdfs/ProspectsofEconomicDevelopmentinAfghanistanOccasionalPaperfinal.pdf.

previously such as security and stability, rule of law, and good governance.[132] Without those pillars economic development is unattainable. Unfortunately, this dissertation establishes that transnational crime negatively impacts and undermines those factors and makes Afghanistan a less favorable locale for economic activity.

VI. Sovereignty

Considering the many ways transnational crime impacts a country, it is very important to address how those implications can also challenge Afghanistan's state sovereignty. Sovereignty is the inherent and inalienable right of a state to govern and control its internal and external affairs. Sovereignty is defined as "the supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign interference."[133] In other words, "sovereignty is the power of a state to do everything necessary to govern itself, such as making, executing, and applying laws; imposing and collecting taxes; making war and peace; and forming treaties or engaging in commerce with foreign nations."[134] Some scholars distinguish between legal and practical sovereignty of a state.[135] Sovereignty in a legal sense means that a state has the highest power within its territory,[136] but practical sovereignty indicates that a state has the actual capacity to exercise the power to control

[132] Mohmand, *supra* note 131 at 7.

[133] *Sovereignty*, THEFREEDICTIONARY, https://legal-dictionary.thefreedictionary.com/State+sovereignty (last visited Sep. 28, 2018).

[134] *Id*.

[135] Jelena Damnjanovic, *Organised Crime and State Sovereignty: The Conflict between the Mexican State and Drug Cartels 2006-2011*, THE UNIVERSITY OF SYDNEY 7 (2011), https://ses.library.usyd.edu.au/bitstream/2123/8273/1/Jelena%20Damnjanovic.pdf.

[136] *Id.*

and organize its affairs.[137] The latter "refers not only to the use of force, but also the effective implementation of laws."[138]

Although transnational crime generally threatens state sovereignty,[139] it is relevant to study its impacts by distinguishing between strong and weak states and how they handle their affairs. Among other things, a strong state is able to successfully provide security and protect borders, establish effective public institutions and good governance, ensure rule of law and justice, and maintain a stable economy.[140] On the other hand, a weak state does not have the ability to carry out those duties.[141] Some scholars indicate that weak states do not have "'the capacity to fulfill their sovereign responsibilities', as well as missing 'law enforcement, intelligence, or military capabilities to assert effective control over their entire territory.'"[142] Following this reasoning, a weak state has "*de jure* but not *de facto* sovereignty."[143] Considering the difference between strong and weak states, transnational crime impacts their sovereignty to different degrees. As discussed previously, weak states are more vulnerable and are threatened by transnational crime to a greater extent.[144]

There is no doubt that Afghanistan can be categorized as a weak state. Having examined the negative effects of transnational crime on the economy, security, rule of law, and public institutions, it should be clear that transnational crimes seriously challenge Afghanistan's state

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[137] *Id.*

[138] *Id.*

[139] *See e.g.* John P Sullivan, *How Illicit Networks Impact Sovereignty*, CENTER FOR SECURITY STUDIES 1 (2014), http://www.css.ethz.ch/en/services/digital-library/articles/article.html/176141/pdf.

[140] *See* Damnjanovic*, supra* note 135 at 9.

[141] *See id.* at 10.

[142] *Id.*

[143] *Id.*

[144] *See id.* at 11.

sovereignty. Transnational crimes undermine the functionality of the Afghan state and impede its ability to provide security and basic public services and ensure rule of law. These crimes have created an enormous illicit informal economy mostly run by traffickers and transnational criminal groups. Most importantly, according to recent reports, the Afghan government does not have effective control over almost half of its territory.[145] Considering that the effective fulfillment of a state's duties is intertwined with its sovereignty, and that transnational crime hinders the Afghan government from accomplishing its responsibilities, the aggregate negative impacts of transnational crime severely threaten and limit the sovereignty of the Afghan state. While theoretically only the Afghan government has the right of sovereignty over its territory, practically the effective exercise of that right is being limited and eroded by transnational crime.

VII. Conclusion

While transnational crime threatens every country, regardless of its power and level of development, it particularly targets and harms poor and less-developed countries. Due to lack of rule of law and weak institutions, these developing countries provide a safe haven and ideal place for the illegal activities of transnational criminal networks. Afghanistan is a clear example of a developing country where transnational crimes have flourished. This chapter has illustrated how four types of transnational crime (drug trafficking, terrorism, corruption, and money laundering) have undermined every aspect of life in the country. These crimes have exacerbated insecurity and instability; disrupted its licit economy; diminished public institutions and rule of law; frustrated state-building efforts; and challenged the sovereignty and overall functionality of the Afghan government. The catastrophic and trans-boundary impacts of these crimes raise the question how those crimes can effectively be dealt with through collective actions and states' legal cooperation.

[145] Alia Chughtai, *Afghanistan: Who Controls What*, ALJAZEERA (2018), https://www.aljazeera.com/indepth/interactive/2016/08/afghanistan-controls-160823083528213.html.

Answering that question requires a thorough investigation of states jurisdiction under traditional international law and examination of modern cross-border mechanisms for investigating, prosecuting and punishing transnational criminal activity.

CHAPTER FOUR: TRANSNATIONAL CRIME AND THE CHALLENGE OF STATE JURISDICTION

As the last two chapters revealed, transnational crimes are prevalent in Afghanistan and negatively impact every aspect of life in the country. Like ordinary domestic crimes, addressing and rooting out transnational crimes requires not only vigorous law enforcement response, but also economic, educational, psychological, sociological, and developmental strategies.[1] That said, this dissertation focuses primarily on the response of law enforcement, in particular, how states like Afghanistan can effectively leverage cross-border legal cooperation and mutual legal assistance to counter these crimes. Before addressing the topic of mutual legal assistance mechanisms, and how and why states have developed and employed them, it is necessary to understand the concept of state jurisdiction and explore how states are legally constrained under traditional international law in enforcing their criminal jurisdiction extraterritorially.

The principal challenge with fighting transnational crimes is they traverse national boundaries and defy the ability and authority of a single state to effectively combat them. Their transnational nature necessitates a transnational response.[2] Transnational crimes challenge the efficiency and effectiveness of ordinary domestic efforts and strategies developed in response to domestic crimes.[3] Restraining transnational crime requires states to pursue transnational criminal enterprises beyond their sovereign boundaries. However, in so doing, states face the fundamental question of jurisdiction: whether international law permits them to establish and enforce their jurisdiction over crimes that are partly or entirely committed outside their territory. Accordingly, one of the topics

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[1] *See* LOUISE I. SHELLEY, DARK COMMERCE: HOW A NEW ILLICIT ECONOMY IS THREATENING OUR FUTURE 223-250 (2018).

[2] Austen L. Parrish, *Domestic Responses to Transnational Crime: The Limits of National Law*, CRIM. LAW FORUM, 23, 275, 279 (2012).

[3] *See generally id.* at 275 & 279.

central to combating transnational crime is state criminal jurisdiction and how it is established and recognized under traditional international law.

State jurisdiction is a complicated issue under international law.[4] Generally, state jurisdiction is defined as "the power of each State under international law to prescribe and enforce its municipal laws with regard to persons and property."[5] According to Shaw and other scholars, under international law, jurisdiction is the authority of a state to enact and execute its domestic laws in light of three important principles: sovereignty, equality of states, and non-interference in domestic matters.[6] As recognized by the Permanent Court of International Justice in the *Lotus* case (1927)[7] and established by the UN Charter, these three principles have limited the ability of states to enforce their jurisdiction extraterritorially.[8] The restriction is established based on the fact that "exercising jurisdiction involves asserting a form of sovereignty." As such, the sovereignty of different states would intersect and potentially conflict if jurisdiction is exercised extraterritorially[9] and "international law has not yet developed any principles to determine any hierarchy of lawful jurisdictional claims."[10]

In light of the above, this chapter will elucidate the forms and principles of state criminal jurisdiction under traditional international law: In explaining principles of jurisdiction), it will

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[4] *See e.g.* Alexander Orakhelashvili, "*State Jurisdiction in International Law: Complexities of A Basic Concept"* in ALEXANDER ORAKHELASHVILI, RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 3 (2015); MALCOLM N. SHAW, INTERNATIONAL LAW 573 (5TH EDITION, 2003).

[5] ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 143 (2ND EDITION, 2003).

[6] MALCOLM N. SHAW, INTERNATIONAL LAW 645 (6TH EDITION, 2008) [hereinafter SHAW SIXTH EDITION); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 42 (2ND EDITION, 2010).

[7] NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 246 & 247 (2ND EDITION, 2018).

[8] *Id*. at 247.

[9] ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 43 (2ND EDITION, 2010).

[10] *Id*.

explore how Afghanistan has incorporated those principles into its legal system. This chapter will also analyze the limits of traditional norms on state criminal jurisdiction and examine how states have attempted to expand their criminal jurisdiction unliterally or multilaterally.

I. Forms of Jurisdiction

State jurisdiction is a crucial and inseparable characteristic of sovereignty.[11] It is typically analyzed in terms of which of the three classic branches of government is exercising the jurisdiction: the legislature (legislative or prescriptive jurisdiction), the judiciary (adjudicative jurisdiction), or the executive (executive or enforcement jurisdiction).[12] Brownlie and other prominent international law scholars further distinguish state jurisdiction between civil and criminal jurisdiction[13] -- each of which can take prescriptive, adjudicative, or executive forms.

Asserting any form of jurisdiction extraterritorially could be controversial, but extraterritorial exercise of prescriptive jurisdiction is the least controversial.[14] On the other hand, extraterritorial exercise of executive/enforcement jurisdiction "almost inevitably infringe[s] the sovereignty of the relevant territorial State."[15] The reason is that while all forms of jurisdiction are predominantly territorial,[16] prescriptive and adjudicative jurisdiction may be established extra-territorially based on other factors such as nationality.[17] However, executive/enforcement jurisdiction remains extremely territorial and cannot be extended beyond a state's borders.[18] It must be noted, however,

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[11] *See* SHAW, *supra* note 6 at 645; Cedric Ryngaert, *The Concept of Jurisdiction in International Law* in CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 50 (2ND EDITION, 2015).

[12] *See id.* at 645.

[13] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300 (7TH EDITION, 2008).

[14] *See generally* ROBERT CRYER ET AL., *supra* note 9 at 43.

[15] *Id.*

[16] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 456 (8TH EDITION, 2012).

[17] *See e.g.* ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 71 (3RD EDITION, 2007); SHAW, *supra* note 6 at 646.

[18] *See e.g.* BANTEKAS & NASH, *supra* note 17 at 71; SHAW, *supra* note 6 at 646.

that the classification of jurisdiction as prescriptive, adjudicative, and executive is not absolute.[19] These forms of jurisdiction may overlap.[20] As one commentator wrote, "little hope exists of reaching a theoretically sound conclusion as to what falls under which type of jurisdiction."[21]

A. Prescriptive Jurisdiction

Prescriptive jurisdiction is defined as "the supremacy of the constitutionally recognized organs of the state to make binding laws within its territory."[22] Essentially, prescriptive jurisdiction refers to the legal capacity of a state to legislate and regulate actions/activities inside its borders.[23] In specific situations, a state may extend its prescriptive jurisdiction beyond its territory.[24] For instance, international law permits states to impose taxes on persons who do not live within their territory[25] as long as "there is some kind of real link between the state and the proposed taxpayer, whether it be, for example, nationality or domicile."[26]

States have an exclusive prescriptive jurisdiction over several areas within their territory.[27] For instance, a state has an exclusive jurisdiction to promulgate certain procedural rules on how its courts should be run.[28] These rules would never affect how courts function in other states and vice

[19] *See generally* Rain Liivoja, *The Criminal Jurisdiction of States: A Theoretical Primer* 29-32 (2010).

[20] *See id.* at 31.

[21] *Id.* at 32.

[22] MALCOLM N. SHAW, INTERNATIONAL LAW 576 (5TH EDITION, 2003).

[23] *See* BANTEKAS & NASH, *supra* note 5 at 143.

[24] SHAW, *supra* note 22 at 576.

[25] *See* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT'L L. 145, 180 (1972-1973).

[26] SHAW, *supra* note 22 at 576.

[27] *Id.*

[28] *See e.g. id.*; Akehurst, *supra* note 25 at 179.

versa.[29] While the superiority of a state's prescriptive jurisdiction is recognized, it is not absolute.[30] A state may not just legislate anything it wants.[31] For example, a state may not enact a law that violates international norms to which it is obligated.[32] Similarly, a state is not allowed to abuse its prescriptive jurisdiction and regulate certain actions which are under the prescriptive jurisdiction of other states.[33]

It is important to understand that prescriptive jurisdiction is the basis for the two other jurisdictions: adjudicative and enforcement.[34] Without prescriptive jurisdiction, the latter two would not exist.[35] Accordingly, it is a pre-requisite for a state to criminalize an action first, and only then can it assert adjudicative and enforcement jurisdiction.[36]

B. Adjudicative Jurisdiction

Adjudicative jurisdiction is the power of domestic courts in a country "to take action to enforce their State's laws and pass judgment on matters brought before them."[37] In other words, adjudicative jurisdiction is the ability of "the courts of a particular country to try cases in which a foreign factor is present."[38] In criminal law, adjudicative jurisdiction is closely intertwined with

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[29] SHAW, *supra* note 22 at 576.

[30] *See id.* at 577.

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] Christopher L. Blakesley, "*Extraterritorial Jurisdiction*" in M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS, VOLLUME II 89 (3RD EDITION, 2008).

[35] *See id.*

[36] *See* BOISTER, *supra* note 7 at 245.

[37] CRYER ET AL., *supra* note 9 at 44.

[38] SHAW, *supra* note 22 at 578.

prescriptive jurisdiction.[39] A state can only apply its own criminal law, not other states' laws.[40] When a state legislates to criminalize certain activities, the courts of that state should have the power to apply that law.[41] If not, "a legal vacuum would appear as the courts of no other State would enforce these rules."[42] As such, adjudicative jurisdiction is deemed a function of prescriptive jurisdiction.[43]

Unlike prescriptive jurisdiction, where the laws are mere words on paper, exercising adjudicative jurisdiction extraterritorially may become problematic. For instance, if a state exercises its adjudicative jurisdiction over a crime that is committed abroad, the country in which the crime was perpetrated might perceive the act as overstepping the latter's domestic jurisdiction.[44] States usually assert their adjudicative jurisdiction based on well-established principles of jurisdiction such as territoriality and universality.[45]

C. Enforcement Jurisdiction

Enforcement jurisdiction is the power of a State to execute its laws and courts decisions.[46] In other words, enforcement jurisdiction is "the state's right to enforce [its] legislation through, for example, the police and public prosecutors, by investigating a crime and arresting a suspect."[47] In most countries, the police department is the responsible agency to exercise enforcement

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[39] Liivoja, *supra* note 19 at 30.

[40] *Id.*

[41] *Id.* at 31.

[42] *Id.*

[43] *Id.* at 30.

[44] *See* CRYER ET AL., *supra* note 9 at 44.

[45] *See* SHAW, *supra* note 22 at 578.

[46] *See* CRYER ET AL., *supra* note 9 at 44.

[47] Ruwanthika Gunaratne, *Prescriptive and Enforcement Jurisdiction: territorial and Extraterritorial Application*, https://ruwanthikagunaratne.wordpress.com/2011/04/13/jurisdiction/ (last visited Apr. 30, 2020).

jurisdiction.[48] Given that enforcement jurisdiction is extremely territorial, states are not permitted to assert their enforcement jurisdiction over the territory of another state unless that other state gives prior consent.[49]

Compared to the two other forms of jurisdiction, exercising enforcement jurisdiction is the most intrusive assertion into the sovereignty of other states.[50] For instance, if a person murders someone in Afghanistan and flees to Pakistan, Afghanistan can exercise its prescriptive and adjudicative jurisdictions (an Afghan court can apply the relevant Afghan laws and try the person in absentia), but the Afghan police cannot march into Pakistan to enforce the court's decision.[51] The *Lotus* case, the current international law on enforcement jurisdiction, acknowledges the territoriality of this jurisdiction as follows:[52]

> …the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[53]

II. Principles of Jurisdiction

Under customary international law, generally a state can establish and exercise its prescriptive, adjudicative or enforcement jurisdiction[54] based on five principles: territoriality, nationality/active

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[48] *See* CRYER ET AL., *supra* note 9 at 44.

[49] *See e.g.* Christopher Staker, "*Jurisdiction*" in MALCOLM D. EVANS, INTERNATIONAL LAW 311 (5TH EDITION, 2018); SHAW, *supra* note 22 at 577.

[50] *See* CRYER ET AL., *supra* note 9 at 44.

[51] *See* SHAW, *supra* note 22 at 572-73.

[52] *See* CRYER ET AL., *supra* note 9 at 44.

[53] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

[54] SHAW SIXTH EDITION, *supra* note 6 at 652.

personality, passive personality, protectiveness, and universality.[55] While these five principles are well-established in international law and universally recognized by all states,[56] some scholars like Sornarajah characterize the territorial principle as "the most entrenched" because of two reasons: the compatibility of the principle with two other principles—the equality of states and non-interference in domestic affairs—and the longstanding locality perception of crime and criminal law by states.[57] Similarly, Shaw and other commentators assert that exercising jurisdiction beyond the five bases can be controversial and requires the consent of other states.[58] In addition, it is worth mentioning that although international law recognizes and provides guidance on the principles of state jurisdiction,[59] states often legislate and exercise criminal jurisdiction through their domestic law.[60] After describing each principle, this chapter will explore how Afghanistan has established that principle within its legal system.

A. The Territoriality Principle

The principle of territoriality is derived from state sovereignty and recognizes territory as a primary basis for asserting criminal jurisdiction.[61] Under this principle, jurisdiction is exercised by the state where the crime occurred within its territory.[62] The territoriality principle is "the most obvious"[63] and "the least controversial"[64] basis of jurisdiction in international law. The principle

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[55] *See id.* at 652-672.

[56] *Id*. at 652.

[57] *See* M Sornarajah, *Globalization and Crime: The Challenges to Jurisdictional Principles*, 1999 SING. J. LEGAL STUD. 409, 411 (1999).

[58] SHAW SIXTH EDITION, *supra* note 6 at 652.

[59] *See* BOISTER, *supra* note 7 at 246.

[60] *See* BOISTER, *supra* note 7 at 245-246.

[61] *See* BANTEKAS & NASH THIRD EDITION, *supra* note 17 at 73.

[62] BROWNLIE, *supra* note 59 at 301.

[63] CRYER ET AL., *supra* note 9 at 46.

[64] VAUGHAN LOWE, INTERNATIONAL LAW 172 (2007).

applies not only to citizens of a state but also to foreign citizens who reside within the territory of the state.[65] In addition, for the purpose of the principle, the territory of a state includes land, sea (internal waters, territorial waters, and continuous zone),[66] and airspace.[67] Assertion of jurisdiction based on territoriality reflects not only the maxims of state sovereignty and independence,[68] but also embodies the authority to prosecute, together with primary responsibility for prosecuting crimes and maintaining law and order within an asserting state's territory.[69] Furthermore, given that most of the time the evidence of crimes, witnesses, and alleged criminals are present in the territory where the crimes occurred,[70] the territoriality principle enables states to provide a swifter, more effective, and more cost-efficient response to the crimes.[71]

In addition to the traditional and strict concept of territoriality, there are three other forms of territoriality. The first is quasi-territoriality, according to which a state can assert its jurisdiction over the ships, aircrafts, and spacecrafts that are registered in the asserting state.[72] The second is subjective territoriality, which allows states to exercise their jurisdiction if "an element of an offence either commences or in any other way takes place on their territory."[73] The third is objective territoriality, which is interconnected with subjective territoriality.[74] According to objective territoriality, a state can claim jurisdiction "when the effect or result of criminal conduct

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[65] AUST, *supra* note 6 at 43.

[66] BOISTER, *supra* note 7 at 252.

[67] *See e.g.* LOWE, *supra* note 64 at 173; Staker, *supra* note 49 at 296.

[68] *See* SHAW, *supra* note 22 at 579.

[69] *See id.*

[70] *See e.g.* BANTEKAS & NASH, *supra* note 5 at 144; SHAW, *supra* note 22 at 579.

[71] *See e.g.* BANTEKAS & NASH, *supra* note 5 at 144; SHAW, *supra* note 22 at 579.

[72] Bin Cheng, *The Extra-Terrestrial Application of International Law*, 18 CURRENT LEGAL PROBLEMS 1, 132, 135 (1965).

[73] BANTEKAS & NASH, *supra* note 5 at 145.

[74] Blakesley, *supra* note 34 at 100.

impacts on the asserting State, but the other elements of the offense take place wholly beyond its territorial boundaries."[75]

Almost all the UN Suppression Conventions mandate states parties to establish the territoriality principle over the respective transnational crimes. For example, the Vienna Convention,[76] the 2003 UN Convention against Transnational Organized Crime (UNCTOC),[77] and UNCAC[78] have identical provisions on the establishment of the territoriality principles. According to these conventions, all states parties "shall adopt such measures as may be necessary to establish"[79] their jurisdiction over the relevant crimes that are committed within their territory[80] OR that are committed on board a vessel flying their flag, or an aircraft registered under their laws at the time of the commission of the crimes.[81]

The territoriality principle is well-established in the Afghan Penal Code. The Penal Code explicitly indicates that the provisions of the Code are applicable to all Afghan citizens, stateless persons, and foreigners who commit a crime within the territory of Afghanistan.[82] The Penal Code identifies five places that fall under the territory of Afghanistan.[83] These five are (1) the land and

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[75] *Id.*

[76] *See* United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, at art. 4 (a) (entered into force Nov. 11, 1990) [hereinafter Vienna Convention]

[77] *See* United Nations Convention against Transnational Organized Crime, at art. 15 (1) (a) & (b) (entered into force Sep. 29, 2003) [hereinafter UNCTOC]

[78] *See* United Nations Convention against Corruption (UNCAC), at art. 42 (1) (a) & (b) (entered into force Dec. 14, 2005) [hereinafter UNCAC]

[79] UNCTOC, *supra* note 77 at art. 15 (1); UNCAC, *supra* note 78 at art. 42 (1).

[80] UNCTOC, *supra* note 77 at art. 15 (1) (a); UNCAC, *supra* note 78 at art. 42 (1) (a); Vienna Convention, *supra* note 76 at art. 4 (a) (i).

[81] UNCTOC, *supra* note 77 at art. 15 (1) (b); UNCAC, *supra* note 78 at art. 42 (1) (b); Vienna Convention, *supra* note 76 at art. 4 (a) (ii).

[82] *Code Jaza* [Penal Code], Official Gazette, at art.16 (1), May 2017, No. 1260 (Afg.) [hereinafter THE PENAL CODE]

[83] *Id.* at art. 16 (2).

air over it;[84] (2) internal waters;[85] (3) border rivers and lakes up to the boundary line designated by international documents or treaties between Afghanistan and neighboring countries;[86] (4) Afghan aircrafts and ships operating inside or outside Afghanistan unless they are subject to other countries' jurisdiction in accordance with international documents;[87] and (5) aircrafts and ships operating outside Afghanistan under the Afghan flag unless they fall under the territory of other states based on international documents.[88] The Penal Code, however, does not provide any examples of international documents according to which an Afghan aircraft or ship might fall under the territory of other States. The Penal Code further provides that a crime is deemed committed within the territory of Afghanistan when the crime itself or its result takes place inside the territory of Afghanistan.[89] Apparently, this last provision corresponds to subjective and objective territoriality and establishes those two forms of territoriality in the Penal Code.

B. The Nationality/Active Personality Principle

The nationality principle permits a state to assume its criminal jurisdiction over crimes committed by its nationals abroad and within its borders.[90] In other words, according to this principle, "[a] state can legislate to regulate activities of its nationals abroad, whether resident there or merely visiting."[91] As can be understood from its name, the nationality of the person in question is the basis for application of the principle.[92] The power of "States to prosecute their nationals on

[84] *Id.* at art. 16 (2) (1).

[85] *Id.* at art. 16 (2) (2).

[86] *Id.* at art. 16 (2) (3).

[87] *Id.* at art. 16 (2) (4).

[88] *Id.* at art. 16 (2) (5).

[89] *Id.* at art. 16 (3).

[90] BOISTER, *supra* note 7 at 257.

[91] AUST, *supra* note 6 at 43.

[92] BANTEKAS & NASH, *supra* note 5 at 151.

the sole basis of their nationality is based on the allegiance that is owed to one's country under municipal law."[93] States have the freedom to establish their own requirements for recognizing someone as their national.[94] Thus, laws of different countries may identify different bases for granting nationality.[95] Some of the most common bases for granting nationality include birthplace, parentage, and naturalization.[96] As many international law scholars observe, most countries establish the nationality principle in their domestic law.[97] Thus this principle is "the second most important" of the five jurisdiction principles in terms of being universally exercised by most countries.[98] Exercising the nationality principle could be particularly effective against those transnational criminals "who enjoy immunity in the territory where the offence occurs because of legislative inadequacy, incapacity, disinterest, or corruption."[99]

As with the principle of territoriality, the relevant international conventions encourage states parties to establish the nationality principle for the relevant crimes. For example, the Vienna Convention, UNCTOC, and UNCAC provide that states parties may assert their jurisdiction over the relevant crimes committed by their nationals.[100]

In Afghanistan, the Penal Code again establishes the nationality principle.[101] If an Afghan carries out an action abroad which is deemed a crime based on the provisions of the Penal Code

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[93] *Id.*

[94] Staker, *supra* note 49 at 299.

[95] *Id.*

[96] BOISTER, *supra* note 7 at 260.

[97] *See e.g.* Blakesley, *supra* note 34 at 116; BOISTER, *supra* note 7 at 258; BANTEKAS & NASH, *supra* note 5 at 151.

[98] Blakesley, *supra* note 34 at 116

[99] UNCTOC, *supra* note 77 at art. 15 (2) (b); UNCAC, *supra* note 78 at art. 42 (2) (b); Vienna Convention, *supra* note 76 at art. 4 (b) (i).

[100] UNCTOC, *supra* note 77 at art. 15 (2) (b); UNCAC, *supra* note 78 at art. 42 (2) (b); Vienna Convention, *supra* note 76 at art. 4 (b) (i).

[101] THE PENAL CODE, *supra* note 82 at art. 24.

and also under the laws of the country where the action occurred, they will be prosecuted and punished when they return to Afghanistan.[102] According to the Penal Code, the person will not be prosecuted if they prove that they have been exonerated by a foreign court, or the foreign court convicted them but they served the required sentence.[103] In another provision, the Penal Code establishes jurisdiction over crimes committed abroad by an Afghan public servant or a foreigner employed by the Afghan government.[104] According to the Code, if a public servant (Afghan or foreign) perpetrates a crime during the course of performing their job abroad, they will be punished based on the provisions of the Penal Code.[105]

C. The Passive Personality Principle

The passive personality principle "provides a state with competence to prosecute and punish perpetrators of criminal conduct that is aimed at or harms the nationals of the asserting state."[106] The principle focuses on the adverse effects of crimes (committed abroad) against a state's nationals.[107] Similar to the nationality principle, the factor of nationality is the basis for establishing and asserting the passive personality principle. Historically, exercising the passive personality principle has been controversial.[108] The *Lotus* case recognized the principle violated customary international law.[109] There are concerns that the principle disproportionately benefits

[102] *Id*. at art. 24 (1).

[103] *Id*. at art. 24 (2).

[104] *See id*. at art. 22 (1).

[105] *Id*.

[106] Blakesley, *supra* note 34 at 121.

[107] *See* SHAW, *supra* note 22 at 589.

[108] Staker, *supra* note 49 at 306.

[109] CRYER ET AL., *supra* note 9 at 49.

strong states,[110] or invites application of various states' laws over the same suspects all at once.[111] Despite the ongoing controversy over the legality of the passive personality principle,[112] its assertion and acceptance by states has been gaining ground recently.[113] For instance, while the U.S. historically has strongly been against the exercise of the passive personality principle,[114] it has started to establish and assert the principle in certain crimes, including terrorism.[115] Furthermore, some of the UN Suppression Conventions recognize the passive personality principle and allow states parties to establish the principle for related crimes.[116] For example, according to the UNCTOC and UNCAC, a state party can establish and assert its jurisdiction over relevant crimes perpetuated against its nationals.[117]

The passive personality principle is also established in the Afghan Penal Code. According to Article 23 of the Penal Code, anyone who perpetrates a crime abroad against an Afghan national is subject to the application of the Penal Code.[118] In Article 22, the Penal Code indicates that if anyone commits a crime against an employee of the Afghan government abroad, the provisions of the Penal Code will be enforceable.[119] This provision seems to be an unusual extension of the nationality principle because according to the previous provision of the article, a government

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Blakesley, *supra* note 34 at 124; BANTEKAS & NASH, *supra* note 5 at 153.

[114] SHAW, *supra* note 22 at 589; BOISTER, *supra* note 7 at 261.

[115] BOISTER, *supra* note 7 at 261.

[116] *See* UNCTOC, *supra* note 77 at art. 15 (2) (a); UNCAC, *supra* note 78 at art. 42 (2) (a).

[117] UNCTOC, *supra* note 77 at art. 15 (2) (a); UNCAC, *supra* note 78 at art. 42 (2) (a).

[118] THE PENAL CODE, *supra* note 82 at art. 23.

[119] *Id.* at art. 22 (2).

employee could be a foreigner abroad.[120] If a crime is committed against such kind of the Afghan government's employee, the Penal Code will still be applicable.

D. The Protective/Security Principle

The protective principle allows a state to exercise its criminal jurisdiction over crimes which are committed by foreign individuals abroad, but which nonetheless undermine essential state interests such as security or sovereignty.[121] In other words, the principle "permits states to establish jurisdiction over specific categories of offenses, which though committed entirely extraterritorially, have an impact on or threaten that state's sovereignty, security, integrity, or some other important governmental function."[122] The protective principle focuses on the harm emanating from a crime against the essential interests of a state no matter where the crime or the harm occurs.[123] Historically, states have exercised the protective principle over specific crimes such as counterfeiting of a state's currency,[124] espionage, or treason.[125] States consider these crimes as grave threats to their internal security and existence.[126] Recently, as one scholar observes, "[t]here has been a growing tendency to characterize a number of transnational crimes as threats to security, particularly when other principles of jurisdiction are not available."[127] The protective principle has been asserted against crimes include drug trafficking, crimes related to terrorism,[128]

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[120] *Id.* at art. 22 (1).

[121] *See* BROWNLIE, *supra* note 59 at 304; BOISTER, *supra* note 7 at 262; B.J. George Jr., Jurisdictional Bases for Criminal Legislation and its Enforcement, 4 Mich. J. INT'L L. 1, 3, 4 (1983).

[122] BOISTER, *supra* note 7 at 262.

[123] Blakesley, *supra* note 34 at 108; BOISTER, *supra* note 7 at 262.

[124] BANTEKAS & NASH, *supra* note 5 at 154.

[125] CRYER ET AL., *supra* note 9 at 50; LOWE, *supra* note 64 at 176.

[126] LOWE, *supra* note 64 at 176; BANTEKAS & NASH, *supra* note 5 at 154.

[127] BOISTER, *supra* note 7 at 262.

[128] BANTEKAS & NASH, *supra* note 5 at 155; LOWE, *supra* note 64 at 176.

and hostage-taking.[129] In addition, international conventions have increasingly recognized the protective principle in recent years.[130]

The Afghan Penal Code recognizes the protective principle in two articles.[131] One of the articles is very general.[132] According to Penal Code Article 23, the provisions of the Penal Code will be applicable over anyone who commits a crime abroad against Afghanistan's interests.[133] The article does not explain what "interests" means. However, in Article 20, the Penal Code provides a list of crimes over which Afghanistan can claim jurisdiction based on the protective principle.[134] According to that article, the provisions of the Penal Code will be applicable over anyone who perpetrates any of the following crimes abroad: (1) crimes against the internal and/or external security of Afghanistan or a foreign State;[135] (2) falsifying official documents or importing counterfeit goods;[136] (3) counterfeiting currency and coins or importing counterfeit currency and coins;[137] and (4) forging governmental medals and symbols or importing forged medals and symbols into Afghanistan.[138] The interesting and puzzling aspect of this article is that it extends the protective principle over the first category of crimes even if they are committed against the internal and external security of a foreign country. This provision enables Afghanistan to exert jurisdiction over a crime committed abroad against the security of another country without

[129] BOISTER, *supra* note 7 at 262.

[130] *See* SHAW, *supra* note 22 at 592.

[131] *See* THE PENAL CODE, *supra* note 82 at art. 20 & 23.

[132] *See id.* at art. 23.

[133] *Id.*

[134] *See id.* at art. 20.

[135] *Id.* at art. 20 (1) (1).

[136] *Id.* at art. 20 (1) (2).

[137] *Id.* at art. 20 (1) (3).

[138] *Id.* at art. 20 (1) (4).

requiring any nexus between the person committing the disruptive act and Afghanistan. This is a highly unusual extension of the principle, quite likely overreaching.

E. The Universality Principle

Finally, the universality principle permits all States to assert criminal jurisdiction over certain crimes.[139] Unlike the four principles above, establishing a connection between the prosecuting state and the crimes/criminals is not necessary under the universality principle.[140] Any state can exercise its universal jurisdiction regardless of the place, nationality, or impact of the crimes.[141] According to a commentator, "[s]ome crimes are regarded as so serious that all mankind has a legitimate interest in repressing them, and all States have the right under international law to criminalize them and to put alleged offenders on trial."[142] The universality principle may be the most debated and disputed principle in international law.[143] Historically, piracy was the only crime over which states have claimed universal jurisdiction, with controversies raging for centuries.[144] Currently, international law allows the assertion of the universality principle over several other international crimes including war crimes, crimes against humanity, genocide, torture, and slavery.[145]

Application of the universality principle has usually been accompanied by controversy and confusion, in part dependent on the facts and circumstances presented in each case and the

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[139] SHAW SIXTH EDITION, *supra* note 6 at 668.

[140] *See* BANTEKAS & NASH THIRD EDITION, *supra* note 17 at 85.

[141] *See id.*

[142] LOWE, *supra* note 64 at 177.

[143] *See e.g.* CRYER ET AL., *supra* note 9 at 50; Sienho Yee, "*Universal Jurisdiction: Concept, Logic, and Reality*" in ALEXANDER ORAKHELASHVILI, RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 76 (2015).

[144] *See* Akehurst, *supra* note 25 at 160; SHAW, *supra* note 22 at 593.

[145] LOWE, *supra* note 64 at 177.

interpretation of the principle by the states involved.[146] Traditionally, two important reasons have been cited to support the establishment of the principle.[147] First, some crimes are so grave they "shock humanity's shared conscience or disturb the international order."[148] Second, the crimes "occur outside an effective jurisdiction, either on the high seas or in states unable or unwilling to prosecute."[149]

Some scholars divide the universality principle into two sub-categories: *absolute* and *conditional* universal jurisdiction.[150] Absolute universality is the assertion of jurisdiction (via opening an investigation and initiating an extradition request) over the relevant international crimes when the alleged perpetrator resides outside the territory of the asserting state.[151] Conditional universality refers to a situation where the accused person is present within the territory of the asserting state.[152]

Today, several countries that ratified the Rome Statute of the International Criminal Court (Rome Statute)[153] have incorporated international crimes and the universality principle into their national laws.[154] It should be mentioned that the universality principle "is not generally applied to transnational crimes by analogy to the core international crimes because they are considered to serve different interests."[155] Apparently, the gravity of even serious transnational crimes such as

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[146] *See e.g.* Yee, *supra* note 143 at 76; CRYER ET AL., *supra* note 9 at 51; LOWE, *supra* note 64 at 178.

[147] *See* BANTEKAS & NASH, *supra* note 5 at 156.

[148] BOISTER, *supra* note 7 at 268.

[149] *Id.*

[150] CRYER ET AL., *supra* note 9 at 51.

[151] *Id.* at 52.

[152] *Id.*

[153] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

[154] *Id.*at 58.

[155] BOISTER, *supra* note 7 at 269.

terrorism has not yet convinced the international community to allow the application of the universality principle over the respective crimes.[156]

Although Afghanistan has ratified the Rome Statute and incorporated the specified international crimes into the Penal Code,[157] the Penal Code has very broad language and does not adequately establish the universality principle.[158] Although the title of Penal Code Article 26 is "universality jurisdiction," it does not set forth the scope of the jurisdiction. According to the article, if the perpetrators of crimes *that are criminalized based on international documents*[159] are found in Afghanistan,[160] they will be prosecuted in accordance with the provisions of the Penal Code after meeting two conditions: first, the actions are criminalized and punishable in the Penal Code, and second, other jurisdictional bases such as territoriality, nationality, and passive personality are not available.[161]

Two things should be noted about Article 26. First, the article does not specify which international crimes are subject to the universality principle under international law. "Actions criminalized based on international documents" is vague and confusing language which could cover an extensive number of crimes, more than the universally accepted ones explained above. Second, the article only establishes *conditional* universality, because according to the Penal Code, the alleged criminal should be present within the territory of Afghanistan.

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[156] *See generally id.*

[157] *See* THE PENAL CODE, *supra* note 82 at art. 332-343.

[158] *See id.* at art. 26.

[159] The language is a word-for-word translation from the original text of the Code.

[160] THE PENAL CODE, *supra* note 82 at art. 26.

[161] *Id.*

III. Concurrent Jurisdiction

One of the challenges that may complicate the application of these principles is *concurrent* or *overlapping* jurisdiction.[162] Concurrent jurisdiction may occur where two or more states can assert criminal jurisdiction over the same crime.[163] For example, a war crime or crime against humanity could potentially fall under the jurisdiction of various states.[164] One state may assume jurisdiction based on the territoriality principle, another state based on the nationality principle, and all other states could assert jurisdiction on the basis of the universality principle.[165] In such a case, all states may have a valid and legal basis for asserting jurisdiction.[166]

Two important questions arise from concurrent jurisdiction.[167] First, does the jurisdictional claim of any state have primacy over the others?[168] Second, is it permissible for two or more states to prosecute the same crime, given the maxim *ne bis in idem* (the rule against double jeopardy)?[169] As an international law scholar observed, "[g]eneral international law does not provide a hierarchy of application of jurisdictional principles and nor [sic] do the suppression conventions."[170] International law therefore permits more than one state to exercise jurisdiction over the same crime without giving precedence to any of the jurisdictional claims, leaving it to the relevant states to make their own arrangements.[171]

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[162] *See* Staker, *supra* note 49 at 309.

[163] Orakhelashvili, *supra* note 4 at 15.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] BOISTER, *supra* note 7 at 270.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

While the law is not settled as to which state may have the primacy claim of jurisdiction in the situation of concurrent jurisdiction. conventions,[172] states, and legal scholars have proposed various possible solutions to avoid conflicts or mitigate the hardship arising from such conflicts.[173] For instance, one solution is to give primacy to the state that has a territorial jurisdictional claim[174] because it is practical[175] and avoids encroaching on the sovereignty of other states.[176] Another solution is to give jurisdictional priority to the state that has been impacted the most by the commission of the crime.[177] In theory, the prosecution of the crime might be more effective as the evidence and witnesses may be more accessible to the most impacted state.[178] Several international conventions recommend states parties to consult with one another in the case of conflict of jurisdiction. For instance, both the UNCTOC and UNCAC conventions have identical provisions concerning concurrent jurisdiction.[179] The conventions provide that if an asserting state party realizes that "one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those states parties shall, as appropriate, consult one another with a view to coordinating their actions."[180]

The Afghan Penal Code does not provide any guidance on the problem of concurrent jurisdiction.

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[172] *Id.*

[173] *See e.g. id.* at 271-272; Staker, *supra* note 49 at 309-311; John M. Raymond, *The Exercise of Concurrent International Jurisdiction: "Move with Circumspection Appropriate*", 8 B.C.L. Rev. 673, 675-678 (1967).

[174] *See e.g.* BOISTER, *supra* note 7 at 271-272; Raymond, *supra* note 173 at 675; LOWE, *supra* note 64 at 177.

[175] BOISTER, *supra* note 7 at 271.

[176] Raymond, *supra* note 173 at 675.

[177] BOISTER, *supra* note 7 at 271.

[178] *Id.*

[179] *See* UNCTOC, *supra* note 77 at art. 15 (5); UNCAC, *supra* note 78 at art. 42 (5).

[180] UNCTOC, *supra* note 77 at art. 15 (5); UNCAC, *supra* note 78 at art. 42 (5).

IV. Immunities from Criminal Jurisdiction

International law does not give unlimited jurisdiction to states.[181] One of the oldest concepts in international law, deeply embedded in customary law, [182] is immunity from criminal jurisdiction.[183] Immunity provides some exceptions to the absolute power of a State to prosecute criminals within its territory.[184] Generally, States are not allowed to prosecute, summon, question, or arrest certain persons who enjoy immunity under international law.[185] This means that "[e]ven if a state has established jurisdiction over a transnational crime, it may be unable to enforce it if the individual or action concerned is immune from that jurisdiction."[186] National and international courts have consistently confirmed that certain people are immune from criminal jurisdiction of foreign states.[187] Immunity has two forms: personal immunity (*ratione personae*) and functional immunity (*ratione materiae*).[188]

A. Personal Immunity

Personal immunity is "an international law concept that bars the jurisdiction of courts over certain high-ranking state officials by virtue of their office."[189] Based on the concept, states should not exercise their jurisdiction over individuals who hold certain positions within their

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[181] LOWE, *supra* note 64 at 184.

[182] *See e.g.* Franey, *supra* note 185 at 205; *Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply*?, ALLARD INTERNATIONAL JUSTICE AND HUMAN RIGHTS CLINIC 2 (2016), http://www.allard.ubc.ca/sites/www.allard.ubc.ca/files/uploads/IJHR/when_do_immunities_apply_final.pdf [hereinafter THE ALLARD IJHR CLINIC REPORT]

[183] LOWE, *supra* note 64 at 184.

[184] *See* BANTEKAS & NASH, *supra* note 5 at 156.

[185] Elizabeth Helen Franey, "*Immunity from the Criminal Jurisdiction of National Courts*" in ALEXANDER ORAKHELASHVILI, RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 205 (2015).

[186] BOISTER, *supra* note 7 at 273.

[187] *See e.g.* Franey, *supra* note 185 at 206; THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 2.

[188] *See e.g.* Franey, *supra* note 185 at 205; THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 1.

[189] THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 3.

governments.[190] Accordingly, personal immunity is regarded as a "'status-based' immunity that attaches to an official's government position rather than the official themselves."[191] Personal immunity is "absolute"[192] because "[t]here is no exception based on the seriousness of the alleged crime, or whether the acts were private or official, because the rationale is unconnected to the nature of the charge."[193] It is temporary: a state's official can only enjoy the immunity as long as they retain the position.[194] Only a limited number of people are entitled to personal immunity.[195] Personal immunity extends to heads of state, heads of government, and ministers of foreign affairs.[196] Diplomatic immunity is another form of personal immunity.[197] According to the Vienna Convention on Diplomatic Relations (1961),[198] diplomats and their family members are entitled to absolute immunity.[199] Personal immunity covers all actions of the immunity holder regardless of whether the actions are carried out in his private capacity or as an official.[200]

[190] *Id.*

[191] *Id.*

[192] CRYER ET AL., *supra* note 9 at 534.

[193] *Id.* at 533.

[194] *Id.*

[195] *Id.*

[196] THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 3.

[197] BOISTER, *supra* note 7 at 275; THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 4.

[198] Vienna Convention on Diplomatic Relations 1961 (entered into force Apr. 24, 1964).

[199] BOISTER, *supra* note 7 at 275.

[200] *See e.g.* BOISTER, *supra* note 7 at 275; THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 4.

B. Functional Immunity

Functional immunity covers an official act rather than a person.[201] It "protects conduct carried out on behalf of a State."[202] Functional immunity is considered the result of the principle that "a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal."[203] Functional immunity can extend to a large number of government officials, irrespective of what position they hold, as long as they act on behalf of their government.[204] Unlike personal immunity, however, functional immunity does not protect actions that are taken by officials in their private capacity.[205] Therefore, if they commit a crime in their private capacity, they will be subject to the exercise of criminal jurisdiction by the foreign state.[206] In addition to granting functional immunity to those persons covered by personal immunity, states have extended functional immunity to consuls, official visitors, and low-ranking officials.[207]

The main goal behind the two forms of immunity is "to protect official acts (functional immunity) or to facilitate international relations (personal immunity)" but not to reward officials.[208] Consequently, because immunity "belongs to the state, not individual,"[209] states can waive the immunity whether or not the holder of the immunity consents.[210]

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[201] THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 11.

[202] CRYER ET AL., *supra* note 9 at 533.

[203] *Id.*

[204] THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 11.

[205] CRYER ET AL., *supra* note 9 at 533.

[206] *Id.*

[207] THE ALLARD IJHR CLINIC REPORT, *supra* note 182 at 12.

[208] CRYER ET AL., *supra* note 9 at 534.

[209] Franey, *supra* note 185 at 205.

[210] *Id.*

Although the Afghan Penal Code recognizes the concept of immunity, it leaves the issue to the international conventions and treaties to which Afghanistan is a state party.[211] According to the Penal Code, if an employee of the UN or a political representative of a foreign state commits a crime over which the provisions of the Penal Code are applicable,[212] they will be treated in accordance with the relevant international conventions and treaties that Afghanistan is party to which govern immunities and privileges concerning that person.[213]

V. The Limits of Jurisdiction under Traditional International Law

While the traditional forms and bases of criminal jurisdiction may have been relatively useful for centuries, their application is not well-suited to transnational crimes for two important reasons. First, globalization and its impacts on transnational crime have threatened traditional jurisdiction norms.[214] As Boister observes, because transnational crimes are complex and carried out in a highly sophisticated manner,[215] it is increasingly difficult to identify the place, suspect, and victim of the crimes.[216] For instance, in transnational cybercrimes, "the ease, speed, and unpredictability with which data flows across borders make its "location" an unstable and often arbitrary determinant of the rules that apply."[217] As the contours of international law and transnational

[211] *See* THE PENAL CODE, *supra* note 82 at art. 21.

[212] *Id.*

[213] *Id.*

[214] *See* M Sornarajah, *Globalization and Crime: The Challenges to Jurisdictional Principles*, 1999 SING. J. LEGAL STUD. 409, 409-410 (1999).

[215] *See e.g.* BOISTER, *supra* note 7 at 247; Parrish, *supra* note 2 at 275.

[216] *See id.*

[217] Jennifer Daskal, The Un-Territoriality of Data, 125 YALE L.J. 326, 331 (2015), quoted in Alexandra Perloff-Giles, *Transnational Cyber Offenses: Overcoming Jurisdictional Challenges*, 43 YALE J. INT'L L. 191, 196 (2018).

criminal conduct become ever murkier, it is harder to apply traditional 17th century Westphalian methods[218]on this modern problem.[219]

Second, basing state jurisdiction on territoriality can create a legal gap which can be exploited by transnational criminals. Falk expressed his concern about territoriality over half a century ago when he observed, "a rigid territorial allocation of jurisdictional competence creates an impunity umbrella for those who act from abroad to achieve their illegal domestic objectives."[220] This assertion still holds true and is especially understandable and relevant in the present global context.[221] As previously discussed, the concept of territoriality is strictly applied on enforcement jurisdiction. Although a state may establish and extend its prescriptive and adjudicative jurisdiction abroad, it cannot exercise its enforcement jurisdiction extraterritorially in order to "investigate a crime, arrest a suspect, or enforce its judgment or judicial process in another State's territory without the latter State's permission."[222] For instance, state A may legislate and criminalize a specific act and its courts may exercise their jurisdiction and try a person for committing the crime even though the person has already fled to state B, however state A cannot directly exercise its enforcement jurisdiction (sending police officers) in state B.[223] state A may take other measures,

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[218] "The so-called 'Westphalian' model of international legal order, based on the Peace of Westphalia, has had a profound social effect by suggesting that a new international system came into being with the end of the Thirty Years War in 1648. This system has defined not only the present state of international society but also the present state of international law." (Stephane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTRALIAN JOURNAL OF LEGAL HISTORY, 181-213 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=672241&download=yes).

[219] *See generally* Keith Cozine et al., *From Local to Global: Comparing Network Approaches to Addressing Terrorism and Transnational Crime*, 9 JOURNAL OF POLICING, INTELLIGENCE AND COUNTER TERRORISM, 2, 117, 132 (2014); LOWE, *supra* note 64 at 180.

[220] Richard A. Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMPLE LAW QUARTERLY, 295, 303 (1959), cited in BOISTER, *supra* note 7 at 245.

[221] *See* BOISTER, *supra* note 7 at 245.

[222] LOWE, *supra* note 64 at 184.

[223] *See* SHAW SIXTH EDITION, *supra* note 6 at 646.

such as seeking extradition, which can be carried out with the two states' mutual consent and agreement,[224] but an enforcement jurisdictional basis is not available under international law.[225] This creates a gap, what Sornarajah called "uncontrolled"[226] space, that is widely used by transnational criminals to escape prosecution and punishment.[227]

VI. States' Attempts to Expand Criminal Jurisdiction

The limits and inefficiency of traditional norms and the resulting jurisdictional gap over transnational crimes have prompted states to find ways to extend their criminal jurisdiction beyond their borders.[228] According to Boister, the extension of jurisdiction is carried out more often by powerful states than weak ones.[229] Although extension of criminal jurisdiction can be controversial, and carries the risk of violating the sovereignty of other states, states have generally used uniliteral and multilateral approaches to extend criminal jurisdiction over transnational crimes beyond their borders.[230]

There are many examples of uniliteral extension of criminal jurisdiction by states, with the U.S. leading the way.[231] Although U.S. law established the presumption that jurisdiction is territorial[232] almost a century ago in *United States v. Bowman,* the necessity of extending criminal

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[224] *See id.*

[225] *See id.*

[226] Sornarajah, *supra* note 75 at 409.

[227] *See e.g.* Adam Taylor, Why the Wife of a U.S. Diplomat Was Granted Immunity After A Fatal Car Crash (2019), https://www.washingtonpost.com/world/2019/10/10/why-wife-us-diplomat-was-granted-immunity-after-fatal-car-crash/.

[228] *See e.g.* BOISTER, *supra* note 7 at 278.

[229] *See e.g. id.* at 248.

[230] *See* Sornarajah, *supra* note 75 at 419-431; BOISTER, *supra* note 7 at 250-270; Christopher L. Blakesley, United States Jurisdiction Over Extraterritorial Crime, 73 J. CRIM. L. & CRIMINOLOGY 3, 1109, 1118 (1982).

[231] *See* Sornarajah, *supra* note 75 at 420.

[232] *See* BOISTER, *supra* note 7 at 248.

jurisdiction over transnational crimes has been recognized by the U.S. Supreme Court.[233] The Court has asserted that territoriality reduces the efficiency of certain criminal laws.[234] In several cases the U.S. has unliterally extended its jurisdiction over crimes committed abroad. The *Alcoa* case is one of the best-known examples where the U.S. applied the doctrine of "effects," extending the application of its antitrust law to include acts carried out by foreign individuals outside U.S. territory where the effects are felt in the U.S.[235] The effects doctrine was later applied in other criminal contexts and widely followed by other countries.[236] In addition, while many states, including the U.S., do not extend universal jurisdiction over transnational crimes,[237] some states, like Switzerland, do exercise universal jurisdiction over certain such crimes (namely human trafficking and sex crimes) where the victims are juveniles.[238] Germany has also extended universal jurisdiction over crimes including human trafficking and counterfeiting where committed extraterritorially.[239] The U.S. has even extended the territoriality principle "to thwarted extraterritorial narcotics or other conspiracies, even when no overt act, element, or any effect has occurred there."[240]

States have also extended criminal jurisdiction through a multilateral approach when the uniliteral extension of criminal jurisdiction may not always be effective.[241] Many transnational

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[233] *United States v. Bowman*, 260 U.S. 94, 43 S. Ct. 39 (1922).

[234] *See id.;* BOISTER, *supra* note 7 at 248.

[235] *See e.g. United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945); Najeeb Samie, *The Doctrine of Effects and the Extraterritorial Application of Antitrust Laws*, 14 LAW. AM. 23, 27-31 (1982); BOISTER, *supra* note 7 at 255.

[236] *See* BOISTER, *supra* note 7 at 255.

[237] *See id.* at 269.

[238] *See id.*

[239] *See id.*

[240] Blakesley, *supra* note 34 at 137.

[241] *See* Sornarajah, *supra* note 75 at 425.

crime suppression conventions establish "reasonable" extension of criminal jurisdiction with the consent of states parties in order to prevent jurisdictional conflicts arising from uniliteral extension of jurisdiction.[242] As Boister observed, the multilateral approach allows states parties to "make reciprocal grants of special competence on the jurisdictional principles listed in the conventions and in doing so waive their rights to object to the establishment of extraterritorial jurisdiction on the basis of these principles."[243] For example, the 1970 Hague Hijacking Convention established "landing State" jurisdiction which allows the state where the plane landing state to assert its jurisdiction if the alleged hijacker is still on board, regardless of the territory where the hijacking crime occurred and the aircraft is registered.[244] In another instance, the United Nations Convention against Transnational Organized Crime extended criminal jurisdiction over crimes committed by a stateless individual "who has his or her habitual residence" in a state party's territory.[245] There are many other examples where jurisdiction has been extended through a multilateral approach.

