



Independent Joint Anti-Corruption Monitoring and Evaluation Committee

Vulnerability to Corruption Assessment on Corruption Case Processing in Afghanistan

**Kabul
February**

ABBREVIATIONS/ACRONYMS

AGO	Attorney General Office
CMS	Case Management System
DL	Defense Lawyer
IARCSC	Independent Administrative Reform and Civil Service Commission
MEC	Independent Joint Anti-corruption Monitoring and Evaluation Committee
ILC	Independent Lawyer Committee
JFAO	Justice For All Organization
JSSP	Justice Sector Support Program
MoI	Ministry of Interior
NDS	National Security Directorate
SAO	Supreme Audit Office
HOO	The High Office of Oversight
AIB	The Afghan Independent Bar Association
TI	Transparency International
UNCAC	United Nation Convention Against Corruption
USAID	United States Agency for International Development
VCA	Vulnerability to Corruption Assessment
WB	World Bank

1. SUMMARY

This Vulnerability to Corruption Assessment (VCA) examines a range of issues pertaining to the management of corruption cases within Afghanistan's justice sector. The VCA team identified a range of vulnerabilities, many of which are due to poor inter-institutional coordination among government stakeholders and significant human resource capacity deficiencies. These deficiencies, combined with lack of political will and interference from high-level officials, conspire to undermine the timely processing of corruption cases in Afghanistan.

2. INTRODUCTION

This Vulnerability to Corruption Assessment (VCA) was conducted to address vulnerabilities in the processing of corruption cases in Afghanistan. It is known that hundreds of cases have been submitted to the Attorney General of Afghanistan (AGO) over the past several years, but the vast majority of them have not been prosecuted. The VCA Team engaged with a wide range of anti-corruption stakeholders, including key government institutions, lawyer organizations, etc.

This is the first Independent Joint Anti-Corruption Committee (MEC) VCA targeted at the Afghanistan justice sector, which presented a number of challenges not previously encountered by the VCA Team since the MEC's inception in 2011. A number of government agencies involved in corruption cases were consulted, however several key entities failed to cooperate, including the High Office of Oversight (HOO) and the Supreme Court of Afghanistan (SC). While several staff members at the SC originally agreed to participate, senior SC officials inevitably prevented them from doing so. It is important to note that the VCA Team made it very clear to all entities that the purpose of the VCA was to look at processes and procedures, rather than individual cases.

The failure of two key anti-corruption government stakeholders to allow scrutiny over processes and procedures is emblematic of the challenge of working with justice sector institutions in Afghanistan. While most of this VCA focuses on human resource capacity, general organizational deficiencies, and lack of inter-agency coordination, it is important to recognize this institutionalized resistance to scrutiny as a significant corruption vulnerability in and of itself and one that undermines the ability of anti-corruption stakeholders to adequately identify and address corruption issues. The lack of scrutiny also facilitates improper external influence on the judicial process.

Many institutions, including the SC and the HOO, tend to justify their lack of information coordination/cooperation by citing vague if not blatantly false institutional mandates, rules and regulations. An example of this is seen in the letter that the SC sent to the MEC to justify their lack of cooperation (See Annex 1). The fight against corruption in Afghanistan is dependent on cooperation by all stakeholders, including the international community, civil society, and government institutions. It is unfortunate that the SC and HOO have failed to grasp this very simple, yet crucially important concept and further calls into question both institutions commitment to the fight against corruption.

3. VCA DATA COLLECTION METHODOLOGY

The information for this VCA was collected from meetings, interviews, etc. with a wide-range of stakeholders, including:

- Attorney General Office (AGO)
- Supreme Audited Office (SAO)
- Anti-corruption Department of Ministry of Interior (MOI)
- Parwan Provincial Court

- Justice and Anti-corruption Commission of Afghanistan Parliament
- Justice Sector Support Program (JSSP)
- GIZ: Rule of Law Project
- Justice For All Organization (JFAO)
- Independent Lawyer’s Committee (ILC)
- University professors
- The Afghan Independent Bar Association (AIBA)
- National Directorate Security (NDS)
- Supreme Court (SC)
- High Office of Oversight (HOO)

It should once again be mentioned that the HOO and SC failed to cooperate in any meaningful way with the VCA Team.

4. LEGAL FRAMEWORK

A myriad of laws comprise Afghanistan’s anti-corruption legal framework. These include provisions in Afghanistan’s Penal Code, which is currently under revision, as well as several specialized laws, including the Anti-Money Laundering Law.

It is clear that there are numerous vulnerabilities in Afghanistan’s current legal framework, too many for the scope of this VCA. As a signatory to the United Nations Convention Against Corruption (UNCAC), Afghanistan is obliged to ensure that its anti-corruption legal framework, including applicable provisions in the Penal Code, meets international standards. The High Office of Oversight (HOO) oversaw the first phase of Afghanistan’s self-assessment of UNCAC compliance. While this self-assessment provided an opportunity to identify gaps and weaknesses in Afghanistan’s anti-corruption framework, it is the MEC’s position that this self-assessment, mandated by international treaty obligations, was not conducted properly and contained many inaccuracies.

The MEC has issued several recommendations to the new administration to address these inaccuracies, including:

- A comprehensive review-whether formal or informal-of the UNCAC self-