Even if a state prescriptively establishes or extends its criminal jurisdiction over a transnational crime, its enforcement remains territorial. States might be able to enforce jurisdiction inside their territory and prosecute the relevant crimes based on available domestic evidence, but they cannot enforce it extraterritorially without the consent and assistance of other sovereign states. In order to give effect to prescriptive criminal jurisdiction over transnational crimes, states must investigate,

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[242] *See* BOISTER, *supra* note 7 at 250.

[243] *See id.*

[244] Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4 (1), (signed Dec 16, 1970); BOISTER, *supra* note 7 at 252.

[245] United Nations Convention against Transnational Organized Crime, at art. 15 (2) (b) (entered into force Sep. 29, 2003) (hereinafter UN CONVENTION AGAINST ORGANIZED CRIME).

prosecute, and adjudicate alleged transnational offenders.[246] At best, extensions of traditional jurisdiction remain uneven, piecemeal, of limited efficiency, and contentious.

VII. Conclusion

Combating transnational crimes requires states to pursue crimes beyond their national boundaries. However, investigation and prosecution of crimes outside a state's territory raises the question of whether a state can extend its jurisdiction beyond its sovereign borders. Under traditional international law, although states may be able to establish their prescriptive and adjudicative jurisdiction over transnational crimes, they are not allowed to enforce their criminal jurisdiction beyond their national borders. Referring back to the Kabul Bank case, the foreign countries where Kabul Bank funds were transferred have no duty or obligation under traditional international law to provide legal assistance or return the money to Afghanistan. Nor can the Afghan government deploy its police officers into those countries to investigate the involved agencies or the suspects who reside there. Due to the limits of enforcement jurisdiction under international law,[247] there has been an increasing need for other cooperative methods to enable states to obtain cross-border information and evidence based on mutual consent. Consequently, states have resorted to cross-border cooperation and developed and implemented mutual legal assistance and/or law enforcement cooperation mechanisms. These mechanisms are the modern tools of enforcement jurisdiction that have developed based on states' consent by entering into bilateral or multilateral agreements or conventions.

[246] *See* BOISTER, *supra* note 7 at 280.

[247] *See id.* at 311.

CHAPTER FIVE: MODERN EFFORTS TO COMBAT TRANSNATIONAL CRIME: ENFORCING JURISDICTION EXTRATERRITORIALLY THROUGH MUTUAL LEGAL ASSISTANCE AND AFGHANISTAN'S OBLIGATIONS UNDER INTERNATIONAL LAW

As discussed in the previous chapter, despite states' attempts to extend their jurisdiction unilaterally or multilaterally, the scope of extension remains quite limited. The challenge of jurisdictional gaps is formidable, chiefly because of the longstanding principle, with narrow exceptions, that states generally cannot enforce their jurisdiction extraterritorially. Therefore, states seek to employ other remedies such as mutual legal assistance (also known as international judicial cooperation,[1] or judicial assistance).[2] Since these developments are quite recent, no globally-accepted uniform terminology exists to describe states' cross-border legal cooperation activities.

There is an important distinction between these modern innovations and traditional attempts to extend jurisdiction. The latter efforts sought to *directly* extend the jurisdiction of a sovereign state, as outlined in the preceding chapter. When State A seeks to directly enforce its laws within the territory of State B, however, this inevitably threatens the long-standing Westphalian principle of non-interference in the domestic affairs of another sovereign (State B). Friction is unavoidable. More recent efforts therefore proceed in a different manner by enlisting the State B to *voluntarily* exercise its own domestic jurisdiction in cooperation with, and in service of, enforcement officials

[1] John A. E. Vervaele, *Mutual Legal Assistance in Criminal Matters to Control (Transnational) Criminality*, in ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 121 (2015), EDITED BY NEIL BOISTER AND ROBERT J. CURRIE.

[2] *Mutual Legal Assistance Manual*, COUNCIL OF EUROPE 9 (2013), https://rm.coe.int/mutual-legal-assistance-manual-eng/1680782927 [hereinafter THE COUNCIL OF EUROPE'S MANUAL]

in State A. In the last three decades, this has been accomplished through a growing network of bilateral and multilateral treaties.[3]

Scholars and practitioners categorize mutual legal assistance or international legal/judicial cooperation slightly differently. Some scholars, such as Neil Boister, discuss international legal cooperation under two categories, treating international law enforcement cooperation[4] separately from legal assistance.[5] Other scholars such as Richardson[6] and Prost,[7] include all of these efforts under the general rubric of mutual legal assistance, but distinguish between formal and informal mutual legal assistance methods. In this classification, law enforcement cooperation falls under the informal mutual legal assistance method.[8] Practitioners such as the drafters of the Council of Europe's Mutual Legal Asssistance Manual differentiate mutual legal assistance (judicial assistance), which requires formal request and compulsory measures in the form of warrants or court orders,[9] with administrative assistance (informal assistance), such as exchanging information or evidence through police-to-police or prosecutor-to-prosecutor cooperation.[10]

Given that all scholars and practitioners describe the same patterns of state actions, the differing terminology does not necessarily indicate a different approach to the underlying

[3] An older, and considerably less efficient, means of formal cooperation has existed for centuries in the form of 'letters rogatory'. These are discussed briefly below, see text at section II (a) (this chapter).

[4] *See* NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 280-310 (2ND EDITION, 2018).

[5] *See id.* at 311-332.

[6] L. Song Richardson, *Due Process for the Global Crime Age: A Proposal*, 41 CORNELL INT'L L. J. 2, 347, 351 (2008).

[7] Kimberly Prost, *Breaking Down the Barriers: Inter-national Cooperation in Combatting Transnational Crime*, OAS (1998), https://www.oas.org/juridico/mla/en/can/en_can_prost.en.html.

[8] *See e.g. id.;* Richardson, *supra* note 6 at 351; Dato' Umar Saifuddin bin Jaafar, *Informal Measures in Mutual Legal Assistance—Success Stories; Public-Private Partnership to Prevent and Detect Corruption* 1, https://www.unafei.or.jp/publications/pdf/GG9/19_GG9_IP_Malaysia2.pdf (last visited Oct. 2, 2019).

[9] THE COUNCIL OF EUROPE'S MANUAL, *supra* note 2 at 9.

[10] *Id*.

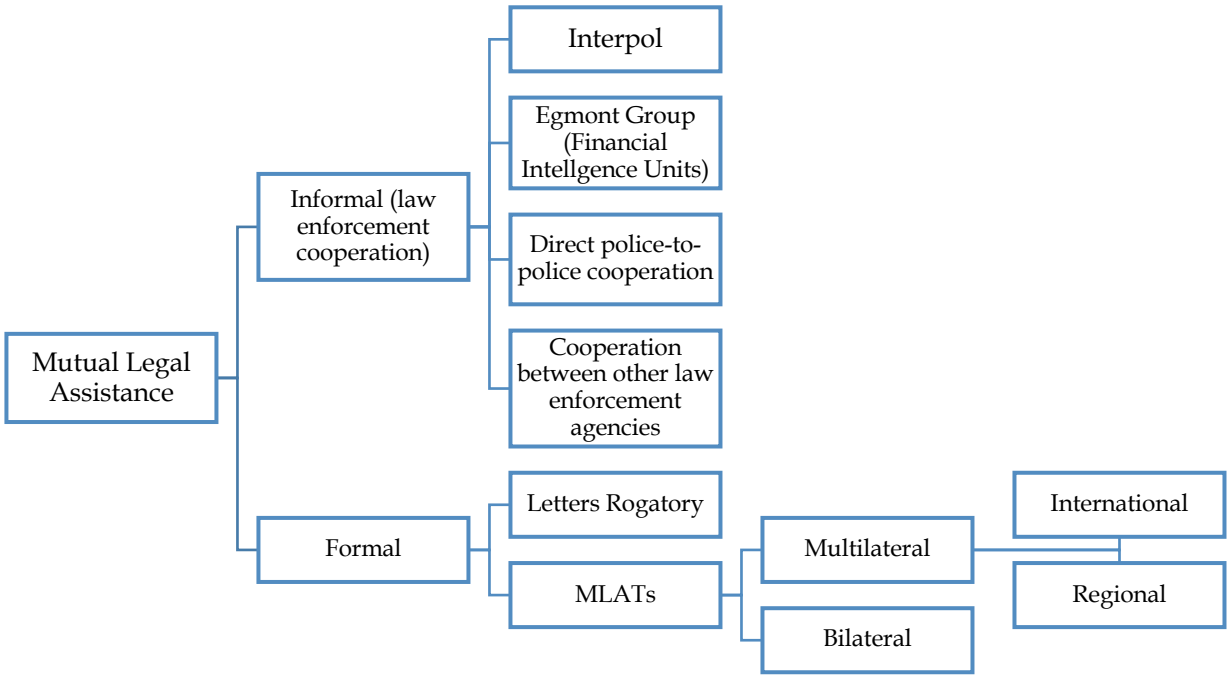
substance; it can, however, lead to confusion and disagreement. [11] Moreover, none of the classifications are particularly clear-cut. The two categories overlap to some extent, and it can be difficult to draw precise lines between them. Nonetheless from the above discussion, as a matter of consistency and clarity, this dissertation follows Richardson and Prost's description and differentiation of mutual legal assistance into formal and informal methods. Generally, mutual legal assistance will therefore be defined as "a process by which states seek and provide assistance in gathering evidence for use in criminal cases."[12] The two methods of mutual legal assistance[13]--informal and formal—have various forms (see Figure 3.). It should be noted that the various methods and forms of mutual legal assistance are complementary to each other rather than conflicting. They will be elucidated in greater detail below.

[11] Even in a single language, such as English, the terminology is not consistent. The problem is further complicated because the legal terminology in common law heritage states (usually operating in English) is different than the legal terminology of civil law heritage states (operating in multiple languages). Additionally, in many local languages, terms for newly introduced legal concepts such as mutual legal assistance may not exist. This invites further confusion. For instance, based on University of Washington Law Prof. Jon Eddy's observation as a Resident Legal Advisor to the Indonesian Ministry of Law and Human Rights in 2003, Indonesia had no existing term for mutual legal assistance. FATF demanded that Indonesia amend its legislation to provide for mutual legal assistance. Indonesia kept putting forward draft legislation using the phrase "kerja sama" (literally, 'working together'). When FAFT officials translated this, it was translated as "cooperation." FATF understood 'cooperation' to refer only to discretionary informal assistance, and not to the more robust and formal mandatory forms of mutual legal assistance. Although substantive issues did divide the parties, to a large extent the controversy continued due to a linguistic misunderstanding. When the linguistic issue was identified, the Indonesians simply created a new term—bantuan hukum balik (roughly, reciprocal legal aid) and the issue was then resolved in short order.

[12] Prost, *supra* note 7.

[13] *Id.*

Figure 3. Forms of mutual legal assistance as practiced globally



I. Informal Mutual Legal Assistance (Law Enforcement Cooperation)

The territorial nature of enforcement jurisdiction and the practical challenges explained in the previous chapters make law enforcement cooperation critical to combating transnational crimes. States initially resort to informal method or law enforcement cooperation. Informal mutual legal assistance refers to the cooperation of law enforcement agencies in one country with their counterparts in another country by exchanging information and obtaining cross-border evidence "below the radar of high-level government officials"[14] in an informal and often relatively unstructured setting.[15] This occurs primarily through police-to-police contact, often with increasing involvement of other law enforcement agencies such as tax authorities, security

[14] *See* Richardson, *supra* note 6 at 351

[15] *See* BOISTER, *supra* note 4 at 283.

agencies, financial intelligence units, and similar entities over time.[16] States aim to assist each other through law enforcement cooperation with the purpose of detecting and investigating transnational crimes.[17] Law enforcement cooperation can take place in different forms, including storing and sharing information, supporting intelligence or undercover operations, or conducting joint investigations.[18] As Boister observes, many recent transnational crime conventions encourage law enforcement cooperation among states parties.[19]

Informal mutual legal assistance is extremely important in obtaining information and gathering evidence. Essentially, the informal method is "the first step in any evidential request of complexity in any event, even where it is always the intention to issue a formal letter of request."[20] The informal method also plays a critical role in establishing networks and good relationships between states' law enforcement agencies;[21] it serves as a rapport-building step before initiating a formal mutual legal assistance request. Except in certain circumstances where a rule/law might be breached in the process, information or evidence produced through informal mutual legal assistance methods not only opens the door for further investigation and potentially a formal mutual legal assistance request, but may itself have evidentiary value.[22] The Council of Europe's Manual on Mutual Legal Assistance indicates that information or documents that are obtained through informal methods are admissible in the courts.[23] According to the Manual, "[t]he word

[16] *See id*.

[17] *See id*. at 280.

[18] *See id*. at 284-296

[19] *See id.* at 283.

[20] THE COUNCIL OF EUROPE'S MANUAL, *supra* note 2 at 9.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 11.

'informal' is not being used in the present context in relation to the product itself, simply in relation to the way in which the request is made and the route by which it is communicated."[24]

Despite a recent increase in developing and using formal methods, such as MLATs, among States, informal methods continue to play a critical role and are considered irreplaceable.[25] In addition to direct agency-to-agency cooperation such as police-to-police contact, there are many international and regional organizations that facilitate information-sharing and law enforcement cooperation among member states.[26] The International Criminal Police Organization (ICPO or INTERPOL) and the Egmont Group are two of the most influential international bodies that facilitate and enhance information-sharing and shape national policies in relevant areas. Afghanistan is a member of both organizations. Below is a brief description of those organizations and their initiatives.

A. INTERPOL

INTERPOL is an inter-governmental organization established in 1923.[27] It is the largest police organization in the world with 194 member countries.[28] Afghanistan has been a member of INTERPOL since October 21, 2002.[29] The goal of INTERPOL is "to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the

[24] *Id.*

[25] Prost, *supra* note 7.

[26] *See* BOISTER, *supra* note 4 at 309-310.

[27] *Our History*, INTERPOL, https://www.interpol.int/en/Who-we-are/Our-history (last visited Oct. 6, 2019).

[28] *Member Countries*, INTERPOL, https://www.interpol.int/en/Who-we-are/Member-countries (last visited Oct. 6, 2019).

[29] *Afghanistan*, INTERPOL, https://www.interpol.int/en/Who-we-are/Member-countries/Asia-South-Pacific/AFGHANISTAN (last visited Oct. 6, 2019).

laws existing in the different countries"[30] and "establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes."[31]

Every INTERPOL member should establish a focal point department within its national police. [32] According to Article 31 and 32 of the INTERPOL Constitution, in order to ensure "constant and active co-operation among member countries,[33] every member "shall appoint a body which will serve as the National Central Bureau."[34] INTERPOL describes National Center Bureaus (NCBs) as the heart of its operations.[35] NCBs serve as a bridge between different police units inside a country and connect the national police of member countries to each other and with INTERPOL's General Secretariat[36] through a "secure global police communications network called I-24/7."[37] NCBs carry out their duties in two important ways. First, they share national criminal data with INTERPOL global databases.[38] INTERPOL has developed 17 databases covering individuals; forensics; travel and official documents; stolen property; firearms trafficking; and organized crime networks.[39] These databases enable national police "to identify a trend, prevent a crime, or arrest a criminal."[40] Second, NCBs "cooperate on cross-border

[30] The Constitution of the ICPO-INTERPOL (adopted by the General Assembly at its 25th session (Vienna - 1956)) at art. 2 (1) [hereinafter INTERPOL CONSTITUTION]

[31] *Id*. at art. 2 (2).

[32] *National Center Bureaus (NCBs),* INTERPOL, https://www.interpol.int/en/Who-we-are/Member-countries/National-Central-Bureaus-NCBs (last visited Oct. 6, 2019) [hereinafter NBCs)

[33] INTERPOL CONSTITUTION, *supra* note 30 at art. 31.

[34] *Id*. at art. 32.

[35] NBCs, *supra* note 32.

[36] INTERPOL CONSTITUTION, *supra* note 30 at art. 32.

[37] NBCs, *supra* note 32.

[38] *Id*.

[39] *Our 17 Databases*, INTERPOL, https://www.interpol.int/en/How-we-work/Databases/Our-17-databases (last visited Oct. 9, 2019).

[40] NBCs, *supra* note 32.

investigations, operations and arrests."[41] NCBs are able to seek or provide cooperation to each other for any crime that crosses national boundaries.[42]

Finally, one of the most important tools that INTERPOL uses to facilitate cooperation is "Notices." Notices "are international requests for cooperation or alerts allowing police in member countries to share critical crime-related information."[43] The General Secretariat of INTERPOL has the authority to issue Notices at the request of NCBs.[44] There are eight types of Notices for different purposes,[45] including Red (for wanted persons), Yellow (for missing persons), Blue (for additional information), and Black (for unidentified bodies).[46] The General Secretariat only issues a Notice if it meets the requirements set by the INTERPOL Constitution and Rules on the Processing of Data.[47] INTERPOL issued 13,377 Red Notices in 2019 alone.[48]

Despite developing comprehensive mechanisms for cooperation and relatively effective communication channels, INTERPOL has been criticized for being informal and for being used by authoritarian states to suppress their political opponents abroad.[49] Additionally, INTERPOL has been criticized for not giving individuals the right to a hearing before the Commission for the Control of INTERPOL's Files (CCF)[50] to dispute INTERPOL Red Notices.[51] Although a Red

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[41] *Id*.

[42] *Id*.

[43] *About Notices*, INTERPOL, https://www.interpol.int/en/How-we-work/Notices/About-Notices (last visited Oct. 8, 2019).

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Red Notices*, INTERPOL, https://www.interpol.int/en/How-we-work/Notices/Red-Notices (last visited Oct. 8, 2019).

[49] *See* Edward Lemon, "*Weaponizing Interpol*" 30 JOURNAL OF DEMOCRACY 2, 15, 15-17 (2019).

[50] The CCF is an independent oversight body that reviews INTERPOL notices. *See* BOISTER, *supra* note 4 at 309.

[51] *See* BOISTER, *supra* note 4 at 309.

Notice is not obligatory,[52] it is the most famous among INTERPOL's notices[53] and is used extensively.[54] Despite the fact that the majority of countries prefer to act only on arrest requests processed through diplomatic channels,[55] about 33% of members make arrests based on INTERPOL Red Notices.[56]

B. The Egmont Group of Financial Intelligence Units

The Egmont Group was founded in 1995 as an informal forum.[57] It is "a united body of 164 Financial Intelligence Units (FIUs)"[58] from around the globe**.** Afghanistan (FinTRACA) joined the Egmont Group in 2010.[59] One of the main goals of the Egmont Group is to facilitate the exchange of financial intelligence information in money laundering and terrorist financing cases.[60] According to the Egmont Group's Charter, "all members foster the widest possible cooperation and exchange of information with other Egmont Group FIUs on the basis of reciprocity or mutual agreement."[61] The Egmont Group has created the Egmont Secure Web (ESW) which is "an electronic communication system that allows encrypted sharing among members of emails and

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[52] *Id*. at 308.

[53] *Interpol: How to Challenge An International Arrest Warrant (Red Notices and Diffusions)?,* KAARLS, http://kaarls-strafrechtadvocaten.nl/english/interpol-red-notice-and-diffusion-removal-request/ (last visited Jan. 26, 2020).

[54] *See* BOISTER, *supra* note 4 at 308.

[55] *Id*. at 309.

[56] *Id*.

[57] *See* Egmont Group of Financial Intelligence Units Charter, at preamble para. 8 (approved by the Egmont Group Heads of Financial Intelligence Units on July 2013 and revised on September 2018) [hereinafter EGMONT GROUP CHARTER]; *The Egmont Group of Financial Intelligence Units,* U.S. TREASURY, https://www.fincen.gov/resources/international/egmont-group-financial-intelligence-units (last visited Oct. 3, 2019).

[58] *About*, EGMONT GROUP, https://egmontgroup.org/en/content/about (last visited Oct. 3, 2019) [hereinafter EGMONT'S WEBSITE)

[59] Egmont, FINTRACA, http://www.fintraca.gov.af/Egmont.html (last visited Oct. 4, 2019).

[60] EGMONT'S WEBSITE, *supra* note 58.

[61] EGMONT GROUP CHARTER, *supra* note 57 at para. 3.1 (A).

financial intelligence."[62] The ESW system establishes a "secure and reliable channel of communication for the members of the Egmont Group."[63]

Some Egmont Group documents, including the Charter and its principles, are binding on member countries.[64] For instance, the document that institutes the Egmont Group's principles for information exchange explicitly indicates that the principles are obligatory and thus "cases of significant and relevant-non-compliance will be subject to the *Egmont Group Support and Compliance Process*."[65] On the other hand, other documents, such as the Operational Guidance for FIU Activities and the Exchange of Information, are merely instructive.[66] According to the 2017/2018 Annual Report of the Egmont Group, 22,532 exchanges of information occurred among FIUs of the Egmont Group.[67]

Although informal mutual legal assistance methods are crucial and useful in gathering information and evidence, enforcing criminal jurisdiction, and disrupting certain types of transnational crime,[68] their scope is limited and they do not provide a vehicle through which states can exchange all of the necessary forms of assistance or evidence.[69] In particular, if a legal assistance request triggers a domestic legal or judicial procedure in the receiving state, or the legal assistance request initiates compulsory measures in the receiving state,[70] informal methods or

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[62] *Id*. at para. 3.3.

[63] *Id*.

[64] *Id*. at para. 1.4.

[65] Egmont Group of Financial Intelligence Units Principles for Information Exchange between Financial Intelligence Units 3 (Oct 28, 2013).

[66] *See* EGMONT GROUP CHARTER, *supra* note 57 at para. 1.4.

[67] *Annual Report 2017/2018*, EGMONT GROUP 9 (2018), https://egmontgroup.org/en/document-library/10.

[68] *See e.g.* Prost, *supra* note 7; BOISTER, *supra* note 4 at 311.

[69] *See e.g.* Prost, *supra* note 7; BOISTER, *supra* note 4 at 311.

[70] Prost, *supra* note 7.

police-to-police cooperation would not be helpful to produce the required evidence or information.[71] For instance, obtaining bank records, search and seizure,[72] interviewing a suspect, or obtaining internet records would not be possible through informal mutual legal assistance requests.[73] To obtain such evidence, states must resort to formal mutual legal assistance methods.[74]

II. Formal Mutual Legal Assistance

Due to the limited scope and efficiency of informal methods, states have worked to enforce criminal jurisdiction through formal mutual legal assistance methods. These methods are the tools by which law enforcement and judicial authorities of different jurisdictions can formally seek and obtain legal assistance and help each other with criminal jurisdiction and effective prosecution and deterrence of serious crimes.[75] As noted above, these methods extend the *practical reach* of criminal enforcement by State A (the requesting state) by enlisting the assistance of State B (the requested state), which then exercises its domestic jurisdiction in furtherance of State A's request. Some scholars, such as Boister and Prost, identify the general domain of mutual legal assistance as covering a wide variety of investigative matters such as taking testimony; interrogating criminals witnesses, experts, and victims; providing evidence and information; executing court decisions; and requests for arrest, detention, search, and seizure.[76] There are two methods for formal mutual legal assistance: letters rogatory and mutual legal assistance treaties (MLATs).[77]

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[71] *Id*.

[72] *Id*.

[73] THE COUNCIL OF EUROPE'S MANUAL, *supra* note 2 at 10.

[74] *See* Prost, *supra* note 7; THE COUNCIL OF EUROPE'S MANUAL, *supra* note 2 at 10.

[75] *See* Marie Chêne, *Mutual Legal Assistance Treaties and Money Laundering*, TRANSPARENCY INTERNATIONAL 2 (2008).

[76] *See* BOISTER, *supra* note 4 at 316-317; Prost, *supra* note 7.

[77] *See e.g.* Richardson, *supra* note 6 at 351-353; T. Markus Funk, Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges 1 (2014); BOISTER, *supra* note 4 at 312-313.

A. Letters Rogatory

Letters rogatory is the traditional, long-standing formal method of pursuing mutual legal assistance among states.[78] While letters rogatory were the primary formal mutual legal assistance tool before the advent of MLATs, they are still used by countries in the absence of an MLAT.[79] Letters rogatory is defined as "a formal request from one responsible authority to another responsible authority in the foreign country where evidence or the service of documents is sought."[80] Commonly, there is judicial oversight over letters rogatory and a judge's signature is required.[81] Although letters rogatory are customarily sent through diplomatic channels,[82] some countries may transmit them via INTERPOL[83] or directly from court to court.[84] Letters rogatory do not convey an obligation to respond to a requested State because the letters rely entirely "on principles of comity, or respect for foreign sovereignty, rather than on an assertion that the jurisdiction seeking the evidence has a legal right to the evidence."[85] Both prosecutors and defendants can use letters rogatory to request evidence.[86]

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[78] *275. Letters Rogatory*, U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/jm/criminal-resource-manual-275-letters-rogatory (last visited Oct. 5, 2019).

[79] *Typology on Mutual Legal Assistance in Foreign Bribery Cases*, OECD 13 (2012) [hereinafter OECD TYPOLOGY)

[80] *Id.*

[81] *275. Letters Rogatory*, U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/jm/criminal-resource-manual-275-letters-rogatory (last visited Oct. 5, 2019).

[82] *Id.*

[83] *Id.*

[84] Funk, *supra* note 77 at 17.

[85] Peter Swire & Justin D. Hemmings, *Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program*, 71 N.Y.U. ANN. SURV. AM. L. 687, 692 (2016).

[86] Funk, *supra* note 77 at 2.

Using letters rogatory can be challenging. First, it is an extremely time-consuming, slow process.[87] According to information available on the U.S. Department of Justice's website, the process of letters rogatory typically takes at least one year.[88] Second, letters rogatory cannot be used before the initiation of judicial proceedings. Therefore, it is not available to prosecutors who may need particular evidence to initiate a judicial proceeding.[89] Third, letters rogatory do not create a binding obligation on a requested state. States may respond to letters rogatory and provide legal assistance as a matter of courtesy, but they have no obligation to do so.[90] One commentator observes, "parties utilizing letters rogatory must simply cross their fingers and hope that the foreign nation will provide the evidence in a timely fashion and in an admissible form."[91] Fourth, letters rogatory does not have a central authority where decisions are made by expert staff. This can create misunderstanding and confusion as to what information is being requested or not requested, and the letters could be directed to the wrong authority in the receiving state.[92] Given the limited efficiency of letters rogatory due to the above shortcomings and the increase in transnational crime, states have endeavored to develop a more effective and reliable method.[93] These efforts have resulted in the advent of MLATs.[94]

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[87] Daniel Halvarsson, The Suspect and Mutual Legal Assistance: A Legal Analysis of the Rights of the Individual in the Suppression of Transnational Organized Crime 29 (2015) (Master's Thesis).

[88] *Letters Rogatory*, U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/jm/criminal-resource-manual-275-letters-rogatory (last visited Oct. 5, 2019).

[89] L. Song Richardson, *Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem*, 26 Berkeley J. Int'l Law. 62, 89 (2008).

[90] *Id.*

[91] Richardson, *supra* note 6 at 352.

[92] *See* Halvarsson, *supra* note 87 at 29.

[93] Richardson, *supra* note 6 at 352.

[94] *Id*.

B. MLATs

An MLAT is "a treaty which creates a binding obligation on the treaty partners to render assistance to each other in criminal investigations and proceedings."[95] MLATs are mandatory and have "the force of law."[96] According to some scholars, MLATs have addressed many flaws of the letters rogatory system and created a mechanism that is a "mandatory, reliable, and efficient means to obtain foreign evidence in a timely fashion and in an admissible form."[97] The main goal of MLATs is "to introduce administrative efficiency into the investigation of criminal cases with transnational aspects, by way of treaty obligations."[98] Unlike letters rogatory, the use of MLATs to obtain cross-border evidence is only available for governments or prosecutors, not for defendants.[99]

MLATs may be bilateral or multilateral.[100] Bilateral MLATs are negotiated and signed between two states. One of the main benefits of bilateral MLATs is that two parties can devise a clear enforcement mechanism which reconciles differences in their legal systems and cultures in the treaty.[101] Bilateral MLATs address a variety of differences such as "the fact that nations criminalize different acts, have different legal traditions (civil versus common law), use different

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[95] James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 Case W. Res. J. Int'l L. 405 (1988).

[96] *276. Treaty Requests*, U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/jm/criminal-resource-manual-276-treaty-requests (last visited Oct. 5, 2019).

[97] Richardson, *supra* note 6 at 353.

[98] ROBERT J CURRIE & JOSEPH RIKHOF, INTERNATIONAL & TRANSNATIONAL CRIMINAL LAW 515 (SECOND EDITION, 2013)

[99] *See id*. at 354-355. The exclusion of defendants from the MLAT compulsory process for obtaining evidence has been subjected to much criticism. Opponents assert that the exclusionary rule establishes an "unconstitutional compulsion disparity" between prosecution and defendant. (*See* L. Song Richardson, "*Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem,"* 26 Berkeley J. Int'l L. 62, 92 (2008)).The disparity in turn undermines the fairness of the process and individual rights. (*id*. at 93) These criticisms have been raised in the context of the U.S., but they can be relatively applicable to other countries.

[100] OECD TYPOLOGY, *supra* note 79 at 13-14.

[101] *See* Richardson, *supra* note 6 at 354.

evidence-gathering mechanisms, and understand appropriate law enforcement behavior differently."[102] The U.S. Department of State asserts that every bilateral MLAT may be quite unique.[103] In recent years, use of bilateral MLATs by states has grown rapidly because they are more effective than letters rogatory, elevate certainty in cooperation,[104] and are binding on signatory states.[105] For example, while the U.S. has historically, been disinclined to provide legal assistance in criminal matters to foreign jurisdictions,[106] the country has entered into MLATs with over 70 countries.[107]

Multilateral MLATs are negotiated and signed by more than two countries. Although states do not have an obligation under customary international law to provide legal assistance,[108] MLAT provisions have been incorporated into many international and regional crime conventions to promote reciprocity.[109] Multilateral MLATs have two important benefits. First, they are particularly efficient because many countries can join and use them together.[110] In the absence of bilateral MLATs, they provide a strong legal basis for member states to use mutual legal assistance tools and engage in cross-border cooperation to fight transnational crime.[111] Second, multilateral

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[102] *Id*.

[103] *276. Treaty Requests*, U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/jm/criminal-resource-manual-276-treaty-requests (last visited Oct. 5, 2019).

[104] *See generally* OECD TYPOLOGY, *supra* note 79 at 14; Funk, *supra* note 77 at 3.

[105] *See e.g.* Halvarsson, *supra* note 87 at 29; Richardson, *supra* note 89 at 84.

[106] *See* Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 THE INTERNATIONAL LAWYER 1, 189, 191-198 (1985).

[107] Charles Doyle, Extraterritorial Application of American Criminal Law, Congressional Research Service 23 (2016), https://fas.org/sgp/crs/misc/94-166.pdf.

[108] *See e.g.* BOISTER, *supra* note 4 at 311; NEIL BOISTER & ROBERT J. CURRIE, ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 122 (2015).

[109] *See* BOISTER, *supra* note 4 at 311.

[110] OECD TYPOLOGY, *supra* note 79 at 15.

[111] *See* Halvarsson, *supra* note 87 at 30.

MLATs set the legal basis and standards for party states to develop and sign more detailed bilateral MLATs based on the general framework and obligations they accepted in the multilateral MLATs.[112]

There are two types of multilateral MLATs. The first type of multilateral MLAT contains the provisions of mutual legal assistance obligations in the UN Suppression Conventions.[113] Some of these "obligations are commonly known as treaties within the treaty, or mini-MLATs."[114] This means that the conventions are not exclusively about mutual legal assistance, but they contain "a set of detailed obligations for the provision of legal assistance."[115] As the UN became increasingly involved in suppressing transnational crimes such as drug trafficking,[116] it started to incorporate mutual legal assistance obligations in many relevant conventions.[117] Some of the UN Suppression Conventions that embody MLAT obligations (mini-MLATs) include the UN Single Convention on Narcotic Drugs of 1961[118] as amended by the 1972 Protocol (UNSCND); the UN Convention

[112] *See e.g. generally id*; BOISTER, *supra* note 4 at 315.

[113] *See e.g.* BOISTER, *supra* note 4 at 314; Halvarsson, *supra* note 87 at 30.

[114] Halvarsson, *supra* note 87 at 30.

[115] BOISTER, *supra* note 4 at 314.

[116] *See* Vervaele, *supra* note 1 at 122-123.

[117] *See id.* at 123.

[118] *See* United Nations Single Convention on Narcotic Drugs 1961, at art. 35 (d) & (e) (entered into force Aug. 8, 1975) [hereinafter UNSCND]

on Psychotropic Substances of 1971 (UNCPS);[119] the Vienna Convention;[120] the Financing Convention;[121] UNCTOC;[122] and UNCAC.[123]

Most of these conventions set general mutual legal assistance obligations and oblige states parties to "afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings"[124] of relevant crimes. For instance, the UNCTOC defines the scope of mutual legal assistance; explains general conditions for providing or refusing mutual legal assistance; requires states parties to designate a central authority;[125] and describes the contents of mutual legal assistance requests.[126] Although the conventions impose a series of detailed obligations on states parties, the ultimate application of these duties largely depends upon further mutual agreement between states and how they develop and implement clear enforcement mechanisms between themselves to comply with the obligations and facilitate mutual legal assistance requests.

The second type of multilateral MLATs are those that focus solely on mutual legal assistance in criminal matters. These multilateral MLATs are generally comprised of regional

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[119] *See* United Nations Convention on Psychotropic Substances 1971, at art. 21 (e) (entered into force Aug. 16, 1976) [hereinafter UNCPS]

[120] *See* United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, at art. 7 (entered into force Nov. 11, 1990) [hereinafter Vienna Convention]

[121] *See* International Convention for the Suppression of the Financing Terrorism, art. 12-17 (entered into force Apr. 10, 2002) [hereinafter Financing Convention]

[122] *See* United Nations Convention against Transnational Organized Crime, at art. 7 & 18 (entered into force Sep. 29, 2003) [hereinafter UNCTOC]

[123] *See* United Nations Convention against Corruption (UNCAC), at art. 14 (b) & 46 (entered into force Dec. 14, 2005) [hereinafter UNCAC]

[124] *See e.g.* UNCTOC, *supra* note 77 at art.18 (1).

[125] As you will see in the last chapter of this dissertation, central authority is the heart of MLAT. One of the significant benefits of central authority is that it establishes and provides law enforcement expertise and its decisions are made by expert staff.

[126] *Id*. at art. 18 (3)-30).

conventions. It has been argued that the European Convention on Mutual Legal Assistance in Criminal Matters (1959) is the oldest MLAT in criminal matters.[127] This convention has been used as a model for various subsequent treaties and conventions.[128] Other regional MLAT conventions include the 1992 Inter-American Convention on Mutual Legal Assistance in Criminal Matters,[129] the 2000 EU Convention on Mutual Legal Assistance in Criminal Matters,[130] the 2004 ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, [131] and the SAARCC.[132] All of these conventions require states parties to afford legal assistance to one another and facilitate flow of cross-border evidence. There is no overarching international convention (such as a UN convention) that exclusively addresses mutual legal assistance in criminal matters. However, in 1998 the UN adopted a non-mandatory model treaty on mutual legal assistance in criminal matters which can be used as a template by states parties when developing their own mechanisms.[133]

In addition to the "hard law" or MLAT treaties which impose legal obligations upon the states parties, many intergovernmental organizations have developed and promoted mutual legal assistance standards among their member states. They track the enforcement and implementation

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[127] *See* BOISTER, *supra* note 4 at 311.

[128] *See e.g.* BOISTER, *supra* note 4 at 313; Halvarsson, *supra* note 87 at 30.

[129] *See* Inter-American Convention on Mutual Legal Assistance in Criminal Matters (adopted on May 23, 1992 and entered into force on Apr. 14, 1996).

[130] *See* Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (entered into force on May 29, 2000). According to article 1 of the Convention, one of the purposes of the Convention "is to supplement the provisions and facilitate the application between the Member States of the European Union, of: (a) the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959." This means that the Convention does not override the provisions of the previous conventions.

[131] *See* Treaty on Mutual Legal Assistance (signed on Nov. 29, 2004) http://agreement.asean.org/media/download/20160901074559.pdf.

[132] SAARC Convention on Mutual Assistance in Criminal Matters (signed by all states parties on Aug. 3, 2008), https://www.vifindia.org/sites/default/files/SAARC%20Convention%20on%20Mutual%20Assistance%20in%20Criminal%20Matters,%202008.pdf [hereinafter SAARCC]

[133] Model Treaty on Mutual Legal Assistance in Criminal Matters (1998) (adopted by General Assembly resolution 45/117, subsequently amended by General Assembly resolution 53/112), https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

of multilateral MLATs; provide capacity building trainings and tools to the relevant institutions of member countries (particularly developing countries); bring member states together and convene regular coordination meetings; and report on the progress of member states in complying with the obligations. Since the decisions they make and the standards and recommendations they promote are non-binding, they are known as "soft law."[134] Some of these organizations include the Financial Action Task Force (FATF), the United Nations Office on Drugs and Crime (UNODC), the Organization for Economic Co-operation and Development (OECD), and the World Bank.

III. Afghanistan's Mutual Legal Assistance Obligations under International Law

Afghanistan has ratified or acceded to all the six UN Suppression Conventions that require or encourage mutual legal assistance, either formal or informal or both. Accordingly, Afghanistan bears many mutual legal assistance obligations under those conventions, which in addition to imposing many legal obligations, also encourage state parties to take additional measures to supplement their mutual legal assistance mechanisms. These non-mandatory measures are extremely important in the creation of a comprehensive and effective mutual legal assistance regime within a state.

In addition to the UN Suppression Conventions, Afghanistan is a party to the 2008 SAARC regional convention and has undertaken several mutual legal assistance obligations. Although the SAARCC is not yet enforceable among states parties because it has not yet been ratified by Pakistan, it has been adopted by the Afghan Parliament and signed by the President. Somewhat peculiarly, it is an applicable law only in Afghanistan. However, as will be explained toward the

[134] *See e.g.* Michael Pucci, *FATF Recommendations: Becoming Soft Law*, 37 Mich. J. Int. Law, http://mjilonline.org/fatf-recommendations-becoming-soft-law-2/ (last visited Oct. 8, 2019).

end of this chapter,[135] as a practical matter the SAARCC is unusable for Afghanistan until it enters into force following ratification by all state parties in accordance with the terms of the convention.

This chapter first identifies and analyzes Afghanistan's mutual legal assistance obligations under the UN Suppression Conventions and subsequently discusses the non-mandatory measures recommended by them. Then, it briefly examines Afghanistan's obligations under regional conventions, particularly SAARCC. Finally, it explores the FATF 40 Recommendations and how they are aggressively implemented by the FATF, and thus affect implementation of mutual legal assistance mechanisms in Afghanistan.

A. Impact of the UN Suppression Conventions

As noted above, Afghanistan has ratified or acceded to at least six UN conventions: UNSCND,[136] UNCPS,[137] the Vienna Convention,[138] the Financing Convention,[139] UNCTOC,[140] and UNCAC.[141] These conventions contain various provisions pertaining to mutual legal assistance, mini-MLATs, or law enforcement cooperation. The relevant provisions embody two

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[135] *See* Section III (b) of this Chapter.

[136] Afghanistan ratified the UNSCND on Feb. 19, 2015, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-18&chapter=6&clang=_en (last visited Oct. 17, 2019).

[137] Afghanistan acceded to the UNCPS on May 21, 1985, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6 (last visited Oct. 17, 2019).

[138] Afghanistan signed Vienna Convention on Dec. 20, 1988 and ratified it on Feb. 14, 1992, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en (last visited Oct. 17, 2019).

[139] Afghanistan acceded to the Financing Convention on Sep. 24, 2003, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en (last visited Oct. 18, 2019).

[140] Afghanistan signed UNCTOC on Dec. 14, 2000 and ratified it on Sep. 24, 2003, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Oct. 18, 2019).

[141] Afghanistan signed UNCAC on Feb. 20, 2004 and ratified it on Aug. 25, 2008, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18 (last visited Oct. 19, 2019).

sets of distinctive concepts. First, they impose a wide array of "obligations" with which Afghanistan, as a state party, is required to comply. Second, the provisions recommend several additional measures that are not obligatory to states parties, but which are crucial and complementary to the obligations. Accordingly, this chapter discusses the obligations and non-mandatory measures separately.

1. Mutual Legal Assistance Obligations

Prior to identifying and examining each of Afghanistan's obligations under the UN Suppression Conventions, it is worth clarifying some important points relating to the conventions and the obligations they impose.

First, each convention addresses one specific category of transnational crime. The UNCAC, for instance, addresses corruption and the Vienna Convention addresses drug trafficking. The specific mutual legal assistance obligations imposed by each treaty thus concern the specific categories of crime addressed by that convention.[142]

The only partial exception to this specificity is the UNCTOC which covers a wide variety of transnational crimes.[143] The UNCTOC also provides that the convention not only applies to the established transnational organized crimes specified in the convention, but also to any "serious crime" "where the offence is transnational in nature and involves an organized criminal group."[144]

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[142] *See e.g.* UNCTOC, *supra* note 77 at art. 3 (1) 18 (1); UNCAC, *supra* note 78 at art. 3 (1) & 46 (1); Vienna Convention, *supra* note 76 at art. 7 (1).

[143] *See* UNCTOC, *supra* note 77 at art. 5, 6, 8 & 23.

[144] *Id.* at art. 3 (b). According to the UNCTOC, "an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State." (UNCTOC, *supra* note 77 at art. (2)). Also, the UNCTOC defines "Organized Criminal Group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit." (UNCTOC, *supra* note 77 at art. 2 (a)).

The convention defines "serious crime" as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty."[145] Given this broad definition, most transnational crimes fall under the auspice of this convention and thus are subject to the convention's provisions regarding mutual legal assistance.

Second, among the six UN Suppression Conventions, UNSCND and UNCPS provide the fewest details on MLAT obligations.[146] They do not even use the term "mutual legal assistance." They each contain only one very general provision about an obligation to transmit legal papers through a designated body for the purpose of prosecution.[147] The text and details of the relevant provision of the two conventions (Article 35 (e) of the UNSCND[148] and Article 21 (e) of the UNCPS)[149] are identical. The lack of details in the two conventions is not surprising given the fact they were the earliest UN conventions to include MLAT provisions. These two conventions will not be further cited or discussed in this dissertation, due to their limited provisions relating to mutual legal assistance.

Third, almost all of Afghanistan's obligations are rooted in three conventions: the Vienna Convention, the UNCTOC, and the UNCAC. These three conventions have nearly identical MLAT provisions: they use practically the same language and contain the same rules.[150] Among the three, UNCTOC and UNCAC, the two most recent, provide the most comprehensive and

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[145] *Id.* at art. 2 (b).

[146] *See* BOISTER, *supra* note 4 at 314; UNSCND, *supra* note 118 at art. 35 (e); UNCPS, *supra* note 119 at art. 21 (e).

[147] Both Article 35 (e) of the UNSCND and Article 21 (e) of the UNCPS require states parties to "[e]nsure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel."

[148] UNSCND, *supra* note 118 at art. 35 (e).

[149] UNCPS, *supra* note 119 at art. 21 (e).

[150] *See* UNCTOC, *supra* note 77 at art.18; UNCAC, *supra* note 78 at art. 46; Vienna Convention, *supra* note 76 at art. 7.

detailed provisions on MLAT obligations.[151] (Although the Financing Convention also embodies several mutual legal assistance obligations with respect to crimes related to financing of terrorism, nearly all of those obligations are also present in the three above conventions, and the relevant provisions of the convention are neither as detailed and nor as well-articulated as the three conventions.)[152] As illustrated in Figure 4, the bulk of Afghanistan's obligations originate from the Vienna Convention, UNCTOC and UNCAC. [153] Afghanistan has thus repeatedly committed to similar or even identical formal mutual legal assistance obligations albeit in connection with different subject matter or crimes under each convention.

[151] *See* UNCTOC, *supra* note 77 at art.18; UNCAC, *supra* note 78 at art. 46.

[152] This means that any gaps under the Financing Convention are covered under UNCTOC and UNCAC.

[153] Wherever necessary, this chapter will refer to the Financing Convention (and if referring to it in conjunction with the other three conventions, may refer to 'the four conventions'—which is to say all the UN Conventions but for the two early (and less developed) ones), the UNSCND and UNCPS.

Figure 4. An overview of obligations (formal and informal) under the four UN Suppression Conventions

No	Obligations	UN Conventions			
		Vienna Convention	Financing Convention	UNCTOC	UNCAC
1	Set the scope of MLATs	YES	YES	YES	YES
2	Provide mutual legal assistance where offenses involve a legal person	NO	NO	YES	YES
3	Determine specific purposes for mutual legal assistance	YES	NO	YES	YES
4	Follow the conventions' procedures in the absence of an actual legal assistance treaty	YES	NO	YES	YES
5	Bar bank secrecy as grounds to refuse mutual legal assistance	YES	NO	YES	YES
6	Designate a central authority	YES	NO	YES	YES
7	Make requests in writing	YES	NO	YES	YES
8	Set requirements for content of mutual legal assistance requests	YES	NO	YES	YES
9	Use information or evidence only for the requested purposes	YES	YES	YES	YES
10	Require speedy execution of requests	NO	NO	YES	YES
11	Mandate confidentiality	YES	NO	YES	YES
12	Requested state must bear the ordinary cost of executing a request	YES	NO	YES	YES
13	Provide copies of publicly available records, documents, or information	NO	NO	YES	YES
14	Provide mutual legal assistance for purposes of confiscation and recovery of assets	YES	NO	YES	YES
15	Determine the scope of law enforcement cooperation	YES	YES	YES	YES
16	Enable national authorities to cooperate and exchange information (particularly in money-laundering cases)	NO	NO	YES	YES
17	Establish special investigative techniques	NO	NO	YES	YES

In Figure 4, "YES" indicates the obligation is present under a specific convention, and "NO" means the obligation does not exist under a convention.

Fourth, given the fact the UNCTOC and UNCAC cover all obligations that are present under the Vienna Convention and the Financing Convention, this dissertation only refers to the

UNCTOC and UNCAC within the main text of this section when it identifies obligations. However, it may occasionally mention the Vienna Convention or the Financing Convention if there is a difference in the substance of an obligation under those conventions compared with the UNCTOC and UNCAC. Nevertheless, the dissertation provides citations to three or all the four conventions in footnotes if three or all four of the conventions encompass a specific obligation.[154]

Fifth, none of these four UN Suppression Conventions adhere to the categorization of formal and informal mutual legal assistance methods. The conventions discuss formal mutual legal assistance or MLATs under the title of "mutual legal assistance," yet they additionally discuss law enforcement and other forms of international cooperation in other articles. To correspond with the classification discussed earlier and as a matter of clarity, this chapter explores and explains Afghanistan's formal and informal obligations.

a. Obligations Related to Formal Mutual Legal Assistance

Afghanistan has accepted a number of obligations with respect to formal mutual legal assistance in criminal matters by ratifying or acceding to UN Suppression Conventions. Most of these obligations are very general. All states parties need to pass domestic legislation or enter into bilateral MLAT agreements in order to fulfill their convention obligations. The UN has developed and published two comprehensive legislative guides for the implementation of the UNCTOC and the UNCAC (the UN Legislative Guides) to assist states' policymakers and legislators in ratification and implementation of the conventions.[155] Since all the conventions impose similar

[154] In many occasions, all four conventions (the Vienna Convention, Financing Convention, UNCTOC, and UNCAC) or three conventions (the Vienna Convention, UNCTOC, and UNCAC) entail the same obligations with similar or identical language. In those cases, the relevant provisions of the Vienna Convention or Financing Convention will be cited in footnotes. This dissertation will only include language from the Vienna Convention and/or the Financing Convention when it contains different language or obligation.

[155] *See e.g.* Nikos Passas et al., Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime 163-170 (2004); Nikos Passas et al.,

obligations on states parties, these guides are a very useful tool for understanding not only the UNCTOC and UNCAC, but also the other named UN Suppression Conventions. The UN Legislative Guides provide a detailed explanation of a state party's obligations and illustrate what measures need be taken by a state party in order to comply with its obligations.[156]

This chapter discusses the obligations in the sequence established by the UNCTOC and UNCAC and the UN Legislative Guides. However, in a few instances, any of the three conventions or the Financing Convention may add a new obligation/requirement that is not present in others, omit an obligation that is present in others, or reduce an obligation to a non-mandatory measure. The chapter will point out those instances as it examines each obligation. The following are the obligations that Afghanistan is required to fulfill under the various conventions.

i. Setting the Scope of MLATs

One of the main obligations for Afghanistan is to provide the most extensive legal assistance possible to other states parties to combat a variety of crimes (e.g. transnational organized crimes, drug-related crimes, terrorism- related crimes, and corruption- related crimes) covered by the conventions.[157] Other states parties bear the same obligation towards Afghanistan. For instance, the UNCTOC and UNCAC require states parties "to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences [sic] covered" by the conventions.[158] Afghanistan cannot comply with this obligation unless it incorporates it in domestic law. The UN Legislative Guides assert that "each State party

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Legislative guide for the Implementation of the United Nations Convention against Corruption, United Nations Office on Drugs and Crime 168-175 (second edition, 2012) [hereinafter Passas et al.-Guide on UNCAC]

[156] *See e.g.* Passas et al.-Guide on UNCAC*, supra* note 155 at 168-175*;* Passas et al., *supra* note 155 at 163-170.

[157] *See e.g.* UNCTOC, *supra* note 77 at art. 18 (1); UNCAC, *supra* note 78 at art. 46 (1). The obligation is also included in Vienna Convention and Financing Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (1); Financing Convention, *supra* note 121 at art. 12 (1)).

[158] *Id.*

must ensure that its mutual legal assistance treaties and laws provide for assistance with respect to investigations, prosecutions and judicial proceedings."[159]

Regarding the scope of MLATs, since the UNCTOC is only applicable to "transnational" and "organized,"[160] crimes, the Convention puts forward a "lower evidentiary standard" for establishing the "elements of transnationality and organized crime" and assessing the necessity for mutual legal assistance.[161] The Convention provides that states parties shall reciprocally extend the widest mutual legal assistance to one another[162] as long as there are "reasonable grounds to infer the crime is transnational[163] and committed by organized criminal networks.[164]

ii. Providing Mutual Legal Assistance Where Offenses Involve a Legal Person

Under the UNCTOC and UNCAC, Afghanistan has an obligation to provide mutual legal assistance in criminal cases where a legal person is deemed responsible.[165] Both the UNCTOC and UNCAC require states parties to afford the greatest mutual legal assistance possible to one another in cases where a legal person is accused of wrongdoing.[166] The identical provisions of both conventions require states parties to provide mutual legal assistance to "the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for

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[159] Nikos Passas et al., *supra* note 155 at 163; Passas et al.-Guide on UNCAC, *supra* note 155 at 168.

[160] *See* UNCTOC, *supra* note 77 at art. 3.

[161] Nikos Passas et al., supra note 155 at 164.

[162] UNCTOC, *supra* note 77 at art. 18 (1).

[163] Article 18 (1) of the UNCTOC indicates that offenses may be transnational if "victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party."

[164] UNCTOC, *supra* note 77 at art. 18 (1).

[165] *See* UNCTOC, *supra* note 77 at art. 18 (2); UNCAC, *supra* note 78 at art. 46 (2). This obligation does not exist in the Vienna Convention and Financing Convention.

[166] *Id.*

which a legal person may be held liable"[167] by the requesting state party.[168] One of the main implications of this obligation is that Afghanistan should amend its domestic law[169] as it does not currently have the ability and the tools necessary to provide legal assistance vis-a-vis legal persons.[170] The UN Legislative Guides for these two conventions contend that if "a State party presently lacks any legal authority to provide assistance with respect to investigations, prosecutions and judicial proceedings against legal persons, amending legislation should be considered."[171]

iii. Determining Specific Purposes for Mutual Legal Assistance

The UNCTOC and UNCAC establish many similar purposes for mutual legal assistance requests.[172] However, it could be said the UNCAC has the most comprehensive provisions in this regard.[173] In addition to covering all the purposes set by the UNCTOC, the UNCAC adds two more purposes for mutual legal assistance, viz., (1) identifying, freezing and tracing proceeds of crime

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[167] *Id.*

[168] Article 18 (2) of the UNCTOC and Article 46 (2) of the UNCAC refer to their respective substantive provisions that establish the liability of a legal persons. For instance, Article 10 of the UNCTOC provides that "(1) Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention. (2) Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. (3) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. (4) Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions." Article 26 of the UNCAC has very similar provisions like article 10 of the UNCTOC but with the only difference in types of crime which are corruption-related crimes.

[169] *See* Nikos Passas et al., *supra* note 155 at 165; Passas et al.-Guide on UNCAC, *supra* note 155 at 169.

[170] *See* Chapter Six.

[171] *Id.*

[172] *See e.g.* UNCTOC, *supra* note 77 at art. 18 (3); UNCAC, *supra* note 78 at art. 46 (3). This obligation is present in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (2)). However, the obligation is not included in the Financing Convention.

[173] *See generally* Passas et al.-Guide on UNCAC, *supra* note 155 at 170.

and (2) recovering assets.[174] If Afghanistan complies with the requirements of Article 46 (3) of the UNCAC regarding the purposes of mutual legal assistance, it will be in compliance with the relevant requirements of all the Suppression Conventions.[175] The text of article 46 (3) of the UNCAC reads as follows:

> Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
> (a) Taking evidence or statements from persons;
> (b) Effecting service of judicial documents;
> (c) Executing searches and seizures, and freezing;
> (d) Examining objects and sites;
> (e) Providing information, evidentiary items and expert evaluations;
> (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
> (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
> (h) Facilitating the voluntary appearance of persons in the requesting State Party;
> (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
> (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
> (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.[176]

States parties should have the ability to provide each type of mutual legal assistance enumerated above.[177] As the above Article indicates, the list is not exhaustive and other type of assistance can be added to the list as long as that does not violate the domestic law of a requested state.[178] The UN Legislative Guides claim that "[i]n most cases, domestic law already provides

[174] UNCAC, *supra* note 78 at art. 46 (3) (j) & (k).

[175] *See generally* Passas et al.-Guide on UNCAC, *supra* note 155 at 170.

[176] UNCAC, *supra* note 78 at art. 46 (3).

[177] *See* Nikos Passas et al., *supra* note 155 at 165; Passas et al.-Guide on UNCAC, *supra* note 155 at 170.

[178] UNCAC, *supra* note 78 at art. 46 (3) (i).

powers to take the measures necessary to deliver the above types of assistance. If not, such powers *must be created*"[179] (emphasis added).

iv. Following UNCTOC and UNCAC Procedures in the Absence of a Mutual Legal Assistance Treaty

Article 18 (7) of the UNCTOC and article 46 (7) of the UNCAC lay out specific requirements and procedures to be followed by Afghanistan if it is not bound by a mutual legal assistance treaty.[180] In both Conventions, the requirements and procedures are set in 20 paragraphs (paragraphs 9 to 29 in both articles).[181] These are the provisions that are generally known as mini-MLATs.[182] These articles require states parties to follow these requirements and procedures in the absence of an applicable mutual legal assistance treaty between requesting and requested states.[183] The articles further explain that if the two states are bound by a treaty, "the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof."[184] According to the UN Legislative Guides, a state party should incorporate the requirements of paragraphs 9 to 29 into its domestic law if it does not directly apply an international treaty such as these conventions.[185] However, "[f]or States parties whose legal systems permit direct application of treaties, no implementing legislation will be needed."[186] It

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[179] *See* Nikos Passas et al., *supra* note 155 at 165; Passas et al.-Guide on UNCAC, *supra* note 155 at 170.

[180] *See* UNCTOC, *supra* note 77 at art. 18 (7); UNCAC, *supra* note 78 at art. 46 (7).

[181] *Id.* Article 7 (7) of the Vienna Convention requires similar procedures (albeit with fewer details, paragraphs 8 to 19). (*See* Vienna Convention, *supra* note 76 at art. 7 (7))

[182] *See* Manual for Compliance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the U.S. Department of Justice 12 (1992).

[183] *See* UNCTOC, *supra* note 77 at art. 18 (7); UNCAC, *supra* note 78 at art. 46 (7).

[184] *Id.*

[185] *See* Nikos Passas et al., *supra* note 155 at 166; Passas et al.-Guide on UNCAC, *supra* note 155 at 171.

[186] *Id.*

should be noted that although the Financing Convention has a few requirements[187] similar to the ones established in the UNCTOC and UNCAC, it does not require states parties to follow those procedures in the absence of a mutual legal assistance treaty.[188]

v. Bank Secrecy Cannot Be Used as Grounds to Refuse Mutual Legal Assistance

The UNCTOC and UNCAC obligate Afghanistan to strictly prohibit the use of bank secrecy as grounds to refuse mutual legal assistance requests.[189] For instance, the UNCTOC provides that "States Parties shall not decline to render mutual legal assistance pursuant to this article [18] on the ground of bank secrecy."[190] The UN Legislative Guides emphasize this prohibition and illustrate the reasons why it is not included among the mini-MLATs paragraphs (9 to 29).[191] According to the UN Legislative Guides, "States parties are obliged to ensure that no such ground for refusal may be invoked under their mutual legal assistance laws or treaties."[192] As such, this provision has two legal implications for states parties. First, if the domestic laws of a state party allow bank secrecy as grounds for refusal, the laws should be modified in accordance with this obligation.[193] Second, if a state party is a party to a mutual legal assistance treaty which allows

[187] *See* Financing Convention, *supra* note 121 at art. 12 (3) & 16.

[188] *See Id*. at art. 12 (5).

[189] *See e.g.* UNCTOC, *supra* note 77 at art. 18 (8); UNCAC, *supra* note 78 at art. 46 (8). The Vienna Convention has the same requirement. (*See* Vienna Convention, *supra* note 76 at art. 7 (5)) However, the Financing Convention does not to prohibit refusals on the basis of bank secrecy, meaning it effectively permits states to refuse MLA requests on the basis of bank secrecy. (*See* Financing Convention, *supra* note 121 at art. 12 (2)).

[190] UNCTOC, *supra* note 77 at art. 18 (8).

[191] *See* Nikos Passas et al., *supra* note 155 at 166; Passas et al.-Guide on UNCAC, *supra* note 155 at 171.

[192] *Id.*

[193] *See e.g.* Passas et al.-Guide on UNCAC, *supra* note 155 at 171.

such grounds for refusal,[194] "the act of that State becoming party"[195] to the Conventions "should as a matter of treaty law *automatically invalidate* the contrary provisions of an earlier treaty"[196] (emphasis added).

vi. Obligations within Mini-MLATs

As noted above, the mini-MLAT requirements and procedures established in the UNCTOC (article 18 paragraphs 9 to 29)[197] and UNCAC (article 46 paragraphs 9 to 29)[198] are applied when Afghanistan is not required to follow another mutual legal assistance treaty. Depending upon the implementation approach a state party follows with respect to international conventions, it can directly apply the requirements and procedures OR incorporate the provisions into its domestic law.[199] The mini-MLATs provisions (9 to 29) impose several mandatory obligations and requirements on states parties, including Afghanistan. Details of some of the key mini-MLAT provisions are discussed in sections A-I below.

A. Designating a Central Authority

Afghanistan is obligated to designate a central authority for execution or transmission of mutual legal assistance requests.[200] The UNCTOC and UNCAC both require states parties to assign a central authority with the duty and authority to execute or transmit mutual legal assistance

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[194] *Id.*

[195] *Id.*

[196] *Id.* As you will see in the next chapter, the 2013 Afghan Cooperation Law has complied with this obligation by prohibiting bank secrecy as grounds for refusal. *(See* Chapter V, (II) (a) (1.2)) (this dissertation).

[197] *See* UNCTOC, *supra* note 77 at art. 18 (9)-(29).

[198] *See* UNCAC, *supra* note 78 at art. 46 (9)-(29). The mini-MLATs are also established in the Vienna Convention (article 7 paragraphs 8 to 19). (*See* Vienna Convention, *supra* note 76 at art. 7 (8)-(19)). However, the Financing Convention does not entail mini-MLATs.

[199] *See* Nikos Passas et al., *supra* note 155 at 167; Passas et al.-Guide on UNCAC, *supra* note 155 at 172.

[200] *See e.g.* UNCTOC, *supra* note 77 at art. 18 (13); UNCAC, *supra* note 78 at art. 46 (13). The Vienna Convention contains similar requirement. (*See* Vienna Convention, *supra* note 76 at art. 7 (8)).

requests.[201] The Conventions contain the same or very similar provisions regarding this obligation. For instance, both the UNCTOC and UNCAC provide that "[e]ach State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution."[202] The central authority must ensure "the speedy and proper execution or transmission" of legal assistance requests whether it executes the requests itself or has this done by other competent authorities.[203] States parties are required to notify the Secretary-General of the United Nations of their designated central authority when they submit their "instrument of ratification, acceptance or approval of or accession" to the Conventions.[204] Although the Conventions oblige states parties to communicate their mutual legal assistance requests through their central authorities,[205] the requirement does not preclude states parties from exercising their right to transmit the requests through diplomatic channels or (in urgent cases) through INTERPOL if they wish to do so.[206] It can be construed from the UN Legislative Guides that a state party to the Conventions can designate the same central authority to serve the purposes of all the Conventions.[207]

[201] *See e.g.* UNCTOC, *supra* note 77 at art. 18 (13); UNCAC, *supra* note 78 at art. 46 (13).

[202] UNCTOC, *supra* note 77 at art. 18 (13); UNCAC, *supra* note 78 at art. 46 (13).

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *See generally* Passas et al.-Guide on UNCAC, *supra* note 155 at 173.

B. Making Requests in Writing

States parties must make their mutual assistance requests in writing and in a language that is acceptable to a requested state.[208] The UNCTOC and UNCAC impose the same requirement on states parties:[209] "[r]equests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity."[210] The Conventions require states parties to inform the Secretary-General of the United Nations concerning "the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession" to the Conventions.[211] In urgent situations, states parties may initially make requests orally, but those must immediately be followed by written requests.[212]

C. Requirements Regarding the Content of Mutual Legal Assistance Requests

The two conventions require states parties to include certain information when they issue a mutual legal assistance request.[213] The UNCTOC and UNCAC contain the same language

[208] *See e.g.* UNCTOC, *supra* note 77 at art. 18 (14); UNCAC, *supra* note 78 at art. 46 (14). The Vienna Convention requires the same thing. (*See* Vienna Convention, *supra* note 76 at art. 7 (9)) However, the obligation is not present in the Financing Convention.

[209] *Id.*

[210] UNCTOC, *supra* note 77 at art. 18 (14); UNCAC, *supra* note 78 at art. 46 (14).

[211] *Id.*

[212] *Id.*

[213] *See e.g.* UNCTOC, *supra* note 77 at art. 18 (15); UNCAC, *supra* note 78 at art. 46 (15). The same obligation is included in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (10)).

concerning the content of a request,[214] laying out "the minimum contents for a request."[215] Identical language is provided in each convention, as follows: [216]

> A request for mutual legal assistance shall contain:
> (a) The identity of the authority making the request;
> (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
> (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
> (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
> (e) Where possible, the identity, location and nationality of any person concerned; and
> (f) The purpose for which the evidence, information or action is sought.[217]

D. Using Information or Evidence only for the Requested Purposes

According to the UNCTOC and UNCAC, states parties cannot use the information or evidence they obtained through mutual legal assistance request for any purposes other than the ones specified in the request unless the requested state consents in advance.[218] For instance, the UNCTOC and UNCAC require that "[t]he requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party."[219]

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[214] *Id.*

[215] DAVID MCCLEAN, TRANSNATIONAL ORGANIZED CRIME: A COMMENTARY ON THE CONVENTION AND ITS PROTOCOLS 224 (2007).

[216] UNCTOC, *supra* note 77 at art. 18 (15); UNCAC, *supra* note 78 at art. 46 (15).

[217] *Id.*

[218] *See e.g.* UNCTOC, *supra* note 77 at art. 18 (19); UNCAC, *supra* note 78 at art. 46 (19). The obligation is also present in the Vienna Convention and the Financing Convention (*See* Vienna Convention, *supra* note 76 at art. 7 (13); Financing Convention, *supra* note 121 at art. 12 (3)).

[219] UNCTOC, *supra* note 77 at art. 18 (19); UNCAC, *supra* note 78 at art. 46 (19).

E. Speedy Execution of Requests

The UNCTOC and UNCAC oblige states parties to promptly execute mutual legal assistance requests and follow the requesting state's deadlines specified in the requests.[220] According to the two conventions, a "requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request."[221] The Conventions further require a requesting state party to "promptly inform the requested State Party when the assistance sought is no longer required."[222]

F. Confidentiality Requirement

Pursuant to UNCTOC and UNCAC, states parties must respect the demand of a requesting state to not disclose the contents of a mutual legal assistance request.[223] For example, according to the two conventions, "[t]he requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request."[224] Accordingly, the two conventions implicitly indicate that the requested State must comply.[225] The conventions further provide that "[i]f the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party."[226]

G. The Requested State Must Bear the Ordinary Costs of Executing a Request

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[220] *See* UNCTOC, *supra* note 77 at art. 18 (24); UNCAC, *supra* note 78 at art. 46 (24).

[221] *Id.*

[222] *Id.*

[223] *See* UNCTOC, *supra* note 77 at art. 18 (20); UNCAC, *supra* note 78 at art. 46 (20). The Vienna Convention embodies the same confidentiality requirement. (*See* Vienna Convention, *supra* note 76 at art. 7 (14)).

[224] UNCTOC, *supra* note 77 at art. 18 (20); UNCAC, *supra* note 78 at art. 46 (20).

[225] *See generally* UNCTOC, *supra* note 77 at art. 18 (20); UNCAC, *supra* note 78 at art. 46 (20).

[226] UNCTOC, *supra* note 77 at art. 18 (20); UNCAC, *supra* note 78 at art. 46 (20).

According to the UNCTOC and UNCAC, a requested state carries the burden of paying the ordinary costs of implementing a mutual legal assistance request.[227] For instance, the two conventions provide that "[t]he ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned."[228] If the execution of a request requires extraordinary costs, the requesting and requested states should discuss the issue and make appropriate arrangements.[229] For instance, the UN Legislative Guides indicate that the cost of transferring a person could be deemed extraordinary in nature.[230] The UN Legislative Guides further explain that "developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements" of the provisions.[231]

H. Providing Copies of Publicly Available Records, Documents, or Information

The UNCTOC and UNCAC require states parties to furnish each other documentary evidence or information that is publicly available.[232] The Conventions provide that a requested state party "[s]hall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public."[233]

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[227] *See* UNCTOC, *supra* note 77 at art. 18 (28); UNCAC, *supra* note 78 at art. 46 (28). The same requirement exists in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (19)).

[228] UNCTOC, *supra* note 77 at art. 18 (28); UNCAC, *supra* note 78 at art. 46 (28).

[229] *Id.*

[230] *See* Nikos Passas et al., *supra* note 155 at 167; Passas et al.-Guide on UNCAC, *supra* note 155 at 173.

[231] Passas et al.-Guide on UNCAC, *supra* note 155 at 173.

[232] UNCTOC, *supra* note 77 at art. 18 (29) (a); UNCAC, *supra* note 78 at art. 46 (29) (a).

[233] *Id*.

I. Providing Mutual Legal Assistance for Purposes of Confiscation and Recovery of Assets

The UNCTOC and UNCAC obligate state parties to furnish mutual legal assistance in confiscation cases.[234] According to the conventions, if a state party receives a request to confiscate proceeds of crime, assets, or any other means of crime, it must take necessary measures to acquire and enforce a confiscation order from its competent authorities.[235] Similarly, if a court in a requesting state has already issued a confiscation order concerning proceeds of crime, assets, or any other means of crime located in the territory of the requested state, the requested state must direct the order to its competent authorities for enforcement.[236] Furthermore, upon receiving either a request for confiscation or a confiscation order from another state party, the requested state must "take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities"[237] in order to be able to ultimately confiscate the requested objects.[238]

b. Obligations Related to Informal Mutual Legal Assistance

In addition to their formal mutual legal assistance obligations and requirements, the Conventions contain several obligations related to informal mutual legal assistance. The UNCTOC and UNCAC discuss the informal mutual legal assistance obligations under the title *law enforcement cooperation*[239] and the Vienna Convention under the title *other forms of cooperation*.[240] The Conventions require states parties to take specific measures in the area of law

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[234] *See* UNCTOC, *supra* note 77 at art. 13; UNCAC, *supra* note 78 at art. 55. The Vienna Convention contains the same obligation. (*See* Vienna Convention, *supra* note 76 at art. 5 (4)).

[235] *See* UNCTOC, *supra* note 77 at art. 13 (1) (a); UNCAC, *supra* note 78 at art. 55 (1) (a).

[236] *See* UNCTOC, *supra* note 77 at art. 13 (1) (b); UNCAC, *supra* note 78 at art. 55 (1) (b).

[237] *See* UNCTOC, *supra* note 77 at art. 13 (2); UNCAC, *supra* note 78 at art. 55 (2).

[238] *Id.*

[239] *See* UNCTOC, *supra* note 77 at art. 27; UNCAC, *supra* note 78 at art. 48.

[240] *See* Vienna Convention, *supra* note 76 at art. 9.

enforcement cooperation in order to provide legal assistance and information to each other effectively and in a timely manner. As a state party to the Conventions, Afghanistan bears significant obligations for law enforcement cooperation.

i. Determining the Scope of Law Enforcement Cooperation

The UNCTOC and UNCAC establish the scope of law enforcement cooperation among states parties (e.g. police-to-police cooperation).[241] The two conventions have identical provisions concerning the extent to which states parties shall provide law enforcement cooperation to one another.[242] For instance, the UNCTOC and UNCAC require states parties to "cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered" [243] by the Conventions. These two conventions further oblige states parties to take effective and specific measures to enhance law enforcement cooperation.[244]

According to the two conventions, states parties are required to (1) ensure secure and swift exchange of information among their competent authorities through improving their communication channels;[245] (2) collaborate with each other in gathering information on the identity and activities of suspects, circulation of proceeds of crimes, and equipment or properties

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[241] *See* UNCTOC, *supra* note 77 at art. 27 (1); UNCAC, *supra* note 78 at art. 48 (1); Nikos Passas et al., *supra* note 155 at 175; Passas et al.-Guide on UNCAC, *supra* note 155 at 181. The Vienna Convention and the Financing Convention contain the same requirement. (*See* Vienna Convention, *supra* note 76 at art. 9 (1); Financing Convention, *supra* note 121 at art. 18 (3)) The UCTOC and UNCAC imply that law enforcement cooperation can include various agencies. For instance, Article 48 (1) (a) of the UNCAC indicates that must "establish channels of communication between their *competent authorities, agencies and services* in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered" by the Convention. (UNCAC, *supra* note 78 at art. 48 (1) (a)).

[242] *Id.*

[243] UNCTOC, *supra* note 77 at art. 27 (1); UNCAC, *supra* note 78 at art. 48 (1).

[244] *Id.*

[245] UNCTOC, *supra* note 77 at art. 27 (1) (a); UNCAC, *supra* note 78 at art. 48 (1) (a). Same requirement exists in the Vienna Convention and the Financing Convention. (Vienna Convention, *supra* note 76 at art. 9 (1) (a); Financing Convention, *supra* note 121 at art. 18 (3) (a)).

used in the commission of crimes;[246] (3) "provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes";[247] (4) "promote the exchange of personnel and other experts" such as the posting of liaison officers;[248] and (5) provide information to one another about the techniques and methods used by criminals when carrying out illegal activities.[249]

ii. Enabling National Authorities to Cooperate and Exchange Information (Particularly in Money-laundering Cases)

Under the UNCTOC and UNCAC, states parties have an obligation to enable their relevant national authorities involved in combating money laundering to cooperate with each other domestically and with their counterparts internationally.[250] The Conventions provide that states parties must "ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law."[251] The Conventions specifically urge states parties to establish a financial intelligence unit "to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering."[252] In addition, article 58 of the UNCAC specifically requires states parties to

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[246] UNCTOC, *supra* note 77 at art. 27 (1) (b); UNCAC, *supra* note 78 at art. 48 (1) (b). Same requirement exists in the Vienna Convention and Financing Convention. (Vienna Convention, *supra* note 76 at art. 9 (1) (b); Financing Convention, *supra* note 121 at art. 18 (3) (b)).

[247] UNCTOC, *supra* note 77 at art. 27 (1) (c); UNCAC, *supra* note 78 at art. 48 (1) (c). The Vienna Convention contains the same requirement. (Vienna Convention *supra* note 76 at art. 9 (1) (d)).

[248] UNCTOC, *supra* note 77 at art. 27 (1) (d); UNCAC, *supra* note 78 at art. 48 (1) (e). The requirement is present in the Vienna Convention as well. (Vienna Convention *supra* note 76 at art. 9 (1) (e)).

[249] UNCTOC, *supra* note 77 at art. 27 (1) (e); UNCAC, *supra* note 78 at art. 48 (1) (d).

[250] *See* UNCTOC, *supra* note 77 at art. 7 (1) (b); UNCAC, *supra* note 78 at art. 14 (1) (b).

[251] *Id.*

[252] *Id.* According to the interpretation by the UN Legislative Guides, states parties are encouraged to consider three types of entity, each having specific authorities and responsibilities, in their strategy to combat money laundering. (*See* Nikos Passas et al., *supra* note 155 at 51; Passas et al.-Guide on UNCAC, *supra* note 155 at 49) First,

cooperate with each other through financial intelligence units in order to prevent transfers of and to recover proceeds of crimes.[253]

iii. Establishing Special Investigative Techniques

To effectively constrain transnational crimes, the UNCTOC and UNCAC obligate states parties to allow their competent authorities to establish and use special investigative techniques ("SITs," including controlled delivery,[254] undercover operations, and electronic or other forms of surveillance) to the extent such techniques do not conflict with domestic law.[255] According to the UNCAC the information and evidence obtained through SITs should be admissible in court.[256] According to the UN Legislative Guides, enacting new legislation may be required if a state party does not have laws or regulations granting admissibility of evidence produced by SITs.[257] For instance, the UNCAC provides:

> In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be

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regulatory agencies such as banks or insurance entities, "with powers to inspect financial institutions and enforce regulatory requirements through the imposition of regulatory or administrative remedies or sanctions." (*See* Nikos Passas et al., *supra* note 155 at 51; Passas et al.-Guide on UNCAC, *supra* note 155 at 49) Second, law enforcement agencies such as police, with powers to investigate cases and arrest alleged criminals. (*See* Nikos Passas et al., *supra* note 155 at 51; Passas et al.-Guide on UNCAC, *supra* note 155 at 49) Third, financial intelligence units (FIU), with the authority to acquire "reports of suspicious transactions, analysing them and disseminating information to prosecution agencies." (*See* Nikos Passas et al., *supra* note 155 at 51; Passas et al.-Guide on UNCAC, *supra* note 155 at 49) These three types of entity should not be confused with the types of FIU itself. Based on states' practices, there are four types of FIUs around the globe: administrative type (e.g. in Belgium), law enforcement type (e.g. in Germany and the United Kingdom), judicial or prosecutorial type (e.g. in Cyprus and Luxembourg), and hybrid type (e.g. in Denmark and Norway). (See Financial Intelligence Units: An Overview, INTERNATIONAL MONETARY FUND & THE WORLD BANK 9-17 (2004), https://www.imf.org/external/pubs/ft/FIU/fiu.pdf).

[253] UNCAC, *supra* note 78 at art. 58.

[254] The UNCTOC defines "controlled delivery" as "the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence." (*See* UNCTOC, *supra* note 77 at art. 2 (i)).

[255] *See* UNCTOC, *supra* note 77 at art. 20 (1); UNCAC, *supra* note 78 at art. 50 (1); Nikos Passas et al., *supra* note 155 at 133; Passas et al.-Guide on UNCAC, *supra* note 155 at 182.

[256] UNCAC, *supra* note 78 at art. 50 (1).

[257] Nikos Passas et al., *supra* note 155 at 134; Passas et al.-Guide on UNCAC, *supra* note 155 at 183.

> necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.[258]

In order to implement this provision and allow use of SITs at the international level, the two conventions encourage states parties to enter into bilateral or multilateral agreements.[259] If an agreement does not exist, states parties may cooperate with each other on a case by case basis with respect to SITs.[260]

2. Non-Mandatory MLATs Requirements and Measures

In addition to the above mandatory requirements, the four UN Suppression Conventions provide guiding provisions and encourage states parties to take various optional measures that supplement the mandatory requirements. [261] Although these measures do not arise from any obligations under the Conventions, incorporating them in domestic laws will enhance the efficiency of Afghan laws and provide further mutual legal assistance tools for the relevant Afghan authorities. Similar to the analysis of the obligations above, this dissertation mostly refers to the UNCTOC and UNCAC unless there is a substantial difference in the provisions of the two conventions compared with the Vienna Convention and the Financing Convention. References will be made to the relevant provisions of the latter two conventions in footnotes.

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[258] UNCAC, *supra* note 78 at art. 50 (1).

[259] UNCTOC, *supra* note 77 at art. 20 (2); UNCAC, *supra* note 78 at art. 50 (2).

[260] UNCTOC, *supra* note 77 at art. 20 (3); UNCAC, *supra* note 78 at art. 50 (3).

[261] *See e.g.* Nikos Passas et al., *supra* note 155 at 163-170; Passas et al.-Guide on UNCAC, *supra* note 155 at 168-175.

Figure 5. An overview of non-mandatory measures under the four UN Suppression Conventions

No	Non-Mandatory Measures	UN Conventions			
		Vienna Convention	Financing Convention	UNCTOC	UNCAC
1	Communicating information spontaneously	NO	NO	YES	YES
2	Requirements for transfer of a person	NO	YES	YES	YES
3	Conducting hearing through videoconference	NO	NO	YES	YES
4	Grounds for refusal	YES	NO	YES	YES
5	Grounds for postponing mutual legal assistance	YES	NO	YES	YES
6	Entering into new agreements and arrangements	YES	NO	YES	YES
7	Facilitating cooperation via use of modern technology	NO	NO	YES	YES
8	Conducting joint investigations	YES	NO	YES	YES

In Figure 5, "YES" indicates the obligation is present in a specific convention, and "NO" means the obligation does not exist under a convention.

Below is an analysis of each of the above non-mandatory measures that are strongly recommended by the Conventions.

a. Communicating Information Spontaneously

The UNCTOC and UNCAC encourage states parties to transmit information without request if the information is deemed useful for the investigation of a crime under the Conventions.[262] According to the Conventions, "the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings"[263] or if the information could help the

[262] *See* UNCTOC, *supra* note 77 at art. 18 (4); UNCAC, *supra* note 78 at art. 46 (4).

[263] *Id.*

receiving state issue a formal mutual legal assistance request based on the mandatory provisions of the Conventions.[264] The UN Legislative Guides assert that this provision of the Conventions creates a legal tool for states parties to share information and evidence that could be crucial in fighting transnational crimes,[265] even though the receiving state might not initially be aware of the information or evidence.[266] The UN Legislative Guides further explain that if a state party does not have such provisions in its domestic laws and does not directly apply international conventions,[267] "it is strongly encouraged, but not obliged, to take such steps as may be necessary to establish such a legal basis."[268]

b. Requirements for Transfer of a Person

Under the UNCTOC and UNCAC, the transfer of a person ("who is being detained or is serving a sentence") between two states parties for "purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings" is optional.[269] However, a transfer shall not take place without the free and informed consent of the person in question and an agreement between the competent authorities of the two states.[270] According to the Conventions, the receiving state party must have "the authority and obligation to keep the person transferred in custody,"[271] and must promptly "return the person to

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[264] *Id.*

[265] *See* Nikos Passas et al., *supra* note 155 at 168; Passas et al.-Guide on UNCAC, *supra* note 155 at 174.

[266] *Id.*

[267] *Id.*

[268] *Id.* In addition to the formal recommendation of the UN, informal communication, personal relations, and building mutual trust would play a significant role in spontaneous communication of information.

[269] UNCTOC, *supra* note 77 at art. 18 (10); UNCAC, *supra* note 78 at art. 46 (10). This measure is included in the Financing Convention. (*See* Financing Convention, *supra* note 121 at art. 16).

[270] UNCTOC, *supra* note 77 at art. 18 (10) (a) & (b); UNCAC, *supra* note 78 at art. 46 (10) (a) & (b).

[271] UNCTOC, *supra* note 77 at art. 18 (11) (a); UNCAC, *supra* note 78 at art. 46 (11) (a).

the custody" of the sending state after completing the required action,[272] and must avoid requiring the sending state to begin an extradition request for return of the person.[273]

c. Conducting Hearing Through Videoconference

According to UNCTOC and UNCAC, states parties may conduct witness or expert testimony hearing through videoconference.[274] Videoconferencing "refers to the use of interactive telecommunications technologies for witness testimony via simultaneous two-way video and audio transmissions."[275] If a state party requests to hear the testimony of a witness or expert who resides within the territory of another State,[276] the hearing may take place through videoconference "if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party."[277] According to the UNCTOC and UNCAC, "States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party."[278] Considering how costly the transfer of a person could be,[279] the UN Legislative Guides stress the importance of conducting hearings through videoconference as that may significantly reduce the costs of obtaining the required evidence.[280] Although it depends on the domestic legal system of each state party, these guides suggest that testimony by videoconference may require some changes in domestic law such as

[272] UNCTOC, *supra* note 77 at art. 18 (11) (b); UNCAC, *supra* note 78 at art. 46 (11) (b).

[273] UNCTOC, *supra* note 77 at art. 18 (11) (c); UNCAC, *supra* note 78 at art. 46 (11) (c).

[274] *See* UNCTOC, *supra* note 77 at art. 18 (18); UNCAC, *supra* note 78 at art. 46 (18).

[275] CECILY ROSE ET AL., THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY 472 (2019).

[276] UNCTOC, *supra* note 77 at art. 18 (18); UNCAC, *supra* note 78 at art. 46 (18).

[277] *Id.*

[278] *Id.*

[279] *See* Nikos Passas et al., *supra* note 155 at 169; Passas et al.-Guide on UNCAC, *supra* note 155 at 174.

[280] *Id.*

amending "evidentiary rules to allow for the basic admissibility of evidence provided by videoconferencing and setting technical standards for reliability and verification."[281]

d. Grounds for Refusal

The UNCTOC and UNCAC do provide some grounds upon which states parties may refuse to provide mutual legal assistance.[282] States parties may withhold mutual legal assistance if: (1) the request is not provided in accordance with the relevant provisions of the Conventions;[283] (2) the execution of the request may harm essential interests of the requested state (such as sovereignty, security, or public order);[284] (3) the authorities of the requested state lack the power under domestic law to execute the request;[285] or (4) the execution of the request could violate the mutual legal assistance mechanisms of the requested state.[286] According to the Conventions, when a requested state declines to provide legal assistance, it must explain the reasons for refusal.[287]

e. Grounds for Postponing Mutual Legal Assistance

According to the UNCTOC and UNCAC, a requested state can postpone the execution of a mutual legal assistance request if it disrupts the process of an ongoing case.[288] The two conventions

[281] Nikos Passas et al., *supra* note 155 at 169; Passas et al.-Guide on UNCAC, *supra* note 155 at 175.

[282] *See* UNCTOC, *supra* note 77 at art. 18 (21); UNCAC, *supra* note 78 at art. 46 (21). Same grounds are provided in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (15)).

[283] UNCTOC, *supra* note 77 at art. 18 (21) (a); UNCAC, *supra* note 78 at art. 46 (21) (a). The Vienna Convention contains the same requirement. (*See* Vienna Convention, *supra* note 76 at art. 7 (15) (a)).

[284] UNCTOC, *supra* note 77 at art. 18 (21) (b); UNCAC, *supra* note 78 at art. 46 (21) (b). The same requirement exists in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (15) (b)).

[285] UNCTOC, *supra* note 77 at art. 18 (21) (c); UNCAC, *supra* note 78 at art. 46 (21) (c). The same requirement is present in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (15) (c)).

[286] UNCTOC, *supra* note 77 at art. 18 (21) (d); UNCAC, *supra* note 78 at art. 46 (21) (d). The Vienna Convention entails the same provision. (*See* Vienna Convention, *supra* note 76 at art. 7 (15) (d)).

[287] UNCTOC, *supra* note 77 at art. 18 (23); UNCAC, *supra* note 78 at art. 46 (23). The same provision is present in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (16)).

[288] *See* UNCTOC, *supra* note 77 at art. 18 (25); UNCAC, *supra* note 78 at art. 46 (25). The Vienna Convention contains the same provision. (*See* Vienna Convention, *supra* note 76 at art. 7 (17)).

provide that "[m]utual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding."[289] The conventions require the requested state to discuss the issue with the requesting state prior to suspending the execution of the request.[290] For instance, according to the conventions, before delaying the execution of a request, "the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary."[291]

f. Entering into New Agreements and Arrangements

The UNCTOC and UNCAC encourage states parties to conclude new bilateral or multilateral agreements that could boost an effective implementation of the provisions of *formal mutual legal assistance*.[292] For instance, the conventions provide that ,"States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions"[293] of the relevant articles of the Conventions.

Second**,** the UNCTOC and UNCAC advise states parties to institute bilateral or multilateral agreements in order to strengthen direct *law enforcement cooperation* between their relevant agencies.[294] Both Conventions provide that "States Parties shall consider entering into bilateral or

[289] UNCTOC, *supra* note 77 at art. 18 (25); UNCAC, *supra* note 78 at art. 46 (25). The Vienna Convention embodies the same provision. (*See* Vienna Convention, *supra* note 76 at art. 7 (17)).

[290] *See* UNCTOC, *supra* note 77 at art. 18 (26); UNCAC, *supra* note 78 at art. 46 (26). The same provision exists in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (17)).

[291] UNCTOC, *supra* note 77 at art. 18 (26); UNCAC, *supra* note 78 at art. 46 (26). The Vienna Convention entails identical provision. (*See* Vienna Convention, *supra* note 76 at art. 7 (17)).

[292] *See* UNCTOC, *supra* note 77 at art. 18 (30); UNCAC, *supra* note 78 at art. 46 (30). The same provision exists in the Vienna Convention. (*See* Vienna Convention, *supra* note 76 at art. 7 (20))

[293] UNCTOC, *supra* note 77 at art. 18 (30); UNCAC, *supra* note 78 at art. 46 (30).

[294] UNCTOC, *supra* note 77 at art. 27 (2); UNCAC, *supra* note 78 at art. 48 (2).

multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them."[295] According to the Conventions, in the absence of agreements between parties, the Conventions can function as a legal basis for law enforcement cooperation among the concerned parties.[296] Moreover, the UN Legislative Guides assert that law enforcement cooperation is permitted by the domestic laws of most countries, and that since almost all countries are members of INTERPOL, "a multilateral arrangement by which such cooperation can generally be carried out."[297]

g. Facilitating Cooperation via Use of Modern Technology

Law enforcement cooperation through the use of modern technology is strongly encouraged by the UNCTOC and UNCAC.[298] According to the Conventions, "States Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology."[299] As transnational criminals increasingly exploit modern technology to carry out their illegal acts, the need for law enforcement agencies to utilize these tools including e-mail or databases to counteract and constrain such crimes effectively is exceedingly critical.[300]

h. Conducting Joint Investigations

The UNCTOC and UNCAC encourage states parties to enter into bilateral or multilateral agreements to enable joint investigations if a crime or matter in question is subject to the

[295] *Id.*

[296] *Id.*

[297] Nikos Passas et al., *supra* note 155 at 176; Passas et al.-Guide on UNCAC, *supra* note 155 at 184.

[298] UNCTOC, *supra* note 77 at art. 27 (3); UNCAC, *supra* note 78 at art. 48 (3).

[299] *Id.*

[300] *See* Nikos Passas et al., *supra* note 155 at 176.

jurisdiction of one or more states.[301] The Conventions provide that "States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies."[302] States parties may agree to conduct joint investigations on a case-by-case basis if they do not have a bilateral or multilateral agreement in place.[303] The UN Legislative Guides indicate that joint investigations are already permitted by most states.[304] However, if the domestic laws of a state party do not allow such investigations, the relevant articles of the Conventions can be used as a legal basis for conducting and facilitating the investigations.[305]

B. Obligations under Regional Conventions

As noted earlier, developing and using MLATs as a tool for exchanging cross-border evidence and information originally involved regional MLAT conventions, starting with the European Convention on Mutual Legal Assistance in Criminal Matters (1959).[306] That Convention inspired other states to incorporate MLAT provisions into the relevant UN conventions and develop other regional conventions. Regional conventions are particularly important for their potential to bring together several states that have similar interests, face similar challenges, and are located in the same geographical region. These regional agreements allow states parties to develop provisions detailing MLAT processes and enforcement mechanisms. States parties to regional conventions

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[301] *See* UNCTOC, *supra* note 77 at art. 19; UNCAC, *supra* note 78 at art. 49. The Vienna Convention entails similar measure with less details. (*See* Vienna Convention, *supra* note 76 at art. (1) (c)).

[302] *Id.*

[303] *Id.*

[304] Nikos Passas et al., *supra* note 155 at 176; Passas et al.-Guide on UNCAC, *supra* note 155 at 184.

[305] *Id.*

[306] The Convention entered into force on Jun. 12, 1962, see the Council of Europe's website for more information: *Details of Treaty No. 030*, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030.

typically hold regularly scheduled meetings to assess progress, address challenges, and conduct peer review of their performance in implementing the conventions.[307]

Unfortunately, Afghanistan is a party to only one regional MLAT convention, namely SAARCC.[308] Afghanistan, along with the other states parties (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka), signed SAARCC on August 3, 2008.[309] However, according to the latest available information, SAARCC has not yet entered into force.[310] Apparently, the reason SAARCC is not currently enforceable is that Pakistan has failed to ratify it.[311] Article 24 of SAARCC indicates that it will not enter into force unless all states parties ratify it.[312]

Although Afghanistan signed the SAARCC convention in 2008, it took eight years before Afghanistan's Parliament adopted it and the President signed it into law in 2016.[313] The Presidential Decree for the signing of SAARCC demonstrates that it is directly applicable immediately upon the date of signature, August 21, 2016.[314] SAARCC was translated into Dari

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[307] *See e.g. ASEAN Attorneys-General/Ministers Pledged for Stronger Cooperation in Mutual Legal Assistance in Criminal Matters*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (2019), https://asean.org/asean-attorneys-generalministers-pledged-stronger-cooperation-mutual-legal-assistance-criminal-matters/.

[308] SAARC stands for South Asian Association for Regional Cooperation.

[309] SAARCC, *supra* note 132.

[310] Dipanjan Roy Chaudhury, *Strong Measures Needed Against States Backing Terror: BIMSTEC*, THE ECONOMIC TIMES (2018), https://economictimes.indiatimes.com/news/defence/strong-measures-needed-against-states-backing-terror-bimstec/articleshow/54897171.cms?from=mdr.

[311] Ostensibly, there is not a clear prospect whether Pakistan would ratify the convention in the near future. Because of rivalry and hostile relationship between Pakistan and India, Pakistan has intentionally disrupted the entire mechanism by not ratifying the convention. (*See* V Balakista Reddy, *Use and Misuse of International Laws*, TELANGANA TODAY (last updated Mar. 3, 2019), https://telanganatoday.com/use-and-misuse-of-international-laws.

[312] SAARC CONVENTION, *supra* note 132 at art. 24.

[313] *See Kanwansiyon Saarc Peramone Komakhai Mutaqabel Dar Mawzoate Jenaee* [SAARC Convention on Mutual Legal Assistance in Criminal Matters], Official Gazette, Mar. 5, 2017, No. 1247 (Afg.)

[314] *Id*. at Presidential Decree about the Enforcement of SAARCC.

and Pashto and published in the Official Gazette.[315] It is surprising that Afghanistan's Parliament and the President did not condition its applicability according to the terms of SAARCC Article 24[316] because its application in Afghanistan is inconsistent if SAARCC is not enforceable in other states parties. In light of Afghanistan's common practice to legislate domestically rather than apply international conventions directly, it seems peculiar to have made this specific convention directly enforceable.

While SAARCC is not currently applicable in the region, it will impose several obligations on states parties upon its entry into force. Similar to the UN Suppression Conventions, SAARCC also encourages states parties to take certain non-mandatory measures with respect to furnishing mutual legal assistance to one another. Most of the obligations and non-mandatory provisions are the same as or similar to obligations under the UN Suppression Conventions (albeit with fewer or more details).[317]

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[315] *Id*.

[316] According to the Article 24, SAARCC "is subject to ratification and shall enter into force on the thirtieth day after the date of deposit of the last instrument of ratification in accordance with Article 26."

[317] In order to avoid unnecessary repetition, this chapter lists the same/similar requirements in a footnote with reference to the relevant articles of the SAARCC. Where there are differences in provisions that are mandatory or optional under the UN Conventions but not under the SAARCC, or requirements that are missing or additional in the SAARCC, those will be highlighted. The SAARCC contains several obligations related to formal mutual legal assistance that are the same or similar to the UN conventions. These obligations include 1) determining scope of MLATs (Article 1.); 2) determining specific purposes for mutual legal assistance (Article 1(4)); 3) executing requests promptly (Article 4(1)); 4) not using bank secrecy as grounds to refuse mutual legal assistance (Article 4(3)); 5) providing copies of publicly available records, documents, or information (*see* SAARCC at Art. 7(1)); 6) designating a central authority (*see* SAARCC Art. 15); 7) requirements for content of mutual legal assistance requests (Article. 16); 8) using information or evidence only for the requested purposes (Article 18); 9) requested state must bear the ordinary costs of executing a request (Article 21(1)); and 10) making requests in writing (Article 16(5)). Furthermore, the SAARCC encompasses some additional obligations that do not exist in the UN conventions. For instance, the SAARCC extends application of its provisions over offenses that occurred before the date it entered into force (Article 1(5)); it prohibits further authentication of evidence produced in accordance with its provisions (Article 19); and it requires requests to be in English *(*Article 20). Unlike the UN conventions, the SAARCC does not include an obligation to provide mutual legal assistance for offenses that involve a legal person. In addition to these listed obligations, the SAARCC encourages states parties to take some non-mandatory measures with respect to mutual legal assistance. These discretionary measures include, 1) grounds to refuse mutual legal assistance requests (Article 5(1)), and 2) provisions for transfer of a person (Article 10(1)). Finally, it should be noted that the SAARCC does not cover informal mutual legal assistance or law enforcement cooperation.

C. Requirements under Intergovernmental Organizations: FATF Standards

As noted previously in this chapter, many intergovernmental organizations monitor and promote mutual legal assistance standards. Perhaps the most influential organization has been the FATF, which recommends universal standards heavily focused on combating money laundering and the financing of terrorism.[318] In addition, it has developed a series of recommendations and international standards known as the FATF 40 Recommendations.[319] FATF contends that although its recommendations are not mandatory (in contrast with the requirements of the UN Suppression Conventions),[320] "many countries in the world have made a political commitment to combat money laundering by implementing the FATF Recommendations."[321] FATF aggressively monitors implementation of these recommendations which gives the recommendations considerably more weight than a simple 'recommendation.' Indeed, the FATF constantly evaluates compliance progress and imposes sanctions in cases of non-compliance.[322]

In order to ensure compliance, the FATF identifies "high-risk" and "other monitored" jurisdictions.[323] Depending on levels of risk, the FATF issues two types of public warning: a public statement or an ongoing process statement.[324] If the risk level is high and the jurisdiction in

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[318] *See Who We are*, THE FINANCIAL ACTION TASK FORCE, http://www.fatf-gafi.org/about/whoweare/ (last visited Oct. 9, 2019) (hereinafter FAFT WEB)

[319] *See* International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations, THE FINANCIAL ACTION TASK FORCE Rec. 1-40 (last updated Jun. 2019), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf [(hereinafter FATF RECOMMENDATIONS].

[320] *The 40 Recommendations, Published October 2004*, THE FINANCIAL ACTION TASK FORCE, https://www.fatf-gafi.org/publications/fatfrecommendations/documents/the40recommendationspublishedoctober2004.html (last visited Oct. 8, 2019).

[321] *Id*.

[322] *See id*.

[323] *High-Risk and Other Monitored Jurisdictions*, THE FINANCIAL ACTION TASK FORCE, https://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc(fatf_releasedate) (last visited Nov. 7, 2019).

[324] *Id*.

question fails to make progress towards reforming its anti-money laundering structures and strategies, the FATF will issue a public statement and ask members and non-members to apply "enhanced due diligence measures,"[325] "counter measures,"[326] or both.[327] However, if the jurisdiction in question has strategic deficiencies in its anti-money laundering regime but is "undergoing review by the FATF according to the agreed milestones and timelines,"[328] the FATF will issue an ongoing process statement to make sure members take into account "the risks arising from the strategic deficiencies."[329]

Afghanistan is not a member of the FATF, but it is a member of the Asia/Pacific Group on Money Laundering (APG), a FATF-style regional body.[330] In fact, from 2012-2017 Afghanistan was included on the FATF's ongoing process list of countries with strategic deficiencies.[331] After

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[325] "Enhanced due diligence measures include obtaining additional information on the customer, obtaining information on the source of funds and source of wealth of the customer, and enhanced monitoring of the business relationship." (*Id.*)

[326] "Counter-measures range from specific elements of enhanced due diligence and systematic reporting of transactions involving the jurisdiction, to a limitation or prohibition of financial transactions with the jurisdiction." (*Id.)*

[327] *Id.*

[328] *Id.*

[329] *Id.*

[330] *Members and Observers*, ASIA/PACIFIC GROUP ON MONEY LAUNDERING, http://www.apgml.org/members-and-observers/members/default.aspx (last visited Nov. 7, 2019). FATF-style regional bodies (FSRBs) are inter-governmental organizations which are established "for the purpose of disseminating the international standards on combating money laundering, financing of terrorism & proliferation (FATF Recommendations) throughout the world." (*FATF-Style Regional Bodies*, EURASIAN GROUP, https://eurasiangroup.org/en/fatf-style-regional-bodies (last visited Jan. 13, 2020)) There are nine of such bodies, each with a focus on a specific region. (*See FATF-Style Regional Bodies (FSRBs),* ASIA/PACIFIC GROUP*,* http://www.apgml.org/fatf-and-fsrb/page.aspx?p=94065425-e6aa-479f-8701-5ca5d07ccfe8 (last visited Jan. 13, 2020)) APG is the largest FATF-style regional body with 41 active members. (*See Overview of APG Members*, ASIA/PACIFIC GROUP, http://www.apgml.org/members-and-observers/page.aspx?p=8c32704a-5829-4671-873c-7b5a23ced347 (last visited Jan. 13, 2020)) The main goal of the APG "is to ensure the adoption, implementation and enforcement of internationally accepted anti-money laundering and counter-terrorist financing standards as set out in the FATF Forty Recommendations and FATF Eight Special Recommendations." (*See Asia/Pacific Group on Money Laundering* (APG), FATF, http://www.fatf-gafi.org/countries/#APG (last visited Jan. 27, 2020)) According to this APG website, it also assists "countries and territories of the region in enacting laws to deal with the proceeds of crime, mutual legal assistance, confiscation, forfeiture and extradition; providing guidance in setting up systems for reporting and investigating suspicious transactions and helping in the establishment of financial intelligence units."

[331] *See e.g. Improving Global AML/CFT Compliance: On-Going Process,* THE FINANCIAL ACTION TASK FORCE (2012), http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-

making the recommended changes in its anti-money laundering regime, Afghanistan was finally removed from the list on June 23, 2017.[332]

Two of the FATF Recommendations (37 and 38) focus on mutual legal assistance,[333] however they do not provide many details and primarily mirror those in the UN Suppression Conventions. Moreover, the FATF Recommendations recognize the UN Suppression Conventions as instruments for international cooperation and urge countries to "take immediate steps to become party to and implement fully" the Vienna Convention, UNCTOC, UNCAC, and Financing Convention.[334] FATF Recommendations 37 and 38 contain nearly identical requirements, including the scope of mutual legal assistance;[335] speedy and efficient execution of requests;[336] ensuring a legal basis (such as law, treaties or agreements) for providing mutual legal assistance;[337] prohibiting bank secrecy as grounds for refusal;[338] and using a central authority.[339] In addition to these similar provisions, the FATF recommends that countries have a case management system for tracking mutual legal assistance requests,[340] equip their Central Authorities with "adequate financial, human and technical resources,"[341] and provide swift response to "requests by foreign

jurisdictions/documents/improvingglobalamlcftcomplianceon-goingprocess-22june2012.html; *Improving Global AML/CFT Compliance: On-Going Process*, THE FINANCIAL ACTION TASK FORCE (2017), http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/fatf-compliance-june-2017.html.

[332] *Improving Global AML/CFT Compliance: On-Going Process*, THE FINANCIAL ACTION TASK FORCE (2017), http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/fatf-compliance-june-2017.html.

[333] FATF RECOMMENDATIONS, *supra* note 319 at Rec. 37-38.

[334] *Id*. at Rec. 36.

[335] *Id*. at Rec. 37.

[336] *Id.* at Rec. 37 (b).

[337] *Id.* at Rec. 37.

[338] *Id*. at Rec. 37 (d).

[339] *Id.* at Rec. 37 (b).

[340] *Id.*

[341] *Id.* at Rec. 37.

countries to identify, freeze, seize, and confiscate" proceeds of crime.[342] Since their inception in 1990, the FATF Recommendations have been revised and updated several times.[343]

IV. Conclusion

Mutual legal assistance is the main tool for states to provide evidence and information to one another in combating transnational crime. Although mutual legal assistance has different forms and practices, MLATs are increasingly being used by states as they presently usually provide the most efficient, reliable, and compulsory process for exchanging legal assistance. States have incorporated many MLAT requirements into many international and regional conventions and also into other forms of international frameworks, such as the FATF Recommendations. The UN Suppression Conventions impose or recommend many obligatory or non-obligatory measures on state parties. As a party to the UN Suppression Conventions, Afghanistan has undertaken many obligations and non-mandatory measures imposed by those conventions. These obligations and non-mandatory measures are intended to harmonize domestic laws, provide obligatory mechanism for legal assistance, and enhance international cooperation in the fight against transnational crime among state parties. This chapter has identified at least 17 obligations and 8 non-mandatory measures for Afghanistan under the UN Suppression Conventions. These obligations and non-mandatory measures will not have any tangible effects unless states parties like Afghanistan incorporate these mechanisms into domestic law and implement them. The question of Afghanistan's statutory compliance with the obligations will be addressed in the next chapter.

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[342] *Id.* at Rec. 38.

[343] *The 40 Recommendations, Published October 2004*, THE FINANCIAL ACTION TASK FORCE, https://www.fatf-gafi.org/publications/fatfrecommendations/documents/the40recommendationspublishedoctober2004.html (last visited Nov. 8, 2019).

CHAPTER SIX: AFGHANISTAN'S CURRENT MECHANISMS ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS AND THE EXTENT OF THEIR COMPLIANCE WITH THE INTERNATIONAL CONVENTIONS

Since 2004, Afghanistan has enacted several laws that incorporate mutual legal assistance provisions. Although the relevant legislative bodies and agencies may have considered the law's conformity with international norms in the drafting process, most domestic laws do not directly refer to compliance with specific international treaties or conventions. This makes it very difficult to ascertain whether the relevant bodies and agencies involved in the legislation process took into account Afghanistan's obligations under international law. Even if they did consider Afghanistan's international obligations, it is difficult to determine which conventions they looked at while drafting, and to what extent provisions of a domestic law were derived from international treaties or conventions. This problem persists when analyzing the relationship of any domestic Afghan legislation with international law, not just those laws related to mutual legal assistance.[1]

This chapter examines the current mutual legal assistance mechanisms in Afghanistan and the extent to which they are in compliance with the international conventions to which Afghanistan is a state party. It is first necessary to briefly explain the relationship between international law and Afghanistan's domestic legal system.

[1] It would be *better practice* to provide references. Interviewees who hold the main responsibility for drafting and scrutinizing legislative bills at the Ministry of Justice indicated that they routinely incorporate the provisions of international conventions into domestic laws where Afghanistan is a party to the conventions. However, they do not always mention, name, or cite any international conventions at the beginning or within the text of domestic laws. Thus, it is not always easy to determine whether a law contains international norms and obligations or to pinpoint if certain provisions have been derived from international conventions. Interviewees emphasized that they always try to consider Afghanistan's obligations under international conventions during the drafting process. However, they could not say whether they used the relevant provisions of any of the UN conventions related to transnational crimes and mutual legal assistance when they drafted and finalized the Law on Extradition and Legal Cooperation, for example.

I. The Relationship between International Law and Afghanistan's Domestic Legal System

The Constitution of Afghanistan requires Afghanistan's government to comply with its obligations under international legal documents, such as those international treaties to which the country is a state party.[2] Article 7 of the Constitution specifically provides that the State shall "observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights."[3] Consequently, the Constitution sets out a strong legal basis for application of international norms and standards within Afghanistan.

In light of Article 7,[4] Afghanistan enacted a new law on international treaties and conventions in 2016.[5] The law provides specific guidance and procedures for signing, ratifying, accepting, and implementing international treaties, conventions, protocols, and memoranda of understandings with foreign countries or international organizations.[6] The law vests the Ministry of Foreign Affairs (MOFA)[7] with responsibility for monitoring the implementation of international treaties.

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[2] The Constitution of Afghanistan, at art. 7, Official Gazette, Extraordinary Issue, January 2004, No. 818 (Afg.) (unofficial translation), http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf.

[3] *Id.*

[4] *Qanooni Maahedat Wa Mesaqhai Bainalmelallli* [Law on International Treaties and Conventions], at art. 1, Official Gazette, Extraordinary Issue, November 2016, No. 1236 (Afg.) [hereinafter LAW ON INTERNATIONAL TREATIES]

[5] *See id.*

[6] *See id.* at art. 4-14.

[7] *See id.* at art. 13 (1).

An examination of the relevant provisions of the Law on International Treaties reveals that it embodies elements of both monist[8] and dualist[9] approaches to international law.[10] For instance, according to the law, international treaties and conventions on particular topics, including judicial cooperation, will only be implemented after they are approved by the Council of Ministers, adopted by the Parliament, and signed by the President.[11] This law indicates that some other agreements would not require the approval of the Parliament, but could be implemented with only the approval of the Council of Ministers.[12] Although this law does not specifically mention a monist or dualist approaches to international law, at least in theory this latter procedure could provide the basis for the monist approach and the direct application of international treaties and conventions.

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[8] In the monist approach, there is no difference between international law and domestic law and thus a state will directly apply international law in its domestic courts (*see How Does International Law Apply in a Domestic Legal System,* THE PEACE AND JUSTICE INITIATIVE, https://www.peaceandjusticeinitiative.org/implementation-resources/dualist-and-monist (last visited Nov. 28, 2019)). According to a commentator, "[t]he essence of the monist approach is that a treaty may, without legislation, become part of domestic law once it has been concluded in accordance with the constitution and has entered into force for the state." (ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 183 (2ND EDITION, 2007).

[9] In the dualist approach, domestic courts will not directly apply international law unless the relevant international law has been incorporated into domestic law (*see How Does International Law Apply in a Domestic Legal System,* THE PEACE AND JUSTICE INITIATIVE, https://www.peaceandjusticeinitiative.org/implementation-resources/dualist-and-monist (last visited Nov. 28, 2019)). In other words, "[u]nder the dualist approach, the constitution of the state accords no special status to treaties; the rights and obligations created by them have no effect in domestic law unless legislation is in force to give effect to them. When the legislation is specifically made for this purpose, the rights and obligations are then said to be 'incorporated' into domestic law." (ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 182 (2ND EDITION, 2007).

[10] As the literature indicates, adopting both monism and dualism at once is a common practice among states. (ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 182 (2ND EDITION, 2007). According to an observer, "in both monist and dualist states, it is rare for a treaty to have domestic legal force unless the legislature has acted either to approve the treaty before international entry into force, or to implement the treaty after international entry into force." (David Sloss, *Domestic Application of Treaties* 3 (2011), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs).

[11] *See* LAW ON INTERNATIONAL TREATIES*, supra* note 4 at art. 9 (1). According to the law, if the MOFA determines that MoUs and simple and executive agreements do not require the approval of the Parliament, they will be approved by the Council of Ministers and implemented thereafter. (*Id*.)

[12] *See id.* at art. 9 (2).

However, the provisions of another article of Afghanistan's Law on International Treaties contain elements of the dualist approach. For instance, Article 14 of the law governs compliance with the requirements of international treaties and conventions.[13] According to its terms, if implementation of an international treaty or convention requires the amendment of current laws or enactment of new legislation,[14] the relevant ministries and agencies *shall* take necessary measures to make the required changes after the approval of the MOFA.[15] This article provides a legal foundation for the relevant agencies to step up and suggest new legislation or amendments when they observe a lack of procedures or the presence of conflicts between current laws and international conventions. The striking point in the article is that it not only suggests amending current laws, but also suggests enacting new legislation for the purpose of complying with an international treaty or convention. It implies that the application of a treaty or convention may require transplantation rather than direct implementation.

While Afghanistan's Law on International Treaties apparently allows both monist and dualist approaches to international law, in practice the government of Afghanistan has rarely employed the monist approach to directly implement international conventions. For instance, although the government of Afghanistan recently translated the Rome Statute into Dari and Pashto and published it in the Official Gazette without going through a normal legislative process (such as being adopted by the Parliament),[16] there is no indication that government agencies would

[13] *See id.* at art. 14.

[14] *See id.*

[15] *See id.*

[16] *See Asasnamae Mahkamae Jazaaee Bainalmelali (Asasnamae Rome)* [Rome Statute of International Criminal Court (Rome Statute)] Official Gazette, October 2018, No. 1311 (Afg.). According to the Constitution of Afghanistan, except in fiscal matters, in urgent situations, the government can prepare legislative decrees when the Parliament is on break. (See *Qanooni Asasi Afghanistan* [The Constitution of Afghanistan], art. 79 (1), Official Gazette, Extraordinary Issue, January 2004, No. 818 (Afg.)) The legislative decrees become law after the signature of the President. (*Id*. at art. 79 (2) However, the decrees should be delivered to the Parliament within a month after the Parliament resumed its sessions. (*Id*.) If the Parliament rejects the decrees, they will no longer be valid. (*Id*) This

directly apply the Rome Statute. At the same time, some of the relevant substantive provisions of the Rome Statute, (including the definition of international crimes such as war crimes, crimes against humanity, and genocide), have been incorporated into the new Afghan Penal Code.[17] In this instance, Afghanistan has utilized both monist and dualist approaches. In another example, however, Afghanistan has not directly implemented the Convention on the Elimination of All Forms of Discrimination against Women. Instead, it has enacted a specific law (again without the Parliament's approval),[18] on the elimination of violence against women in order to comply with some of its obligations under that convention. This is an example of the dualist approach.

Afghanistan has ostensibly utilized a dualist approach toward the UN Suppression Conventions. The country has incorporated various provisions of the conventions into different domestic laws (such as the Penal Code or the Whistleblowers Protection Law).[19] This chapter will explain that Afghanistan has incorporated many MLAT provisions of these conventions into domestic law. Of the six UN Suppression Conventions, only UNCAC has gone through Afghanistan's legislative process;[20] however there is no evidence that Afghanistan has directly implemented that convention or the other five. Several reports from United Nations Assistance

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provision has been widely misused by the government. There are countless laws that are enacted through legislative decrees including the Law on Elimination of Violence against Women and the new Penal Code.1311 (Afg.).

[17] *Code Jaza* [Penal Code], Official Gazette, at art. 332-340, May 2017, No. 1260 (Afg.) [hereinafter THE PENAL CODE]

[18] *Qanooni Mane Khoshonat Alaihe Zanan* [Law on Elimination of Violence against Women], Official Gazette, August 2009, No. 989 (Afg.).

[19] United Nations Assistance Mission in Afghanistan (UNAMA) confirms that Afghanistan has incorporated a large number its obligations under the UNCAC into the new Penal Code and Whistleblowers Protection Law. (*See Afghanistan's Fight Against Corruption: Groundwork For Peace and Prosperity*, U.N. ASSISTANCE MISSION IN AFG. 9 & 21 (May 2019), https://unama.unmissions.org/sites/default/files/afghanistan_fight_against_corruption_groundwork_for_peace_and_prosperity-20_may_2019-english.pdf) *See* also *Qanooni Hemayat Az Etla Dehendagane Jarayeme Fesade Edari* [Whistleblowers Protection Law,] at art. 5-18, Official Gazette, September 2018, No. 1314 (Afg.).

[20] *Meesaqe Mubareza Alaihe Fesade Edari* [Convention against Corruption], Official Gazette, Extraordinary Issue, January 2008, No. 936 (Afg.). The Convention is approved by the Parliament, singed by the President, and translated and published in Dari and Pashto.

Mission in Afghanistan (UNAMA) confirm Afghanistan's dualistic approach toward the UNCAC,[21] despite the fact that the convention was approved by the Parliament, signed by the President, and published in the official languages (Dari and Pashto) in the Official Gazette. [22]

It appears that Afghan courts would prefer to incorporate the relevant provisions of international conventions into domestic laws rather than directly apply the provisions of international conventions. Based on the author's experience as a practicing lawyer and opinions of the judges who were interviewed during field research, there is little to no evidence that Afghanistan has directly implemented international conventions (including the UN Suppression Conventions). Unfortunately, the MOFA, as the sole responsible authority for monitoring implementation of international treaties, has done almost nothing to monitor and assess the incorporation or direct implementation of the conventions including their MLAT provisions in Afghanistan.

In order to understand the extent to which Afghanistan has complied with its international mutual legal assistance obligations, this chapter examines Afghanistan's legislative actions, analyzes the text of the relevant laws that have been enacted by Afghanistan, and compares them

[21] Beginning in 2017, the United Nations Assistance Mission in Afghanistan (UNAMA) started to provide annual reports on Afghanistan's fight against corruption. (*See* Corruption, U.N. ASSISTANCE MISSION IN AFG, https://unama.unmissions.org/corruption (last visited Feb. 23, 2020)) Among other things, the UNAMA reports focuses on Afghanistan's compliance with its obligations under the UNCAC. In the reports, to assess compliance, UNAMA compares the UNCAC's provisions with the relevant Afghan domestic laws. (*See e.g. Afghanistan's Fight Against Corruption: Groundwork For Peace and Prosperity*, U.N. ASSISTANCE MISSION IN AFG. 9 & 21 (May 2019), https://unama.unmissions.org/sites/default/files/afghanistan_fight_against_corruption_groundwork_for_peace_and_prosperity-20_may_2019-english.pdf) Rather than mentioning the published Dari and Pashto version of the UNCAC, UNAMA relies on Afghanistan's domestic laws. This confirms Afghanistan's dualistic approach toward the UN conventions.

[22] Publication in the Official Gazette is part of legislative process in Afghanistan. (*See Qanooni Tai Marahele Asnade Taqnini* [Law on Processing of Legislative Documents] at art. 48, Official Gazette, October 2018, No. 1313 (Afg.)) Unless otherwise indicated in a law, all laws are applicable only after publication in the Official Gazette. (*Id.* art. 50) In any circumstances, all laws are subject to publication in the Gazette regardless of their entry into force date. (*See id.* at art. 52)

with Afghanistan's obligations under the UN Suppression Conventions.[23] In terms of current domestic mutual legal assistance mechanisms, three categories of legal instruments should be distinguished and analyzed separately.

First, there are statutes passed by Parliament that become law when signed by the President. Currently, Afghanistan has three statutes that regulate issues related to mutual legal assistance. These statutes are (1) the Law on Extradition of the Accused, Convicted Individual and Legal Cooperation (the 2013 Legal Cooperation Law),[24] (2) the Law on Prevention of Money Laundering and Proceeds of Crimes (the 2014 Anti-Money Laundering Law),[25] and (3) the Law on Prevention of Financing Terrorism (the 2014 Anti-Financing Terrorism Law).[26] Mutual legal assistance provisions in these laws enable examination of Afghanistan's obligations under and compliance with the UN Suppression Conventions. In particular, discussion will focus on the 2013 Legal Cooperation Law because it provides generalized authority for mutual legal assistance, regardless of the type of crime.

Second, Afghanistan has entered into bilateral mutual legal assistance agreements with foreign countries. According to available information, Afghanistan has signed an agreement for bilateral judicial assistance in civil and criminal matters with Iran, and an agreement for bilateral mutual legal assistance in criminal matters with UAE. These agreements are only applicable

[23] As mentioned above, this approach is also utilized by UNAMA when it assesses the extent of Afghanistan's compliance with the UNCAC.

[24] *See Qanooni Esterdade Mutahameen, Mahkomeen, Wa Hamkari Adli* [Law on Extradition of Accused and Convicted Persons and Legal Cooperation], Official Gazette, April 2013, No. 1103 (Afg.) [hereinafter EXTRADITION AND LEGAL COOPERATION LAW]

[25] *See Qanooni Jelowgiri Az Polshoaee Wa Awayede Nashi Az Jarayem* [Law on Prevention of Money Laundering and Proceeds of Crimes], Official Gazette, July 2014, No. 1142 (Afg.) [hereinafter ANTI-MONEY LAUNDERING LAW]

[26] *See Qanooni Jelawgiri Az Tamweele Terrorism* [Law on Prevention of Financing Terrorism], Official Gazette, September 2014, No. 1146 (Afg.) [hereinafter ANTI-FINANCING TERRORISM LAW]

between Afghanistan and each of these two countries, respectively. They neither correspond to Afghanistan's obligations under the UN Suppression Conventions nor affect any domestic laws. This type of agreement should comply with the requirements of the relevant national laws, particularly the 2013 Legal Cooperation Law.[27] Accordingly, the two agreements will be examined together for the purpose of understanding other aspects[28] of Afghanistan's mutual legal assistance mechanisms and revealing their strengths and deficiencies.

Third, there are Memoranda of Understanding (MoUs) that have been signed between Afghanistan's national agencies and their foreign counterparts. For instance, the AGO and the FinTRACA have signed several MoUs with their foreign counterparts. Similar to the bilateral agreements, these MoUs are only applicable between Afghanistan and other foreign countries and do not directly relate to the obligations of Afghanistan under the UN Suppression Conventions.

This chapter will first examine the current statutes/laws and the extent of their compliance and non-compliance with the international obligations. Second, it will analyze the bilateral mutual legal assistance agreements. Third, it will discuss the MoUs. Finally, the chapter will reveal the inconsistencies, contradictions, and deficiencies that exist within these mutual legal assistance mechanisms.

II. Current Domestic Laws on Mutual Legal Assistance and the Extent of Their Compliance with the Obligations under the UN Suppression Conventions

A quick review of the history of Afghan legislation in this area shows that mutual legal assistance in criminal matters has only been introduced to the country's legal system very recently

[27] Article 49 of the 2013 Legal Cooperation Law obligates the MOFA to observe the requirements of the law when it negotiates and enters into mutual legal assistance agreements with foreign countries. (*See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 96 at art. 49).

[28] In general, the bilateral mutual legal assistance agreements are part of a broader Afghan legal assistance spectrum. Thus, they need be analyzed in order to reveal the bigger picture of mutual legal assistance infrastructure in the country.

and in a limited way. After the collapse of the Taliban, the newly established transitional government of Afghanistan enacted a series of applicable laws and regulations. For instance, the transitional government enacted a Law on Money Laundering and Proceeds of Crimes[29] and a Law on Prevention of Financing Terrorism[30] on almost the same date in October 2004. For the first time in Afghan history, these two laws incorporated mutual legal assistance provisions..[31] However, the relevant mutual legal assistance provisions were limited to money laundering and terrorist finance cases.[32] These two laws were later superseded by the 2013 Legal Cooperation Law,[33] the 2014 Anti-Money Laundering Law,[34] and the 2014 Anti-Financing Terrorism Law.[35] These are the current applicable laws on mutual legal assistance in Afghanistan.

There are some general points to clarify concerning the current laws before analyzing their mutual legal assistance provisions in relation to Afghanistan's international obligations.

First, when assessing compliance with Afghanistan's international obligations, the 2013 Legal Cooperation Law is the principle source to examine. Although Afghanistan does not have generalized obligations under the UN Suppression Conventions, the 2013 law provides generalized authority for mutual legal assistance regardless of the type or severity of crime. Consequently, the law's relevant mutual legal assistance provisions correspond to the obligations under all the UN

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[29] *Qanooni Mubareza Alaihe Tathire Pol Wa Awaayede Nashi Az Jarayem* [Law on Combating Money Laundering and Proceeds of Crimes], Official Gazette, Extraordinary Issue, October 2004, No. 840 (Afg.) [hereinafter LAW ON COMBATING MONEY LAUNDERING]

[30] *Qanooni Mubareza Alaihe Tamweele Terrorism* [Law on Combating Financing Terrorism], Official Gazette, Extraordinary Issue, October 2004, No. 839 (Afg.) [hereinafter LAW ON COMBATING FINANCING TERRORISM]

[31] *See e.g. id* at art. 18-24; LAW ON COMBATING MONEY LAUNDERING, *supra* note 29 at art. 51-56.

[32] *See* LAW ON COMBATING FINANCING TERRORISM, *supra* note 30 at art. 18; LAW ON COMBATING MONEY LAUNDERING, *supra* note 29 at art. 51.

[33] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 51.

[34] *See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 70.

[35] *See* ANTI-FINANCING TERRORISM LAW, *supra* note 26 at art. 29.

Suppression Conventions.[36] In contrast, the 2014 Anti-Money Laundering Law and the 2014 Anti-Financing Terrorism Law are applicable only to crimes related to money laundering and financing of terrorism. [37] Therefore, the relevant provisions of these two laws only provide specific authority for mutual legal assistance for those specific crimes.

Second, the 2013 Legal Cooperation Law contains more detailed and comprehensive provisions than the 2014 Anti-Money Laundering Law and the 2014 Anti-Financing Terrorism Law. Additionally, the 2014 Anti-Financing Terrorism Law adds no new specific provisions[38] on mutual legal assistance; instead, it refers to the relevant mutual legal assistance provisions of the 2014 Anti-Money Laundering Law.[39] The 2014 Anti-Financing Terrorism Law will therefore not be discussed further in the later sections of this chapter.

Third, the laws do not use consistent terms for mutual legal assistance. The 2013 Legal Cooperation Law does not use a straightforward Dari equivalent for the English term "mutual legal assistance." Instead, it employs the Dari term "*hamkari adli*" [همکاری عدلی] which translates literally as "justice cooperation." However, an analysis of the law's definition of the term reveals it is essentially equivalent to "mutual legal assistance" in English.[40] The law defines *hamkari adli* as the exchange of information, evidence, and documents, transferring of witnesses during investigation, prosecution and trial, and enforcement of courts' final orders.[41]

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[36] *See generally* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26.

[37] *See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 55 (1); ANTI-FINANCING TERRORISM LAW, *supra* note 26 at art. 6.

[38] The 2014 Anti-Financing Terrorism Law has only three general articles. (*See* ANTI-FINANCING TERRORISM LAW, *supra* note 26 at art. 6, 7, & 8).

[39] *See* ANTI-FINANCING TERRORISM LAW, *supra* note 26 at art. 6.

[40] According to the UNODC "[m]utual legal assistance (MLA) in criminal matters is a process by which States seek for and provide assistance to other States in servicing of judicial document and gathering evidence for use in criminal cases." (*Mutual Legal Assistance (MLA)*, UNODC, https://www.unodc.org/e4j/en/organized-crime/module-11/key-issues/mutual-legal-assistance.html (last visited Jan. 2, 2020).

[41] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 3 (2).

Furthermore, the 2014 Anti-Money Laundering Law is very inconsistent with its legal terminology--it employs three different terms in varying order. In several articles, the law mentions only *hamkari adli.*[42] In another article, the law uses both *hamkari adli mutaqabel* [همکاری عدلی متقابل] and *hamkari mutaqabele adli* [همکاری متقابل عدلی] interchangeably.[43] In another article, the law employs *hamkari adli du janeba* [همکاری عدلی دوجانبه].[44] The literal translation of the latter three terms is similar to "mutual justice cooperation" or "mutual justice assistance" in English. Finally, the 2014 Anti-Financing Terrorism Law uses two different terms in one article: *hamkari mutaqabel* [همکاری متقابل] and *hamkari adli wa qazaaee du janeba* [همکاری عدلی و قضایی دوجانبه].[45] The literal translation of the first term is "mutual cooperation" and the second translates most closely in English as "mutual justice and judicial cooperation." Surprisingly, neither the 2014 Anti-Money Laundering Law nor the 2014 Anti-Financing Terrorism Law offers any definitions for the above terms. To avoid confusion, this chapter will consistently use "mutual legal assistance" as the translation for all the above terminology.[46]

Fourth, Article 1 of each law provides that the law is enacted based upon Article 7 of the Constitution.[47] Although no reference is made to any specific convention, the broad implication is certainly that one of the goals of the laws is to observe Afghanistan's obligations under international conventions by incorporating the relevant international provisions into domestic law.

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[42] *See e.g.* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 55 & 59.

[43] *See id.* at art. 56.

[44] *See id.* at art. 57

[45] *See* ANTI-FINANCING TERRORISM LAW, *supra* note 26 at art. 6.

[46] Based on the author's understanding and observation, any inconsistencies may be ascribed to lack of capacity in the relevant legislative agencies. Recall the discussion of similar problem in Indonesian legislation footnote 11, Chapter five.

[47] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 1; ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 1; ANTI-FINANCING TERRORISM LAW, *supra* note 26 at art. 1.

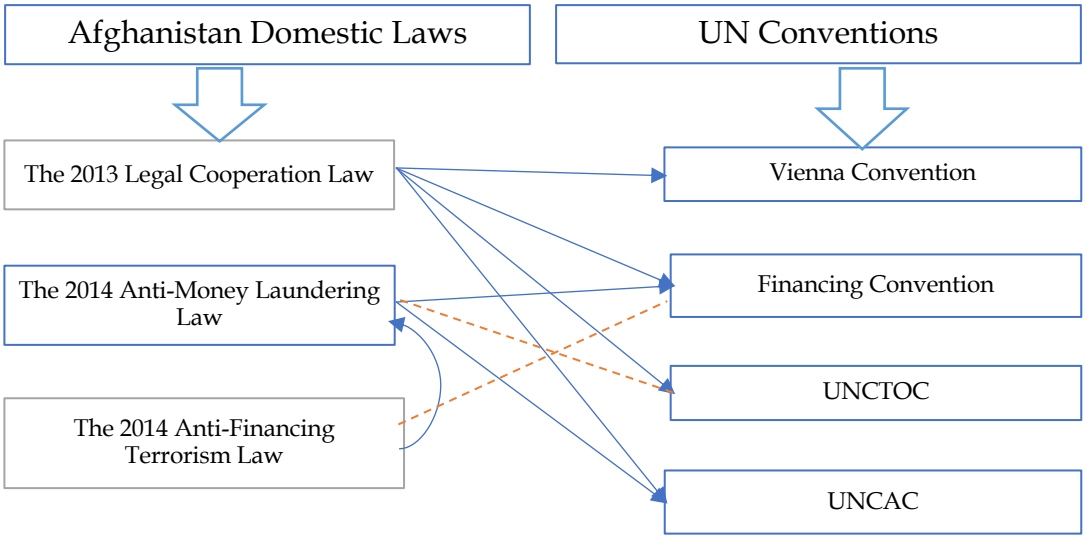
Among the three laws, only the 2014 Anti-Financing Terrorism Law identifies complying with the requirements of the Financing Convention as one of its goals,[48] but as noted, the law does not have much in the way of mutual legal assistance provisions. The other two laws do not reference any conventions.

Fifth, since the 2013 Legal Cooperation Law is the only law that applies broadly regardless of criminal subject matter (see Figure 6), this law can satisfy a requirement that exists under any of the UN Suppression Conventions, provided that the law has a corresponding mutual legal assistance provision. Accordingly, this chapter focuses on the extent to which that law has provisions that satisfy one or more of the requirements of the UN Suppression Conventions. However, if a specific convention, such as the UNCAC, might have a requirement (concerning money laundering cases) that is not met under the general provisions of the 2013 Legal Cooperation Law, the extent of compliance with that requirement will then be further examined under the 2014 Anti-Money Laundering Law.[49]

[48] *See* ANTI-FINANCING TERRORISM LAW, *supra* note 26 at art. 2 (1).

[49] It will be elucidated in footnotes if a requirement exists in several conventions (e.g. UNCTOC, UNCAC, and Financing Convention), and it is met by both the general provisions of the 2013 Legal Cooperation Law and the specific provisions of the 2014 Anti-Money Laundering Law.

Figure 6. The relationship between the relevant Afghan laws and the UN Suppression Conventions



Sixth, the three laws fail to differentiate between formal and informal mutual legal assistance or between mutual legal assistance and law enforcement cooperation. Therefore, this chapter will neither address the classifications of mutual legal assistance as formal or informal nor the sequence of obligations under the UN Suppression Conventions. Instead, this chapter will break down the provisions of the laws into three segments to examine the relevant mutual legal assistance provisions of the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law and assess their compliance with the UN Suppression Conventions,

Section A analyzes provisions related to Afghanistan's obligations under the UN Suppression Conventions by comparing relevant domestic provisions with its international obligations to assess the extent of Afghanistan's compliance. Section B addresses domestic provisions that correspond to non-mandatory measures under the UN Suppression Conventions. These provisions will be compared with the relevant non-mandatory measures recommended by the UN Suppression Conventions to assess the extent of their incorporation into domestic mutual legal assistance mechanisms. Section C examines Afghanistan's domestic law provisions that

relate neither to the obligations nor to non-mandatory measures under the UN Suppression Conventions. These provisions are very important as they regulate certain domestic procedures related to mutual legal assistance.[50]

A. Provisions Related to the International Obligations and Assessment of Compliance

The 2013 Legal Cooperation Law and the 2014 Anti-Money Laundering Law contain multiple provisions that correspond to the mutual legal assistance obligations of Afghanistan under the UN Suppression Conventions. However, in order to assess the extent of Afghanistan's compliance with its obligations under the UN Suppression Conventions, this dissertation compares and contrasts the general provisions of the 2013 Legal Cooperation Law with Afghanistan's obligations under the conventions.[51] The results of this assessment will be classified as full compliance, partial compliance or non-compliance. For the purposes of this dissertation, full compliance means the relevant Afghan laws fully met the requirements of the UN Suppression Conventions for an obligation. Partial compliance means the provisions of the relevant Afghan laws either embody only part of the UN Suppression Conventions' requirements related to an obligation, or their language is not as clear as the conventions require. Non-compliance means that the Afghan laws[52] either lack any provisions concerning the relevant obligations, or their provisions fail to substantially correspond to the conventions' obligations.

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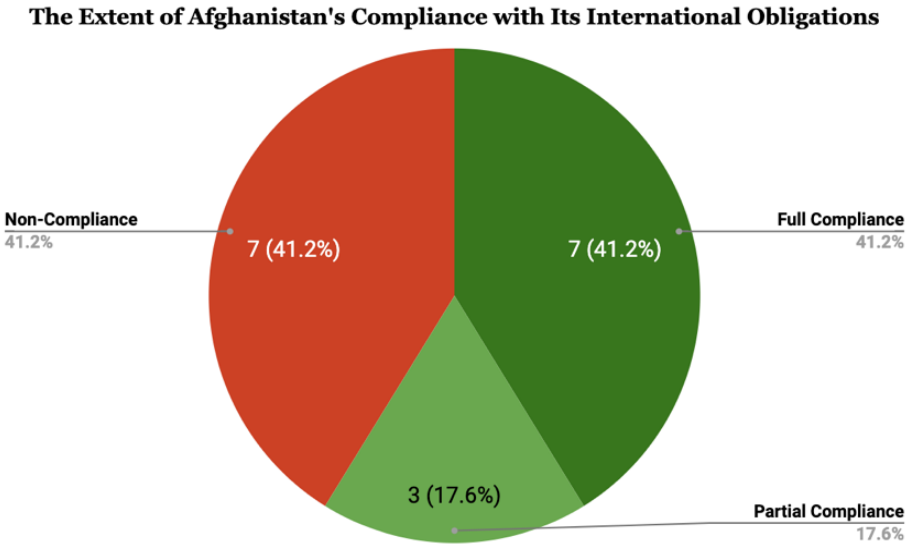
[50] *See infra* Chapter Six.

[51] Similar or identical provisions of the 2014 Anti-Money Laundering Law will largely be mentioned in footnotes unless a provision of that law corresponds to an obligation under the Financing Convention and UNCAC (crimes related to money laundering and terrorism financing) which might not be addressed by the 2013 Legal Cooperation Law.

[52] Under non-compliance, both the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law come into play. The reason is that "non-compliance" is recognized as a situation where none of the two laws has any provisions in relation to an obligation under the UN conventions. As such, regardless of their general or specific authority, both should lack provisions with respect to an obligation.

As illustrated in Figure 7, Afghanistan has partially or fully complied with slightly less than 60% of its obligations under the UN Suppression Conventions. Figure 8 lists the 17 international obligations identified in Chapter Five and compares the relevant provisions of the 2013 Legal Cooperation Law.[53] A detailed explanation follows Figure 8.

Figure 7. Percentage of Afghanistan's compliance with its international obligations



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[53] *See supra* Chapter Five.

Figure 8. An overview of Afghanistan's compliance under the UN Suppression Conventions

No	Obligations	The 2013 Legal Cooperation Law		
		Full Compliance	Partial Compliance	Non-Compliance
1	Determining specific purposes for mutual legal assistance			
2	Prohibiting bank secrecy as grounds for declining mutual legal assistance			
3	Requirements regarding the content of mutual legal assistance requests			
4	Using information or evidence only for the requested purposes			
5	Confidentiality requirement			
6	Providing mutual legal assistance for purposes of confiscation and recovery of assets			
7	Enabling national authorities to cooperate and exchange information (particularly in money-laundering cases)			
8	Setting the scope of MLATs			
9	Making requests in writing			
10	Speedy execution of requests			
11	Providing mutual legal assistance where offenses involve a legal person			
12	Following the conventions' procedures in the absence of an MLAT			
13	Designating a central authority			
14	Making the requested state bear the ordinary costs of executing a request			
15	Providing copies of publicly available records, documents, or information			
16	Determining the scope of law enforcement cooperation			
17	Establishing special investigative techniques			

The relevant provisions of the law are analyzed in detail below.

1. Full Compliance

As noted above, Afghanistan has fully complied with seven of its obligations. The following sections detail the relevant provisions of the 2013 Legal Cooperation Law to demonstrate specifically how Afghanistan has fully complied with each obligation under the UN Suppression Conventions.

a. Determining Specific Purposes for Mutual Legal Assistance

Like the conventions, the 2013 Legal Cooperation Law identifies specific purposes requiring the use of mutual legal assistance.[54] The provisions of the law are very close to the provisions of the UN Suppression Conventions.[55] According to the law, mutual legal assistance could be sought or provided for the following purposes:

1. Collecting evidence and taking statements of persons[56]
2. Assisting in submission of detained persons and summoning other people to obtain evidence[57]
3. Sending court orders for execution[58]
4. Executing searches and seizures and confiscating assets[59]

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[54] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1). The 2014 Anti-Money Laundering Law embodies similar provisions about the purposes of mutual legal assistance. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2)).

[55] *See* Chapter Five.

[56] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1) (1). Similar provision exists in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (1)).

[57] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1) (2). The 2014 Anti-Money Laundering Law contains similar provision. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (2)).

[58] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1) (3). Similar provision exists in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (3)).

[59] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1) (4). Similar provision is present in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (4)).

5. Examining objects and locations[60]
6. Providing information and evidence[61]
7. Providing the original or certified copies of documents and records such as bank statements and other business documents[62]

The 2014 Anti-Money Laundering Law adds the following purposes pertaining to offenses related to money laundering and financing of terrorism:[63]

1. Identifying or tracing proceeds of crime, assets, and instrumentalities for the purpose of collecting evidence or confiscating them[64]
2. Freezing or seizing and other temporary measures[65]
3. Executing investigative measures and special investigative techniques including undercover operations and controlled delivery[66]
4. Other purposes that are not contrary to Afghan law.[67] (this provision is present in both law).

The above list follows the UN Suppression Conventions so closely[68] that it is safe to conclude that Afghanistan has fully complied with its obligation to determine specific purposes for mutual legal assistance.

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[60] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1) (5). The 2014 Anti-Money Laundering Law embodies similar provision. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (5)).

[61] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1) (6). Similar provision exists in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (6)).

[62] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1) (7). The same requirement is present in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (7)).

[63] These purposes correspond to the sources of obligation under the UNOCTC and UNCAC. The subject matter in both conventions are offenses related to money laundering.

[64] ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (8).

[65] *Id.* at art. 56 (2) (9).

[66] *Id.* at art. 56 (2) (10).

[67] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1) (8); ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56 (2) (11).

[68] *See* Chapter Five.

b. Bank Secrecy Cannot Be Used as Grounds for Refusing Mutual Legal Assistance

The 2013 Legal Cooperation Law prohibits Afghan authorities from using bank secrecy as grounds for refusing mutual legal assistance requests.[69] This demonstrates complete compliance with Afghanistan's obligation under the UN Suppression Conventions[70] to forbid bank secrecy as a basis for declining mutual legal assistance requests.

c. Requirements Regarding the Content of Mutual Legal Assistance Requests

The 2013 Legal Cooperation Law contains comprehensive provisions regarding the underlying content of mutual legal assistance requests.[71] Under the law, some of the most important requirements[72] for the content of a mutual legal assistance request include:

1. The identity of the requesting authority[73]
2. The identity of the requested authority[74]

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[69] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38 (2). The same provision exists in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 57 (3)).

[70] *See* Chapter Five.

[71] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 28. The 2014 Anti-Money Laundering Law contains similar provisions with respect to content of mutual legal assistance requests. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60) There is a small issue with the 2013 Legal Cooperation Law in terms of content of mutual legal assistance request. (*See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 28 (1)) The problem is that the law conflates content of mutual legal assistance requests with content of extradition requests. The law indicates that a mutual legal assistance request should have some additional requirements (as noted above) in addition to the requirements set for an extradition request. (*See id*.) This conflation complicate implementation of the law pertaining to preparing requests for mutual legal assistance and extradition. The 2014 Anti-Money Laundering Law, in contrast, has clear and straightforward requirements for content of mutual legal assistance requests. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60.) While the 2014 Anti-Money Laundering Law does not suffer from this defect, it applies only re: anti-money laundering cases.

[72] Other requirements not listed above include: date of request, final date of expected delivery of information, and information about property, financial documents, and bank accounts in question. (*see* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 28 (2) & (3)). According to the 2014 Anti-Money Laundering Law a request should also contain name and position of the person who carries out investigation or prosecution. (ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60 (1) (2)).

[73] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 10 (1) (1). The same requirement is present in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60 (1) (1)).

[74] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 10 (1) (2). The same requirement is present in the 2014 Anti-Money Laundering Law. (ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60 (1) (4)).

3. The required information, including evidence and documents related to the case[75]
4. A detailed description of the crime committed[76]
5. Information about the persons in question, including the accused, witnesses, their locations, and the questions that will be asked of them[77]
6. Specifying the applicable provisions of the relevant laws, agreements, or conventions upon which mutual legal assistance is requested[78]
7. A description of the legal assistance requested[79]
8. If information in the request is insufficient to reach a decision, the requested state can ask the requesting state to provide additional information and documents.[80]

The law further provides that in certain circumstances a request should contain a description of the facts and evidence of the case.[81] For instance, in confiscation cases, the request should contain information about the facts, reasoning, and the law upon which a court issued an order of confiscation.[82] In addition, a request should seek information about the rights of third parties who may have a claim on the assets in question.[83]

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[75] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 10 (1) (4). Similar provision is present in the 2014 Anti-Money Laundering Law. (See ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60 (1) (4) & (5)).

[76] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 10 (1) (4).

[77] *Id*. at art. 28 (1) (4).

[78] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 10 (1) (7). The 2014 Anti-Money Laundering Law embodies similar provision. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60 (1) (8)).

[79] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 28 (1) (1). The 2014 Anti-Money Laundering Law contains similar provision. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60 (1) (9)).

[80] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 28 (3) (4).

[81] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 28 (2) & (3). Similar provision exists in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 60 (2)).

[82] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 28 (2) (2) & (3) (1)

[83] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 28 (2) (2) & (3).

Comparing the requirements of the law with those of the conventions concerning the content of mutual legal assistance requests, the law lays out more than the minimum contents required by the conventions.[84] Accordingly, Afghanistan again has fully complied with the requirements of the conventions regarding the content of mutual legal assistance requests.

d. Using Information or Evidence only for the Requested Purposes

According to the 2013 Legal Cooperation Law, Afghan authorities are prohibited from using evidence or documents produced through mutual legal assistance beyond the purposes specified in the request.[85] Like the conventions,[86] the law permits authorities to use evidence for other purposes in exceptional circumstances, but only if they receive the prior consent of the requested state.[87] According to the law, any proceedings undertaken by Afghan authorities that violate the above provisions will be deemed null and void.[88] However, the law does not indicate whether a foreign country would be allowed to use the evidence provided by Afghanistan beyond the purposes specified in a request; this is determined by the domestic law of the requesting state.

As explained above, the provisions of the 2013 Legal Cooperation Law contain all the requirements of the UN Suppression Conventions[89] regarding prohibition on the use of information or evidence beyond the identified purposes. Therefore, Afghanistan is in full compliance.

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[84] *See* Chapter Five.

[85] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 46. It should be noted that the 2014 Anti-Money Laundering Law does not contain any provisions on the above requirement.

[86] *See* Chapter Five.

[87] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 46.

[88] *Id*.

[89] *See* Chapter Five.

e. Confidentiality Requirement

The 2013 Legal Cooperation Law requires Afghan authorities to preserve the confidentiality of a request if such confidentiality is invoked by the requesting state.[90] If it is not possible to preserve confidentiality, Afghan authorities must swiftly inform the requesting state.[91] The provisions of the law are identical with the provisions of the UN Suppression Conventions,[92] so Afghanistan has fully met the confidentiality requirement.

f. Providing Mutual Legal Assistance for Purposes of Confiscation and Recovery of Assets

According to the 2013 Legal Cooperation Law, the government of Afghanistan can request a foreign country to return assets or property confiscated by a competent Afghan court.[93] Similarly, Afghanistan can accept such a request from a foreign country.[94] After receiving a request, the government of Afghanistan will render the confiscated assets (confiscated per court order in the requesting state) to the requesting state.[95] If the assets in question are real property, the government will sell the properties at auction and transfer the proceeds to the requesting state.[96] As an exception to the rule, the 2013 Legal Cooperation Law permits Afghan courts to refuse or postpone returning confiscated assets to a foreign country if the assets in question are subject to seizure or related to another case under consideration in Afghanistan.[97] The provisions of the Afghan law thus mirror

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[90] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 44. The 2014 Anti-Money Laundering Law contains the same requirement. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 62).

[91] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 44. The same requirement exists in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 62).

[92] *See* Chapter Five.

[93] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 31.

[94] *Id*.

[95] *Id*.

[96] *Id*. at art. 33.

[97] *Id*. at art. 37.

the requirements of the conventions[98] with respect to providing legal assistance for the purposes of confiscation and asset recovery. As a result, Afghanistan has fully met its obligation under the conventions.

g. Enabling National Authorities to Cooperate and Exchange Information (Particularly in Money Laundering Cases)

Consistent with the requirements of the UN Suppression Conventions[99] and FATF recommendations,[100] the 2014 Anti-Money Laundering Law established FinTRACA. This center is an autonomous department within the Central Bank.[101] The law authorizes the center to exchange financial intelligence information and cooperate with its foreign counterparts in money laundering and financing of terrorism cases.[102] The law contains very detailed and comprehensive provisions on the role of the center and how it should operate.[103] In addition, the 2013 Legal Cooperation Law identifies the center as a competent authority to execute mutual legal assistance requests.[104] As such, Afghanistan has fully met its obligation to enable its national authorities to cooperate with their foreign counterparts in combating money laundering cases.

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[98] *See* Chapter Five.

[99] *See id.*

[100] *See id.*

[101] *See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 25. It should be noted this is one of few areas where the above provision of the 2014 Anti-Money Laundering Law satisfies the obligation of Afghanistan under the UN conventions. The reason is that the requirement of the UN conventions is exclusively related to money laundering cases.

[102] *See id.* at art. 31.

[103] *See id.* at art. 25-34.

[104] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 29 (1).

2. Partial Compliance

Afghanistan has partially complied with three of its obligations under the UN Suppression Conventions. The following are the obligations with which Afghanistan is only in partial compliance.

a. Setting the Scope of MLATs

Although the 2013 Legal Cooperation Law generally obligates Afghanistan's authorities to provide mutual legal assistance,[105] it does not clearly lay out the scope of mutual legal assistance. The UN Suppression Conventions require Afghanistan to provide "the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings"[106] in relation to the crimes covered by the conventions. The absence of a clear scope for mutual legal assistance indicates that Afghanistan at best has met its obligation only partially.

b. Making Requests in Writing

The language of the 2013 Legal Cooperation Law is not particularly clear about the requirement that requests be made in *writing*. For instance, the law provides that the Afghan competent authorities should send mutual legal assistance requests to the MOFA and the MOFA directs the requests to the diplomatic mission of the requested state.[107] According to the law, in urgent and emergency circumstances, an incoming or outgoing request could be channeled through INTERPOL or exchanged directly between the competent authorities of Afghanistan and foreign

[105] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 29.

[106] *See e.g.* United Nations Convention against Corruption (UNCAC), at art. 46 (1) (entered into force Dec. 14, 2005) [hereinafter UNCAC].

[107] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (2). It can be implied from the language of the provision that request are made in writing by the Afghan competent authorities. However, the law is not explicit about the issue.

countries through postal services or other methods that could produce a written record.[108] These provisions of law are in compliance with part of the requirements of the UN Suppression Conventions. According to the UNCTOC and UNCAC, "[r]equests *shall be made in writing* or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to *establish authenticity*."[109] The Afghan law does not explicitly require that all requests be made in writing. Also, the law does not discuss conditions for establishing authenticity. As such, Afghanistan is only in partial compliance with the relevant obligation.

c. Speedy Execution of Requests

The 2013 Legal Cooperation Law requires the MOFA and other competent authorities to respond to incoming requests within specific time frames.[110] According to the law, upon receiving an incoming request, the MOFA shall direct it to any of the competent authorities (the Ministry of the Interior, AGO, or Supreme Court) within 14 days.[111] The MOFA should make a determination based upon the circumstances of the request as to which competent authority the request should be sent.[112] Then, the designated authority (the Ministry of the Interior, AGO, or Supreme Court) shall consider the case and make a decision based upon the law within 60 days.[113] These time frames could be considered an attempt at speedy execution of requests. However, to determine whether a

[108] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (3). The 2014 Anti-Money Laundering Law contains similar language but extends the postal services and other methods to all circumstances, not limited to urgent situations. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 59 (1)).

[109] *See* United Nations Convention against Transnational Organized Crime, at art. 18 (14) (entered into force Sep. 29, 2003) [hereinafter UNCTOC], United Nations Convention against Corruption (UNCAC), at art. 46 (14) (entered into force Dec. 14, 2005) [hereinafter UNCAC].

[110] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (4) (5).

[111] *Id. at art.* 26 (4).

[112] *See id.*

[113] *Id.* at art. 26 (5).

request is swiftly executed depends in large part upon a requesting state's deadlines but Afghanistan's law does not take into account a requesting State's deadlines as required by the UN Suppression Conventions.[114] As a result, the law has partially complied with the obligation concerning speedy execution of requests. It will be discussed later how the time frames established by the 2013 Legal Cooperation Law are problematic and unrealistic.

3. Non-Compliance

Although Afghanistan has fully or partially complied with many of its obligations, it has failed to meet 7 out of 17 of the conventions' obligations. Below are the obligations with which Afghanistan is in a state of non-compliance.

a. Providing Mutual Legal Assistance Where Offenses Involve a Legal Person

Both the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law do not contain provisions on providing mutual legal assistance in offenses where a legal person is involved. As such, Afghanistan has not met its obligation under the UN Suppression Conventions[115] to establish the provision of mutual legal assistance with respect to crimes that involve a legal person.

b. Following the Conventions' Procedures in the Absence of a Mutual Legal Assistance Treaty

The Afghan laws fail to mandate the Afghan authorities to provide legal assistance based on the mini-MLATs provisions of the relevant international conventions in the absence of a bilateral mutual legal assistance treaty with a country. Instead of requiring the application of the mini-MLATs, the 2014 Anti-Money Laundering Law indicates that in the absence of specific mutual legal assistance agreements, the principle of reciprocity is the sole basis for the government of

[114] *See* Chapter Five.

[115] *See* Chapter Five.

Afghanistan to provide or seek legal assistance.[116] Although the principle of reciprocity may be an alternative basis, it neither corresponds to nor meets the requirements of the UN Suppression Conventions.[117] Moreover, the principle of reciprocity is not exclusive and should not preclude the application of mini-MLATs required by the conventions. Mini-MLATs can play a significant role in the absence of a bilateral treaty because the UN Suppression Conventions have been ratified by almost every country so it is nearly a certainty that both requesting and requested states would be parties to the convention (190 and 186 States are party to the UNCTOC and UNCAC respectively).[118]

c. Designating a Central Authority

Afghan laws fail to designate a central authority to facilitate and effectively execute incoming and outgoing mutual legal assistance requests. Not only do Afghan laws fail to meet this requirement of the UNCTOC and UNCAC,[119] but Afghanistan failed to designate any institution as the central authority when it deposited its instrument of ratification.[120] Instead, Afghan laws only identify domestic competent authorities and require processing of requests through diplomatic channels. As such, the MOFA emerges as a liaison office but has not been designated a central authority. For instance, the 2013 Legal Cooperation Law and the 2014 Anti-Money Laundering

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[116] ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 55 (3).

[117] *See* Chapter Five. Among other things, the provision of mutual legal assistance on the basis is wholly discretionary; this clearly leaves Afghanistan non-compliant, as a major purpose of mutual legal assistance is to introduce a mandatory basis for co-operation.

[118] United Nations Convention against Transnational Organized Crime, United Nations Treaty Collections, , https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en (last updated Dec. 12, 2019); Signature and Ratification Status, UNODC, https://www.unodc.org/unodc/en/corruption/ratification-status.html (last updated Jun. 26, 2018).

[119] *See* Chapter Five.

[120] *See generally United Nations Convention against Transnational Organized Crime*, UNITED NATIONS, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12.en.pdf (last visited Feb. 25, 2020). *See* also Executive Summary, UNITED NATIONS 12 (2016), https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1604983e.pdf.

Law provide that the competent authorities (such as the Supreme Court, Ministry of the Interior, or AGO) should send their mutual legal assistance requests to the MOFA.[121] The MOFA then has the responsibility to channel the requests to the respective diplomatic mission of foreign countries.[122] Similarly, if the MOFA receives mutual legal assistance requests from foreign countries, it should send them to the relevant Afghan competent authorities.[123] The laws provide for exceptions in urgent and emergency circumstances: an incoming or outgoing request could be channeled through INTERPOL or directly exchanged between the competent authorities of Afghanistan and foreign countries through postal services or other methods that produce a written/receipt.[124] However, even in exigent circumstances, the government of Afghanistan will not provide a formal response until it receives the request through diplomatic channels.[125]

All the above procedures laid out by the laws are necessary and normal steps for channeling information and requests through diplomatic processes. The role of the MOFA, as the principal agency for managing Afghanistan's foreign relations, in this diplomatic process comes naturally, however, it is not the central authority required by the UN Suppression Conventions.[126] Furthermore, mutual legal assistance procedures have been deliberately structured to remove the process from the hands of diplomats.[127]

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[121] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (2); ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 59 (1).

[122] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (2).

[123] ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 59 (1).

[124] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (3); ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 59 (1).

[125] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (3).

[126] *See* Chapter Five.

[127] Based on Jon Eddy's observation in Indonesia, diplomats tend to 1) move with the speed of molasses, 2) usually would lack necessary criminal law expertise, and 3) obsess over "sovereignty", and see it violated at the drop of a hat.

d. The Requested State Must Bear the Ordinary Costs of Executing a Request

According to the 2013 Legal Cooperation Law and the 2014 Anti-Money Laundering Law, the requesting state shall incur the costs of executing a mutual legal request.[128] This is the opposite of what the UN Suppression Conventions require.[129] According to the conventions, requested states must bear the ordinary costs of executing mutual legal assistance requests. As such, nominally, Afghanistan is in a state of non-compliance with its obligation. That said, as a practical matter, Afghanistan, like many other developing states, may need the support of requesting states to pay the costs of executing mutual legal assistance requests.

e. Providing Copies of Publicly Available Records, Documents, or Information

The 2013 Legal Cooperation Law and the 2014 Anti-Money Laundering Law do not contain a single provision regarding providing copies of records or documents that are available to the public under the Afghan law on access to information.[130] Therefore, Afghanistan has not met its obligation under the UN Suppression Conventions[131] to allow the provision of publicly available records, documents, or information.[132]

f. Determining the Scope of Law Enforcement Cooperation

The applicable Afghan laws do not incorporate the requirements of the UN Suppression Conventions[133] concerning determining the scope of law enforcement cooperation. The

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[128] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 50; ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 64.

[129] *See* Chapter Five.

[130] *See Qanooni Dastrasi Ba Etlaat* [Law on Access to Information], at art. 15, Official Gazette, October 2019, No. 1358 (Afg.).

[131] *See* Chapter Five.

[132] It should be noted that as a matter of law and obligation Afghanistan has not complied with its obligation. However, due to lack of resources and capacity, Afghanistan practically needs other states' assistance with respect to fulfilling the obligation.

[133] *See* Chapter Five.

conventions require Afghanistan to ensure law enforcement cooperation, such as police-to-police cooperation or direct cooperation between other law enforcement authorities. As such, Afghanistan has not complied with this requirement.

g. Establishing Special Investigative Techniques

Finally, Afghanistan's relevant laws fail to comply with the requirements of the UN Suppression Conventions[134] to allow competent authorities to establish and use special investigative techniques, such as controlled delivery, undercover operations, and electronic or other forms of surveillance, if requested through mutual legal assistance requests. The conventions further require that evidence produced via special investigative techniques should be admissible in the courts.

B. Examination and Assessment of Provisions Related to Non-Mandatory Measures

While the two Afghan laws examined in this chapter contain a few provisions that relate to non-mandatory measures, they do not incorporate other non-mandatory measures that are strongly recommended by the UN Suppression Conventions. As illustrated in Figure 9, an examination of the relevant provisions of the 2013 Legal Cooperation Law again reveal a 50/50 split between incorporation of some/all of the non-mandatory measures under the UN Suppression Conventions and a complete lack of incorporation of some non-mandatory measures.[135]

[134] *See id.*

[135] Most of the domestic provisions pertaining to non-mandatory measures stem from the 2013 Legal Cooperation Law. The 2014 Anti-Money Laundering Law contains few provisions that correspond to the non-mandatory measures (which in any event would only be applicable with reference to money-laundering offenses).

Figure 9. Measuring incorporation of the non-mandatory measures in Afghan laws

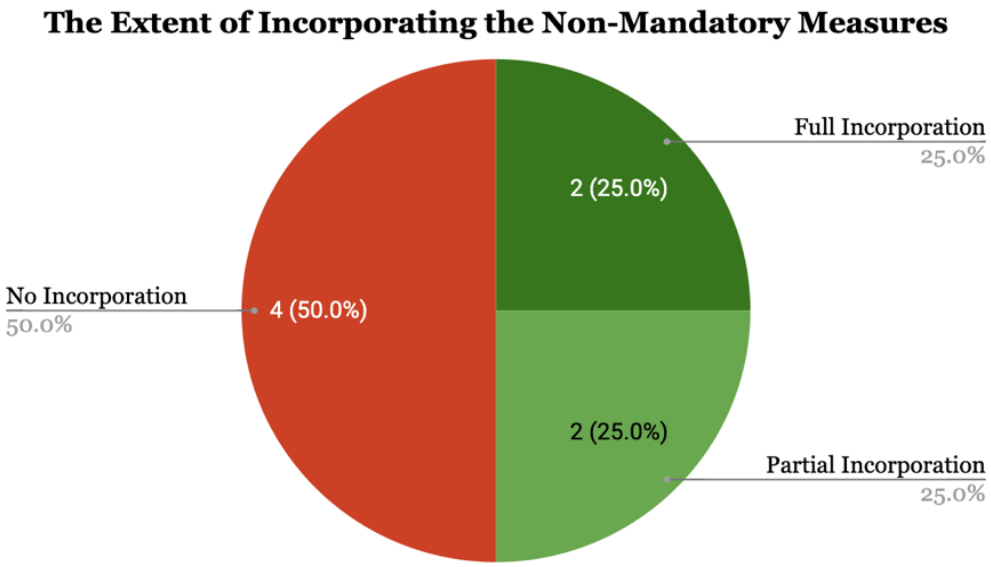

Figure 10. An overview of incorporation of the non-mandatory measures into the Afghan domestic law

No	Non-Mandatory Measures	The 2013 Legal Cooperation Law		
		Full Incorporation	Partial Incorporation	No Incorporation
1	Grounds for refusal			
2	Grounds for postponing mutual legal assistance			
3	Requirements for transfer of a person			
4	Entering into new agreements and arrangements			
5	Communicating information spontaneously			
6	Conducting hearing through videoconference			
7	Facilitating cooperation via use of modern technology			
8	Conducting joint investigations			

The relevant provisions of Afghanistan's domestic laws are analyzed in detail below.

1. Full Incorporation

a. Grounds for Refusal

Afghanistan's 2013 Legal Cooperation Law provides a long list of grounds for refusing mutual legal assistance requests.[136] Some of the most important grounds upon which Afghanistan can refuse to provide mutual legal assistance to a foreign country are:

1. The request is not provided in accordance with the laws of the requesting state.[137]
2. The execution of the request will violate the laws of Afghanistan or it will likely harm fundamental public policy and essential interests of the country.[138]
3. A court has already issued a final order about the crime which is the subject of the request.[139]
4. The request requires taking measures that are not allowed under Afghan law or not applicable with respect to the crime in question.[140]
5. The request to execute a court order of a foreign country violates Afghan law.[141]

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[136] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38. The 2014 Anti-Money Laundering Law contains similar provisions. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 57).

[137] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38 (1) (1). Similar provision exists in the 2014 Anti-Money Laundering Law. The law adds that a request may be refused if the legal assistance is sought by an agency which is not a competent authority based upon the laws of the requesting State. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 57 (1) (1)).

[138] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38 (1) (2). The 2014 Anti-Money Laundering Law embodies the same provision. (ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 57 (1) (2)).

[139] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38 (1) (3). Similar provision is present in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 57 (1) (3)).

[140] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38 (1) (4).

[141] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38 (1) (5).

6. There are strong indications that the request arises from discriminatory considerations based on race, religion, nationality, ethnicity, gender, or political beliefs of the person about whom the legal assistance is sought.[142]

In the case of refusal, the 2013 Legal Cooperation Law requires the government of Afghanistan to swiftly inform the requesting state of the grounds upon which the request is denied.[143]

These Afghan domestic law provisions are very similar to the grounds recommended by the UN Suppression Conventions,[144] and thus it is safe to conclude that Afghanistan has fully incorporated the above non-mandatory measures.

b. Grounds for Postponing Mutual Legal Assistance

According to the 2013 Legal Cooperation Law, in circumstances where referring a mutual legal assistance request to the Afghan competent authorities would disrupt ongoing investigations in a case, the AGO can postpone issuing the request to the relevant Afghan authorities.[145] Subsequently the AGO is to inform the requesting state of this decision.[146] Apparently, this provision addresses situations where a request may interfere with proceedings actively under consideration by the Afghan authorities. In a similar provision, the 2013 Legal Cooperation Law indicates that a request for mutual legal assistance could be delayed if the request is related to a crime on which an

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[142] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38 (1) (6). The 2014 Anti-Money Laundering Law contains similar provision. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 57 (1) (4)). In addition to the above bases, the 2014 Anti-Money Laundering Law adds two grounds for refusal in crimes related to money laundering or financing terrorism: (1) The crime listed in the request is not criminalized under Afghan law or it lacks the criminal elements anticipated in Afghan law. In the latter situation, legal assistance could be provided to the requesting State only if the request does not entail mandatory measures, (ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 57 (1) (5)) and (2) the requested measures in connection with money laundering or financing of terrorism cases could not be taken due to the statute of limitations under Afghan law or the laws of the requesting State. (*Id.* at art. 57 (1) (6)).

[143] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 38 (3).

[144] *See* Chapter Five.

[145] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 45. Similar provision is present in the 2014 Anti-Money Laundering Law. (*See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 63).

[146] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 45.

investigation has been opened by the Afghan authorities. [147] These provisions of the laws are sufficiently similar to the UN Suppression Conventions[148] and contain all the requirements of the non-mandatory measures as to be deemed compliant.

2. Partial Incorporation

The two Afghan laws which have partially incorporated other non-mandatory measures recommended by the UN Suppression Conventions are examined below.

a. Requirements for Transfer of a Person

According to the 2013 Legal Cooperation Law, for the purpose of providing testimony before the competent authorities of a requesting state, a convict can temporarily be transferred to a foreign country.[149] However, such transfer is prohibited if the convict's presence is required in a case under consideration in an Afghan court or if the duration of the transfer and return would exceed the remaining sentence of the person.[150]

This measure is determined to be only partially incorporated because the law does not condition the transfer upon the convict's consent. The UN Suppression Conventions prohibit the requested state from transferring persons without their free and informed consent.[151] In addition, the law fails to incorporate a separate aspect of the UN Suppression Conventions' measure[152] that prohibits a requesting state from requiring the return of the transferred person to the requested state through the extradition process. As such, the measure is only partially incorporated into Afghan domestic law.

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[147] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 36 (1).

[148] *See* Chapter Five.

[149] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 40 (1).

[150] *Id*. at art. 40 (2) (3).

[151] *See* Chapter Five.

[152] *Id.*

b. Entering into New Agreements and Arrangements

The 2013 Legal Cooperation Law does not explicitly encourage the government of Afghanistan to enter into new bilateral or multilateral agreements as recommended by the UN Suppression Conventions.[153] However, the law does obligate the MOFA to follow the provisions of that law when it enters into mutual legal assistance agreements with foreign countries.[154] In addition, Afghanistan has ratified the SAARCC and signed bilateral agreements with Iran and UAE. Therefore, Afghanistan has partially, even if not fully, incorporated the objectives of the measure.

2. Measures Not Incorporated

Both of these Afghan laws[155] fail to incorporate several non-mandatory measures of the conventions, as detailed below.

a. Communicating Information Spontaneously

The relevant Afghan laws do not include any provisions implementing the UN Suppression Conventions' recommendation[156] to authorize Afghan authorities to share information with foreign countries spontaneously or without prior request. Consequently, Afghanistan has not incorporated this crucial measure into its domestic law.

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[153] *See* Chapter Five.

[154] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 49.

[155] Under this section (no incorporation), both laws should be analyzed because even if the 2014 Anti-Money Laundering Law would have a provision concerning a non-mandatory measure, it would account for partial incorporation.

[156] *See* Chapter Five.

b. Conducting Hearings Through Videoconference

Another important measure recommended by the UN Suppression Conventions,[157] but not incorporated into the Afghan laws, is the power to conduct hearings through videoconference. As explained in the previous chapter, this measure can increase efficiency and be critical to accessing witnesses and experts that live abroad and cannot attend court in person.[158] Due to the extent these methods can reduce costs, their absence is particularly to be regretted in a poor country with weak public finances.

c. Facilitating Cooperation via Use of Modern Technology

Unfortunately, the Afghan laws do not incorporate the UN Suppression Conventions' measure[159] that permits authorities to use modern technology in providing mutual legal assistance. Modern technology, such as reliable databases, e-mail, and other applications, can facilitate cooperation swiftly and effectively.[160]

d. Conducting Joint Investigations

Finally, the Afghan laws do not incorporate the measure recommended by the UN Suppression Conventions[161] to allow Afghan authorities to conduct joint investigations or establish bodies for

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[157] *See* Chapter Five.

[158] Domestically, the Afghan Criminal Procedure Code allows taking witness's testimony through videoconference. (*See Qanooni Ejra'at Jazaee* [Criminal Procedure Code], art. 53 (3), Official Gazette, May 2014, No. 1132 (Afg.)) This will make it easier to extend the measure for cross-border videoconference.

[159] *See* Chapter Five.

[160] There is no indication that Afghan law would prohibit using modern technology. Quite to the contrary, it can be implied from the Afghan Criminal Procedure Code that using modern technology may not violate any law. (*See Qanooni Ejra'at Jazaee* [Criminal Procedure Code], art. 53, Official Gazette, May 2014, No. 1132 (Afg.)) The author observed in the field that, even domestically, judges and prosecutors face various challenges due to lack of accessing and using modern technology. For instance, judges have complained that they have to send their draft opinions to other judges in nearby courts through courier, as the courts do not provide e-mail/internet (and many judges don't have personal e-mail/internet). Also, prosecutors, and judges have complained that they need to travel in person to other provinces to obtain evidence from prosecutors in those other provinces, since they do not have court e-mail to request evidence from prosecutors at other courts.

[161] *See* Chapter Five.

conducting joint investigations in collaboration with the competent authorities of foreign countries.[162]

The 2013 Legal Cooperation Law only permits observation by a competent law enforcement officer of a foreign country in an investigation or trial in Afghanistan in order to obtain information and assurances regarding the investigation or trial process.[163] The law requires that such an officer should be assigned by a requesting state.[164]

C. Provisions Related to Domestic Mutual Legal Assistance Procedures

There are many provisions in Afghanistan's 2013 Legal Cooperation Law that lay out domestic procedures pertaining to mutual legal assistance mechanisms. These provisions do not correspond to any of the obligations or to the non-mandatory measures under the UN Suppression Conventions. Instead, they regulate internal processes, specify competent authorities, and characterize the conditions and limits within which mutual legal assistance requests should be initiated or responded to. Below are the most important provisions of the law that address specific domestic issues.

1. Competent Authorities That Can Authorize/or Respond to A Mutual Legal Assistance Request

The 2013 Legal Cooperation Law is inconsistent when it comes to specifying competent authorities with the ability to authorize and/or provide responses to a mutual legal assistance request. In Article 26, the law vests the power to authorize an outbound mutual legal assistance

[162] Since many Afghan criminal networks extend into wealthy countries (UAE, Europe, etc.), it seems as though joint investigation authority might leverage the financially-strapped Afghan authorities utilizing resources of wealthier countries.

[163] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 41. Basically, the foreign officer is only an observer but not a collaborator.

[164] *Id*.

request in three institutions: the MOI, AGO, and High Council of the Supreme Court.[165] The law implies that each of these three institutions can authorize a mutual legal assistance request when a request is brought before them by their sub-agencies.[166] However, in Article 29, when discussing the competent authorities with the responsibility to execute an inbound request,[167] the law specifies *four* institutions that can determine the jurisdiction of their line sub-agencies to execute incoming mutual legal assistance requests.[168] In addition to the three institutions named above, the article adds the Central Bank as another competent authority.[169] There is no stated reason why the law only recognizes the Central Bank as a competent authority to execute *incoming* requests but not as a competent authority with the power to authorize *outgoing* requests. One possible explanation is that the Central Bank (particularly its FinTRACA unit) is not considered a law enforcement agency and therefore does not have as extensive authority as the three other institutions.[170] However, as discussed below, FinTRACA regularly exchanges financial intelligence information with its foreign counterparts in accordance with the 2014 Anti-Money Laundering Law.[171]

In determining the competent authorities, the 2013 Legal Cooperation Law appears to follow the distinction between the three stages of a case set forth in the Afghan Constitution and the Afghan Criminal Procedure Code (CPC), establishing jurisdiction for each institution over a corresponding stage of the case. This division of authority applies to both outgoing and incoming

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[165] *See id.* at art. 26 (1).

[166] *See id.*

[167] *See id.* at art. 29.

[168] *See id.*

[169] *See id.*

[170] FinTRACA is responsible to receive and analyze reports from financial institutions about suspicious transactions to track and determine illegal financial flows such as money laundering. It does not have much enforcement authority.

[171] *See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 31.

requests.[172] Based on Afghan law, from the beginning of a case until the issuance of the court's final decision, a case will go through three stages: discovery, [173] investigation[174] and prosecution, and trial.[175]

Over each stage of a case, one of the three authorities mentioned above (except the Central Bank which has authority only in money laundering cases), has an exclusive power and responsibility. For instance, pursuant to the Constitution of Afghanistan and Police Law, the discovery of a crime is one of the main functions and responsibilities of the police,[176] and the MOI is the flagship institution that leads and manages the national police.[177] Similarly, the Constitution vests the responsibility for investigation and prosecution of crimes in the AGO.[178] Finally, the Constitution gives exclusive authority to issue judgment in criminal cases to the courts.[179]

Against this backdrop, it appears that the 2013 Legal Cooperation Law determines these institutions to be competent authorities based on their investigative authorities and involvement in every phase of a criminal case as mandated by the Constitution and other relevant laws of

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[172] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 29.

[173] Discovery of a crime involves a preliminary investigation by police and is defined as taking measures for the purpose of preventing the commission of crimes; detecting perpetrators, methods and motives of committing crime; specifying the place of occurrence; and preserving evidence and instrumentalities of the crime. (*Qanooni Ejra'at Jazaee* [Criminal Procedure Code], art. 4 (1), Official Gazette, May 2014, No. 1132 (Afg.) [hereinafter CRIMINAL PROCEDURE CODE]

[174] Investigation is defined as conducting a thorough inquiry into a criminal incident, collecting information and evidence via interrogating the accused, taking witness testimony, analyzing the gathered evidence and information in order to establish the occurrence of a crime and its perpetrators, and charging the accused person in accordance with the law. (CRIMINAL PROCEDURE CODE, *supra* note 173 at art. 4 (4)).

[175] Trial is defined as consideration of the indictment, the defendant's defense, and issuance of a final decision in accordance with law by a competent court. (CRIMINAL PROCEDURE CODE, *supra* note 173 at art. 4 (9)).

[176] *See Qanooni Asasi Afghanistan* [The Constitution of Afghanistan], art. 134 (1), Official Gazette, Extraordinary Issue, January 2004, No. 818 (Afg.) [hereinafter THE CONSTITUTION]; *Qanooni Police* [Police Law], art.5 (4), Official Gazette, August 2009, No. 994 (Afg.).

[177] *See* Police Law, *supra* note 176 at art. 3 & 4 (1).

[178] *See* THE CONSTITUTION, *supra* note 176 at art. 134 (1).

[179] *See id.* at art. 131; CRIMINAL PROCEDURE CODE, *supra* note 173 at art. 178.

Afghanistan. This suggests that the MOI, AGO, or the High Council of the Supreme Court respectively can authorize outgoing mutual legal assistance requests, depending on whether a case is in discovery, investigation or trial stage.[180]

Although the law only establishes jurisdiction of each competent authority over authorization of outgoing requests without much guidance, it provides greater detail regarding jurisdiction for executing incoming requests. To facilitate the execution of an incoming mutual legal assistance request, Article 29 of the 2013 Legal Cooperation Law provides partial guidance as to how the four institutions should determine the jurisdictional authority of their sub-agencies when they receive a request.[181] According to this article, in the *discovery stage*, jurisdiction lies with the police department in whose territory the crime was committed, or with FinTRACA of the Central Bank.[182] As such, if a case is in the discovery stage, the MOI should refer a mutual legal assistance request to the police department with territorial jurisdiction over the crime; in money laundering cases, the Central Bank may refer the request to FinTRACA. In the *investigation stage*, jurisdiction resides with the prosecution department stationed where the crime was committed, or the department with territorial jurisdiction over the assets in question.[183] Lastly, at the trial stage, jurisdiction rests with the court located where the crime was committed or with the court that has territorial jurisdiction over the assets in question.[184]

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[180] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1).

[181] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 29. The language of the Article is not clear about incoming or outgoing requests. However, it can be construed that the Article is discussing executing mutual legal assistance requests not initiating a request. As such, executing a request usually relates to an incoming request.

[182] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 29 (1).

[183] *See id.* at art. 29 (2).

[184] *See id*. at art. 29 (3).

It is highly relevant that the CPC establishes the time frame for each stage of a case.[185] These time frames are extremely important because they have significant implications for deciding whether to use or not to use mutual legal assistance mechanisms in transnational criminal cases. According to the Code, the police must deliver a case to the prosecution within 72 hours if a suspect or suspects are in detention.[186] This means that the period for discovery only lasts 72 hours if a suspect has been detained.[187] Regardless of whether or not a suspect has been detained, the police must inform the relevant prosecution department of the discovery within 24 hours.[188] Then, a prosecutor must complete investigation and prosecution within 27 days for misdemeanors and 75 days for felonies.[189] In situations where a suspect has not been detained, the Attorney General can extend the time frames to 90 days for misdemeanors and 180 days for felonies.[190] Regarding the permissible duration of trials, the primary court must reach a final decision in the case within 30 days if an accused person is in detention.[191]

Finally, it should be noted that even though the Constitution and other laws distinguish various stages in a case, the stages themselves are not always clearly defined and may overlap. For instance, according to the CPC, courts can have semi-investigative authority during trial, including returning a case to the prosecution for further investigation.[192] Moreover, this code recognizes the

[185] *See e.g.* CRIMINAL PROCEDURE CODE, *supra* note 173 at art. 87 (1) & 149 (1).

[186] *See id.* at art. 87 (1).

[187] *See id.*

[188] *See id.* at art. 80 (3).

[189] *See id.* at art. 149 (1).

[190] *See id.* at art. 149 (3).

[191] *See id.* at art. 101 (1) (1).

[192] *See id.* at art. 177 & 202 (4) (2).

National Directorate of Security (an intelligence agency) as an additional institution with discovery authority besides the police.[193]

2. Conditions for Providing Legal Assistance

According to the 2013 Legal Cooperation Law, legal assistance will be provided only after three conditions are met. First, the action in question should be a crime punishable by more than a year based on the laws of both Afghanistan and the requesting state.[194] Second, the requesting state should be obligated to observe the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) during its investigation and trial processes.[195] Third, Afghanistan or the requesting state should be the location where the accused person has been detained or the crime took place, OR the accused person or victim should be a citizen of Afghanistan or the requesting state.[196] It should be noted, however, that the law conflates the conditions for providing mutual legal assistance with conditions for extradition in different ways.[197] For instance, the requirement to observe the ICCPR and UNCAT comes from conditions for extradition.[198] However, in a later article, the law links that condition to mutual legal assistance as well.[199] This may create confusion for the relevant authorities and complicate implementation.

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[193] *See e.g. id.* at art. 80 & 81.

[194] EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 11 (1) (2).

[195] *Id*. at art. 11 (1) (3); The International Covenant on Civil and Political Rights (entered into force Mar. 23, 1976); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force Jun. 26, 1987).

[196] *Id*. at art. 27.

[197] *See id*. at art. 27 & 11 (1) (2)-(3).

[198] *See id.* at art. 11 (1) (3).

[199] *See id.* at art. 27.

3. The Role of the AGO in Transmitting and Rendering Evidence and Documents

According to the 2013 Legal Cooperation Law, the AGO can agree to transmit evidence and documents to a requesting State after the following conditions are met:[200]

1. The evidence and documents were the instrumentalities of the crime or they were produced as a result of the crime[201]
2. The crime to which the requested evidence and documents are related is not under judicial consideration in Afghanistan[202]
3. Transmitting the requested evidence and documents would not hurt third parties or they do not carry any value which a third party can rightly claim.[203]

The law implicitly gives the AGO authority to approve transmission of evidence to a foreign country. The law, however, does not explain whether the AGO has the authority to approve transmission of the requested evidence in every stage of a case, or only has the authority during the investigation and prosecution stage. Given that the law provides similar authority to the court,[204] it can be implied that the AGO has the authority only during investigation and prosecution, and it can defer to the courts once the matter has progressed to the courts.

4. The Role of the Courts in Transmitting and Rendering Documents and Assets

The 2013 Legal Cooperation Law also grants courts the authority to approve transmission of documents and assets under certain conditions, which are similar to the conditions for the AGO

[200] *Id.* at art. 30.

[201] *Id.* at art. 30 (1).

[202] *Id.* at art. 30 (2).

[203] *Id.* at art. 30 (3) & (4).

[204] *See id.* at art. 32.

discussed above.[205] Under the law, a court can authorize transmission of evidence and assets of high value not claimed by third parties that are prohibited assets or instrumentalities or proceeds of crime.[206] The law also indicates that the court can temporarily freeze assets for a period of time, not exceeding a month, based on notice from the requesting state before an official request for freezing or confiscating assets is received from the requesting state.[207] These provisions are very similar to the ones explained above with respect to the AGO's authority. The only difference is that the current provisions specify assets and evidence of high value. The law does not address how to determine whether an asset or evidence should be considered "high value," nor describe in which stages of a case the courts have approval authority.

5. Responding to Requests from More Than One Country at Once

The 2013 Legal Cooperation Law anticipates some situations where two or more states request the same evidence or assets and provides some guidance to the AGO and Supreme Court.[208] According the law, if Afghanistan receives requests from more than one state to render the same evidence, documents, or assets related to the same crime, the AGO or Supreme Court should only accept the request of the state whose citizen is the victim of the crime.[209] In another situation, if two or more states request the same evidence, documents, or assets related to different crimes, the AGO or Supreme Court should accept the request of the state whose citizens or assets endured the severest crime or greatest harm.[210] If the requesting states endured the harm equally, the AGO or Supreme Court can render the requested evidence or assets to the state that requested the items

[205] *See id.*

[206] *Id.* at art. 32 (1).

[207] *Id.* at art. 32 (2).

[208] *See id.* at art. 34.

[209] *Id.* at art. 34 (1).

[210] *Id.* at art. 34 (2).

first.[211] While these provisions may be helpful for responding to requests for transfer of assets, they appear rather unnecessary with respect to documents or evidence that can be copied. In such cases, Afghanistan can send certified copies of documents or records to many requesting states at once.

6. Conditions Required to Execute a Foreign Court Order

According to the 2013 Legal Cooperation Law, a court order from a foreign country may be executed in Afghanistan if it is considered a final order (not appealable to higher courts) in the requesting state and the action upon which the person was convicted constitutes a crime under Afghan law.[212] However, the order of the foreign court may not be executed in Afghanistan if (1) a competent Afghan court has already issued a final order on the case,[213] (2) the crime addressed by the foreign court order is not considered a crime in Afghanistan,[214] or (3) the foreign court order is contrary to Afghan law or would disrupt fundamental public policy in the country.[215]

7. Admissibility of Cross-Border Evidence

These two Afghan laws do not provide guidance on the admissibility of cross-border evidence nor whether the method of obtaining evidence would impact its admissibility in court. However, it may be instructive to look to the CPC on inadmissibility of evidence.[216] CPC Article 21 provides that evidence is inadmissible if it is obtained as a result of violating any provision of the CPC or other laws of Afghanistan.[217] If the CPC applies, and, in the author's opinion, it does, then all the

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[211] *Id.*

[212] *Id*. at art. 42.

[213] *Id*. at art. 43 (1).

[214] *Id*. at art. 43 (2).

[215] *Id*. at art. 43 (4).

[216] CRIMINAL PROCEDURE CODE, *supra* note 173 at art. 21.

[217] *Id.*

limitations on admissibility of evidence apply. For instance, when considering witness testimony, an obvious example of inadmissible evidence would be testimony from individuals (such as lawyers or doctors) that have a duty of confidentiality.[218]

III. Bilateral Mutual Legal Assistance Agreements in Criminal Matters

As noted before, according to the field work findings and based on available information on the MOJ's website, Afghanistan has signed a Bilateral Judicial Assistance Agreement with Iran (Agreement Between Afghanistan and Iran) [219] and a Bilateral Mutual Legal Assistance Agreement in Criminal Matters with the UAE (Agreement Between Afghanistan and UAE).[220] The two agreements were approved by Afghanistan's Parliament, signed by the President, published in the Official Gazette, and became law.[221] While these agreements contain innumerable

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[218] *See id.* at art. 26 (1).

[219] *See Muaafeqatnamaee Hamkari Qazaee Bain Jamhori Islami Afghanistan Wa Jamhori Islami Iran* [Judicial Assistance Agreement Between Islamic Republic of Afghanistan and Islamic Republic of Iran], Official Gazette, March 2008, No. 941 (Afg.) [hereinafter AGREEMENT BETWEEN AFGHANISTAN AND IRAN]

[220] *See Muaafeqatnama Meyane Jamhori Islami Afghanistan Wa Dawlate Emarate Mutahedae Arabi Peramone Musaedate Qanooni Mutaqabel Dar Masaele Jenaee* [Agreement Between Islamic Republic of Afghanistan and the United Arab Emirates on Mutual Legal Assistance in Criminal Matters], Official Gazette, July 2010, No. 1029 (Afg.) [hereinafter AGREEMENT BETWEEN AFGHANISTAN AND UAE]

[221]

The Agreement Between Afghanistan and Iran was signed by the Presidents of Afghanistan and Iran in Tehran on April 28, 2006. (*Id.* at art. 31) After two years, the agreement became law in Afghanistan, adopted by the parliament, signed by the President, and published in the Official Gazette of Afghanistan on March 19, 2008. (*Id.)* On the other side, the agreement was adopted by Iran's Parliament and the Expediency Discernment Council and signed by the President in June 2010. (*See* Qanooni *Muaafeqatnamaee Hamkari Qazaee Bain Jamhori Islami Iran Wa Jamhori Islami Afghanistan* [The Law on Judicial Assistance Agreement Between the Islamic Republic of Iran and the Islamic Republic of Afghanistan], ISLAMIC PARLIAMENT RESEARCH CENTER OF THE ISLAMIC REPUBLIC OF IRAN, https://rc.majlis.ir/fa/law/show/782103 (last visited Dec. 3, 2019). The final provisions of the agreement demonstrate that the agreement will enter into force for a period of five years after the last party notifies the other one about completing the necessary legal measures (such as making it the law after adoption by Parliament and signature of president) for the implementation of the agreement. (AGREEMENT BETWEEN AFGHANISTAN AND IRAN supra note 219 at art. 31) After the five years, the enforceability of the agreement will automatically be extended each year unless one of the parties terminates the extension six months before the end of a one-year period. (*Id.)* So far, there is no indication that either party would terminate the annual automatic extension. Therefore, the agreement is deemed enforceable at the present time.
The Agreement Between Afghanistan and the UAE was signed by the Minister of Foreign Affairs of Afghanistan and the Minister of Justice of the UAE in Abu Dhabi on October 19, 2008. (*See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 21 (2)) The date for entry into force of the agreement has been subjected to the internal legislative process of the two Parties. (*See id.* at art. 21 (1).) In Afghanistan, the agreement was adopted by the Parliament on May 30, 2010, signed by the President on June 14, 2010, and published in the

comprehensive provisions and follow standard international law norms (actually better than the Afghan laws do, in particular the Agreement Between Afghanistan and the UAE), they unfortunately have various drawbacks with negative implications for Afghanistan. Comparing the provisions of the two agreements, they have both similarities and differences, the most important of which are noted below. In addition to the differences between the treaties, they contain provisions that contradict the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law which are also highlighted in the following comparison and analysis.

A. Differences Between the Two Agreements

There are many differences between the two agreements. Given that the agreements are signed between Afghanistan and two different countries, some differences are to be expected. However, some stark differences exist that contradict and complicate Afghan domestic legal processes. The inconsistencies addressed below negatively impact implementation.

1. Use of Terminology and Thematic Coverage

The Afghan version of the agreements published on the Official Gazette in Dari and Pashto use different terms for "mutual legal assistance."[222] For instance, the Agreement Between Afghanistan and Iran uses *hamkari qazaee* [همکاری قضایی][223] which literally translates to "judicial assistance." In contrast, the Agreement Between Afghanistan and UAE uses *musaedate qanooni*

Official Gazette on July 1, 2010. (*See id.* at the Presidential Decree at (a).) The author has not been able to determine when the UAE completed its internal legislative process and when the agreement entered into force. However, it is evident from proceedings in the Kabul Bank case that the agreement is currently in force between the two countries. (*See Update of the Kabul Bank Case*, INDEPENDENT JOINT ANTI-CORRUPTION MONITORING & EVALUATION COMMITTEE (MEC) 4 (2018), http://www.mec.af/files/2018_05_12_kabul_bank_update_english.pdf).

[222] It is not known to the author what terms are used in the English version of the agreements. The author was not able to find an English version of the agreements. Nevertheless, the most important versions for Afghanistan are the Dari and Pashto versions which are supposed to be implemented directly by the relevant authorities. Also, despite the differences in terminology, the scope of the two terms are very similar to each other and to the scope of mutual legal instance in the UN conventions.

[223] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1.

mutaqabel [مساعدت قانونی متقابل][224] which literally means "mutual legal aid." The word *musaedat* [مساعدت] carries a connotation of assisting an impoverished person or one in need. These two terms also differ from the plethora of terms found in the laws. When it comes to terminology employed in this area of law, there is absolute chaos.

In terms of thematic coverage, as can be implied from the broad wording of its title, the Agreement Between Afghanistan and Iran covers legal assistance in both *civil and criminal* matters.[225] After reviewing the history of Afghanistan's bilateral agreements with foreign countries, it appears this is the first bilateral agreement to encompass legal assistance in criminal matters between Afghanistan and a foreign country. In contrast, the Agreement Between Afghanistan and the UAE solely deals with mutual legal assistance in *criminal* matters.[226] This is the first bilateral agreement of Afghanistan with a foreign country that *exclusively* addresses mutual legal assistance in *criminal* matters.

2. Competent Authorities and Central Authorities

According to the Agreement Between Iran and Afghanistan, only judicial authorities can carry out and facilitate judicial assistance, even if the subject of a judicial assistance request falls within the jurisdiction of other authorities in the two countries.[227] This agreement designates the Supreme Courts of both countries as the Central Authorities.[228] The agreement requires parties to send their requests directly via the Central Authorities.[229] Establishing direct communication between the

[224] *See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 3.

[225] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1 (1).

[226] *See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 3.

[227] AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 2.

[228] *Id.* at art. 3 (2).

[229] *Id.* at art. 3 (1).

Central Authorities is a crucial and positive development in the agreement. However, the Afghan Supreme Court may not be well situated for the job.

On the other hand, the Agreement Between Afghanistan and the UAE does not designate Central Authorities. The agreement recognizes the Ministries of Justice of both countries as competent authorities.[230] This agreement does not permit direct communication between the two Ministries of Justice. Rather, it requires them to pursue mutual legal assistance requests and other communications through diplomatic channels.[231]

3. Other Differences

Other differences between the two agreements stem from provisions that are unique to each agreement. For instance, the Agreement Between Afghanistan and Iran contains a provision concerning requests to prosecute.[232] According to that provision, if initiated by the request of one party, and in accordance with the national laws of the requested state, either party may prosecute the other party's nationals suspected of crime in the territory of the requesting state.[233]The Agreement Between Afghanistan and Iran also requires both parties to provide the criminal records of individuals upon request[234] or inform each other annually about final court orders related to the nationals of the other party. [235] Finally, the agreement provides that if both states parties consent,

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[230] AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 1.

[231] *Id.* This, as noted previously, is contrary to normal mutual legal assistance thinking, and by and large a recipe for inaction and non-cooperation.

[232] AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 19 (1).

[233] *Id.* Apparently, this provision is about situations where the suspect (who is the national of the Requested State) might commit a crime in the territory of the Requesting State and then escape to his home country. According to the provision, if the Requesting State asks the Requested State to prosecute the suspect, the Requested State should do so.

[234] *Id.* at art. 22. According to the article, if a person is prosecuted and convicted by one of the states parties, information about that person's criminal records should be provided by the requested State upon the request of the requesting State.

[235] *Id.* at art. 23. Based on the article, every year each of the states parties will inform the other about the final court orders related to nationals of the other party.

representatives of either party can be present during the execution of a judicial assistance request.[236] The above provisions do not exist in the Agreement Between Afghanistan and UAE.

Similarly, the Agreement Between Afghanistan and UAE contains many provisions that do not exist in the Agreement Between Afghanistan and Iran. For example, similar to the UN Suppression Conventions but lacking from the Iran agreement, the UAE agreement sets the scope of mutual legal assistance.[237] The agreement lays out several requirements for execution of a request by a requested state.[238] In addition, similar to the UN Suppression Conventions, the agreement limits the use of evidence produced through mutual legal assistance requests. The competent authorities of the requested state can restrict the use of the evidence to the purposes specified in the request.[239] The agreement also contains provisions concerning the transfer of witnesses and detained persons and collection of evidence.[240] According to the agreement, if the presence of a person who resides

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[236] *Id.* at art. 21.

[237] *See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 1 & 3 (1). Article 1 of the agreement requires the two Parties to afford the widest mutual legal assistance possible to one another in investigation, prosecution, and prevention of crimes.

[238] *See id.* at art. 6. The agreement lays out several requirements for requested State to consider during the execution of a mutual legal assistance request. (*Id*.) Accordingly, the competent authority of the requested State shall send the request to the relevant authorities within the country. (*Id*. at art. 6 (1)) It is up to the judicial authorities of the requested State to issue summon, search, seizure, or other whatever order is required to implement a request. (*Id*.) During executing a request, the requested State shall follow its domestic laws and the proceedings required in the request as long as they are not in conflict with the domestic laws. (*Id*. at art. 6 (3)) The requested State shall do its best to protect the confidentiality of requests. (*Id*. at art. 6 (5)) If the requested State is not able to protect the confidentiality, it should notify the Requesting State. (*Id*.) The Requested State has the obligation to report the execution results to the requesting State. (*Id*. at art. 6 (7).

[239] *Id.* at art. 8 (1). The agreement further indicates that the requesting State shall comply with the limiting conditions of the requested State. (*Id*.) The competent authorities of requested State can also ask the requesting State to preserve the confidentiality of evidence and information provided in response to the request. (*Id*. at art. 8 (2).

[240] *See id.* at art. 9 (1) & 11 (1). The agreement embodies extensive provisions on transfer of a person. According to the agreement, if the requesting State requires the presence of a witness who resides in the requested State, the requested State shall ask the witness if he/she is willing to give testimony. (*Id*. at art. 11 (1)) The requesting State bears the costs of transfer and the witness can request the requesting State to pay his/her travel costs in advance. (*Id*. at 11 (2)) The payment should be processed through Embassies or Consulates. (*Id*.) The requesting State shall not detain or prosecute the witness for any actions or crimes committed before leaving the requested State. (*Id*. at art. 11 (3)) Also, the witness should not be detained or punished because of the testimony. (*Id*.) If both parties agreed, a temporary transfer of a detained person is permitted to the requesting State. (*Id*. at art. 12 (1)) The requesting State shall keep the person in detention and return it to the requested State within a month. (*Id*. at art. 12 (2)) The detention period of the person in the requesting State will be deducted from its total time of sentence. (*Id*.)

in the requested state is required for testimony or if they possess essential objects, documents, and records, the person may be compelled to appear or produce the items.[241] Finally, like the UN Suppression Conventions, the agreement requires both parties to provide publicly available information to each other upon request.[242]

B. Similarities Between the Two Agreements

The two agreements share certain problems, but also entail many similar standard provisions that are required or recommended by the UN Suppression Conventions. The following are the most important similarities between the two conventions.

1. The Problem of Language

The Dari version of both agreements suffers from countless ambiguities and poor wording. For instance, the Agreement Between Afghanistan and Iran is published in both Dari/Farsi and Pashto[243] in the Official Gazette, the language and wording of the Dari/Farsi version exhibits the influence of Iranian Farsi.[244] Although Dari/Farsi is overwhelmingly used by most government institutions, including the courts in Afghanistan, legal terms can have or may have developed very

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[241] *Id.* at art. 9 (1). According to the agreement, a requested State will follow its domestic laws and procedures when it takes the above measures. (*Id.* at art. 9 (2)) The requested State shall document the process of obtaining the evidence or testimony in accordance with its domestic proceedings, and the evidence and documents shall be admissible in the requesting State without further authentication. (*Id.* at art. 9 (4)).

[242] *Id.* at art. 10 (1). According to the agreement, if requested, the requested State shall provide publicly available information and records including the records that are maintained by public institutions. (*Id*.) The requesting State shall also provide those records that are still not generally available to the public as long as the they are not related to national security. (*Id.* at art. 10 (2)) The process of providing the records should be documented in accordance with the domestic procedures and the agreement. (*Id.* at art. 10 (3)) The records shall be admissible in the requesting State without further authentication. (*Id*.)

[243] Both Dari and Pashto are the two official languages of Afghanistan but as a practical matter Dari predominates (understood by 80% of the population, including major portions of the populations in some Pashtun areas, and certainly in mixed ethnic regions.)

[244] *See e.g.* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 5 (1) (e) & 12. The agreement has been provided and signed in the two languages of Farsi/Dari and English with equal legal weight. (*Id*. at art. 31) As to the language of request, according to the agreement judicial assistance requests shall be provided in the language of the requested State. (*Id*. at art. 4) Otherwise, a certified translation of the request in the language of shall be attached to the request. (*Id*.)

different definitions and applications in the two countries. Therefore, the direct incorporation of Iranian legal terms in the agreement is confusing and could be problematic over the course of implementing the agreement. Some Iranian terms include *bazjuaee* [بازجویی][245] which literally means "investigation", *karshenas* [کارشناس][246] which literally means "expert", *tameen* [تأمین][247] which is literally translated to "guarantee", and *maazedat* [معاضدت],[248] meaning "aid".

Similar to the Agreement Between Afghanistan and Iran, the Dari/Farsi version of the Agreement Between Afghanistan and the UAE (one of the official versions)[249] also suffers from several linguistic shortcomings. The language is ambiguous and complicated and appears repetitive in several instances. It reads as a poor translation (mostly likely from English). For instance, it is very difficult to understand the meaning Article 14 of the agreement.[250] Given that the overwhelming majority of officials in Afghanistan use Farsi/Dari, the poor drafting may have an adverse effect on implementation of the agreement. Even small linguistic issues could cause major problems and misunderstandings.

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[245] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1 (2) (b). In Afghan law, the closest legal term to *bazjuaee* would be *tahqeeq* [تحقیق]. However, as explained previously, *tahqeeq* has a specific definition in the Afghan Criminal Procedure Code. (*See* FN 174). It is most likely that the definition of *bazjuaee* under Iranian law could be different than the definition of *tahqeeq* under Afghan law.

[246] *Id*. at art. 9. The Afghan (Dari/Kabuli dialect) equivalent term for *karshenas* could be *ahlekhebrah* [اهل خبره].

[247] *Id*. at art. 12. The Afghan (Dari/Kabuli dialect) equivalent term for *tameen* could be *zamanat* [ضمانت].

[248] *Id*. at art. 13. The Afghan (Dari/Kabuli dialect) equivalent term for *maazedat* could be *masaedat* [مساعدت].

[249] According to the agreement, all requests and their supporting documents should be provided in two languages: the language of the requested state and English. (*See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 1.) The request and documents should be signed, stamped, and certified by the authorities of the requesting state. (*Id*.)

[250] This is the text of the article: *dar halate ke dawlate darkhast dehenda khahane muain sakhtane makan ya huwayate ashkhas ya ashya gardad, bar dawlate darkhast shuda as ta muntha sai khod ra tebqe qanoone meli khod jehat tahaquq az makan ya huwayat ba kar barad*
[در حالتی که دولت درخواست دهنده خواهان معین ساختن مکان یا هویت اشخاص یا اشیا گردد، بر دولت درخواست شده است تا منتها سعی خود را طبق قانون ملی خود جهت تحقق از مکان یا هویت به کار برد.]

The first part of the article is clear. It reads, "if the requesting state asks for determining a location or identity of persons or objects". The next part of the article deals generally with the obligation of the requested state, but it is fairly poorly drafted and largely unintelligible.

2. Purposes for Mutual Legal Assistance

In line with the UN Suppression Conventions and Afghan law in this area, both agreements set forth several purposes for mutual legal assistance in criminal matters.[251] These include questioning persons and taking statements from witnesses and victims;[252] transferring detained persons or others for taking testimony;[253] examining the scenes of crime and collecting evidence;[254] providing information and documents and original or certified copies of banking and business records;[255] and confiscating assets and proceeds of crime.[256] In this area the two agreements are largely in alignment.

3. Content of Requests

Both agreements also contain similar requirements for the content of requests, in line with the UN Suppression Conventions and Afghan law.[257] For instance, a mutual legal assistance request should contain the identity of the requesting and requested authorities; identity of persons (such as the accused, those who have been convicted, witnesses, and victims); their residential address; and the reasons for and description of the request. [258]

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[251] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1 (2); AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 3 (2).

[252] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1 (2) (a); AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 3 (2) (a).

[253] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1 (2) (b); AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 3 (2) (e).

[254] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1 (2) (d); AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 3 (2) (c).

[255] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1 (2) (f); AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 3 (2) (b).

[256] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 1 (2) ((j) & (l).; AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 3 (2) (g).

[257] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 5; AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 5 (2) & (3).

[258] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 5 (1) (a)-(i).; AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 5 (2) & (3). Each of the agreements contains less or more provisions about method and content of request. For instance, the Agreement Between Afghanistan and UAE explicitly

4. Grounds for Refusal

Both agreements list similar grounds upon which a party can refuse to provide legal assistance.[259] According to the agreements, a requested state can refuse to provide legal assistance if the execution of a request would potentially violate its essential interests such as national sovereignty, security, or public order.[260] Both agreements further indicate that a requested state should provide the reasons for its refusal.[261]

5. Other Similarities

Both agreements require the requested state to incur the ordinary costs of executing legal requests.[262] Furthermore, both agreements contain similar provisions on providing assistance for seizure and confiscation of the proceeds of crime.[263] Similarly, states parties should assist one

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indicates that State Parties shall provide the request in writing. (AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 5 (1)). According to the agreement, in emergency situations, if a request is not sent in writing, the requesting State shall provide a writing request within 10 days. (*Id*.) On the other hand, the Agreement Between Afghanistan and Iran requires states parties to determine a time frame for execution of a request and provide certified attached documents to the requesting State. (AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 5 (2)).

[259] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 11; AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 4 (1).

[260] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 11; AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 4 (1). Each of the agreements provides further grounds that do not exist in the other. For instance, the Agreement between Afghanistan and Iran allows refusal on the grounds that the request is against the fundamental legal principles of the requested State. (*See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 11) In contrast, the Agreement Between Afghanistan and UAE includes military and political crimes as further grounds as well as not preparing the request in accordance with the provisions of the agreement. (*See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 4 (1)).)

[261] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 11; AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 4 (3). The Agreement Between Afghanistan and the UAE requires a requested State to consult with its counterpart before rejecting a request based on any of the above grounds. (AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 4 (2)).

[262] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 10; AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 7 (1). Both agreements indicated that extraordinary costs must be paid based upon the two parties' arrangements. (*See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 10; AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 7 (2)).

[263] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 20 (1) & (2); AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 16.

another in detecting and confiscating proceeds of crime based on the request of a requesting state.[264]

IV. MoUs Between Afghan Authorities and Their Foreign Counterparts

Signing and using MoUs to obtain cross-border information is another form of mutual legal assistance in Afghanistan. Several MoUs have been signed between Afghan authorities and their foreign counterparts that contain mutual legal assistance provisions. These MoUs are not strictly binding on signatory parties and do not contain compulsory measures. Providing legal assistance through such arrangements largely falls under informal mutual legal assistance. The AGO, Central Bank (FinTRACA), and Ministry of Finance, among others, have signed such MoUs. Unfortunately, neither the AGO nor the Ministry of Finance provides regular information on the number of MoUs they have signed with foreign countries. However, FinTRACA has disclosed it has signed MoUs with at least 21 countries. However, the agency has not made the text of these MoUs available to the public. The following discussion relies upon two documents: the text of an MoU entered into by the AGO with its Russian counterpart[265] and an MoU between Afghanistan's and Turkmenistan's Ministries of Finance which was published in the Official Gazette.

[264] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 219 at art. 20 (1) & (2); AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 16. The Agreement Between Afghanistan and the UAE further provides that the responsible person in the requested State shall record every detail of the seized material in a form in accordance with the laws of the requested State, and the form should be admissible in the requesting State without further authentication. (AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 16 (2))).) According to the agreement, if the competent authority of either party is informed that proceeds of crime exist in the territory of the other party, it should notify the competent authority of the party. (*Id*. at 18 (1)) The informed party may take necessary measures regarding the proceeds of crime and report the results to the informant party. (*Id*.)

[265] The author was able to obtain the text of the MoU through one of his interviewees.

A. MoU Between the Afghan and Russian AGOs

An MoU on mutual assistance was signed by the Attorneys General of Afghanistan and Russia on September 20, 2018.[266] The MoU contains broad language supporting mutual collaboration on various topics, including exchange of information, experience, and experts, and conduct of joint seminars and conferences.[267] The MoU has only one provision focused on mutual legal assistance.[268] This provision indicates that the AGOs may consult with one another during preparation of a mutual legal assistance request to determine the expectations of the requested state.[269] According to the MoU, the AGOs will contact each other directly and provide the necessary assistance through written means, such as email or fax, or via phone conversation with subsequent written confirmation.[270] Although the MoU refers to preparatory arrangements and can be used before issuing a mutual legal assistance request, it does not help much with the actual production and implementation of a formal request.

B. MoU Between Afghanistan's and Turkmenistan's Ministries of Finance

An MoU was also signed by the Finance Ministers of Afghanistan and Turkmenistan on August 27, 2015,[271] and adopted by Parliament and signed by the President on November 20,

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[266] *See Yaddashte Tafahum Hamkari Mutaqabel Fimabaine Edaraee Loysaranwali Dawlate Jamhori Islami Afghanistan Wa Edaraee Loysaranwali Fedraseyone Russia* [Memorandum of Understanding on Mutual Assistance Between the Attorney General's Office of Afghanistan and the Attorney General's Office of Russian Federation], art. 12 (Sep. 20, 2018).

[267] *See id.* at art. 2.

[268] *Id.* at art. 2 (2).

[269] *Id.*

[270] *See id.* at art. 3 & 4.

[271] *See Yaddashte Tafahume Hamkari Peramone Tabadulae Estekhbarate Mali Dar Ertebat Ba Polshoee Wa Tamweele Terrorism Bain Wezarate Maleya Jamhori Islami Afghanistan Wa Wezarate Maleya Jamhori Turkmenistan* [Memorandum of Understanding on Exchange of Financial Intelligence Information Between the Islamic Republic of Afghanistan's Ministry of Finance and the Republic of Turkmenistan's Ministry of Finance], artArt. 11, Official Gazette, March 2017, No. 1249 (Afg.) [hereinafter MOU BETWEEN AFGHANISTAN AND TURKMENISTAN]].

2016.[272] The MoU exclusively addresses sharing financial intelligence in money laundering and financing cases between the two countries.[273] This MoU suffers from two serious problems.

First, the MoU was signed between the Ministries of Finance instead of the Central Bank. This is problematic because Afghanistan's Ministry of Finance lacks the constitutional authority to directly address money laundering or terrorism financing. Based on the 2014 Anti-Money Laundering Law, FinTRACA of the Central Bank is the sole responsible agency for analyzing suspicious transactions and activities related to money laundering and financing of terrorism, and enhancing information-sharing with other countries.[274] Therefore, the intrusion of the Ministry of Finance into this area is not legally justifiable. In a field research interview conducted at FinTRACA, it was inferred that all other relevant MoUs with foreign countries have been signed by FinTRACA, not the Ministry of Finance.

Second, the MoU was passed through Parliament and signed by the President. This is at odds with the procedures laid out for signing MoUs in the Law on International Treaties and Conventions.[275] This law provides that MoUs do not need to be passed by Parliament or signed by the President. To be implemented, they only require the approval of the Council of Ministers.[276] Therefore, the MoU went through an unnecessary process and failed to comply with the relevant provisions of the Afghan Law on International Treaties and Conventions.[277]

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[272] *See id.* at Presidential Decree. The author was not able to discover what actions Turkmenistan might have taken with respect to the implementation of the MoU.

[273] *Id.* at preamble.

[274] *See* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art.25 & 31.

[275] *See* LAW ON INTERNATIONAL TREATIES, *supra* note 4 at art. 9 (2).

[276] *Id.*

[277] It is unknown in what ways the irregularities in adoption of the MoU may affect implementation in Afghanistan. Also, it is not clear what domestic procedures the MoU went through in Turkmenistan.

Notwithstanding the above, the MoU contains 11 articles on the exchange of financial intelligence information between the two parties.[278] The MoU encourages the parties to collect, classify, and analyze information on suspicious activities related to money laundering and terrorism financing, and if requested, share the information with each other based on the principle of mutual respect.[279] The MoU explicitly restricts the use of information shared through this process to intelligence purposes.[280] The MoU provides that the information cannot be used for prosecution or in the courts without the prior consent of the other party.[281] The MoU stresses the importance of ensuring the confidentiality of information and does not permit the parties to disclose the information without each other's consent.[282] According to the MoU, either party can refuse to share the requested information if it is against its essential interests such as security, public order, or domestic laws.[283] English is designated as the language of request and information sharing.[284] Ironically, the MoU does not discuss the competent authorities of either party, thus, it is not made clear which authorities may seek or provide the requested assistance.

V. Tracing Problems and Inconsistencies Within the Laws and Agreements

As observed, Afghanistan's current laws and agreements have relatively up-to-date and detailed provisions on mutual legal assistance. The laws and agreements provide extensive provisions on various topics of mutual legal assistance including competent authorities; purposes for and contents of mutual legal assistance; grounds for refusal; transferring of the accused and

[278] MOU BETWEEN AFGHANISTAN AND TURKMENISTAN, supra note 271 art. 1-11.

[279] *Id.* at art. 1.

[280] *Id.* at art. 2.

[281] *Id.*

[282] *Id.* at art. 4.

[283] *Id.* at art. 7.

[284] *Id.* at art. 6.

witnesses; conditions for providing legal assistance; search and seizure; confiscation and returning assets; and confidentiality. However, despite the many advantages of the mechanisms established, they suffer from a range of problems and inconsistencies that make them practically ineffective and difficult to implement.

A. Problems with Language and Terminology

As noted previously, there are three major problems with the language of the laws and agreements examined in this chapter. First, the laws and agreements contain many inconsistent and ambiguous provisions. For instance, each law and agreement uses a different term for the concept of mutual legal assistance, from "justice cooperation" to "judicial assistance" to "mutual legal aid."[285] This inconsistency can create confusion and impact implementation. Similarly, some provisions of the 2013 Legal Cooperation Law are ambiguous. For example, the law gives similar authority to the prosecution and courts to hand over evidence or documents to a requesting state without drawing a clear line between the powers of the institutions.[286] The only distinction that can be implied from the relevant provisions is that courts should decide upon the rendering of more valuable documents or evidence than the prosecution.[287] However, the law does not provide any guidance for determining the value of an item of evidence or document or what threshold must be met to trigger the court's involvement. Furthermore, as mentioned, the agreements also entail innumerable ambiguous provisions.[288]

Second, there are too many nearly identical provisions in the 2013 Legal Cooperation Law and the 2014 Anti-Money Laundering Law. For instance, both laws have the same or similar provisions

[285] *See* Section II and Section III of this chapter.

[286] *See e.g.* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 30 & 32.

[287] *See id.*

[288] *See* Section III of this chapter.

concerning the purpose of requests, content of requests, grounds for refusal, confiscation of assets, confidentiality, and so on.[289] This repetition could be avoided if the 2014 Anti-Money Laundering Law would refer to the relevant provisions of the 2013 Legal Cooperation Law rather than presenting the same provisions again.

Third, in the agreement between Afghanistan and Iran, some of the legal terminology is Iranian.[290] As mentioned, while Afghanistan's Dari/Farsi is not very different—at least in written form--from Iranian Farsi, in terms of legal terminology they can have different meanings for the same term or different terms for the same meaning. Using Iranian Farsi (effectively foreign) legal terms in the agreement and publishing it without translation in Afghanistan's Official Gazette complicates the enforcement of the agreement between the two countries.

B. The Problem of Time Frames

There are two problems with time frames in the current provisions of the 2013 Legal Cooperation Law. First, the law sets a maximum of 14 days for the MOFA to channel an incoming mutual legal assistance request to the competent authorities inside Afghanistan[291] and then the competent authorities must provide their response within two months.[292] These time frames could be too long for some requests (simple cases) and too short for other requests (complex cases). The law does not provide any explanation and guidance for different scenarios. Most importantly, the law does not anticipate what the consequences would be if the authorities cannot fulfill their duties within the given time frames.

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[289] *See e.g.* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26, 28, 36, & 44; ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 56, 57, & 60.

[290] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 116 at art. 11, 13, &14.

[291] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (4).

[292] *See id.* at art. 26 (5).

Second, the time frames in the CPC for discovery, investigation and prosecution, and trial[293] are extremely restrictive for prosecutors if there is a need for mutual legal assistance request in a case. It is quite challenging for prosecutors to complete their investigation and prosecution based solely on domestic evidence in a felony case within 75 or 180 days, let alone also to seek, and receive, and integrate into their case cross-border evidence via mutual legal assistance within those time frames. As the field research findings indicate, these short time frames discourage prosecutors from seeking cross-border evidence and pressure them to shape their case based on whatever domestic evidence they have at their disposal.[294]

C. Inconsistency in Determining Competent Authorities

The laws do not take a consistent approach to determining the competent authorities for providing or seeking legal assistance in Afghanistan. As explained previously, in one article, the 2013 Legal Cooperation Law specifies the Ministry of the Interior, AGO, and High Council of the Supreme Court as the competent authorities.[295] In another article, it also recognizes the Central Bank as a competent authority.[296] Unlike the 2013 Legal Cooperation Law, the 2014 Anti-Money Laundering Law does not explicitly specify any institution as a competent authority. The law mentions "competent authorities" and requires them to provide legal assistance to the competent authorities of foreign countries.[297] However, it neither explains which institutions are competent authorities, nor references the applicable provisions of the 2013 Legal Cooperation Law. Such inconsistencies fail to provide a clear picture of which institutions have what powers and how they

[293] *See* CRIMINAL PROCEDURE CODE, *supra* note 173 at art. 87 (1) & 149 (1).

[294] Although in addition to domestic evidence, there might be some foreign-sourced evidence that was produced spontaneously or via informal cooperation.

[295] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (1).

[296] *See id.* at art. 29.

[297] *See e.g.* ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 55 (1).

can exercise their authority properly in the process of requesting or executing a legal assistance request.

D. The Problem of a Central Authority

Only the Agreement Between Afghanistan and Iran clearly designates a central authority.[298] The 2013 Legal Cooperation Law, the 2014 Anti-Money Laundering Law, and the Agreement Between Afghanistan and the UAE all fail to designate a central authority.[299] The two laws and the Agreement Between Afghanistan and the UAE only refer to "competent authority."[300] Competent authorities are different from a central authority. Based on the UN Suppression Conventions, the central authority functions as a liaison or point of contact between domestic and foreign competent authorities.[301] Competent authorities, on the other hand, have the investigative and judicial jurisdiction over a case in their country.[302] Competent authorities can include many institutions (such as police, prosecution, or courts) within a country that have jurisdiction over criminal cases. A central authority could be a competent authority at the same time, but its role as a central authority should be recognized by domestic law.[303]

The laws and agreements are similarly inconsistent in recognizing an institution as the central authority, Although the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law do not designate a central authority, they both recognize the MOFA as the primary liaison office

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[298] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 116 at art. 3 (2).

[299] And, as noted in section (II) (a) (3) (3.3.) this chapter, Afghanistan also failed to designate a central authority when it deposited its instrument of ratification for the UNCTOC to the United Nations.

[300] *See* e.g. AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 1.

[301] *See generally* United Nations Convention against Corruption (UNCAC), at art. 46 (13) (entered into force Dec. 14, 2005) [hereinafter UNCAC]

[302] *See id.*

[303] *See id.*

between Afghanistan and other countries' competent authorities.[304] Since the laws recognize the diplomatic process as the channel of mutual legal assistance requests with foreign countries, the role of the MOFA as the liaison office seems natural but undesirable.[305]

The agreement between Afghanistan and Iran designates the Supreme Court of Afghanistan as the central authority.[306] In contrast, the agreement between Afghanistan and the UAE designates the Ministry of Justice as the "Competent Authority" but with a similar role to the central authority.[307] While treating the Supreme Court as the central authority may be pertinent, the designation of the Ministry of Justice as the "Competent Authority " (essentially the central authority for purposes of this agreement) is problematic and out of step with the current criminal procedures in Afghanistan.

E. Inconsistency in Permitting Authorities to Directly Contact Their Counterparts

The chaotic situation with respect to central and competent authorities negatively affects the way the authorities contact their counterparts in mutual legal assistance cases. The laws and agreements are inconsistent regarding whether the competent authorities or the central authority can directly contact their foreign counterparts. The 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law require the competent authorities to process mutual legal assistance requests through the MOFA.[308] As an exception to the rule, the laws allow the competent authorities to contact their counterparts directly or channel requests through INTERPOL in urgent

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[304] *See e.g.* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (12); ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 59.

[305] *See* Section (II) (this chapter).

[306] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 116 at art. 3 (2).

[307] *See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 1.

[308] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (2); ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 59 (1).

and emergency situations.[309] The Agreement Between Afghanistan and the UAE requires the Ministry of Justice to receive or send requests only through diplomatic channels.[310] The agreement does not allow for any exceptions to the rule. In contrast, the Agreement Between Afghanistan and Iran requires the direct exchange of requests through the Central Authorities.[311] It does not permit other forms of contact, such as through diplomatic channels. The above inconsistencies in the method of communication severely impact the ability of the relevant authorities to efficiently engage with mutual legal assistance mechanisms.

F. Contradictions with Respect to the Costs of Executing Mutual Legal Assistance Requests

Executing a mutual legal assistance request necessarily incurs costs. The current mechanisms contain conflicting provisions about who should pay the potential expenses. Both the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law oblige *requesting* states to incur the costs of implementing a mutual legal assistance request without exceptions.[312] On the other hand, the two agreements between Afghanistan and Iran and the UAE require the *requested* state to incur the expected costs of executing mutual legal assistance requests.[313] According to the agreements, the parties may make case-by-case arrangements if a request would require extraordinary costs.[314] As explained previously, the 2013 Legal Cooperation Law is applicable to all requests while the

[309] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 26 (3); ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 59 (1).

[310] *See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 1.

[311] *See* AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 116 at art. 3 (1).

[312] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 50; ANTI-MONEY LAUNDERING LAW, *supra* note 25 at art. 64.

[313] *See* AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 220 at art. 7; AGREEMENT BETWEEN AFGHANISTAN AND IRAN, *supra* note 116 at art. 10.

[314] *See id.*

2014 Anti-Money Laundering Law is enforceable only with regard to money laundering and terrorism financing cases. Although the agreements are only applicable between Afghanistan and the respective countries, the problem is that the agreements conflict with the main domestic laws (particularly the 2013 Legal Cooperation Law) that govern mutual legal assistance in the country.

G. Lack of Arrangements to Deal with the Contradictions

As explained above, there are numerous contradictions and inconsistencies between provisions in the main law (the 2013 Legal Cooperation Law) and the agreements. However, the laws and agreements do not provide clear guidance on how the relevant authorities should deal with these conflicts. The 2013 Legal Cooperation Law obliges the MOFA to observe the requirements of the law when it negotiates bilateral mutual legal assistance agreements with other countries.[315] This means that agreements with foreign countries should conform with the provisions of the law. This would suggest the provisions of the law take priority over the provisions of the agreements if there is conflict. Nonetheless, one could argue that the agreements have the same weight as the 2013 Legal Cooperation Law because they were passed by Parliament and signed by the President. Another argument could be that the 2013 Legal Cooperation Law does not affect the agreements because the law was enacted after the agreements. However, one could argue that the later laws supersede the preceding laws. Unfortunately, neither the laws and agreements nor the Law on International Treaties and Conventions provide any clear direction.

H. Conflating Mutual Legal Assistance with Extradition

As noted previously, the 2013 Legal Cooperation Law covers both extradition and mutual legal assistance (legal cooperation). Regulating the two topics under one law may not in itself be problematic, but conflating provisions of the two could be. For instance, the law combines the

[315] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 24 at art. 49.

content of a request for mutual legal assistance with the content of a request for extradition.[316] Historically, blending the two further complicates the process and makes it difficult to follow and implement.

I. Lack of Reference to Afghanistan's International Obligations

Neither the 2013 Legal Cooperation Law nor the 2014 Anti-Money Laundering Law refer to the mutual legal assistance obligations of Afghanistan under the UN Suppression Conventions or other international instruments. This makes it difficult to understand the extent to which they incorporate the relevant compulsory and non-obligatory provisions. Apparently, the legislature and the people involved in the legislative process indeed incorporated many provisions of the UN Suppression Conventions, but the lack of reference (even general reference) makes it difficult to decipher which conventions have been reviewed and considered during the legislative process. Lack of such a specific reference also makes it hard for the MOFA to determine the extent of Afghanistan's compliance with international law if requested to provide reports on Afghanistan's compliance with the international conventions.

J. Conflating Mutual Legal Assistance in Civil and Criminal Matters

The agreement between Afghanistan and Iran covers both civil and criminal matters. The process and requirements for providing legal assistance in civil cases are different from those in criminal cases. However, they are not clearly differentiated in this agreement. Conflating the two categories only complicates the implementation of the agreement. Although the agreement is only applicable to the two signatory countries, it should not be treated as a good example for future agreements.

[316] *See e.g. id.* at art. 28 (1)

VI. Conclusion

Several Afghan laws contain mutual legal assistance provisions. Since the 2013 Legal Cooperation Law provides general authority for mutual legal assistance regardless of the type of crime, it is the primary source to be compared with the UN Suppression Conventions in order to assess Afghanistan's compliance with its international obligations. As this chapter has shown, Afghanistan has not fully complied with many of its obligations and has not incorporated many of the non-mandatory measures into domestic law. In addition to failing to fully comply and incorporate the obligations and non-mandatory measures, the current Afghan mutual legal assistance mechanisms suffer from innumerable shortcomings and inconsistencies. Additionally, the two bilateral mutual legal assistance agreements with Iran and UAE are are replete with ambiguities, inconsistencies, and contradictions. The extent of implementation and effectiveness of the flawed domestic mechanisms will be examined in the coming chapter.

CHAPTER SEVEN: FROM THEORY TO PRACTICE-ASSESSING IMPLEMENTATION OF AFGHANISTAN'S CURRENT MUTUAL LEGAL ASSISTANCE MECHANISMS

I. General Observations about the Implementation of Afghanistan's Current Mutual Legal Assistance Mechanisms

Mutual legal assistance is a very new subject globally. It is even newer in Afghanistan, where the relevant legislation and treaties have yet been in effect for less than 10 or 20 years respectively. Despite the fact that Afghanistan has been a party to the UN Suppression Conventions for a substantial time and more recently enacted the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law; interviews with many prosecutors, judges, and other officials in the relevant agencies reveal that mutual legal assistance is barely known. When there is some knowledge, there is only weak differentiation between formal and informal mechanisms or practices, and all may simply be referred to as "legal cooperation." Such actions as do occur are often as a matter of practice rather than a matter of law or implementation of law. This demonstrates a huge gap between law on paper and law in practice.

As revealed in this chapter, officials often remain ignorant of the new laws, international treaties, and concepts, even as they may take, or wish to take, actions addressed by those laws, treaties, and concepts. Thus, as a long-standing practice, if a prosecutor wants to obtain a document or evidence from a foreign country, they typically ask for the required document or evidence through diplomatic channels without citing any laws relevant to mutual legal assistance. For instance, they might simply refer to Afghanistan's criminal code or code of criminal procedure in a request. This was the process outlined by the vast majority of interviewees when asked how they obtain cross-border evidence and what laws they refer to. Particularly now, as the current administration tries to fight corruption, drug trafficking, and other forms of transnational crime,

several prosecutors have indicated that cases frequently raise questions such as where the proceeds of corruption have gone and how they should be recovered, or how perpetrators who have left the country can be successfully prosecuted. A clear understanding of mutual legal assistance law and effective legal procedures is essential to enable them to succeed.

Initial awareness among prosecutors regarding the concept of cross-border legal cooperation largely began with their investigation of the Kabul Bank case,[1] but it has largely remained limited to those who were involved with that investigation. More recently, as prosecutors grapple with large scale corruption cases and numerous money laundering cases, they are realizing that they may not have sufficient evidence to successfully prosecute complex crimes with cross-border components. This is especially true where the proceeds of crime have already been transmitted outside Afghanistan or the suspects are no longer in the country.

This increased need for international legal cooperation has motivated several prosecutors in the relevant departments[2] to emphasize the urgent need for mechanisms for mutual legal assistance. They have also urged higher-level officials in the AGO to take certain actions, including accelerating the process of entering into bilateral agreements with other countries' AGOs. However, sufficient efforts and effective actions are yet to be taken. As discussed below, the current mutual legal assistance mechanisms, albeit flawed as previously noted,[3] exist largely only on paper, not in practice.

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[1] *See* Chapter One. The Kabul Bank case has been very controversial and affected many people in the country. It also involved transfer of a huge amount of money to foreign countries. That made the relevant officials question and contemplate about the ways to recover the stolen money from abroad.

[2] There are many departments within the AGO that may deal with transnational crimes. Some of the departments include Anti-Drug Crimes Prosecution Offices in Kabul, Anti-Corruption Prosecution Offices in Kabul, and Kabul Prosecution Offices on Crimes against Internal and External Security.

[3] The previous chapter revealed how current mutual legal assistance mechanisms are full of contradictions and inconsistencies. Regardless of how flawed the mechanism might be, they are neither understood nor applied by the relevant authorities.

II. Officials are Generally Ignorant about the Concept of Mutual Legal Assistance and the Relevant Laws, Procedures, and Conventions

An overwhelming majority of interviewees were simply not familiar with the concept of mutual legal assistance as practiced in today's world.[4] Many of them heard about the concept for the first time in the interview. This is especially shocking given that most of the interviewees work in the departments which have the highest probability of encountering transnational crimes, including anti-drug courts and prosecution, and anti-corruption courts and prosecution. Most of the officials confused mutual legal assistance with extradition, a more familiar concept.

It was also surprising that most of the interviewees did not know anything about Afghanistan's current laws and regulations related to mutual legal assistance. When they were asked if Afghanistan had any law to regulates mutual legal assistance, the response of an overwhelming majority (94%) was negative. Even most of the prosecutors who have been involved in issuing requests for legal assistance from foreign countries were not aware of the 2013 Legal Cooperation Law or the mutual legal assistance provisions of the 2014 Anti-Money Laundering Law.

As mentioned previously, as a matter of practice most interviewees make their request to foreign countries without referencing the relevant mutual legal assistance apparatus. For instance, an interviewees at INTERPOL explained that they implement the Penal Code, the Code of Criminal Procedure, and INTERPOL's bylaws and policies over the course of performing their duties.[5] But merely implementing the Penal Code or the Code of Criminal Procedure may not be sufficient in mutual legal assistance requests. He did not know about the 2013 Legal Cooperation

[4] An exception was provided by a few people at the AGO and the respondent at FinTRACA.

[5] Informant—MOI 3 (interview with author, May 28, 2019).

Law. In another instance, an interviewee at the MOFA, whose primary duty is channeling incoming and outgoing requests in criminal matters, told me there are no laws or bilateral agreements for mutual legal assistance in Afghanistan.[6]

Interviewees similarly lack knowledge about Afghanistan's bilateral agreements with Iran and the UAE. Some interviewees were involved in cases where they had to make mutual legal assistance requests to Iran or the UAE,[7] however they did not know that bilateral agreements exist between Afghanistan and those two countries and thus they did not take advantage of the agreements. One interviewee in an anti-corruption department of the AGO explicitly lamented the lack of a bilateral mutual legal assistance agreement between Afghanistan and the UAE and complained that was the reason why Afghanistan has not been able to receive sufficient assistance from the UAE.[8] Additionally, other prosecutors and judges who have handled cases involving requests for evidence from Iran also reported being unaware of the bilateral agreement between Afghanistan and Iran.[9]

With regard to the UN Suppression Conventions, only four interviewees (three at the AGO[10] and one at FinTRACA)[11] had any knowledge of the conventions, and only two of them were aware that the conventions contain mutual legal assistance provisions.[12] Furthermore, only

[6] Informant—MOFA 2 (interview with author, April 6, 2019).

[7] E.g. informant—AGO 16 (interview with author, July 16, 2019); informant—AGO 11 (interview with author, June 13, 2019); Informant—AGO 5 (interview with author, May 20, 2019).

[8] Informant—AGO 5 (interview with author, May 20, 2019).

[9] E.g. informant—SC 9 (interview with author, June 25, 2019); informant—SC 11 (interview with author, June 25, 2019).

[10] Informant—AGO 4 (interview with author, May 20, 2019); Informant—AGO 5 (interview with author, May 20, 2019); Informant—AGO 8 (interview with author, June 11, 2019).

[11] Informant—CB 1 (interview with author, June 23, 2019).

[12] Informant—AGO 5 (interview with author, May 20, 2019); Informant—AGO 8 (interview with author, June 11, 2019).

one at the AGO, who handled the Kabul Bank case, cited the UNCTOC and the UNCAC when he made requests to the UAE.[13] None of the other interviewees were cognizant of the relevant international conventions, let alone how to cite or implement them.

A few interviewees who had been involved in issuing requests to foreign countries were able to generally identify the legal bases for mutual legal assistance in Afghanistan. They identified domestic law, bilateral agreements, international conventions, and principle of reciprocity as the bases for mutual legal assistance in the country. Only two of those interviewees could understand and identify all of the above legal bases. Based on the reports of the interviewees, their current practice suggests that most mutual legal assistance takes place based on reciprocity and the existence of a positive relationship. Prosecutors, in particular, report requesting legal assistance from those countries with which Afghanistan has a good relationship, however, the interviewees were not able to explain how the government of Afghanistan determines a positive or good relationship with other countries, nor how a prosecutor or the other relevant officials would know that.

Finally, knowledge of the concepts of "transnational crime" is also not extensive among officials. Afghanistan's Penal Code does not provide any definition of transnational crime. Officials usually have not received sufficient (or often any) training on the relevant international conventions. Transnational crime topics are not yet part of the criminal law, criminal procedure, or international law curriculum in Afghan law schools.[14] This lack of awareness concerning

[13] Informant—AGO 5 (interview with author, May 20, 2019).

[14] Largely funded by foreign governments, several programs have implemented projects to train Afghan law and sharia professors and students about various legal topics as well as pedagogy. LESPA, the Asia Foundation, JSSP and GIZ are among many organizations that have been working with the law and sharia schools for many years. Several new courses have been introduced into law schools' curriculum over the last few years. Despite this progress, when the author presented his research to a large group of law and sharia professors in 2019, he found that they are generally ignorant about the concepts of "transnational crime" and "mutual legal assistance". The situation in sharia faculties is worse compared to law faculties because they do not focus as much on "positive law" in general

transnational crime is emblematic of the current early stage of development of mutual legal assistance and efforts to combat transnational crime in Afghanistan.

III. Institutions Involved in Mutual Legal Assistance and the Problem of 'Central Authority'

As detailed in Chapter Four, Afghanistan is party to a number of international conventions and agreements which require the government to designate a central authority to deal with mutual legal assistance matters.[15] Afghanistan has failed to comply with this key obligation.[16] The result has been a hodgepodge of provisions that exacerbate the very problems that designation of a central authority is intended to resolve. As noted in the previous chapter, the Afghan institutions that are charged as competent authorities[17] with responsibility for mutual legal assistance are: the AGO,[18] the Supreme Court,[19] the MOI,[20] the Central Bank,[21] and the MOJ.[22] In addition to these competent authorities, the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law recognize

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and international law topics in particular. That said, more judges are graduates of sharia faculties than law faculties and more prosecutors are graduates of law faculties than sharia faculties.

[15] As extensively discussed in Chapter Four, Afghanistan is, for instance, a state party to the UNCPS, Vienna Convention, the Financing Convention, UNCTOC, and UNCAC.

[16] *See* Chapter Six.

[17] These competent authorities are designated either by the Afghan laws or bilateral agreements.

[18] *See Qanooni Esterdade Mutahameen, Mahkomeen, Wa Hamkari Adli* [Law on Extradition of Accused and Convicted Persons and Legal Cooperation], at art. 26 & 29, Official Gazette, April 2013, No. 1103 (Afg.) [hereinafter EXTRADITION AND LEGAL COOPERATION LAW]

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *See Muaafeqatnama Meyane Jamhori Islami Afghanistan Wa Dawlate Emarate Mutahedae Arabi Peramone Musaedate Qanooni Mutaqabel Dar Masaele Jenaee* [Agreement Between Islamic Republic of Afghanistan and the United Arab Emirates on Mutual Legal Assistance in Criminal Matters], at art. 1, Official Gazette, July 2010, No. 1029 (Afg.) [hereinafter AGREEMENT BETWEEN AFGHANISTAN AND UAE]

the MOFA as the liaison office[23] between Afghanistan's competent authorities and foreign countries even though this is the essential role played by a central authority (which MOFA is NOT so designated).

This section will first assess the present functionality of Afghanistan's decentralized system of competent authorities and how the MOFA performs its role as liaison within the current apparatus. Then, it will discuss many complexities and problems flowing from the lack of a central authority as reported by the interviewees.

A. The AGO

In practical terms, the AGO has taken the lead role in seeking mutual legal assistance from other countries. Since the Constitution of Afghanistan[24] and the Law on Structure and Authority of the Attorney General's Office[25] each vests the AGO with the power to investigate and prosecute crimes, it is not surprising that the AGO has been the primary agency to deal with mutual legal assistance requests. Evidence is usually collected during the investigation phase and it is natural that the AGO would lead in this arena.[26] Interviews at the AGO confirm this.[27] The AGO has primary responsibility for investigating and prosecuting and it handles a high volume of transnational crime cases. Surprisingly, however, the actual number of mutual legal assistance

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[23] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 18 at art. 26 (2); *Qanooni Jelowgiri Az Polshoaee Wa Awayede Nashi Az Jarayem* [Law on Prevention of Money Laundering and Proceeds of Crimes], at art. 59 (1), Official Gazette, July 2014, No. 1142 (Afg.) [hereinafter ANTI-MONEY LAUNDERING LAW].

[24] *See Qanooni Asasi Afghanistan* [The Constitution of Afghanistan], art. 134 (1), Official Gazette, Extraordinary Issue, January 2004, No. 818 (Afg.) [hereinafter THE CONSTITUTION].

[25] *See Qanooni Tashkeel Wa Salaheyate Saranwali* [Law on Structure and Authority of the Attorney General's Office], at art. 3 (1), Official Gazette, October 2013, No. 1117 (Afg.) [hereinafter THE LAW ON AGO STRUCTURE].

[26] As it noted in previous chapters, the Afghan Constitution vests the power of investigating crimes to the AGO.

[27] Informant—SC 11 (interview with author, June 25, 2019); Informant—SC 9 (interview with author, June 25, 2019); informant—AGO 9 (interview with author, June 9, 2019); informant—MOJ 1 (interview with author, May 23, 2019).

requests initiated by the AGO has been negligible, even in those AGO departments[28] with the highest probability of dealing with transnational crime. In the handful of cases where requests have been sought by the AGO, they were usually channeled through the MOFA, or occasionally through the MOI or the Central Bank.

B. The Supreme Court

Although the Afghan Supreme Court and other courts have legal authority to initiate a mutual legal assistance request,[29] in practice, they are rarely part of the process. As a civil law country, Afghanistan's courts have a semi-investigative authority. However, they generally do not directly exercise this power, instead giving guidance to prosecutors about what to further investigate in a given case.[30] Supreme Court interviewees emphasized that they prefer to exercise their authority through prosecution offices if there is need for mutual legal assistance requests.[31] For instance, if a piece of evidence is missing in a case and a competent judge requires it before deciding the case, they will return the case to the prosecution office with a guiding order, asking them to obtain the required evidence. The judge would not issue a mutual legal assistance request directly. In fact, none of the interviewees at either the Supreme Court or the AGO had encountered a mutual legal assistance request made directly by a court. Only one interviewee (a judge) indicated that they exercised their authority to issue a guiding order to a prosecution office for a mutual legal assistance request in two cases.[32] In a hijacking case, the judge instructed the prosecution to find

[28] Some of the AGO departments include Anti-Drug Crimes Prosecution Offices in Kabul, Anti-Corruption Prosecution Offices in Kabul, and Kabul Prosecution Offices on Crimes against Internal and External Security.

[29] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 18 at art. 26 (2).

[30] Informant—SC 12 (interview with author, July 5, 2019); Informant—SC 11 (interview with author, June 25, 2019).

[31] Informant—SC 7 (interview with author, June 11, 2019); Informant—SC 11 (interview with author, June 25, 2019).

[32] Informant—SC 13 (interview with author, July 6, 2019).

information from other countries about the ownership of the plane that was hijacked (however the prosecution did not succeed in their mutual legal assistance request).[33] In a separate money laundering case, this judge also instructed the prosecution to request mutual legal assistance from several countries to determine who had received the funds, but this request also failed.[34]

Furthermore, although the Supreme Court is designated as the central authority in accordance with the Agreement Between Afghanistan and Iran, this appears remain entirely remains on paper because no evidence could be found to indicate that the Supreme Court would play any role in any transnational case that involves Iran in practice. In fact, two interviewees provided success stories of achieving cross-border evidence through INTERPOL without any Supreme Court involvement.

C. The MOI

Within the MOI, the INTERPOL department[35] is responsible for facilitating incoming and outgoing requests. Accordingly, INTERPOL is involved in law enforcement cooperation, but its actions do not constitute formal mutual legal assistance. Although the interviewees could not distinguish between legal cooperation and mutual legal assistance,[36] it appears that information or documents that are obtained through INTERPOL are deemed informal law enforcement cooperation. INTERPOL does not or is not able to initiate law enforcement cooperation requests

[33] *Id.*

[34] *Id.*

[35] Although semi-autonomous, Afghanistan's INTERPOL department functions under the umbrella of the MOI. It has primary responsibility for facilitating mutual legal assistance requests from police departments and other competent authorities.

[36] Informant—MOI 3 (interview with author, May 28, 2019).

because it is wholly dependent on other police departments and prosecution offices.[37] It only acts upon requests of other relevant agencies.[38]

D. The Central Bank (FinTRACA)

FinTRACA at the Central Bank actively initiates requests for financial intelligence information from foreign countries on its own, or upon request of Afghanistan's AGO. However, the information obtained through this method is deemed government intelligence so cannot be used as evidence in court.[39] Moreover, the information is deemed to be obtained informally, falling under law enforcement cooperation.[40] In addition, FinTRACA activities and information sharing is limited to financial crimes, particularly money laundering and financing terrorism.[41]

According to the interviews, FinTRACA receives hundreds of assistance requests from prosecution offices, but primarily for domestic purposes.[42] FinTRACA obtains information about bank accounts and other financial documents concerning suspects from foreign countries.[43] This information can provide valuable clues to prosecutors, enabling them to expand their case investigation to find admissible evidence or additional means to authenticate the intelligence[44]

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[37] *Id.*

[38] *Id.* Afghanistan's INTERPOL department is active 24 hours a day and 7 days a week. It is connected with INTERPOL departments of 193 member states. It offers a rapid method of sharing information through an online tool. (Informant—MOI 2 (interview with author, May 28, 2019)).

[39] Although the FinTRACA's financial intelligence information may not be admissible, it may definitively provide leads for mutual legal assistance request that do produce cognizable evidence. As noted earlier in Chapter Four, informal procedures are often the precursor and predicate for formal procedures.

[40] Informant—CB 1 (interview with author, June 23, 2019).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

even though the FinTRACA information itself cannot be used as evidence.[45] Therefore, technically, FinTRACA cannot be considered a major actor in mutual legal assistance processes.

E. The MOJ

In addition to above four institutions identified under the 2013 Legal Cooperation Law as "competent authorities", the bilateral Agreement between Afghanistan and the UAE identifies the MOJ as the only competent authority in Afghanistan for such purposes.[46] However, field research respondents at the MOJ, and even those at the other agencies, identified the MOJ as the least involved and an irrelevant agency in the mutual legal assistance process.[47] In practice, the MOJ has done nothing in connection with mutual legal assistance.[48]

It is not clear why the MOJ was selected for a role in the Agreement between Afghanistan and the UAE. Some MOJ interviewees suggested that the reason could be tied to the UAE's preference (in the agreement the UAE identified its Ministry of Justice as the competent authority) or[49] perhaps because the MOJ was in the past responsible for administering prisons and extradition tied to mutual legal assistance in the law.[50] The MOJ may also have been selected as the competent authority due to its perceived neutrality within the legal process.[51]

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[45] *Id.*

[46] AGREEMENT BETWEEN AFGHANISTAN AND UAE, *supra* note 22 at art. 1.

[47] Informant—MOJ 1 (interview with author, May 23, 2019).

[48] *Id.*

[49] Informant—MOJ 2 (interview with author, May 23, 2019); Informant—MOJ 3 (interview with author, May 23, 2019); Informant—MOJ 4 (interview with author, May 23, 2019).

[50] Informant—MOJ 1 (interview with author, May 23, 2019). Given this past role of the MOJ, it might have some relevancy in the eyes of the agreement's negotiators.

[51] Informant—MOJ 1 (interview with author, May 23, 2019).

F. The MOFA as the Liaison Office

The Ministry of Foreign Affairs (MOFA) plays a major role in current mutual legal assistance mechanisms by serving as a bridge between domestic agencies and their counterparts in other countries.[52] All incoming and outgoing mutual legal assistance requests go through MOFA and Afghan embassies abroad.

MOFA, however, does not have any executive authority in this process. It only processes what it receives from relevant domestic agencies. Some MOFA respondents indicated that they do evaluate incoming and outgoing requests in extradition cases to make sure they are in compliance with the relevant laws and the required documents are complete.[53] However, they could not confirm whether they also evaluate mutual legal assistance requests; they seemed completely unfamiliar with the subject.[54] They only knew about the extradition process.

Based on information received from judges and prosecutors, MOFA, in particular Afghan embassies, typically perform any needed translations. For instance, Afghan embassies translate all requests they receive from Afghanistan (typically translated into English and sometimes into the respective language of the resident country). MOFA also translates incoming requests into Dari or Pashto.

The field research revealed many complaints about the lack of capacity at MOFA. Many interviewees at the Supreme Court and the AGO criticized MOFA for being incompetent in two respects. First, the Ministry is not able to translate the requests and documents accurately.[55] Some interviewees said that they receive translated letters and documents that were unclear and had

[52] As noted previously, there is no designated Central Authority but MOFA currently functions as a liaison office.

[53] Informant—MOFA 2 (interview with author, April 6, 2019).

[54] *Id.*

[55] Informant—SC 8 (interview with author, June 11, 2019).

many deficiencies.[56] One of respondent characterized dealing with MOFA's documents as "daily struggle."[57] This critical view expressed by the interviewees appears consistent with MEC's research findings. According to MEC's report, MOFA does not have a clear mechanism through which they can assess whether their incoming staff are competent in a foreign language.[58] The MEC report indicated that the Ministry has not focused sufficiently on foreign language skill as a qualification for recruitment to MOFA.[59]

MOFA officials' lack of adequate legal knowledge both inside and outside Afghanistan was identified as the second major incompetency. Some interviewees at the Supreme Court and the AGO stated that MOFA officials are not familiar with the relevant laws and procedures, nor with legal writing.[60] MOFA officials were not able to duly provide the evidence or documents the AGO requested. In some cases, the AGO requested one thing but MOFA provided something else; in other instances, MOFA officials' written documents or translations were plagued with shortcomings which significantly impacted the utility of a letter or document.[61] Some letters or incoming requests were even sent to the MOJ, which is completely inapposite to the procedure for mutual legal assistance.[62] One interviewee who held a high position at the Supreme Court said

[56] Informant—AGO 8 (interview with author, June 11, 2019).

[57] Informant—SC 8 (interview with author, June 11, 2019). He even claimed that over 60% of documents provided by the MOFA are legal deficiencies.

[58] *Inquiry on the Recruitment and Deployment Processes at the Ministry of Foreign Affairs*, MEC 11 (2019), http://www.mec.af/files/2019_08_06_mofa_full_report_en.pdf.

[59] *Id.*

[60] Informant—MOJ 2 (interview with author, May 23, 2019); Informant—AGO 9 (interview with author, June 11, 2019).

[61] Informant—SC 8 (interview with author, June 11, 2019).

[62] Informant—MOJ 2 (interview with author, May 23, 2019); Informant—MOJ 3 (interview with author, May 23, 2019).

they had suggested to MOFA several times to hire legal advisors with sufficient legal knowledge and experience at the Afghan embassies, but the Ministry has yet to take appropriate action.[63]

G. Complexities and Problems Arising from the Lack of a Central Authority

A functional central authority is the nucleus of a mutual legal assistance apparatus. Afghanistan's failure to designate a central authority causes countless irregularities and problems. The field research reveals a number of practical problems emanating from the lack of a central authority, and from the default role played by the MOFA as a liaison, which are detailed below.

1. Lack of Coordination Between and Within Agencies and Lack of Any Department in Each Agency to Facilitate Mutual Legal Assistance Requests

Given the confused decentralized mutual legal assistance system, it is not surprising that there is considerable lack of coordination between the relevant agencies. Even coordination between departments inside the agencies is extremely poor, verging on non-coordination. This situation flows naturally from Afghanistan's failure to clearly identify a consistent central authority, and is exacerbated by the extremely low level of basic mutual legal assistance knowledge among pertinent officials.[64] Many interviewees noted that agencies do not hold coordination meetings on this issue even though it would help resolve inter-agency complaints regarding problematic or erroneous actions.[65]

Unfortunately, the relevant departments within each agency and the people within each department do not interact or coordinate with each other on issues or technicalities related to mutual legal assistance or transnational crimes. As a result, when they make mutual legal

[63] Informant—MOJ 2 (interview with author, May 23, 2019).

[64] The lack of involvement of some of the agencies (the MOJ) in the process could be another reason for this failure to coordinate. However, it appears that even the most active agencies, such as the AGO and the MOFA, do not engage with each other over mutual legal assistance.

[65] Informant—MOJ 2 (interview with author, May 23, 2019); Informant—SC 8 (interview with author, June 11, 2019); Informant—AGO 8 (interview with author, June 11, 2019).

assistance requests, they may repeat mistakes and they cannot benefit from each other's experience to build a pool of shared expertise. For instance, MOJ respondents said they frequently receive letters or requests from the MOFA that are not pertinent to them.[66] Problems also arise when a request is misplaced or dropped in the process because there are no mechanisms to coordinate or follow through to trace the status of the request. Furthermore, there is no designated department within any of the agencies that is responsible for coordinating mutual legal assistance requests. This might be related to the overall lack of understanding about mutual legal assistance concepts and practices, or to the low incidence of mutual legal assistance activity.

2. Occasional Involvement of Unrelated Agencies in the Mutual Legal Assistance Process and Unfortunate Consequences

At least on one occasion, the intervention of an extraneous agency in mutual legal assistance has caused the failure of the prosecution's case in a UAE court. To identify and recover Kabul Bank stolen monies and assets, the President of Afghanistan established the Kabul Bank Settlement Commission through a presidential decree in 2015.[67] According to an interviewee who works with the Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC), in one example the Kabul Bank Settlement Commission represented the Afghan government in the UAE and filed a lawsuit against Kabul Bank debtors in a Dubai court.[68] After numerous trips to Dubai and over two years' work on the case to identify stolen assets and debtors, the commission finally brought the case to court.[69] However, despite the significant expense and time devoted to the case, the court rejected the commission's lawsuit on the basis that the MOJ is the only

[66] Informant—MOJ 2 (interview with author, May 23, 2019).

[67] Informant—MEC 1 (interview with author, July 22, 2019).

[68] *Id.*

[69] *Id.*

competent authority and should represent Afghanistan based on the bilateral mutual legal assistance agreement between Afghanistan and the UAE, not the Kabul Bank Settlement Commission.[70] As this interviewee explained, according to the court order, if Afghanistan wants to pursue the lawsuit, the country's MOJ should start the investigation from scratch and refile the lawsuit in court.[71] According to this interviewee, the MOJ is not yet aware of the commission's actions and the whole Kabul Bank case drama in Dubai, and has not taken any action to represent the government and pursue the case in Dubai.[72]

This Kabul Bank example clearly illustrates the ignorance of officials concerning the laws and a poor institutional choice when drafting the Agreement Between Afghanistan and UAE because it vested technical authority in the wrong institution (the MOJ). Even if the MOJ had known about the case and the Dubai court's assertion regarding the MOJ's sole authority to pursue the case, it could not have done anything since the MOJ lacks the investigative authority and the professional capacity to represent Afghanistan in such a complex case.

3. Lack of a Clear Compliance Mechanism/Process for Incoming and Outgoing Requests Both in Theory and Practice

Issuing or responding to mutual legal assistance requests requires a clear mechanism to ensure that all outgoing requests are prepared by the competent authorities and in accordance with the relevant laws and regulations, and that incoming requests contain the required information and are applicable in Afghanistan. The mechanism should also identify an authority to perform a final review before making a request and to assess the legality and applicability of incoming requests

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[70] *Id.*

[71] *Id.* If the interviewee is correct, the order is extreme and suggests underlying unwillingness of the UAE to comply. It should have been sufficient to amend the proceedings to make the MOJ the complaining party in the UAE court case. Even with the court order, it is extraordinary that the Afghan government did not take this course.

[72] *Id.*

before channeling them to the relevant agencies inside Afghanistan. Such mechanisms do not exist under the 2013 Legal Cooperation Law.

The field research reveals that, in practice, no agency performs a final review or compliance assessment of mutual legal assistance requests before channeling them to foreign countries. This could be one of the main reasons there are so many irregularities in the current practice of mutual legal assistance. For instance, as noted previously,[73] some requests were sent to the MOJ which does not have any involvement in the process. There is also a high likelihood that other countries may not respond to Afghanistan's requests and provide legal assistance because they do not receive complete and well-prepared requests from Afghanistan.

As mentioned above, only one interviewee at MOFA said that the Ministry does a final review of outgoing requests, but this is only in extradition cases.[74] They did not know about mutual legal assistance requests. Even if MOFA performs this review with respect to mutual legal assistance requests, MOFA lacks the necessary expertise.

Lack of compliance assessment and final review increases the possibility of incorrect and/or incomplete requests. Such faulty requests may lead to no response, rejection, or delay by the receiving countries, or could trigger requests for corrections which would further exacerbate delays caused by this process. One interviewee at the AGO gave an example of a mutual legal assistance request sent to the United States.[75] According to this interviewee, the U.S. asked Afghanistan to

[73] *See* Section III of this chapter.

[74] Informant—MOFA 2 (interview with author, April 6, 2019).

[75] Informant—AGO 5 (interview with author, May 20, 2019)

amend the request several times.[76] He claimed that despite making many revisions as instructed, Afghanistan never received the desired legal assistance.[77]

IV. The Concept of Formal and Informal Mutual Legal Assistance

A. Formal and Informal Methods as Understood and Practiced by Officials

As discussed above, both formal and informal methods[78] of mutual legal assistance are used in Afghanistan. Only one interviewee was able to distinguish between formal and informal methods of mutual legal assistance. One prosecutor claimed, "nothing is informal once a prosecutor or public official signs something."[79] In actuality, the informal method includes INTERPOL and FinTRACA cooperation with their counterparts in other countries. INTERPOL and FinTRACA regularly seek or provide assistance to foreign countries.

FinTRACA has signed an MoU with its counterparts in 20 countries, including Uzbekistan, Kazakhstan, Australia, China, Korea, Ukraine, Taiwan, Turkmenistan, Tajikistan, the United Kingdom, Saudi Arabia, the United States, Bangladesh, Sri Lanka, Mongolia, Belarus, Russia, and Kyrgyzstan.[80] These MoUs fall under the informal method of cooperation.[81] Due to the growing volume of trade between China and Afghanistan, FinTRACA has the greatest number of interactions with China.[82] INTERPOL and FinTRACA have each developed their own standard forms for requests and online systems and databases through which they can exchange information

[76] *Id.*

[77] *Id.*

[78] *See* Section III of this chapter.

[79] Informant—AGO 3 (interview with author, May 19, 2019).

[80] *See* International Memorandum of Understanding, FinTRACA, http://www.fintraca.gov.af/InternationalMOUs.html (last visited Mar. 3, 2020).

[81] Informant—CB 1 (interview with author, June 23, 2019).

[82] *Id*.

with other countries.[83] The standard forms and online systems make it easier for officials to issue a request relatively quickly and receive a response within a short period of time.[84]

FinTRACA is also a member of the Egmont Group which "provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing (ML/TF)."[85] Financial Intelligence Units (FIUs) from 164 countries are members of the Egmont Group which encompasses eight regional groups.[86] According to the FinTRACA interviewee, exchange of information through the Egmont Group's platform has been very effective and swift.[87]

In addition to INTERPOL and FinTRACA, the interviewees reported some additional informal methods of cooperation. For instance, occasionally international advisors, in particular American and British advisors to prosecutors in anti-drug cases, have directly contacted their respective embassies or responsible agencies in their countries to provide certain documents or other evidence.[88] In such cases, the relevant agencies in those countries request specific information from Afghanistan through the international advisors.[89] This exchange of evidence and information occurs completely beyond the conventional formal and informal methods of mutual legal assistance.

Changes in technology are facilitating additional informal methods of information gathering. One interviewee explained that he is a member of an informal association of prosecutors

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[83] *Id*.

[84] *Id*.

[85] *About*, EGMONT GROUP, https://egmontgroup.org/en/content/about (last visited Sep. 1, 2019).

[86] *Id*.

[87] Informant—CB 1 (interview with author, June 23, 2019).

[88] Informant—AGO 3 (interview with author, May 19, 2019); Informant—AGO 2 (interview with author, May 19, 2019).

[89] Informant—AGO 3 (interview with author, May 19, 2019).

on WhatsApp called the Black Sea Association of Prosecutors.[90] The members of this international group occasionally exchange texts and information, but the communication is entirely informal.[91] Occasionally, a member prosecutor may ask for information about a case from a prosecutor in another country to make sure that they can locate the required information or evidence before starting a formal request.[92] Although the information exchanged by text is not directly admissible, this type of informal communication helps both sides make prudent decisions before initiating the lengthy process of a formal mutual legal assistance request.

Another protocol for informal cooperation has been evidenced in two high profile cases – the Kabul Bank case and in a recent case concerning the sexual and physical abuse of members of the Afghan women's national soccer team by the president of the country's football federation.[93] In these two instances, two separate teams of Afghan prosecutors travelled to Dubai[94] and a few European countries, including France and Germany,[95] to talk to people of interest in the cases, determine the assets of Kabul Bank's debtors in Dubai, and speak with victims of sexual and physical abuse in Europe. According to the interviewees, the visited countries gave their consent informally and allowed the informal investigation to proceed based on comity.[96] All of the arrangements took place outside of the formal mechanisms provided by laws, agreements, and conventions. One interviewee explained that, in the women soccer players case, Switzerland

[90] Informant—AGO 8 (interview with author, June 11, 2019).

[91] *Id.*

[92] *Id.*

[93] For more information about the case, see Suzanne Wrack, *'There Was Blood Everywhere': The Abuse Case against Afghan FA President*, THE GUARDIAN (2018), https://www.theguardian.com/football/2018/dec/27/sexual-abuse-allegations-afghan-fa-president-keramuudin-karim.

[94] Informant—AGO 5 (interview with author, May 20, 2019).

[95] Informant—AGO 9 (interview with author, June 11, 2019).

[96] *Id.*

rejected Afghanistan's informal request to allow its prosecutors into the country to meet and speak with the victims.[97] Undeterred, the team of prosecutors arranged to interview the victims who resided in Switzerland over Skype.[98]

Finally, in another example using Skype, a competent court took the testimony of an Australian victim in a kidnapping case (where the kidnapping was committed in Afghanistan). A respondent judge noted that the defense attorney for the victim arranged a Skype session with his client, and the victim offered her testimony during a formal session of the court on the case.[99] The judge reported that, according to the victim's testimony, the accused persons before the court were not involved in her kidnapping, and she asked the court to exonerate them.[100] When the judge was asked whether he decided the case based on the victim's testimony, he did not provide a clear answer.

Turning to formal methods of mutual legal assistance, although not well developed nor frequently used, officials engage with two type of practice: letters rogatory and MLATs. To be clear, the letter rogatory method may not bear the same meaning and follow the same procedures in Afghanistan as practiced globally.[101]

As an established practice among states, letters rogatory are usually requested by courts and in situations where a mutual legal assistance agreement is not in place between two countries.[102] In Afghanistan, prosecutors typically originate requests that are effectively letters rogatory. Similar to the global practice; the requests are made to countries that do not have bilateral

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[97] *Id.*

[98] *Id.*

[99] Informant—SC 11 (interview with author, June 25, 2019).

[100] *Id.*

[101] *See* Chapter Five.

[102] *See id.*

mutual legal assistance agreements with Afghanistan. This method of seeking formal assistance is the most common practice in Afghanistan, regardless of how other countries may perceive Afghanistan's requests.

The second form of formal assistance which is practiced in Afghanistan involves MLATs. Despite the presence of the UN Suppression Conventions and the two bilateral agreements, one with Iran and the other with the UAE (this may change soon), officials do not utilize the MLAT method very often. In fact, as mentioned above, the interviewees reported only one case in which Afghanistan attempted to use the MLAT method.[103] It should be noted that both the letters rogatory and MLAT requests were processed through diplomatic channels.[104] The Afghan prosecutors prepared a request to the UAE based on the mutual legal assistance agreement between Afghanistan and the UAE in Kabul Bank case.[105] However, the interviewee complained that despite the MLAT request, the UAE refused to provide the required legal assistance.[106] It is not clear why the UAE did not provide legal assistance in accordance with the bilateral agreement, however it might have been due to a sole rejection, procedural improprieties, or irregularities in the request.

[103] Informant—AGO 5 (interview with author, May 20, 2019).

[104] As extensively discussed in Chapter Six, the Afghan laws require processed mutual legal assistance requests through diplomatic channel. As such, the official's practice is unconsciously consistent with the laws. But it also directs requests through an entity that lacks expertise, and, given the generally low level of knowledge concerning modern mutual legal assistance, may well not distinguish clearly between purely discretionary letters rogatory procedures and the obligatory nature of modern mutual legal assistance.

[105] Informant—AGO 5 (interview with author, May 20, 2019).

[106] *Id.*

B. The Relative Paucity of Incoming Formal Requests Compared to Incoming Informal Requests from Other Countries

While both incoming formal and informal requests are lower in number than outgoing requests, the number of incoming informal requests are greater than incoming formal requests. While the interviewees at INTERPOL and FinTRACA reported that they receive frequent legal assistance requests from many countries, a handful of interviewees at the Supreme Court and the AGO also noted they had been involved in cases where they had to respond to a foreign country request processed through formal methods and via the diplomatic channel. They reported that formal requests for legal assistance from other countries are very rare. This suggests that the number of informal mutual legal assistance requests from foreign countries is much higher than formal ones. Only a few interviewees at the AGO could provide examples where their office had received requests from other countries and provided responses to the requests. For instance, one interviewee received a request from Russia in a drug trafficking case and provided the requested information and documents to Russia through MOFA.[107] In another case, Tajikistan requested assistance from Afghanistan in a money laundering case—asking for bank account information and financial documents about one of its nationals—and the interviewee provided the documents.[108] In another instance, Sweden requested legal assistance from Afghanistan in a drug trafficking case and received the required information.[109]

Several interviewees provided some tentative explanations that could explain the rarity of incoming requests, and why other countries rarely seek legal assistance from Afghanistan. First, foreign countries do not trust Afghanistan's legal and judicial system. Due to the rampant

[107] Informant—AGO 2 (interview with author, May 19, 2019).

[108] Informant—AGO 11 (interview with author, June 13, 2019).

[109] Informant—AGO 3 (interview with author, May 19, 2019).

corruption and lack of capacity in the relevant agencies, other countries do not want to bother asking anything of Afghanistan.[110] Second, which is related to the first, they might be hesitant to rely on the ability of Afghanistan's courts and prosecution offices to collect the requested documents and evidence properly so they can be used and admitted in the respective foreign courts.[111] Third, the time-consuming process of the formal method may be another reason why foreign countries are not be interested in seeking legal assistance from Afghanistan.[112] Fourth, lack of a clear mechanism or bilateral mutual legal assistance agreements between Afghanistan and many countries is another major reason why they would not seek legal assistance from Afghanistan.[113] Finally, another reason could be that foreign officials do not want to share information (required by a request) with Afghan officials; whether due to instability, rampant corruption or low capacity, they may fear leaks that would endanger success of their ongoing investigations.[114]

Nevertheless, the overall situation is changing as several countries currently want to sign bilateral mutual legal assistance agreements with Afghanistan. Some MLATs have already been provisionally drafted and are in different stages of the negotiation and acceptance process.[115]

[110] Informant—AGO 1 (interview with author, May 19, 2019).

[111] Informant—AGO 4 (interview with author, May 20, 2019).

[112] Informant—SC 8 (interview with author, June 11, 2019). The formal method is considered very time-consuming globally, but it could be particularly time-consuming in Afghanistan due to the inefficiency of the Afghan administrative system and unnecessary delays.

[113] Informant—SC 7 (interview with author, June 11, 2019).

[114] Most countries take the confidentiality issue extremely seriously. Particularly, if there is a high-profile case, the need to keep the investigation confidential is very high.

[115] *See* Section VI of this chapter.

C. Admissibility of Evidence (Obtained through Formal or Informal Methods) in Afghan Courts

The interviewees provided conflicting information about what types of evidence are accepted by Afghan courts. Since an overwhelming majority of the interviewees did not know the difference between formal and informal methods of mutual legal assistance, they could not distinguish between documents and evidence produced through each method and how these may raise admissibility issues in court. Focusing on admissibility of evidence, this section classifies interviewees into three groups.

First, some of the interviewees at the AGO reported that they had not encountered any problems with admissibility of evidence in the courts.[116] They said that court did not even have any issue with admitting documents they received from England through their British advisors.[117] Additionally, many of the interviewees in both prosecution offices and the courts claimed that documents produced by INTERPOL and FinTRACA are *ipso facto* admissible in court.[118]

Second, some interviewees indicated that any evidence should formally be channeled through appropriate authorities in order to be admissible in the courts.[119] One respondent cited Article 21 of the Afghan Code of Criminal Procedure which provides that documents or evidence obtained as a result of violating any laws of Afghanistan are not admissible.[120] This article only requires that laws not be violated, but does not address the situation where a document or evidence

[116] Informant—AGO 3 (interview with author, May 19, 2019); Informant—AGO 2 (interview with author, May 19, 2019).

[117] Informant—AGO 3 (interview with author, May 19, 2019).

[118] Informant—AGO 13 (interview with author, June 15, 2019); Informant—SC 7 (interview with author, June 11, 2019).

[119] Informant—AGO 8 (interview with author, June 11, 2019).

[120] *Id.*

is obtained through informal methods where the process does not violate any law.[121] Based on the respondents' experience, documents or evidence are admissible in the courts, including information or documents obtained by INTERPOL and FinTRACA, except for informal communications or exchanges of information between Afghanistan and other countries' prosecutors or other forms of informal cooperation like the international advisor method.[122] For instance, they frequently brought up their cooperation with FinTRACA and how they ask the agency to provide them with information about bank accounts and other financial documents from abroad.[123]

The final group of five interviewees consisted of judges and prosecutors. They asserted that no cross-border evidence could be admissible in court unless processed and obtained through formal methods, specifically diplomatic channels. They maintained that even documents or evidence collected by INTERPOL and FinTRACA should be authenticated by prosecutors through diplomatic channels.[124] Otherwise, the court would not accept the presented evidence.[125] The interviewee at FinTRACA explained that although they explicitly write on their documents that they are not evidence but rather financial intelligence information, some prosecution offices and courts ignore that fact and treat the documents as evidence.[126] He believed that the problem derives

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[121] *See Qanooni Ejra'at Jazaee* [Criminal Procedure Code], art. 21, Official Gazette, May 2014, No. 1132 (Afg.))

[122] Informant—SC 7 (interview with author, June 11, 2019).

[123] Informant—AGO 17 (interview with author, July 16, 2019).

[124] Informant—AGO 16 (interview with author, July 16, 2019).

[125] Informant—AGO 16 (interview with author, July 16, 2019); Informant—SC 9 (interview with author, June 25, 2019).

[126] Informant—CB 1 (interview with author, June 23, 2019). One of the key anti-money laundering activities of FinTRACA is analyzing suspicious transaction reports (STR). (*See e.g. Annual Report 2019*, DA AFGHANISTAN BANK 6 (2019), http://www.fintraca.gov.af/assets/Annual%20Report/FinTRACA_Annual%20Report_2019.pdf) As such, a STR should be issued on any suspicion, and it is assumed that many will report innocent activity. As a corollary, a) STRs are to be kept strictly confidential, and b) they cannot be introduced as evidence. This is all standard anti-money laundering doctrine globally (although Afghanistan is hardly alone in experiencing confusion on these points).

from lack of knowledge on the part of officials about formal and informal methods of mutual legal assistance cooperation.[127] In his view, one of the main goals of their work is to provide clues and preliminary information to prosecution offices.[128] FinTRACA's expectation is the prosecution would expand on this information to obtain admissible evidence through diplomatic channels.[129]

Based on the respondents' inconsistent contentions and viewpoints, it appears there is not a unified practice of admissibility of evidence in the courts and prosecution offices. The Code of Criminal Procedure does not provide rigorous and comprehensive provisions regarding admissibility of evidence. Given the ambiguity of the law, various judges and prosecutors may develop different practices based on their level of knowledge and experience of the law and mutual legal assistance mechanisms. To further complicate matters, precedent is not a formal source of law in Afghanistan, [130] so there are few means to help unify the practice.

V. Crime-Based and Country-Based Variations in Receiving Assistance from Foreign Countries

Foreign countries do not consistently provide legal assistance to Afghanistan's requests on every type of case according to several interviewees. Interviewees noticed variations in responses when seeking legal assistance from other countries. According to their observations, most countries are willing to provide assistance where the crimes in question involve drug trafficking or ordinary serious crimes like murder.[131] However, other countries may abstain from providing legal assistance in cases involving crimes such as money laundering, cash smuggling, and crimes

[127] Informant—CB 1 (interview with author, June 23, 2019).

[128] *Id.*

[129] *Id.*

[130] Consistent with this view, cases are not reported.

[131] Informant—AGO 13 (interview with author, June 15, 2019); Informant—AGO 9 (interview with author, June 11, 2019).

related to national security.[132] For instance, one interviewee with extensive experience working with both anti-drug and anti-corruption prosecutions, explained that they had success with mutual legal assistance from foreign countries in anti-drug prosecutions.[133] However, in the anti-corruption prosecution office, they have not been able to receive legal assistance from the very same countries when cases involve corruption and money laundering.[134]

Field research reveals that other countries typically provide legal assistance based on their national interest.[135] Since combating and constraining drug trafficking provides broad benefits, most countries are motivated to provide legal assistance in drug trafficking related cases.[136] On the other hand, countries which are potentially safe havens for money launderers are not willing to provide legal assistance in these cases,[137] most likely because they do not want to see money and wealth taken away from them.[138] The likelihood of receiving legal assistance in money laundering and cash trafficking cases is so low that several interviewees confessed they no longer bother drafting requests for legal assistance from foreign countries in such cases.

In cases involving ordinary crimes like murder, several countries have responded positively and provided legal assistance for Afghanistan's requests.[139] For instance, some interviewees pointed to Iran which has provided documents and evidence in several murder

[132] Informant—AGO 13 (interview with author, June 15, 2019); Informant—AGO 9 (interview with author, June 11, 2019).

[133] Informant—AGO 8 (interview with author, June 11, 2019).

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] Informant—AGO 17 (interview with author, July 16, 2019).

[139] Informant—AGO 13 (interview with author, June 15, 2019); Informant—SC 11 (interview with author, June 25, 2019).

cases.[140] However, Iran has failed to respond to many requests of Afghanistan in cases related to intelligence and national security (typically involving terrorism and fraud).[141]

Irrespective of the type of crime, each country may or may not provide legal assistance to Afghanistan for a variety of reasons. Accordingly, the level and extent of legal assistance between Afghanistan and other countries varies based on different factors. For example, due to ongoing tensions and the volatile political/diplomatic relationship between Afghanistan and Pakistan, not a single formal mutual legal assistance request has been exchanged between the two countries, at least to the interviewees' knowledge. Even informal mutual legal assistance requests appear to be only infrequently exchanged between the two countries. The interviewee at FinTRACA told me that they could not sign a bilateral MoU with their counterpart in Pakistan due to the unstable and hostile political relationship between the two countries.[142] One MOFA interviewee told me that a mutual legal assistance agreement is presently being negotiated between Afghanistan and Pakistan, but they do not expect the agreement to be signed and implemented in the near future.[143] Considering the UNODC reports' findings that most of Afghanistan's heroin is trafficked to Pakistan and numerous money laundering and cash trafficking offenses are committed daily across the two countries' borders,[144] the lack of cooperation between Afghanistan and Pakistan is unfortunate and very disappointing.

Some countries may not provide legal assistance due to concerns about fair trials and human rights. For instance, one interviewee relayed that Sweden denied legal assistance in a case

[140] Informant—AGO 13 (interview with author, June 15, 2019).

[141] Informant—SC 10 (interview with author, June 25, 2019); Informant—SC 11 (interview with author, June 25, 2019).

[142] Informant—CB 1 (interview with author, June 23, 2019).

[143] Informant—MOFA 3 (interview with author, April 9, 2019).

[144] *See* Chapter Two, section II (a) & (d).

because it was not convinced Afghanistan would hold a fair trial and observe the human rights of the suspect at trial.[145]

VI. Lack of Capacity and a Dearth of Resources at All Agencies

The above discussions clearly indicate that the relevant agencies in Afghanistan are operating at a lower than optimal capacity. Officials at all the relevant agencies lack sufficient knowledge of international law and how it should be applied in the domestic context. More specifically, none of the officials have received training in transnational crimes and mutual legal assistance. The United Kingdom (UK) supports anti-corruption efforts in Afghanistan, and it has been especially active in supporting the establishment of the Anti-Corruption Judicial Center (ACJC), both technically and financially. Recently, the UK provided a targeted training on money laundering for many judges and prosecutors who work at the ACJC.[146] Some interviewees have also received similar trainings in Indonesia and India.[147] However, during the trainings, the interviewees did not receive mutual legal assistance training.[148]

It seems that new recruitment has also been problematic for the AGO. Recently, many people have been appointed to middle and high-level positions at the AGO. Most of the new recruits are outsiders who have legal education at the bachelor's level but lack experience practicing law or working with the relevant agencies as prosecutors or judges. As some interviewees indicated, these new appointments have not helped bring about positive changes at the AGO.[149] The interviewees contend that the new appointees are not familiar with the necessary

[145] Informant—AGO 8 (interview with author, June 11, 2019).

[146] Informant—SC 7 (interview with author, June 11, 2019).

[147] Informant—AGO 3 (interview with author, May 19, 2019); Informant—SC 12 (interview with author, July 5, 2019).

[148] Informant—SC 12 (interview with author, July 5, 2019).

[149] Informant—AGO 5 (interview with author, May 20, 2019).

procedures and practices.[150] As a result, they do not implement the relevant laws properly in the course of performing their duties, and they create extra work for their colleagues who constantly must take time to help and advise them.[151]

Except at INTERPOL and FinTRACA, the officials interviewed could not speak English or any other foreign language. The Supreme Court and AGO do not have a department dedicated to providing translation services. Therefore, all mutual legal assistance requests are written in Dari or Pashto and then the MOFA must translate them into a foreign language, typically English.

In addition to capacity issues, many relevant departments at the Supreme Court and the AGO are under-resourced. Even today, most departments do not have access to computers, let alone access to the internet. One interviewee at Kabul's anti-corruption prosecution told me they do not even have a printer to use so they must write all their documents by hand.[152] In terms of human resources, many departments do not have sufficient staff. Some interviewees at the Supreme Court and the AGO said they have too many cases to manage, which impedes them from considering more time-consuming matters such as mutual legal assistance.[153] They make their decisions on which claims to file based on the evidence that is accessible as quickly as possible.

Many other problems arise from lack of capacity within the institutions. Below are several problems that result from the lack of capacity or resources.

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[150] *Id.*

[151] *Id*.

[152] Informant—AGO 5 (interview with author, May 20, 2019).

[153] Informant—AGO 16 (interview with author, July 16, 2019); Informant—SC 9 (interview with author, June 25, 2019).

A. Lack of Statistics on Transnational Crime and Mutual Legal Assistance

Almost all the relevant institutions fail to provide clear data and reports on transnational crime and mutual legal assistance. The only agency which is doing a passable job of reporting data is FinTRACA. Still, even it does not provide comprehensive reports that list the countries from which it seeks or to which it provides legal assistance or the types of cases where information has been exchanged between two countries. For instance, for the year 2019, FinTRACA reported that it exchanged 64 analytical reports with foreign countries.[154] Of 64 requests, 11 requests were made by Afghanistan and 53 requests were sought by other countries.[155] As mentioned, FinTRACA did not explain which countries were involved in the requests nor the types of cases. However, with respect to the internal exchange of information within domestic agencies, FinTRACA maintains detailed statistics including the name of the relevant agencies and crimes involved.[156]

The interviewees at INTERPOL could not answer questions about statistics on transnational crimes and mutual legal assistance. Apparently, they do not track the number of requests they make nor those they receive from other countries in a sufficiently detailed way. Considering that their resources are much better than those of the Supreme Court and the AGO, the lack of statistics at INTERPOL is particularly disappointing. No reports appear on their website either. Similarly, neither the Supreme Court, the AGO, nor MOFA provide any statistics on transnational crime and mutual legal assistance. As some interviewees indicated, they might provide some basic information for internal use only, but they do not maintain detailed and useful

[154] *Annual Report 2019*, DA AFGHANISTAN BANK 19 (2019), http://www.fintraca.gov.af/assets/Annual%20Report/FinTRACA_Annual%20Report_2019.pdf

[155] *Id.*

[156] *See id*. at 16-18.

data.[157] Given that there is not a department responsible for mutual legal assistance at each agency, and how disconnected the departments within each agency are, the prospect of providing a comprehensive report may seem a bit unrealistic.

B. Establishment of New Departments at the AGO Without a Clear Mandate

As part of recent reform efforts, the AGO has established several new departments that could be relevant to mutual legal assistance in the country. Of these, the Asset Recovery Department seems the most relevant. It was established in 2018 based on recommendations from the international community,[158] particularly the United States. The department was created to implement court orders in cases where courts seek recovery of illicit or stolen assets or money within Afghanistan and abroad.[159] However, in practice, the department has done almost nothing since its establishment. Employees in the department do not know the department's mandate nor do they fully understand their duties.[160] The department was not established based on a law or regulation,[161] however an interviewee said he heard that the AGO is working on a draft law to establish the subject-matter and territorial jurisdiction of the department.[162] The department has distributed a letter to all prosecution offices across Afghanistan to refer asset recovery cases to them, but no one has sent any cases to them yet.[163] The prosecutors in the department felt frustrated and tired of doing nothing. They come to the office to sit behind their desks all day without doing anything.

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[157] Informant—AGO 8 (interview with author, June 11, 2019).

[158] Informant—AGO 6 (interview with author, May 26, 2019).

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

C. Too Few Bilateral Mutual Legal Assistance Agreements with Foreign Countries

According to the latest data received from an interviewee at MOFA, Afghanistan has signed bilateral mutual legal assistance in criminal matters agreements with three countries: Iran (2008),[164] UAE (2011),[165] and Uzbekistan (2017).[166] This interviewee emphasized that these three agreements are finalized and enforceable.[167] While the text of the agreements with Iran and the UAE (discussed extensively in Chapter Six) are published in the Official Gazette and available on the MOJ's website, the author could not find the text for the agreement between Afghanistan and Uzbekistan. The interviewees at the MOFA and the MOJ were not able to provide the text either.[168] According to Afghanistan's legislative process, no law is enforceable until it is signed by the president and published in the Official Gazette.[169] If this interviewee's information is correct and the three agreements have all been signed , it is not clear how the agreement between Afghanistan and Uzbekistan could be enforceable if it is not yet published in the Official Gazette.

Additional bilateral agreements are in different phases of negotiation and acceptance between Afghanistan and four countries: Pakistan, Russia, Tajikistan, and Turkey.[170] According to some interviewees, among these four agreements, the prospect of signing a bilateral agreement

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[164] *See* Chapter Six (III).

[165] *See* Chapter Six (III).

[166] Informant—MOFA 3 (interview with author, April 9, 2019).

[167] *Id.*

[168] *Id.*

[169] Publication in the Official Gazette is part of legislative process in Afghanistan. (*See Qanooni Tai Marahele Asnade Taqnini* [Law on Processing of Legislative Documents] at art. 48, Official Gazette, October 2018, No. 1313 (Afg.)) Unless otherwise indicated in a law, all laws are applicable only after publication in the Official Gazette. (*Id.* art. 50) In any circumstances, all laws are subject to publication in the Gazette regardless of their entry into force date. (*See id.* at art. 52)

[170] Informant—MOFA 3 (interview with author, April 9, 2019).

with Pakistan seems dubious at best due to the unstable and deteriorating relationship between the two countries, but the remaining three agreements are expected to be finalized in the near future.[171]

The remarkable thing about these agreements is that none of them were initiated or suggested by Afghanistan. The interviewees could not provide a single example where Afghanistan had taken the initiative to institute a legal assistance agreement. Instead, other countries have suggested the idea of signing bilateral agreements and provided a draft to Afghanistan.

Examining the text of the Agreement between Afghanistan and Iran and the Agreement between Afghanistan and the UAE, each of the agreements appears more closely compatible with the domestic laws of the other country than with those of Afghanistan. For instance, the designation of different competent authorities for Afghanistan in each of the agreements is informative as to which country suggested the idea and provided the text.[172] As mentioned above, in the Agreement between Afghanistan and the UAE, the MOJ is designated as the competent authority for Afghanistan, however in the Agreement between Afghanistan and Iran, the Supreme Court is designated as the competent authority for Afghanistan.[173] Unfortunately, as detailed in Chapter Six, neither of these two agencies has the qualifications and institutional capacity to serve as a competent authority for Afghanistan in such an agreement. On the other hand, the Ministry of Justice and the Supreme Court may make sense as competent authorities for the UAE and Iran respectively, in accordance with their domestic laws.

One interviewee at MOFA highlighted that the present negotiations on bilateral agreements between Afghanistan and Russia and between Afghanistan and Turkey were initiated by those

[171] *Id*.

[172] *See* Chapter Six.

[173] *Id*.

countries and they provided drafts to be reviewed by Afghanistan.[174] Interestingly, since transnational crimes have been committed in Russia and Turkey and they need Afghanistan's legal assistance to solve them, these two countries have initiated the process of putting in place mutual legal assistance agreements with Afghanistan.[175]

With respect to informal methods, including MoUs, the FinTRACA respondent related that in some instances, Afghanistan has initiated establishing MoUs with other countries, however the overwhelming number of MoUs were initiated by other countries.[176] In light of the field research findings on the state of mutual legal assistance in Afghanistan, it is not surprising that Afghanistan has not been proactive, nor taken the initiative, nor set priorities to determine with which countries it most needs to enter into mutual legal assistance agreements.

VII. Practical Challenges That Complicate Mutual Legal Assistance Requests

Many interviewees pointed out to several challenges including unrealistic time frames, dual citizenship, and political crime that complicate and impede using mutual legal assistance tool.

A. The Challenge of Time in Mutual Legal Assistance

Current mutual legal assistance practice is extremely time-consuming.[177] Some interviewees indicated that even if a foreign country opts to provide legal assistance, the quickest response they could expect from the requested country would be at least six months.[178] It is impossible to accommodate this lengthy delay within the tight schedule and time frames set for

[174] Informant—MOFA 3 (interview with author, April 9, 2019).

[175] *Id.*

[176] Informant—CB 1 (interview with author, June 23, 2019).

[177] *See* Section IV of this chapter.

[178] Informant—AGO 9 (interview with author, June 11, 2019).

investigation and prosecution by the CPC.[179] While these time frames are not always strictly enforced (in practice, many cases are delayed far beyond the specified time frames), several interviewees raised the problem of the Code's schedules because they restrict prosecutors' ability to extend investigation and prosecution until cross-border evidence is received. Prosecutors are also under pressure from their superiors to complete investigation and prosecution within the mandated time frames.[180] In addition to being time-consuming, there is also considerable uncertainty whether a foreign country will even provide a requested piece of evidence. The above factors, together with many others, such as the lack of clear mutual legal assistance mechanisms, the low level of professional capacity, and the broad lack of adequate resources, have persuaded many prosecutors to disregard any trans-border aspects of their cases and limit the evidence to what they can locate domestically, even though it may be insufficient to establish an indictment. Several interviewees reported that they intentionally did not bother to request cross-border legal assistance in many cases due to these challenges.[181]

B. The Problem of Dual Citizenship

Most interviewees identified dual citizenship as an increasingly serious challenge that hinders the effective use of mutual legal assistance. Over the last two decades, many Afghans who lived abroad for years and naturalized in their host countries have returned to their home country to live or work. Although their intention may be positive, such as serving Afghanistan and making it a better place, Afghanistan has had several high-profile corruption and money laundering cases

[179] As discussed in previous chapter, according to Article 149 of the Code of Criminal Procedure, a prosecutor should complete investigation and prosecution within 27 days for misdemeanors and 75 days for felonies. In situations where a suspect is not in detention, the Attorney General can extend the time frames to 90 days for misdemeanors and 180 days for felonies. (*See* Chapter Six).

[180] Informant—AGO 19 (interview with author, July 20, 2019).

[181] Informant—AGO 16 (interview with author, July 16, 2019); Informant—AGO 17 (interview with author, July 16, 2019).

that were allegedly committed by dual citizens who returned in recent years to serve as ministers or heads of government departments. Several interviewees mentioned that the when dual citizens commit a crime, they can easily flee to their second country of citizenship.[182]

Respondents provided many examples where the main perpetrators of crimes left Afghanistan without being held accountable for what they had done.[183] Moreover, when they returned to their second country, not only did the second country refuse to extradite them, but it also refused to provide legal assistance to Afghanistan.[184]

Interviewees provided numerous examples of former ministers, the former head of the Central Bank, and other former high-profile officials who were accused of corruption and embezzlement, but now live freely abroad. For instance, the former head of Afghanistan's Central Bank was one of the main actors in the Kabul Bank case, but he fled to the United States before the investigation was initiated. Despite many requests, the United States has yet to extradite him or provide legal assistance in the case.[185] Allegedly, the United States told Afghan officials that he is a U.S. citizen and they cannot extradite him. Furthermore, in terms of mutual legal assistance, it is not clear why the United States would not provide other types of legal assistance in the case.

In another example, a former minister of the Hajj and Religious Affairs Ministry was accused of corruption and embezzlement.[186] Before the investigation began, he fled to the UK, his second country of citizenship, and still resides there.[187] One interviewee reported that, despite many

[182] Informant—AGO 5 (interview with author, May 20, 2019).

[183] Informant—AGO 13 (interview with author, June 15, 2019).

[184] *Id.*

[185] Informant—AGO 5 (interview with author, May 20, 2019).

[186] Informant—AGO 3 (interview with author, May 19, 2019).

[187] *Id.*

requests, the UK has not yet provided any legal assistance.[188] Interviewees gave some additional examples where the accused escaped to Canada or Sweden; those countries also declined to provide legal assistance to Afghanistan to prosecute the crimes.[189]

C. The Political Crime Challenge: A Barrier for INTERPOL in Combatting Corruption

The interviewees at INTERPOL pointed out a further barrier which impedes INTERPOL in seeking legal assistance from other countries. According to Article 3 of the INTERPOL Constitution, the organization is prohibited from acting in matters of a political nature. Article 3 stipulates that "it is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character."[190] According to the interviewees, INTERPOL's Secretariat will not approve a request for extradition (dubbed a "Red Notice"[191]) in corruption cases where the suspects or accused are former Afghan officials.[192] Apparently, INTERPOL's Secretariat considers the corruption of high-level officials as activity with a political character and will not approve Afghanistan's Red Notice requests. The interviewees claimed that many high-ranking officials who had committed corruption or other crimes simply fled to other countries, leaving it up to Afghanistan alone to try to find and arrest them abroad.[193] This lack of cooperation by INTERPOL's Secretariat has handicapped Afghanistan's INTERPOL by severely circumscribing its ability to act against perpetrators of high-profile corruption crimes who have

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[188] *Id.*

[189] Informant—AGO 8 (interview with author, June 11, 2019); Informant-AGO 13 (interview with author, June 15, 2019).

[190] The Constitution of the ICPO-INTERPOL, at art. 3 (adopted by the General Assembly at its 25th session (Vienna-1956)).

[191] "A Red Notice is a request to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action." For more information, visit INTERPOL website: https://www.interpol.int/en/How-we-work/Notices/Red-Notices.

[192] Informant—MOI 2 (interview with author, May 28, 2019).

[193] *Id.*

left Afghanistan.[194] The interviewees, however, did not know if INTERPOL's Secretariat exhibits the same behavior and implements the same convoluted interpretation of Article 3 for all member countries, or if this constricting determination is specific to Afghanistan.[195]

VIII. Recent Initiatives, Impacts of Using Mutual Legal Assistance, and Prospect for Future

Many respondents reported recent initiatives taken by the Afghan AGO, provided success stories of utilizing mutual legal assistance, and emphasized on the urgent need for developing an effective mutual legal assistance mechanism in Afghanistan.

A. Recent Developments at the AGO with Respect to Mutual Legal Assistance Agreements

In a very recent development, the Afghanistan AGO is directly negotiating memoranda of understandings (MoUs) with its counterparts in several countries.[196] Although it appears that other countries' AGOs have taken the initiative, the idea of direct cooperation between Afghanistan and other countries' AGOs is very new in the country. Although MoUs do not impose *obligations* on signatory parties, an increase in the number of MoUs would raise many questions about their role, utility, and effectiveness within the mutual legal assistance context, and their relationship with the bilateral agreements that are processed through the legislative process. In the course of the field research, one interviewee showed the author a draft MoU that was supposedly going to be finalized and signed between Afghanistan's AGO and Uzbekistan's AGO.[197] If signed, this would be the

[194] *Id.*

[195] *Id.*

[196] Informant—AGO 12 (interview with author, June 15, 2019); Informant—AGO 4 (interview with author, May 20, 2019).

[197] Informant—AGO 12 (interview with author, June 15, 2019).

second MoU of its kind, after the one between Afghan and Russian AGOs. The interviewee said that there are ongoing talks and negotiations on similar agreements to be signed with other countries' AGOs.[198]

B. Using Mutual Legal Assistance Leads to Successful Prosecution

Despite all the difficulties, barriers, and the low number of mutual legal assistance cases in Afghanistan, most prosecutors who were able to get cross-border evidence found it extremely helpful in their investigation, prosecution, and successful conviction of criminals.[199] They gave several examples in which prosecutions and courts relied solely on evidence that was obtained from other countries. In one instance, an exchange of information and mutual legal assistance between Afghanistan and the UK led to the detection of a group of transnational drug traffickers and confiscation of drugs in both countries.[200] In that case, many criminals were tried and convicted in both countries.[201] In addition, some interviewees gave several examples of murder cases for which Afghanistan sought and obtained legal assistance from Iran.[202] In another example, a mysterious murder case was resolved after receiving evidence from Norway.[203] In each case, the interviewees were able to successfully prosecute the accused based on the information they received from another country.

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[198] *Id.*

[199] Informant—AGO 3 (interview with author, May 19, 2019); Informant—AGO 10 (interview with author, June 13, 2019).

[200] Informant—AGO 3 (interview with author, May 19, 2019).

[201] *Id.*

[202] Informant—AGO 13 (interview with author, June 15, 2019).

[203] Informant—SC 9 (interview with author, June 25, 2019).

C. The Urgent Need for Effective Mutual Legal Assistance Mechanisms Including Bilateral Agreements

Almost all interviewees expressed concerns about the current state of the struggle against transnational crime and the need to achieve leverage through mutual legal assistance mechanisms to successfully prosecute these crimes. They indicated that the most beneficial way to enhance investigation and prosecution of transnational crimes would be to reform and strengthen mutual legal assistance mechanisms to encourage their increased utilization. In particular, they suggested signing bilateral agreements with each country to make the process clearer, quicker, and obligatory for both sides.

Some interviewees who deal with transnational crime daily and know the importance of mutual legal assistance, expressed strong frustration with the current situation. Due to the lack of effective mechanisms, they must rely on evidence available domestically. Since sufficient domestic evidence is lacking in many cases, they frequently have to change the interpretation of a crime to make it prosecutable under current provisions of law.[204] For instance, in transnational money laundering cases, although prosecutors recognize that the case involves money laundering, they lack domestic evidence to prove that.[205] The accused often allege they legally obtained the money in another country, such as Pakistan, through trade or other licit activities.[206] Lacking evidence of the underlying crimes committed in Pakistan or elsewhere, the prosecutors typically pursue such actions by filing claims that are easier to prove, for example focusing on the illicit transfers of money.[207]

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[204] Informant—SC 12 (interview with author, July 5, 2019).

[205] *Id.*

[206] *Id.*

[207] *Id.*

IX. Conclusion

The empirical research demonstrates that the current Afghan mutual legal assistance mechanisms are barely implemented by the relevant officials and authorities. The relevant officials lack knowledge about the relevant laws, agreements, and conventions, and do not implement them. Additionally, some of the flaws in current mechanisms (discussed in Chapter Six) in turn produce problems and complicate implementation. For instance, failing to designate a central authority is a primary issue which creates many problems and irregularities, including lack of coordination among the competent authorities, lack of clear compliance mechanisms for processing mutual legal assistance, and involvement of unrelated agencies in the process. Furthermore, lack of capacity and dearth of resources in the relevant competent authorities have extremely limited the ability of the authorities to implement Afghanistan's laws and mechanisms. Consequently, the theoretical flaws and lack of implementation invite substantial changes and reforms in the current laws and institutions.

CHAPTER EIGHT: RECOMMENDATIONS TO RECONFIGURE COMPLIANCE WITH INTERNATIONAL CONVENTIONS, RESTRUCTURE MUTUAL LEGAL ASSISTANCE MECHANISMS, FOCUS ON IMPLEMENTATION, AND RETHINK AFGHANISTAN'S APPROACH TO INTERNATIONAL LAW

As this dissertation has underscored, transnational crimes pose a serious threat to international peace and security and individual states. In particular, transnational crimes including drug trafficking, terrorism, and corruption have been pervasive in Afghanistan over the last two decades. They have had devastating impacts on the country's economy, security, rule of law, and development. The complexity and transnational character of the crimes have defied the Afghan legal system and confounded the legal authority and capability of the Afghan government to contain the crimes. Additionally, under traditional international law, the government of Afghanistan lacks the authority to enforce its jurisdiction beyond its sovereign boundaries in order to investigate and prosecute these crimes.

In the effort to contain transnational crimes and mitigates its effects, Afghanistan has ratified several UN Suppression Conventions that address transnational crimes such as corruption, terrorism, drug trafficking, and money laundering. Four of these conventions—the Vienna Convention, Financing Convention, UNCTOC, and UNCAC—specifically impose a wide variety of mutual legal assistance obligations on Afghanistan. Some of these obligations include designating a central authority, providing legal assistance in cases that involve entities, providing requests in writing, and establishing special investigative techniques. In response to these conventions and the obligations therein, Afghanistan has developed and enacted at least two laws that encompass mutual legal assistance provisions: the 2013 Legal Cooperation Law and the 2014 Anti-Money Laundering Law. While the laws have several useful provisions and address some

important obligations of Afghanistan under the UN Suppression Conventions, they lack numerous other measures required or recommended by the conventions and suffer from serious shortcomings, complexities, contradictions, and inconsistencies. For instance, the laws have only partially incorporated or failed to incorporate at least 58.8% of Afghanistan's obligations under the UN Suppression Conventions. Furthermore, the laws suffer from many complexities and inconsistencies including using contradictory and inconsistent terminology, conflating mutual legal assistance with extradition, failing to clearly determine competent authorities, and setting unrealistic time frames.

Despite the existence of these (albeit flawed) laws on paper, the empirical research section of this dissertation found little evidence that these laws are being enforced. Among the many factors potentially contributing to the laws' poor implementation are lack of capacity; implementing officials' lack of awareness and knowledge of the laws; resource shortages; complexities of the laws; lack of cooperation and coordination among the relevant agencies; and lack of investment and concentration on enforcement.

To address the above deficiencies, this chapter provides concrete and detailed recommendations for law reform and implementation on four fronts. First, it proposes recommendations for dealing with the issue of compliance to bring the Afghan domestic law in full conformity with the requirements of the UN Suppression Conventions. Second, the chapter addresses the shortcomings and inconsistencies within Afghanistan's current mutual legal assistance mechanisms. Third, it provides recommendations for strengthening and ensuring implementation of the relevant laws. Fourth, drawing on the overall findings of the dissertation, this chapter provides suggestions to enable Afghanistan to take a consistent approach to

incorporating its international obligations.[1] These proposed changes are intended to bring the Afghan laws into conformity with the UN Suppression Conventions; to enhance clarity, effectiveness, and efficiency of mutual legal assistance provisions; to make mutual legal assistance mechanisms more comprehensive; and to facilitate the implementation of mutual legal assistance in Afghanistan.

I. Incorporate Obligations and Non-Mandatory Measures of the UN Suppression Conventions

The first category of proposed reforms addresses issues arising from Afghanistan's lack of compliance with existing obligations and its failure to incorporate certain non-mandatory measures under the UN Suppression Conventions. As discussed in previous chapters, although the two presently existing Afghan laws[2] comply with many obligations under the UN Suppression Conventions and incorporate several non-mandatory measures, they fail to incorporate many other obligations and non-mandatory measures required or recommended by the conventions. It is important for Afghanistan to incorporate these as-yet-unaddressed obligations and non-mandatory measures because it will significantly enhance the comprehensiveness and effectiveness of its mutual legal assistance provisions and will harmonize Afghanistan's laws with those of other countries. In the area of mutual legal assistance, harmonizing national laws is particularly critical because it can reduce the barriers arising from differences in legal systems by laying out a clear

[1] However, this topic will only receive ancillary treatment, as a full consideration would be beyond the scope of this dissertation.

[2] *Qanooni Esterdade Mutahameen, Mahkomeen, Wa Hamkari Adli* [Law on Extradition of Accused and Convicted Persons and Legal Cooperation], Official Gazette, April 2013, No. 1103 (Afg.) [hereinafter EXTRADITION AND LEGAL COOPERATION LAW]; *Qanooni Jelowgiri Az Polshoaee Wa Awayede Nashi Az Jarayem* [Law on Prevention of Money Laundering and Proceeds of Crimes], Official Gazette, July 2014, No. 1142 (Afg.) [hereinafter ANTI-MONEY LAUNDERING LAW]

process for exchanging information and evidence, and accelerating the speed of executing requests.

The following sections detail the recommendations and reasoning for incorporating every obligation and non-mandatory into Afghan domestic law.

A. Comply with All Obligations

1. Designate A Central Authority

The current Afghan laws fail to designate a central authority as required by the UN Suppression Conventions. This failure creates many other problems as discussed in Chapter Six. The central authority functions as the heart of mutual legal assistance mechanisms and can have a major impact upon the effectiveness of the entire process.

There are various reasons behind the requirement to designate a central authority. First, a central authority provides a clear point of contact for the parties. This avoids confusion and assists requesting states in preparing requests for a pre-identified point of contact in the requested states. Second, designation of a central authority shortens the process and time of channeling incoming and outgoing mutual legal assistance requests. Central authorities are mandated to directly communicate and exchange requests with one another to avoid the long and bureaucratic processes of diplomatic channels. Third, since the entire mutual legal assistance mechanism centers around one institution, the central authority becomes a repository of expertise, knowledge, and institutional culture. As such, it functions as a resource to provide information and guidance for all the relevant authorities inside a country. Finally, the central authority is intended to be well-connected with competent domestic authorities and able to effectively coordinate mutual legal assistance requests within a country. Using its expertise, the central authority will communicate

the proper request or information to the correct authority inside Afghanistan or abroad and make the procedure more efficient.

Designating a central authority is very important, however it is even more critical to designate the right institution as the central authority. Designating the wrong institution as a central authority may defeat the very purpose of its existence. Like Afghanistan, every country has many competent authorities tasked in criminal procedure and mutual legal assistance. Those authorities may have overlapping authority over certain processes or cases. In addition, there might be politics between or controversies among competent authorities over which should be designated the central authority.[3] As such, it is not always easy to choose a single authority to serve as the central authority.

Each country should specify its central authority after carefully taking into account domestic procedures and which institution or department is best equipped to fulfill the functions of a central authority. But there is no guarantee that states will always choose the best institution as the central authority; domestic tensions, politics, or bureaucratic competition may complicate the task. In 2013, a review of the implementation of the UN Convention Against Corruption (UNCAC) in 44 states indicated that most states (50%) designated their Ministry of Justice as the central authority.[4]

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[3] Based on author interviews with many officials in Indonesia in 2019, there has been an ongoing fight between the AGO and the Ministry of Law and Human Rights (current central authority). The AGO claims that the Ministry of Law and Human Rights is the wrong institution to be the central authority because it does not have any investigative authority or direct criminal law duties or expertise, except immigration matters and maybe prisons. It is primarily a 'policy shop' not a practice-oriented agency.

[4] *Review of the Implementation of the United Nations Convention against Corruption: International Cooperation*, UNITED NATIONS 7 (CAC/COSP/2013/10), https://www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1386713e.pdf [hereinafter REPORT ON THE IMPLEMENTATION OF THE UNCAC] It should also be noted that the functions and authority of a 'Ministry of Justice' may be quite different in different countries. For instance, in the United States, the Department of Justice is headed by the Attorney General, and includes not only the federal prosecution function, but also the principal federal police function (Federal Bureau of Investigation). In contrast, the Ministry of Law and Human Rights in Indonesia has operational authority over immigration and prisons, but largely serves as a 'policy shop'; prosecution is vested in an entirely separate Office of the Attorney General.

The AGO was the second most designated agency as the central authority.[5] A few states designated their Ministry of Foreign Affairs or a specific department as their central authority.[6]

As discussed previously, the 2013 Legal Cooperation Law and the Agreement Between Afghanistan and the UAE together identify five institutions as competent authorities:[7] the AGO, the Supreme Court, the Ministry of the Interior, the Central Bank,[8] and the Ministry of Justice.[9] In addition, the 2013 Legal Cooperation Law and 2014 Anti-Money Laundering Law characterize the Ministry of Foreign Affairs (MOFA) as a liaison office.[10] Considering the role and authority of the AGO in the Afghan criminal justice system, this dissertation identifies the AGO as the most appropriate institution to be designated as the central authority for mutual legal assistance in Afghanistan.

The following sections examine each institution and provide explanations for why the AGO should be the central authority and other institutions are not suitable for the job.

a. Suggestions from the Field

When the author asked interviewees which institution they would recommend to be designated as the central authority, they provided a variety of suggestions. While most identified the AGO as the most suitable agency for the central authority, other suggestions included establishing a new department, designating MOFA, or the Ministry of the Interior. The proponents of each option provided reasons for their choices. The striking point was that no one (not even

[5] *Id.*

[6] *Id.*

[7] As a reminder, a competent authority is an institution that, within a state's domestic structure, is 'competent' to initiate a request; a central authority is the conduit and point of contact for external parties.

[8] *See* Chapter Five.

[9] *See id.*

[10] *See id.*

judges) proposed the Supreme Court as the central authority. Similarly, none of the interviewees (including MOJ officials) identified the MOJ as the proper institution to be the central authority.

The proponents of the AGO as the central authority gave four reasons why it should be designated the central authority. First, the Constitution of Afghanistan has vested the powers of investigation and prosecution in the AGO.[11] Since collection of evidence, both domestic and cross-border, is part of investigation, the AGO has the primary responsibility and should be the central authority.[12] Second, since collection of evidence is the responsibility of the AGO, the vast majority of mutual legal assistance requests currently come from the AGO.[13] In that sense, the AGO is the main agency that has the institutional and practical qualifications to be the central authority.[14] Third, the AGO has greater capacity to handle mutual legal assistance professionally and in accordance with domestic and international law compared with other agencies.[15] The AGO has experience with criminal investigations and implementation of relevant laws, which would help it better carry out the job.[16] Finally, if the AGO were the central authority, it would provide the shortest and quickest path to obtain the necessary evidence from foreign countries.[17] The AGO could directly contact other countries' central authorities and obtain information and evidence within the shortest possible time.[18] Conversely, if a different agency is designated as the central authority, the process could become bogged down and unnecessarily lengthy because the central

[11] Informant—SC 7 (interview with author, June 11, 2019); Informant—MOJ 1 (interview with author, May 23, 2019).

[12] Informant—SC 9 (interview with author, June 25, 2019).

[13] Informant—SC 11 (interview with author, June 25, 2019).

[14] Informant—AGO 16 (interview with author, July 16, 2019).

[15] Informant—AGO 17 (interview with author, July 16, 2019).

[16] Informant—AGO 17 (interview with author, July 16, 2019).

[17] Informant—AGO 16 (interview with author, July 16, 2019); Informant—SC 9 (interview with author, June 25, 2019).

[18] Informant—SC 12 (interview with author, July 5, 2019).

authority would introduce an extra step in the process.[19] Proponents for the AGO as the central authority cautioned, however, that the AGO would not be able to carry out the duties of the central authority unless additional resources were provided to the AGO and the relevant employees received specialized training.[20]

MOFA has been identified as another option for the central authority. Some interviewees asserted that MOFA has primary responsibility for establishing relationships and maintaining connections with foreign countries.[21] It also has a better understanding and more experience interacting and working with other countries.[22] In addition, MOFA has greater resources and more officials with the ability to speak foreign languages.[23]

The third most popular suggestion was establishing an independent department made up of representatives from each of the relevant agencies with a rotating chairperson.[24] Proponents argued that this combination would have two benefits. First, it would avoid any potential conflicts of jurisdiction or other controversies among the relevant agencies.[25] They could all see themselves represented in this new department and feel included.[26] Second, the presence of representatives from each agency could help the department to swiftly channel information and requests and easily perform follow-ups within the respective agencies.[27]

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[19] Informant—SC 9 (interview with author, June 25, 2019).

[20] Informant—AGO 9 (interview with author, June 11, 2019).

[21] Informant—SC 8 (interview with author, June 11, 2019); Informant—AGO 14 (interview with author, June 25, 2019).

[22] Informant—SC 8 (interview with author, June 11, 2019).

[23] Informant—AGO 5 (interview with author, May 20, 2019).

[24] Informant—AGO 8 (interview with author, June 11, 2019).

[25] Informant—AGO 8 (interview with author, June 11, 2019).

[26] Informant—AGO 8 (interview with author, June 11, 2019).

[27] Informant—AGO 9 (interview with author, June 11, 2019).

Finally, a few interviewees proposed designating the MOI, particularly INTERPOL, as the central authority.[28] The main reasoning behind their proposal was that INTERPOL has greater resources and technical expertise, and has been supported directly by the international community.[29]

b. The AGO as the Central Authority

This dissertation argues that the AGO is the most appropriate institution to serve as the central authority in Afghanistan. There are many reasons why the AGO is in a unique position compared with the other competent authorities. First, designating the AGO as the central authority simplifies the process of mutual legal assistance. The AGO has the constitutional authority to investigate criminal cases, and thus the duty to collect evidence and information over the course of investigation. The purpose of mutual legal assistance is to collect cross-border evidence and information. If another institution is selected as the central authority, it will further complicate the process of mutual legal assistance. Second, mutual legal assistance mechanisms will become more effective and efficient if the AGO is designated as the central authority. Because of the nature of their duties, prosecutors are relatively more experienced and skilled than other officials in understanding the technicalities and urgency of investigation and gathering evidence. This dissertation's field research establishes that the AGO has already been engaged in several mutual legal assistance cases. As such, the AGO can capitalize on its experience and operationalize the mutual legal assistance infrastructure more efficiently than any other institution. Third, when assessing the authority and the role of the AGO in legal processes, only the AGO can provide the

[28] Informant—AGO 4 (interview with author, May 20, 2019); Informant—MOI 2 (interview with author, May 28, 2019).

[29] Informant—AGO 4 (interview with author, May 20, 2019); Informant—MOI 2 (interview with author, May 28, 2019).

shortest process for exchanging cross-border evidence. This is exactly the goal of designating a central authority. No other institution designated to act as the central authority could improve the current process. If another institution were designated as the central authority, it would create an additional layer in the process, and would likely have to process the request through the AGO anyway.

In comparison, no other relevant agencies have the authority or competency to function as the central authority. First, the Supreme Court is not a good fit for the role of central authority. As previously noted, although courts have semi-investigative authority, they do not exercise that power. They simply ask the prosecution to look for a missing piece of evidence or they return the entire case to the prosecutors for further investigation. As one interviewee correctly elaborated, if courts exercised their authority and intervened in investigations, they would lose their neutrality.[30] Considering this situation, if the Supreme Court serves as the central authority, it will disrupt the entire criminal procedure system and prolong the process rather than shorten or simplify it.

Second, INTERPOL in the MOI is also not an appropriate agency for the role of central authority. While the agency can provide or seek valuable information from other countries, it does not have the legal capacity to function as the central authority. Interaction and exchange of information through INTERPOL is considered informal and therefore usually requires authentication. In fact, a review of the implementation of the UNCAC indicates that no country has designated their INTERPOL department as their central authority.[31] Furthermore, most of the officials who work with INTERPOL lack sufficient legal education (e.g. a law degree) and thus

[30] Informant—SC 7 (interview with author, June 11, 2019).

[31] REPORT ON THE IMPLEMENTATION OF THE UNCAC, *supra* note 4 at 7.

they are not familiar with the complexities and nuances of legal processes. The agency can assist with investigations in urgent cases, but cannot bear the responsibility of the central authority.

Third, the Central Bank (FinTRACA) is not a suitable agency to be the central authority. First, the agency does not have the legal capacity to be involved in criminal investigations. Second, although the agency exchanges invaluable information with its counterparts, the information is scoped narrowly to financial intelligence and is considered informal mutual legal assistance. Third, the scope of the agency's work is limited to financial crimes such as money laundering and financing terrorism.

Fourth, the MOJ does not have any executive or investigative authority within the Afghan legal system and thus it is completely removed from the process. It cannot even be considered a competent authority with respect to criminal legal processes. Accordingly, the government of Afghanistan should reconsider its role in the Agreement Between Afghanistan and the UAE.

Finally, the MOFA is not the right institution for the role of central authority. Even though the MOFA has the primary responsibility for engaging with foreign countries in a wide range of issues, it does not have executive authority in terms of domestic legal processes. Also, if the MOFA serves as the central authority, it will not simplify or expedite the process of mutual legal assistance. Its designation as the central authority will perpetuate the status quo. Lastly, as noted in previous chapters, MOFA officials lack sufficient knowledge and experience to understand legal procedures and the value of a certain piece of evidence in a given timeframe. Notwithstanding these reasons, the MOFA still remains an important institution. Some countries may still require the exchange of evidence and information through diplomatic channels.[32] In those circumstances, the MOFA plays

[32] For instance, when the author was in Indonesia, he heard from Indonesian prosecutors that some countries such as Japan only accept the exchange of evidence through diplomatic channels. According to a report on the implementation of the UNCAC, at least three countries have designated their MOFA as their central authority. (REPORT ON THE IMPLEMENTATION OF THE UNCAC, *supra* note 4 at 7.)

an important role in the mutual legal assistance process. Furthermore, the role of MOFA is critical in conducting active diplomacy, negotiating mutual legal assistance treaties, and convincing other countries to engage with Afghanistan to fight transnational crimes

c. Institutional Changes and the Duties of the AGO as the Central Authority

To function effectively as the central authority, the AGO would need to make some institutional changes to its current structure. Primarily, a new department should be established under the direct supervision of the AGO to deal exclusively with international cooperation and mutual legal assistance. This change would require amending the current Law on Structure and Authority of the Attorney General's Office.[33] The new department should be tasked to carry out at minimum the following important duties and activities.

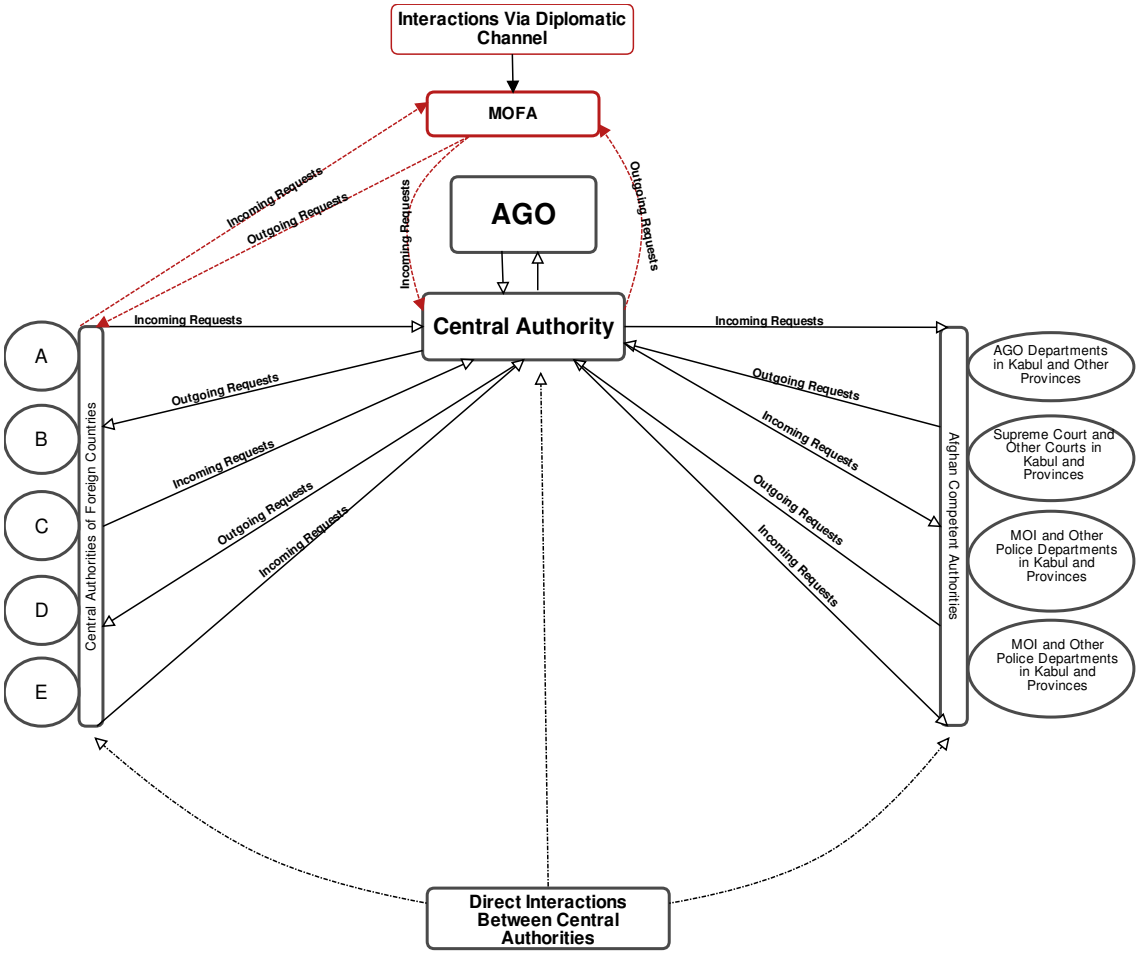
First, the department's primary job should be executing and monitoring the execution of incoming requests and channeling and following up on outgoing requests with foreign authorities. To do so, the department should establish a direct and close connection with all AGO departments and all other competent authorities inside Afghanistan. The department should be empowered to send incoming requests to the relevant authorities for execution. Maintaining a tight network should allow the department to effectively monitor and track the execution of incoming requests without unnecessary delays. Technology should be used to effectively operationalize the network. In addition, other AGO departments and competent authorities should be able to send mutual legal assistance requests to the new department to be channeled to the appropriate authorities of foreign countries. The department should develop procedures to enable it to monitor compliance and assess the compatibility of outgoing requests with the laws of the requested states and incoming

[33] *See Qanooni Tashkeel Wa Salaheyate Saranwali* [Law on Structure and Authority of the Attorney General's Office], Official Gazette, October 2013, No. 1117 (Afg.) [hereinafter THE LAW ON AGO STRUCTURE]

requests with Afghan laws before taking further action or sending out the requests to appropriate authorities. This will make the process more effective and avoid unnecessary delays.

Second, the department should *directly* communicate and exchange information and evidence with its foreign counterparts. This is one of the most important aspects of the central authority. Direct communication can significantly shorten the process and reduce the time needed to seek or receive legal assistance (see Figure 11). Unless a foreign country requires it, no request should be transmitted through diplomatic channels (several countries, including Japan, do require processing mutual legal assistance requests through diplomatic channels).

Figure 11. A diagram of the mutual legal assistance process in Afghanistan after necessary reforms



Third, the department should function as a source of information, expertise, and capacity building on mutual legal assistance for other departments within and outside the AGO. It should hire employees with a solid legal education, meaning they should have sufficient knowledge of international law as well as domestic criminal law and criminal procedure. Given that most mutual legal assistance requests are initiated duration the investigation stage, it is anticipated that the department will be primarily engaged with other AGO departments. The department should hold

specialized trainings on mutual legal assistance and transnational crime for judges, prosecutors, police, and other relevant departments.

Fourth, the department should perform its own translations. Employees of the department should also be bilingual or multilingual and have an excellent command of at least one foreign language. Although most countries accept requests in English, there might be the need for employees that can speak other international languages. All incoming requests should be translated to Dari or Pashto and outgoing requests should be translated into the language required by a requested state. If the central authority receives requests already translated into an Afghan official language, it should authenticate the translation and ensure its accuracy. The department should take the language issue seriously and invest in it sufficiently because a small linguistic problem can negate all efforts, create confusion, cause delays, or make the entire process ineffective.

Finally, the department should create a secure electronic case management system for requests. The system should link the department with all other relevant departments within or outside the AGO. The system should allow the department to easily track the execution of requests and take appropriate action if a request faces any challenge or delay. The system will also facilitate the department's ability to generate statistical data about its activities. Creating such a system is feasible as the government of Afghanistan has already developed and introduced a nationwide case management system for all criminal cases.[34] An option for mutual legal assistance should be added to that system which should then be linked to the case management system of the department.

[34] The case management system has been funded by the U.S. government as part of state-building efforts to reform the Afghan legal and judicial system.

2. Establish the Scope of Mutual Legal Assistance

Although the 2013 Legal Cooperation Law authorizes the relevant authorities to provide or seek mutual legal assistance, it does not clearly determine the scope of mutual legal assistance. The scope of mutual legal assistance should clearly be established in accordance with the requirements of the UN Suppression Conventions. The new Afghan law should specify the scope and contours of legal assistance for all types of transnational crimes. It would be best to directly incorporate the language of the UN Suppression Conventions and allow the Afghan presumptive central authority (AGO) to provide "*the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings"*[35] of any type of transnational crime.

3. Authorize Mutual Legal Assistance in Crimes That Involve Legal Persons

No Afghan law complies with the UN Suppression Conventions' requirement to provide mutual legal assistance to the fullest extent possible in connection with offenses that involve a legal person.[36] The ability to hold legal entities criminally liable is crucial as transnational criminal groups increasingly use various forms of organizations such as corporations or non-profit organizations as a shield to carry out their criminal activities such as financing terrorism or money laundering.[37] Fortunately, the government of Afghanistan has realized the importance of this issue and criminalized the illicit activities of legal entities. For instance, the new Afghan Penal Code has established the criminal liability of legal entities[38] in various crimes including financing of

[35] This is the language of the UN conventions. *See e.g.* United Nations Convention against Corruption (UNCAC), at art. 46 (1) (entered into force Dec. 14, 2005) [hereinafter UNCAC].

[36] *See* Chapter Six.

[37] *See Liability of Legal Persons*, UNODC, https://www.unodc.org/e4j/en/organized-crime/module-4/key-issues/liability-legal-persons.html (last visited Mar. 16, 2020).

[38] *See Code Jaza* [Penal Code], Official Gazette, at art. 86, May 2017, No. 1260 (Afg.) [hereinafter THE PENAL CODE]

terrorism;[39] corruption;[40] money laundering;[41] organized crime;[42] human trafficking;[43] and drug trafficking.[44] The Afghan government can comply with the UN Suppression Conventions' requirement by adding a provision that obligates Afghan authorities, particularly the central authority, to provide mutual legal assistance in crimes that involve a legal person.

4. Require Written Requests

Afghan law should explicitly require the relevant Afghan authorities and requesting states to make all mutual legal assistance requests in writing to comply with the UN Suppression Conventions.[45] Furthermore, the law should ensure that the method will produce written records that can be authenticated.

5. Bear the Ordinary Costs of Executing Requests

Contrary to the UN Suppression Conventions,[46] Afghan laws obligate requesting states to bear the ordinary costs of executing mutual legal assistance requests.[47] Afghanistan should comply with its obligation and amend its law to incur the ordinary costs of executing incoming requests. It is unrealistic for requesting states to pay the ordinary costs of incoming and outgoing requests for Afghanistan. It is globally accepted that ordinary costs must be paid by the requested states because it is the place where a request is executed. However, if a request imposes extraordinary costs on

[39] *See id.* at art. 281 & 282.

[40] *See id.* at art. 374.

[41] *See id.* at art. 500.

[42] *See id.* at art. 508.

[43] *See id.* at art. 515.

[44] *See id.* at art. 309 (3).

[45] *See* Chapter Five.

[46] As previously explained, the UN Suppression Conventions require requested states to bear the ordinary costs of mutual legal assistance. (*See* Chapter Five).

[47] *See* Chapter Six.

Afghanistan, it can ask for payment from the requesting states. This is permitted and even recommended by the UN Suppression Conventions.[48]

6. Provide Copies of Publicly Available Records, Documents, or Information

Under the UN Suppression Conventions, if requested, Afghanistan has an obligation to provide copies of publicly available records, documents, or information to requesting states.[49] The 2013 Legal Cooperation Law has not incorporated this obligation. A provision should be added that requires Afghan authorities to provide the publicly available documents to requesting states if they request such documents. Unfortunately, Afghan public institutions rarely have good filing systems so, as a practical matter, the application of such a provision may remain challenging. However, as a matter of obligation and law, the government of Afghanistan must comply with its obligation. In the future, as the government develops and improves its administrative system, the provision will become fully implemented.

7. Require Use of UN Mini-MLATs in the Absence of Bilateral Agreements

In compliance with the UN Suppression Conventions, Afghanistan should incorporate a provision into its new mutual legal assistance law to obligate its authorities to use the mini-MLATs provisions of the UN Suppression Conventions in the absence of bilateral mutual legal assistance agreements with other countries. The UN Suppression Conventions have been ratified by most countries so it's likely that a country from which Afghanistan may need legal assistance will be a party to the UN Suppression Conventions.

As explained in Chapter Seven, most Afghan officials have limited knowledge of mutual legal assistance and rely solely on reciprocity or good intergovernmental relationships when they

[48] *See* Chapter Five.

[49] *See id.*

request legal assistance from a foreign country.[50] In addition, since Afghanistan presently only has bilateral agreements with two or three countries,[51] for the foreseeable future use of mini-MLATs provides the most clear, effective and mandatory mechanism for Afghan authorities to seek legal assistance from, or provide it to, foreign countries.

8. Ensure Speedy Execution of Requests

The 2013 Legal Cooperation Law does not fully comply with the requirement of the UN Suppression Conventions to ensure speedy execution of requests.[52] Afghan law needs to lay out a process which takes into account the deadlines set by requesting states. Incorporating consideration for the deadlines of requesting states will also allow the presumptive Afghan central authority to prioritize the execution of incoming requests in light of the time span set forth in each request.

9. Establish the Scope of Law Enforcement Cooperation

Although required by the UN Suppression Conventions,[53] the notion of law enforcement cooperation is entirely absent in Afghan law. It is imperative that Afghanistan incorporate law enforcement cooperation and define its scope in Afghan domestic mutual legal assistance law. This will enable Afghanistan's police and other law enforcement agencies to interact with their counterparts within a framework. Since the UN Suppression Conventions separately discuss mutual legal assistance and law enforcement cooperation, and global practice distinguishes between formal and informal mutual legal assistance, the establishment of law enforcement cooperation will harmonize Afghan law with global practice and the laws of other countries. Consequently, the distinction will reduce misunderstandings between Afghanistan and other

[50] *See* Chapter Seven.

[51] *See id.*

[52] *See* Chapter Six.

[53] *See* Chapter Five.

countries and further clarify the process for legal assistance. The new law should specifically identify the agencies that are considered a "law enforcement agency" for the purpose of cooperation.

10. Provide Legal Assistance Through Conducting Special Investigative Techniques

The new Afghan law should authorize its competent authorities to provide mutual legal assistance to foreign countries using special investigative techniques (such as controlled delivery, undercover operations, and electronic or other forms of surveillance). If requested by a foreign country, the law should explicitly allow the relevant Afghan authorities to obtain the required information and evidence through such special investigative techniques and provide it to the requesting states. The complex nature of transnational crime requires states to utilize special investigative techniques and authenticate the evidence produced via those techniques to get it admitted in court. Some of these techniques, such as undercover operations and electronic surveillance, are already allowed under the CPC[54] so use of these techniques in the context of mutual legal assistance does not offend domestic rules or practices. To fully comply with the obligation, Afghanistan should amend the CPC to broaden its scope of special investigative techniques to include controlled delivery, which is often utilized in combating drug trafficking.

B. Incorporate Non-Mandatory Measures

1. Authorize Spontaneous Communication of Information

Although spontaneous exchange of information is encouraged, but not required, by the UN Suppression Conventions, its use could be very important to effectively provide legal assistance and combat transnational crime. The Afghan law should allow the relevant Afghan authorities to

[54] *Qanooni Ejra'at Jazaee* [Criminal Procedure Code], art. 112-118, Official Gazette, May 2014, No. 1132 (Afg.). [hereinafter CRIMINAL PROCEDURE CODE]

spontaneously share information with relevant states if they deem certain information/documents beneficial for combating a crime that is subject to the jurisdiction of those states. At a minimum, the new law should allow the spontaneous communication of information through the central authority or through direct law enforcement cooperation between other agencies and their foreign counterparts.

2. Authorize Videoconference Hearings

In the age of technology, computers and the internet, conducting hearings through videoconference has become common practice internationally. In transnational crime cases, witnesses and experts could be far away from Afghan courts; the utility and economy of videoconferencing has special advantages for Afghanistan because it is more cost effective. The measure is not only encouraged by the UN Suppression Conventions, but it is also a practical necessity. The Afghan law should incorporate videoconference hearings and ensure the admissibility of evidence obtained through this method.

3. Authorize Use of Modern Technology to Provide or Seek Legal Assistance

Afghan law should authorize the relevant authorities to use modern technology such as secure and reliable databases, e-mail, and other technological applications to provide or seek legal assistance from foreign countries. Obviously, the use of modern technology depends on whether a requested state authorizes the same method. Because modern technology can be very swift and effective, the UN Suppression Conventions encourage states parties to take advantage of modern methods. Although less formal, the Egmont Group has already developed a database through which the financial intelligence units of member states regularly exchange information and

documents.[55] Afghanistan and other states should follow the example of the Egmont Group in using technology to facilitate communication and transmission of documents; although Afghan government resources will remain limited in the short term, this should be an area of interest to foreign donors who can provide assistance in implementation.

4. Authorize Joint Investigations

To effectively constrain transnational crime, the UN Suppression Conventions strongly recommend state parties to conduct joint investigations if necessary. The 2013 Legal Cooperation Law has not incorporated this measure. For a developing country like Afghanistan, conducting joint investigations with other countries not only helps fight transnational crime but also provides an opportunity for Afghan law enforcement officers to learn from others' experience and increase their skills and capabilities. As a result, when a case is the subject of investigation in more than one state, the Afghan law should establish a legal basis for and authorize competent Afghan authorities to enter into specific bilateral agreements for the purpose of conducting a joint investigation with foreign authorities.

II. Required Changes to Address Inconsistencies in the Current Mutual Legal Assistance Mechanisms

In addition to incorporating the above obligatory and non-mandatory measures, this dissertation recommends substantial changes to help resolve the many existing deficiencies and inconsistencies in Afghanistan's current mutual legal assistance mechanisms.

[55] The interviewee at FinTRACA indicated that the Egmont Group has developed a database for members and they frequently use that database when they request information from their counterparts. (Informant—CB 1 (interview with author, June 23, 2019)).

A. Combine Mutual Legal Assistance Provisions of All the Three Laws in One

As noted, currently Afghanistan has three laws that contain provisions on mutual legal assistance: the 2013 Legal Cooperation Law (the primary law), the 2014 Anti-Money Laundering Law, and the 2014 Anti-Financing Terrorism Law.[56] As explained in Chapter Six, the last law has the fewest provisions (only three articles) on mutual legal assistance.[57] The current situation is chaotic and seriously impedes enforcement.

To avoid confusion and repetition in the existing laws and to facilitate implementation, this dissertation proposes that the relevant provisions of the laws should be merged and unified in a new law. Similar to the 2013 Legal Cooperation Law, this new law should provide general authority to provide legal assistance in any type of transnational crime. The law will then meet the obligations of Afghanistan under the various UN Suppression Conventions, but it will also provide a clear, comprehensive, and coherent mechanism for mutual legal assistance. In the future, if Afghanistan ratifies other conventions similar to the UN Suppression Conventions, the law would already provide the necessary authority for mutual legal assistance. If a new convention requires something which does not exist in that law, Afghanistan need only amend or modify the 'umbrella' law, rather than enacting an entirely new law.

B. Separate Mutual Legal Assistance from Extradition

The 2013 Legal Cooperation Law covers both extradition and mutual legal assistance.[58] The law first discusses extradition and then addresses mutual legal assistance procedures in chapters

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[56] *See* Chapter Six.

[57] *See id.*

[58] *See Qanooni Esterdade Mutahameen, Mahkomeen, Wa Hamkari Adli* [Law on Extradition of Accused and Convicted Persons and Legal Cooperation], at art. 9-43 Official Gazette, April 2013, No. 1103 (Afg.) [hereinafter EXTRADITION AND LEGAL COOPERATION LAW]

two and three respectively.[59] Although both extradition and mutual legal assistance fall under "international cooperation" (at least under the UN Suppression Conventions), in practice they are separate and distinct topics with distinct procedural requirements.[60] Extradition is more complex and has stricter rules than mutual legal assistance.[61] In recognition of these differences, countries have recently been separating and regulating the two concepts under separate laws or otherwise maintaining a clear distinction.[62] The 2013 Legal Cooperation Law not only regulates both topics but also occasionally and erroneously conflates the provisions of the two topics.[63] It might be possible to discretely regulate both topics under one law but there are good reasons to suggest that they should be regulated under two separate laws in Afghanistan.

First, extradition entails higher bars and more legal limitations than mutual legal assistance. Since extradition involves transferring an accused or convicted person from one country to another, domestic laws impose very strict rules pertaining to extraditable offenses or persons.[64] Second, the Afghan extradition process and the role of agencies are quite different than the process for mutual legal assistance requests. For instance, the High Council of the Supreme Court has the central role and is the only agency that can authorize extradition of a person to a foreign country.[65] The High Council consists of all nine justices of the Supreme Court.[66] It is not surprising that the

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[59] *See id.*

[60] *See* MANUAL ON MUTUAL LEGAL ASSISTANCE AND EXTRADITION 41-86 (2012) (EBOOK, PUBLISHED BY UNODC) [hereinafter THE UNODC MANUAL]

[61] *See generally id.*

[62] *See generally* Els De Busser, *The Digital Unfitness of Mutual Legal Assistance*, 28 SECURITY AND HUMAN RIGHTS 1-4, 161, 164-165 (2018).

[63] *See* Chapter Six.

[64] *See* THE UNODC MANUAL, *supra* note 60 at 41.

[65] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 58 at art. 9 (1); *Qanooni Taskheel Wa Salaheyate Quwae Qazaeya Jumhori Islami Afghanistan* [Law on Organization and Jurisdiction of the Judiciary of the Islamic Republic of Afghanistan], at art. 31 (4) & (5), Official Gazette, June 2013, No. 1109 (Afg.).

[66] *See id.* at art. 24.

Supreme Court has already established a department that exclusively deals with extradition cases.[67] However, as explained in Chapter Six, the High Council does not have any involvement in mutual legal assistance processes. Instead, several other institutions including the AGO play a major role. Given the differences between these two processes, separating them would help establish clarity, facilitate effective implementation, and allow the government to specify the process for each concept with greater detail under two respective laws.

C. Separate Mutual Legal Assistance in Criminal Matters from Civil Matters

Although the title of the 2013 Legal Cooperation Law does not explicitly provide that it governs mutual legal assistance in *criminal* matters, it can be understood from its provisions that it regulates mutual legal assistance only in criminal matters. In contrast, the Judicial Assistance Agreement Between Afghanistan and Iran covers both *criminal* and *civil* matters.[68] While the agreement is only enforceable between the two countries, it is not a good example for future bilateral mutual legal assistance agreements.

Procedures in criminal cases are very different from civil cases in every country. Conflating the two complicates processes and implementation. As the government of Afghanistan amends the current mechanisms, it should also request the amendment of the Agreement between Afghanistan and Iran accordingly. Therefore, a single Afghan law should exclusively regulate mutual legal assistance in criminal matters and the bilateral agreements should follow suit.[69]

As this dissertation proposes, building on the current provisions of the 2013 Legal Cooperation Law, a new independent mutual legal assistance law should exclusively regulate "mutual legal

[67] During his field research, the author interviewed officials in the department.

[68] *See* Chapter Six.

[69] It might be desirable to enact a new law for mutual legal assistance in civil matters. But that is beyond the scope of this dissertation.

assistance in criminal matters." This law should be clear and precise because the current mechanisms contain many ambiguities, including a lack of clarity about the subject matter of the law.

D. Resolve Inconsistencies Pertaining to Competent Authorities

The current Afghan laws do not provide a clear definition of "competent authority." This should be provided; for instance, a competent authority could be defined as "an agency that is involved in criminal investigation (including preliminarily investigation), prosecution, and trial in accordance with the relevant laws of Afghanistan."[70] A proper definition will clearly delineate jurisdiction and prevent irrelevant agencies (such as the MOJ) from being involved in the process.

As explained in Chapter Six, the 2013 Legal Cooperation Law and the Agreement Between Afghanistan and the UAE are not consistent in how they identify the competent authorities. In one instance, the 2013 Legal Cooperation Law identifies three competent authorities: the AGO, the Supreme Court, and the MOI.[71] In another section, the law adds the Central Bank as a competent authority.[72] In addition, the Agreement Between Afghanistan and the UAE specifies the MOJ as a competent authority.[73] This dissertation has already explained the negative consequences of identifying the MOJ as a competent authority.[74] Consequently, the existing agreements should be changed to be consistent with the new law when specifying the agencies designated as competent authorities. Subsequently, any bilateral agreements that might be signed in the future should ensure

[70] *See* footnote 7 (this chapter).

[71] *See* Chapter Six.

[72] *See id.*

[73] *See id.*

[74] *See* Chapter Seven.

the correct agency is designated. The new law will also need to specify the process for interaction between competent authorities and the central authority.

E. Address the Problem of Time Frames

As elaborated in previous chapters, Afghan laws currently have two separate time frames which are neither realistic nor compatible with each other (and may even be contradictory): the time frames set forth in the CPC for discovery, investigation and prosecution, and trial phases;[75] and the time frames set forth in the 2013 Legal Cooperation Law for the competent authorities to process mutual legal assistance requests.[76] The latter time frames are not realistic and do not distinguish between a complicated case and a simple one. Either the time frames in the 2013 Legal Cooperation Law should be removed, or they should be lengthened or shortened depending on the nature of the crime, requested documents and evidence, and complexity of the case.

Additionally, the CPC should be amended to provide flexibility for time frames in transnational criminal cases. This could be done by making adherence to the CPC timeframes optional or it could build in guidelines to permit some discretion for the relevant authorities, particularly prosecutors. Presently, the time frames make it unfeasible for prosecutors to request cross-border evidence within the limited time provided. As a result, prosecutors are usually limited to relying on whatever evidence they can obtain domestically, even though acquiring cross-border evidence may lead to discovering or dismantling a transnational criminal network.

F. Employ Precise Legal Terminology and National Language, and Avoid Ambiguity

As explained in the previous chapters, there are many problems and inconsistencies with use of language and terminology in Afghanistan's laws and agreements. Those problems are

[75] *See* Chapter Six.

[76] *See id.*

significant and can complicate or impede implementation. Parties to an agreement may infer different meanings for the same term. To address these problems and inconsistencies, this dissertation proposes the following:

First, only one term should be used in Dari and Pashto for "mutual legal assistance." Currently, none of the terms that are used by the Afghan laws and agreements is an appropriate equivalent to mutual legal assistance. Therefore, this dissertation recommends using either *hamkari du janeba huqooqi* [همکاری دوجانبه حقوقی] or *hamkari mutaqabel qanooni* [همکاری متقابل قانونی]. These two are literal translations of "mutual legal assistance" in Dari/Farsi. Regardless which is used, the law should provide a proper definition[77] and use the term consistently.

Second, the government of Afghanistan should be prudent about incorporating foreign terminology when signing an agreement with another country. As noted, there are many Iranian legal terms within the Agreement Between Afghanistan and Iran. Afghanistan should replace them with the Afghan Dari/Farsi equivalent. For instance, some of the Iranian terms that can be replaced with common Afghan legal terms are as follows:

- *bazjuaee* [بازجویی] for "investigation" should be replaced with *tahqeeq* [تحقیق].
- *karshenas* [کارشناس] for "expert" should be replaced with *ahlekhebrah* [اهل خبره].
- *tameen* [تأمین] for "guarantee" should be replaced with *zamanat* [ضمانت].
- *maazedat* [معاضدت] for "aid" should be replaced with *masaedat* [مساعدت].

These are just a few examples. A thorough review is required to identify all the foreign terms and replace them with Afghan legal terminology. In light of these issues, the government of Afghanistan should be more cautious in the future and limit the use of foreign terms in laws or

[77] As previously noted, the 2013 Legal Cooperation Law already provides a definition for *hamkari adli* [همکاری عدلی], meaning justice cooperation.

agreements to situations where there is no equivalent word in the official languages of Afghanistan. In the case when a foreign term does not have an equivalent Dari or Pashto counterpart, it is important that the respective law or agreement clearly defines the foreign term.

Finally, with respect to ambiguities, all laws and agreements should be thoroughly reviewed by judges, prosecutors, lawyers, and legal scholars prior to adoption/enactment in order to identify and resolve any ambiguities. In particular, the ambiguities identified in the 2013 Legal Cooperation Law[78] should be addressed in the new law. For instance, the new law should clarify the role of the AGO and the Supreme Court in the process of rendering evidence or documents to a foreign state.

G. Resolve the Contradictions Between the Laws and the Agreements

This dissertation has identified several contradictions[79] between the 2013 Legal Cooperation Law and the bilateral agreements between Afghanistan and the countries of Iran and the UAE. The 2013 Legal Cooperation Law requires the MOFA to follow its requirements when entering into agreements with foreign countries.[80] However, the law was enacted after the two agreements were signed and enforced. The problem is that neither the law nor the agreements provide any guidance as to which one supersedes the other in the case of contradiction. It is a common practice in Afghanistan that this is addressed in one of the final articles of a law. Therefore, this dissertation recommends that the 2013 Legal Cooperation Law should be replaced with a new law on mutual legal assistance in criminal matters in order to fully incorporate all the requirements of the UN Suppression Conventions and resolve the other problems discussed above. Additionally, the

[78] *See* Chapter Six.

[79] *See id.* Some contradictions concern costs of executing a request, specifying the Ministry of Justice as the competent authority in the agreement between Afghanistan and UAE, or the Supreme Court as the Central Authority in the agreement between Afghanistan and Iran.

[80] *See* EXTRADITION AND LEGAL COOPERATION LAW, *supra* note 58 at art. 49.

government of Afghanistan should discuss and request modification of the current agreements with Iran and the UAE to conform them to the requirements of the revised law. Alternatively, if modification of the current agreements is time-consuming or difficult to negotiate with the two countries, they may stay in place. However, subsequent agreements should strictly follow the requirements of the proposed new mutual legal assistance law.

III. Focus and Invest in Implementation of the Law

As the field research revealed, in Afghanistan there is a tremendous gap between law on paper and implementation of the law.[81] The current mechanisms largely remain on paper and have failed to achieve their intended objective to contribute to the effective prosecution of transnational crimes. Similarly, the above proposed formal institutional changes have no hope of achieving any tangible impact unless the government of Afghanistan takes serious steps to implement the laws. Informed by the findings of the field research, this dissertation recommends the following measures be taken by the government of Afghanistan and its relevant agencies to effectively implement mutual legal assistance law and combat transnational crimes:

A. Develop Detailed Mutual Legal Assistance Guide

There is an urgent need for a detailed, visual guide on mutual legal assistance to be created and distributed to the relevant authorities and officials. The guide should be tailored to the proposed new law on mutual legal assistance. It should clearly illustrate the provisions of the law and provide details and examples for each provision to ensure consistent implementation. It should provide a framework and the basis for the central authority to facilitate coordination among competent authorities in mutual legal assistance cases.

[81] *See* Chapter Seven.

The guide should be clear, comprehensive, and include detailed instructions about every step of mutual legal assistance so the relevant officials can use it easily. The guide should employ visuals such charts and diagrams to portray the process to execute an incoming or outgoing mutual legal assistance request. It should also include instructions on how officials can obtain further assistance or instructions from the central authority when needed.

Furthermore, the guide should develop a standard and uniform template for an outgoing request that can be used by all the competent authorities across the country. The template should contain at least the minimum required by the UN Suppression Conventions. The template should include the contact information of the relevant competent authority and the central authority so the central authority and foreign countries can quickly authenticate the issuance of such a request.

The guide should also provide detailed information to foreign countries on how they can request legal assistance from Afghanistan, an estimated time for execution of a request in various cases, and the minimum requirements for an acceptable incoming request. The guide should be provided in Afghan official languages and English, and it should be made available on the website of the central authority to make it easily accessible to all stakeholders.

The guide should be developed by the presumptive central authority in close coordination with other relevant authorities, including the Supreme Court, the MOI, and the MOFA. The Afghan government has already developed guidelines in the form of regulations for extradition,[82] although those regulations are not as detailed and comprehensive as would be desirable. Learning from the experience of those guidelines, the proposed guide on mutual legal assistance should be as self-explanatory and detailed as possible. The guide should be regularly updated and distributed

[82] *See Muqarara Esterdade Maznoneen Wa Mutahameen Wa Enteqale Mahkoomeen Ba Habs* [Regulation on Extradition of Suspects and Accused Individuals and Transfer of Convicted Persons] Official Gazette, April 2017, No. 1256 (Afg.).

in accordance with any changes that may take place in national or international law, however the most current version should always be available online for immediate access.

B. Build the Capacity of the Relevant Officials

As noted in Chapter Seven, the field research found very low levels of technical and professional capacity in the relevant agencies with respect to mutual legal assistance. While officials in each of the relevant institutions generally lacked sufficient capacity to conduct their general jobs, their capacity for confronting transnational crimes and handling mutual legal assistance was further challenged. The officials did not have the required knowledge and skills to use the tools and mechanisms necessary to initiate or execute mutual legal assistance requests. The government of Afghanistan should take specific actions to enhance the capacity of the personnel in the relevant agencies.

More specifically, the government should support and provide capacity building trainings for judges, prosecutors, police officers, and other relevant officials in the agencies that could be involved in the mutual legal assistance process. The trainings should focus on the applicability of international law; transnational criminal law; international conventions; bilateral agreements; MoUs; domestic laws; and guidelines related to mutual legal assistance in Afghanistan. These capacity building efforts should be initiated for the central authority and extended to those departments of the competent authorities that encounter transnational crimes. Capacity building efforts should start in Kabul then expand to the border provinces (such as Herat, Balkh, Kandahar, and Nangahar) where most transnational crimes take place. The trainings should include all judges, prosecutors, and the officials in the MOI and the MOFA.

As part of Afghanistan's state-building efforts, numerous capacity building trainings have been conducted for judges, prosecutors, and other officials over the last two decades, generally by

international or foreign agencies. The trainings have had positive impacts and increased the general capacity of the officials. The trainings proposed by this dissertation are a step further to enable the relevant authorities to effectively investigate more sophisticated crimes that are transnational in nature.[83]

To accomplish this additional capacity building, the government of Afghanistan needs to receive technical assistance from the United Nations on Drug and Crimes (UNODC) and other international partners. The UNODC is extensively and regularly engaged with member states (particularly developing countries) to build and strengthen the capacity of officials with respect to effectively implementing mutual legal assistance mechanisms. The UNODC has also developed a comprehensive training model on international cooperation and mutual legal assistance.[84]

In close collaboration with the UNODC and other international donors, the government of Afghanistan should develop a model training that encompasses both international and national tools and materials. The training should jointly be delivered by international and national practitioners and experts. Recognizing the need for capacity building, a UNCTOC resolution strongly encourages states parties to take specific measures aimed at enhancing the capacity of their relevant officers. The resolution provides:

> Member States should consider supporting technical assistance efforts, including as undertaken by the United Nations Office on Drugs and Crime, geared towards developing training programmes to improve the capacities of domestic law enforcement officers, including those who may serve as liaison officers, and of liaison magistrates, and enhance their knowledge on, inter alia, applicable international instruments and the domestic legal systems of host countries and their

[83] Given that many capacity-building programs have been implemented by international donors for judges and prosecutors, it is not clear to what extent those programs included or focused on combating transnational crimes. At least as the previous chapter revealed, the interviewees did not receive substantial trainings on how they can effectively investigate and prosecute complex transnational crime including utilizing mutual legal assistance.

[84] *Mutual Legal Assistance (MLA),* UNODC, https://www.unodc.org/e4j/en/organized-crime/module-11/key-issues/mutual-legal-assistance.html (last visited Mar. 18, 2020).

criminal procedure laws, including requirements on admissibility of evidence in courts.[85]

To build capacity over the long term, this dissertation recommends creating a course named Transnational Criminal Law and Practice for inclusion in the curriculum of law and sharia faculties in Afghanistan. The course should focus on transnational crimes and mutual legal assistance, drawing materials from international and domestic law. To accomplish this, the central authority should work with the Ministry of Higher Education to emphasize the importance of this subject. The two agencies should work together to develop a curriculum for the course and distribute it to all universities across the country.[86] Alternatively, the central authority may work with the Supreme Court, the AGO itself, and the Afghanistan Independent Bar Association to add an advanced course on transnational criminal law in the Judicial, Prosecutorial, and Legal Stage programs.[87] Regardless of the program, additional legal education in this area will provide all future judges, prosecutors, lawyers, and diplomats basic knowledge and skills for combating transnational criminal law that they can further develop over the course of their careers.

C. Hire New Public Officers with Strong Qualifications for the Central Authority

The AGO should hire new officials with high qualifications: well-educated, including knowledge of international law, transnational criminal law, and international relations; experienced in working with the competent authorities; and having a professional level of

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[85] *Enhancing the Effectiveness of Central Authorities in International Cooperation in Criminal Matters to Counter Transnational Organized Crime*, UNODC Annex I-para. (f) (Resolution 8/1), https://www.unodc.org/documents/treaties/Resolutions_and_Decisions/Resolution_8_1.pdf (last visited Mar. 19, 2020) [hereinafter THE CONFERENCE RESOLUTION]

[86] Given the centralized system of government in Afghanistan, it is common practice for the Ministry of Higher Education to develop a unified curriculum for all universities in the country. As such, universities have very limited autonomy to add elective courses in the unified curriculum.

[87] All three institutions have a required one- or two-year practical training program (the Stage) for Law and Sharia schools graduates who want to become judges, prosecutors, or defense lawyers.

familiarity with a foreign language. Afghanistan established an independent commission called the Independent Administrative Reform and Civil Service Commission in 2002.[88] One of the main tasks of the commission has been "recruiting civil servants based on merit and skill"[89] in public institutions across Afghanistan. While the commission has not done much over the last two decades, under mounting pressure from international donors, the commission has recently (over the last three years) intensified its efforts to reform the administrative system and recruit staff based on merit. Since this mechanism is already in place, the commission should be directed to recruit staff that are well-prepared for the job in the central authority. It is likely that the commission can find a sufficient number of qualified people because the post-Taliban era has produced a large population of educated youth who have completed higher education inside or outside Afghanistan and have enhanced foreign language skills, especially in English.

D. Provide the Required Resources and Equipment to the Central Authority and the Relevant Agencies

Field research findings also indicated that most departments in the agencies that work to combat transnational crimes and implement mutual legal assistance suffer from lack of resources and equipment. The government of Afghanistan should devote sufficient funds for equipping the relevant departments with necessary computers, printers, scanners, internet, official e-mail addresses, and other equipment or supplies that are required for the departments to function effectively. Providing sufficient resources and materials for the central authority is particularly important because this department will act not only as the primary responsible agency for implementing mutual legal assistance mechanisms, but it will also function as the source of

[88] *Independent Administrative Reform and Civil Service Commission: Introduction*, IARCSC, https://iarcsc.gov.af/en/about-iarcsc/ (last visited Mar. 17, 2020).

[89] *Id.*

information, expertise, technical guidance, and capacity building for other departments in the relevant authorities. Therefore, it is essential that the central authority have sufficient tools and resources to perform its duties properly. Recognizing the critical role of resources and equipment in implementation, the Conference of the Parties to the UNCTOC encourages states parties:

> [T]o staff, equip and empower central authorities so that those authorities play an effective coordinating role among various government agencies within a State party and with other States parties in order to ensure effective implementation of the Convention regarding international cooperation in criminal matters, and to help facilitate the timely execution of requests for assistance or cooperation, including, where appropriate, requests for electronic evidence.[90]

E. Initiate and Promote Active Diplomacy and Build Formal and Informal Networks

Effective implementation of mutual legal assistance mechanisms is largely dependent on building relationships and networks (formal and informal) with like-minded countries. Even if two countries have a bilateral mutual legal assistance agreement, its implementation requires ongoing communication, close relationship, active diplomacy, and collaboration between the respective officials of the two countries. The more officials of two countries interact formally or informally, the greater the likelihood of cooperation and effective collaboration between them. The resolution of the Conference of the Parties to the UNCTOC acknowledges the significance of this, and strongly recommends that states parties "facilitate engagement between and among central authorities in person, including through regional networks, or by virtual means, such as videoconferences, and highlights the particular importance of engagement between central authorities in order to review the execution of requests, discuss impediments to mutual cooperation and identify solutions to those challenges."[91]

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[90] THE CONFERENCE RESOLUTION, *supra* note 85 at para. 7.

[91] *Id*. at para. 11.

The role of the central authority and the MOFA will be critical in building connections and networks with their foreign counterparts. These two agencies should work closely together to take coordinated action to build networks with foreign authorities and engage with regional and international organizations. As the resolution recommends, they should engage in person or via modern technology such as e-mail or videoconferencing.

F. Take the Initiative to Enter into Bilateral Agreements with Other Countries

Currently, Afghanistan has bilateral mutual legal assistance agreements with only three countries. Afghanistan has never initiated bilateral mutual legal assistance agreements with other countries; current agreements or ongoing negotiations for new agreements all have been initiated and proposed by other countries. Considering the prevalence of transnational crimes and their catastrophic impacts on the country, Afghanistan must take the initiative and actively pursue a policy of entering into and implementing bilateral agreements.

Building networks and establishing close relationships will facilitate Afghanistan's ability to initiate negotiations for new bilateral agreements. The central authority should closely work with the MOFA to develop a negotiation strategy. After consulting with the relevant authorities, they should start with those countries from which Afghanistan requires the most legal assistance, such as countries in Central Asia (e.g. Tajikistan, Turkmenistan, and Kazakhstan). Like many countries, Afghanistan can use the UN Model Treaty on Mutual Legal Assistance in Criminal Matters[92] and other resources and materials developed by the UNODC to develop and draft bilateral agreements.

[92] Model Treaty on Mutual Legal Assistance in Criminal Matters, (Adopted by General Assembly resolution 45/117, subsequently amended by General Assembly resolution 53/112), https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

G. Enhance Cooperation and Coordination Among the Relevant Afghan Agencies

Currently, cooperation and coordination among the relevant authorities on mutual legal assistance in Afghanistan ranges from extremely poor to non-existent. Without constant coordination among the competent authorities, effective implementation of mutual legal assistance mechanisms would not be possible. As one of its primary responsibilities, the central authority should take the lead and organize at least regular monthly and quarterly coordination meetings with the competent authorities. Close coordination will enable the authorities to ensure speedy execution of requests, respond to any potential delays or issues that may arise in the process, and discuss policies or reforms that may be necessary for improving the apparatus. If necessary, they should also hold emergency meetings to discuss and find remedies for complicated or urgent cases.

H. Provide Statistical Data and Triage Activities

The central authority should keep track of incoming and outgoing mutual legal assistance requests and provide statistical reports and data. As noted previously, a case management system for mutual legal assistance is required to generate comprehensive statistical data. The data should include indicators including type of request (incoming or outgoing); country from/to which requests are sent; type of crime; type of assistance; legal basis; time span within which a request is executed; agency that initiated or executed a request; any possible delay and reason; denial and reasons; failure to provide assistance and reasons; and method of request. Such data will significantly assist the central authority and other competent authorities to make informed and data-driven decisions and set priorities accordingly.

Recognizing the importance of statistical data, the resolution of the Conference of the Parties to the UNCTOC strongly encourages states parties to assist and provide sufficient resources to their central authorities to develop a case management system to track the status of mutual legal

assistance requests and "collect and make available statistical information about requests, including the forms of assistance sought, the legal bases invoked, and time periods for processing requests."[93]

The central authority should analyze the data annually to detect patterns in types and severity of crimes and cross border issues. For instance, if a high number of transnational crimes cross borders between Afghanistan and Country A and the need for mutual legal assistance is urgent, the central authority should make country A top priority for collaboration and devote sufficient time and resources for that purpose.

I. Take Advantage of Technology and the Internet

Based on the author's observations during field research, officials in most of the relevant offices in the competent authorities still prepare documents by hand, not on a computer. Except for a few offices, internet was not accessible in courts, prosecution offices, or other relevant departments. In connection with Recommendation D in this section, in addition to equipping offices with the necessary tools and materials, the officials should be trained on and required to use the tools and resources effectively. They should in particular use internet, e-mail, and other secure forms of online communication. Adopting modern technology will significantly improve the effectiveness of mutual legal assistance processes and save time and resources.

IV. Rethink Afghanistan's Approach to Compliance with International Law

This research has revealed two important issues with respect to Afghanistan's approach to international law. First, Afghanistan does not usually reference a specific international convention, even if it may incorporate its international obligations arising from that convention into a domestic law. This causes confusion and makes it difficult to track and assess Afghanistan's compliance

[93] THE CONFERENCE RESOLUTION, *supra* note 85 at para. 13.

with international obligations. Second, Afghanistan's domestic law allows both monist and dualist approaches to international law. While utilizing both approaches within the legal system is not a problem in itself, it may not produce optimal results if they are not applied properly. Although a full discussion of this topic is beyond the scope of this dissertation, the research points to a few preliminary recommendations on how those issues could be resolved.

A. Reference International Conventions or Obligations in the Laws

When drafting Afghan laws and regulations, it is quite possible that the legislature or the relevant agencies drew many provisions from the UN Suppression Conventions or other treaties or agreements to comply with the country's international obligations. However, neither the 2013 Legal Cooperation Law nor the 2014 Anti-Money Laundering Law make any reference to the relevant international conventions.[94] This is not unique to the topic of mutual legal assistance, but is a general practice for almost all of Afghanistan's obligations under all international conventions. As previously noted, this creates challenges for the relevant agencies, researchers, or other stakeholders to conveniently assess whether the laws have incorporated Afghanistan's obligations under the UN Suppression Conventions or any other treaties or conventions.[95]

To avoid such challenges, this dissertation suggests that the Afghan legislature and other relevant agencies make a general reference in a preamble to the law to clarify which (if any) international obligations are incorporated in the law. This is particularly important if the law intends to incorporate Afghanistan's obligations under an international convention. Such clarity would provide transparency and assist officials in the MOFA who are obligated to report compliance with and implementation of international conventions. In addition, it will save time

[94] *See* Chapter Six. The only exception was the 2014 Anti-Financing Terrorism Law which identifies complying with the requirements of the 1999 Financing Convention as one of its goals.

[95] References would not be determinative, but they would certainly be helpful.

and resources if the laws need to be revised or amended in the future to bring them into conformity with international norms.

B. Draw A Clear Line Between Using Dualist and Monist Approaches

As this research revealed, Afghanistan has not taken a unified and consistent approach to international law in terms of incorporating and implementing its international obligations.[96] Afghanistan has adopted both monist and dualist approaches to international law. Although Afghanistan may not be the only country to have done this, as noted in Chapter Six, it produces parallel legislative documents, thereby creating confusion and generating inconsistent practices.

As an example, the UNCAC went through all the required legislative processes and thereby became law in Afghanistan. In principal, the convention should be directly applicable because it is the law.[97] However, in practice, it is not directly applied. Instead, Afghanistan incorporated most of the provisions of the convention into various domestic laws, in addition to passing the convention itself through the legislative process.[98] When assessing the extent of Afghanistan's compliance with the convention, the UN's reports have taken into account only the incorporation of the convention's provisions into the Afghan domestic laws, not the direct adoption of the convention.[99] Consequently, the passage of the convention through the legislative process seems both confusing and unnecessary. The example of the UNCAC shows only a very small piece of a broader picture of inconsistent interactions between international law and domestic law in

[96] *See* Chapter Six.

[97] *See id.*

[98] For instance, Afghanistan incorporated several substantive provisions of the convention into the Penal Code and the Whistleblowers Protection Law. (*See id.)*

[99] *See id.*

Afghanistan. For instance, Afghanistan has also applied the two approaches to the Rome Statute of the International Criminal Court.[100]

Given the problems and issues that arise from utilizing these two approaches simultaneously, this dissertation recommends that Afghanistan reform its Law on International Treaties and Conventions to draw a clear line between application of the monist and dualist approaches and specify when each of the approaches should be utilized. Most importantly, the law should prohibit the use of both with respect to the same convention or treaty.

This dissertation also proposes that the law limit the use of the monist approach. The monist approach should only be used with respect to those conventions, treaties, or agreements that do not impose many obligations or require substantial changes to and reforms in domestic law and procedures. The reason is that if a convention requires substantial reforms, or its provisions are in serious conflict with aspects of domestic law, the monist approach will not be helpful in implementing the convention directly and effectively in Afghanistan. First, even though the convention becomes law under the monist approach, it cannot be guaranteed that the other laws will be amended to resolve conflicts. The convention will exist as a law on paper, but confusion will remain as to which law should be followed in the event of a conflict. Second, officials in the competent authorities tend to implement and enforce domestic law more than international conventions or treaties. Therefore, international conventions may be neglected, and this will negatively affect implementation.

This dissertation therefore suggests an extensive use of the dualist approach. First, the dualist approach effectively domesticizes international norms by simplifying international norms and translating them into the vernacular. This makes their implementation easier in the courts,

[100] *See id.*

prosecution offices, and other relevant authorities. Indeed, many international conventions are drafted with permissive language recommending the harmonizing of their general norms with the country's existing law. Second, as a matter of practicality; judges, prosecutors, police, and other officials are generally familiar and accustomed to implementing domestic laws. Consequently, if the provisions of international conventions are incorporated in domestic law, it will significantly increase the probability of their application.

V. Conclusion

This chapter provides a detailed set of recommendations to address the many issues and shortcomings in the Afghan mutual legal assistance regime, promote statutory compliance with international obligations, and enhance enforcement mechanisms by focusing on reforming laws and enhancing implementation.

To incorporate the recommendations related to statutory reforms, Afghanistan should enact a new law on mutual legal assistance in criminal matters. The new law should fully comply with the obligations and incorporate the relevant non-mandatory measures of the UN Suppression Conventions. The incorporation of these obligations and non-mandatory measures will increase the clarity, effectiveness, and comprehensiveness of the proposed Afghan mutual legal assistance mechanisms. Moreover, Afghanistan should designate the AGO as the central authority in order to increase the effectiveness and efficiency of the mechanisms and improve implementation.

This chapter also provides practical recommendations to enable the government of Afghanistan to enforce its new mutual legal assistance mechanisms effectively: principally by developing a detailed guideline, building the capacity of the relevant officials, and devoting sufficient resources and equipment to the relevant authorities.

Afghanistan should also make efforts to resolve the inconsistencies and contradictions in the current mechanisms. Afghanistan should reconsider its approach to international law by directly referencing international obligations in its national laws and adopting a dualist approach. As proposed, this last recommendation should be implemented through reforming the Law on International Treaties and Conventions.

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Annex I: List of Interviewees

LIST OF INTERVIEWEES					
No	Agency	Departments	Number of Interviewees	Number of Departments	Total
1	Attorney General's Office	1. Anti-Corruption Crimes Prosecutions 2. Anti-Drug Crimes Prosecutions 3. Anti-Drug Crimes Appeal Prosecutions 4. Plan and External Relation Department 5. Kabul Anti-Corruption Crimes Prosecutions 6. Asset Recovery Department 7. Anti-Corruption Crimes Appeal Prosecutions 8. Investigation Directorate 9. Deputy Attorney General's Office for Anti-Corruption 10. Oversight Prosecution over Detention Centers and Prisons 11. Prosecution Offices on Crimes against Internal and External Security 12. Attorney General's Secretariat 13. International Crimes Department	22 prosecutors	13	50 interviewees
2	Supreme Court	1. Kabul Family Court 2. Anti-Drug Crimes Primary Court 3. Supreme Court Secretariat 4. Department of Extradition 5. Anti-Corruption Crimes Appeal Court	14 judges	10	34 departments

		6. Anti-Corruption Primary Court 7. Kabul Appeals Court 8. Kabul Primary Courts, Division on Crimes against Internal and External Security-Kabul Zone One 9. Anti-Drug Appeals Court 10. Kabul Primary Courts-Second Zone Civil Division			
3	Ministry of Justice	1. Office of Senior Legal Advisor to the Ministry 2. Criminal Law Department 3. International Law Department 4. Human Right Department and Anti-Human Trafficking Secretariat	5 officials	4	
4	Ministry of Foreign Affairs	1. Consulate Directorate and Legal and Criminal Issues Department 2. International Treaties Department 3. Fifth Political Branch	4 officials	3	
5	Ministry of Interior	1. Office of Senior Advisor to the Ministry 2. Interpol Department	3 officials	2	
6	Central Bank	1. FinTRACA	1 official	1	
7	Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC)	1. MEC	1 official	1	

Annex II: Interview Guides and Questions

The questions below were constructed for semi-structured interviews. Semi-structured interviews enabled the author to select appropriate questions depending on each interviewee's knowledge and experience related to mutual legal assistance and ask additional spontaneous and follow up questions depending on the interviewee's response. The author did not follow the exact order of the questions as they are laid out below because the questions are interrelated and an interviewee's response to one question might address other questions as well.

Interviews were conducted in the local language (Dari/Farsi). Accordingly, interview questions were translated into Dari and given to interviewees before or during the interviews. Before obtaining each official's oral consent, the author gave them an opportunity to ask any questions they might have in order to make sure that they fully understood what they were going to be asked. They were able to end the interview anytime they wanted, and they could also choose to answer questions they selected without having to respond to all. As per University of Washington Institutional Review Board (IRB)'s approval, the author took written notes but did not record the interviews.

The interview questions helped the author stay on topic during interviews in order to ascertain what is actually happening on the ground with regard to mutual legal assistance and combating transnational crimes in Afghanistan. Additionally, the questions helped the author to obtain the required information about the current state of transnational crimes and mutual legal assistance to develop recommendations for an effective mechanism of mutual legal assistance in the future. These questions provided relevant talking points to the interviewees and give them the opportunity to share thoughts and experience and explain how they deal with transnational

crimes and to what extent they are aware of the existence of mutual legal assistance mechanisms within the Afghan legal system.

Based on the interviewees' answers, the author was able to draw conclusions with respect to the current state of implementation of existing laws as well as institutional and human capacity in the relevant institutions. The information the interviewees provided played a crucial role to enable the author to lay the foundation for suggesting effective mutual legal assistance mechanisms for Afghanistan.

Interview Questions (English/Dari)

1. What's your role/job and what type of cases do you handle? Please explain.

۱. وظیفه شما چیست و کدام نوع قضایا را به پیش میبرد؟ لطفاً توضیح دهید.

2. How long have you been working in this institution?

۲. چه مدت است که شما در این نهاد کار میکنید؟

3. Do you know what "mutual legal assistance in criminal matters" means?

۳. آیا شما میدانید که «همکاری متقابل حقوقی/قانونی/عدلی در مسایل جزایی» چه معنی دارد؟

4. What's the institutional and practical role of your agency in initiating or responding to mutual legal assistance requests?

۴. نقش سازمانی یا عملی نهاد شما در آغاز کردن یا ارایه جواب به درخواست های همکاری متقابل حقوقی چیست؟

5. Do you have any knowledge/experience/expertise of mutual legal assistance? If yes, does Afghanistan have any mutual legal assistance mechanisms within its legal system? Please explain.

۵. آیا شما دانش/تجربه/تخصص در مورد همکاری متقابل حقوقی دارید؟ اگر بلی، آیا افغانستان کدام مکانیزم همکاری متقابل حقوقی در سیستم حقوقی خود دارد؟ لطفاً توضیح دهید.

6. Do you know which international conventions require mutual legal assistance and whether Afghanistan is a state party to them? If so, what are the international obligations of Afghanistan and how should it comply with them?

۶. آیا شما میدانید که کدام کنوانسیون بین المللی همکاری متقابل حقوقی را لازم دانسته و آیا افغانستان عضو این کنوانسیون ها است؟ اگر بلی، کدام تعهدات بین المللی را افغانستان متقبل شده و چگونه باید آنها را رعایت کند؟

7. Are you aware of any Afghan domestic laws, regulations, or bilateral agreements with foreign countries on mutual legal assistance mechanisms?

۷. آیا شما از کدام قانون داخلی، مقررات یا موافقتنامه دوجانبه افغانستان با کشورهای خارجی در مورد مکانیزم های همکاری متقابل حقوقی آگاهی دارید؟

8. Do you know about mutual legal assistance provisions of the Law on Extradition of Accused and Convicted Persons and Justice Cooperation; the Law on Anti-money Laundering; or the Law on Prevention of Financing Terrorism? Or any other law?

۸. آیا از مواد مربوط به همکاری متقابل حقوقی یا همکاری عدلی در قانون استرداد متهمین، محکومین و همکاری عدلی؛ قانون جلوگیری از پولشویی؛ و عواید ناشی از جرایم و قانون جلوگیری از تمویل تروریزم آگاهی دارید؟

9. Do you know if Afghanistan has signed any bilateral mutual legal assistance agreements with foreign countries? If yes, what countries? Have you ever used any of those agreements over the course of doing your duties?

۹. آیا در مورد اینکه افغانستان موافقتنامه های دوجانبه در مورد همکاری متقابل حقوقی با کشورهای خارجه امضا کرده باشد، آگاهی دارید؟ اگر بلی، با کدام کشورها؟ آیا گاهی شده که شما در جریان کارتان از آنها استفاده کرده یا به آنها استناد کرده باشید؟

10. Do you know about bilateral mutual legal assistance agreements between Afghanistan and United Arab Emirates and Iran? Or any other bilateral agreements?

۱۰. آیا در مورد موافقتنامه های همکاری متقابل حقوقی/قضایی بین افغانستان و ایران و افغانستان و امارات متحده عربی آگاهی دارید؟ و یا کدام مواقفتنامه دوجانبه دیگر؟

11. Can you give me an example of a case in which you needed to get some sort of evidence (documents, witness testimony, etc.) from outside Afghanistan?

۱۱. آیا شما میتوانید قضیه ای را مثال بزنید که شما در آن نیاز داشتید مدارک اثباتیه جرمی (مانند اسناد و یا شهادت شهود) را از خارج کشور بدست بیاورد؟

12. Have you ever requested any evidence from foreign jurisdictions in a transnational crime case? If yes, how did you develop and send the request? If not, why?

۱۲. آیا گاهی شده که شما مدارک اثباتیه جرمی را از کشورهای خارجی درجرایم فرا ملی درخواست کرده باشید؟ اگر بلی، شما چگونه درخواست را نوشته و ارسال کردید؟ اگر نه، چرا؟

13. Have you ever received a request to provide evidence from a foreign jurisdiction? If yes, how did you deal with it?

۱۳. آیا گاهی شده که شما درخواست ارایه مدارک اثباتیه جرمی را از یک کشور خارجی دریافت کرده باشید ؟ اگر بلی، چگونه با آن برخورد کردید؟

14. Have you ever cited/enforced/implemented any of the available mechanisms of legal assistance (e.g. international conventions, bilateral agreements/domestic laws) over the course of doing your activities? If yes how? If not, why? Please explain.

۱۴. آیا شما در جریان انجام وظایف خود به کدام یک از مکانیزم های موجود همکاری متقابل حقوقی (مانند کنوانسیون های بین المللی، قوانین داخلی، یا موافقتنامه های دوجانبه) استناد کرده اید؟

15. If you haved used mutual legal assistance mechanisms, in practice how long would it take to obtain cross-border evidence from foreign jurisdictions?

۱۵. اگر شما مکانیزم های همکاری متقابل حقوقی را استفاده کرده اید، در عمل چه مدت زمان را در میگیرد تا مدارک اثباتیه را از کشورهای خارجی بدست بیاورید؟

16. What institutional challenges/legal constraints are you facing if you try to obtain evidence from outside Afghanistan?

۱۶. اگر شما بخواهید و یا کوشش کنید که مدارک اثباتیه را از خارج کشور بدست بیاورید، با کدام چالش های سازمانی/محدودیت ها قانونی مواجه میشوید؟

17. What practical challenges are you facing when you implement or use the current mutual legal mechanisms?

۱۷. وقتی شما میکانیزم های موجود را استفاده یا اجرا میسازید، با کدام چالش های عملی مواجه میشوید؟

18. Has your agency taken any steps (e.g. establish a department) to facilitate legal assistance or combat transnational crimes?

۱۸. آیا نهاد شما کدام قدم عملی مانند تاسیس یک شعبه برای تسهیل همکاری متقابل حقوقی یا مبارزه با جرایم فرا ملی برداشته است؟

19. What is or would be the role of your institution in channeling incoming and outgoing mutual legal assistance requests if the government of Afghanistan develops and implements a new mutual legal assistance mechanism?

۱۹. اگر دولت افغانستان مکانیزم جدید همکاری متقابل حقوقی را ایجاد و اجرا کند، نقش نهاد شما در اجرا/تسهیل درخواست های ورودی و صدوری همکاری متقابل حقوقی چه است یا چه خواهد بود؟

20. What is the role of your agency in relation to other institutions with respect to mutual legal assistance processes? What is the current level of cooperation with those agencies? What are the institutional/practical strengths and weaknesses of the relationship/cooperation?

۲۰. رابطه نهاد شما با نهادهای مربوط دیگر در مورد همکاری متقابل حقوقی چگونه است؟ سطح همکاری و هماهنگی نهاد شما با نهادهای دیگر چگونه است؟ نقاط ضعف و قوت نهادی/عملی این رابطه/همکاری کدام است؟

21. How do courts admit cross-border evidence and information obtained by police, prosecutors, or other officials through formal and informal mutual legal assistance channels?

۲۱. چگونه محاکم افغانستان مدارک اثباتیه فرا مرزی را که توسط پولیس، سارنوالی و یا مقامات دیگر از طریق همکاری متقابل رسمی یا غیر رسمی بدست می آید، می پذیرند؟

22. What are the countries from which Afghanistan receives mutual legal assistance requests the most? What are the countries to which Afghanistan sends mutual legal assistance requests the most?

۲۲. افغانستان از کدام کشورها بیشترین تعداد درخواست همکاری متقابل حقوقی دریافت میکند؟ به کدام کشورها افغانستان بیشترین تعداد درخواست همکاری متقابل میفرستد؟

23. In what types of transnational crime have you needed cross-border evidence the most? In what types of transnational crime have you made mutual legal assistance requests the most?

۲۳. در کدام نوع قضایا شما نیاز بیشتر به مدارک اثباتیه فرامرزی دارید؟ شما در کدام نوع قضایای جرایم فراملی بیشترین تعداد درخواست همکاری متقابل حقوقی کرده اید؟

24. In your opinion, which government institution of Afghanistan would be best suited for being the “central authority” for mutual legal assistance requests? Why? Please explain your legal and practical observations and arguments.

۲۴. به نظر شما، کدام نهاد دولتی افغانستان مناسب ترین مرجع برای نقش «صلاحیت/مرجع مرکزی» برای تسهیل همکاری متقابل حقوقی است؟ چرا؟ لطفا دلایل و مشاهدات قانونی و عملی خویش را توضیح دهید.

25. What do you think what are the drawbacks of the current mutual legal assistance mechanisms in combatting transnational crimes?

۲۵. به نظر شما، نواقص مکانیزم های موجود همکاری متقابل حقوقی برای مبارزه با جرایم فراملی کدام ها است؟

26. What are your recommendations for improving the current mutual legal assistance mechanisms in Afghanistan?

۲۶. سفارشات شما برای بهتر شدن مکانیزم های موجود همکاری متقابل حقوقی در افغانستان چیست؟

27. In your opinion, how does using mutual legal assistance mechanisms help Afghan law enforcement agencies to effectively contain transnational crimes?

۲۷. به نظر شما، چگونه استفاده از مکانیزم های همکاری متقابل حقوقی نهادهای عدلی و قضایی افغانستان را در مبارزه موثر با جرایم فراملی کمک میکند؟

28. Does your institution/agency provide reports/statistics on combating transnational crimes/mutual legal assistance? Can you share any or all of the reports/statistics?

۲۸. آیا نهاد شما گزارشی/آماری در مورد مبارزه با جرایم فراملی یا همکاری متقابل حقوقی تهیه یا ارایه میکند؟ آیا شما میتوانید کدام یکی یا تمام آنها را با من شریک سازید؟

29. Do you know about any other law/regulations or other internal procedures relevant to transnational crime/mutual legal assistance that I might not be aware of? Can you share them with me?

۳۰. آیا شما در مورد کدام قانون یا مقرره و یا کدام طرزالعمل داخلی دیگر در مورد جرایم فراملی یا همکاری متقابل حقوقی آگاهی دارید که من آنرا نمیدانم؟ آیا شما میتوانید آنرا با من شریک سازید.

Annex III: Consent Talking Points

- **Introductory** conversation between researcher and interviewee
- Telling the interviewee that he/she is going to participate in **my research study on mutual legal assistance in criminal matters in Afghanistan**
- **Purposes of my research:** identifying Afghanistan's obligation under international conventions, assessing Afghanistan's efforts to combat transnational crimes, and improving and reforming current mutual legal assistance mechanisms
- **Duration of participation:** I will interview you once, and the expected duration of interview will be between 2-3 hrs
- **Research procedures:** if you agree to participate in my research, I will ask you the following questions (the research questions will be provided beforehand), giving enough time to read the questions, follow-up questions will be asked during the interview, no recording—only notes, no disclosure of identity, and free to withdraw anytime during interview.
- **Foreseeable risks:** I will maintain information about your identity (name, position, government department) in a password-protected file which will be kept separate from my notes of this interview and will not be shared with anyone. I will not reveal your identity in my dissertation. There is a small risk that the file that contains your identifying information may be stolen or otherwise illegally obtained from my computer, however that file will be password protected and I will not store the password for that file on my computer. In my interview notes you will be identified only by department and a random number (such as MoJ 100) so if someone obtains my interview notes, they will not be able to determine your identity from those notes. Although I believe the risk of anyone obtaining identifying information [or of such information causing any harm to you], in the event I get access to some confidential information from you, a breach of confidentiality might expose you to the risk of demotion or injury to reputation. However, you are in a better position to make the determination what confidential information would be and how a potential unintentional disclosure may or may not negatively affect you. You are free to withdraw anytime during the interview or to request that I not use the interview in my research.
- **Benefits from the research:** this interview will not have any monetary or non-monetary benefits for you
- **Interviewee identity:** your identity will not be disclosed in my research. I will keep my study records strictly confidential and in password-protected files.
- **Compensation:** this interview will be done within 2 or 3 hours at your office or in another location if that is more convenient for you. No injury is foreseeable, and no compensation is available
- **Contacting researcher:** You can directly contact (call or email) me any time after interview if you have any concern or should you feel you have been harmed by participating in the research (I will provide my number and email).

- **Voluntary participation:** your participation is completely voluntary in this research, it is your choice to participate or refuse to participate. It is also up to you to answer all my questions or some of them. You can refuse to answer any question you want.
- **Participation refusal:** You may refuse to participate at any point.
- **Not using/distributing the information/data for future research:** The information and/or biospecimens collected as part of this research will not be used or distributed for future research studies
- **Discontinuation:** you can discontinue participation at any time during the interview
- This research has been reviewed by the University of Washington's IRB. If you have questions about your rights as a research subject, you can call the Human Subjects Division at (206) 543-0098 or call collect at (206) 221-5940.

Are you willing to voluntarily participate in my research and answer my questions in the next 2 or 3 hours?

Annex IV: Mutual Legal Assistance Provisions of the UN Convention against Corruption

Article 46. Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

(a) Taking evidence or statements from persons;

(b) Effecting service of judicial documents;

(c) Executing searches and seizures, and freezing;

(d) Examining objects and sites;

(e) Providing information, evidentiary items and expert evaluations;

(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information

remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise

providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article: (a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations

shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case,

advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall
promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions

under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

Annex V: Mutual Legal Assistance Provisions of the United Nations Convention against Transnational Organized Crime

Article 18. Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b), is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

(a) Taking evidence or statements from persons;

(b) Effecting service of judicial documents;

(c) Executing searches and seizures, and freezing;

(d) Examining objects and sites;

(e) Providing information, evidentiary items and expert evaluations;

(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or

successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance

and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent

circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language

or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested

State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requested State Party shall respond to
reasonable requests by the requesting State Party on progress of its handling of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems
necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in
the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions
under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.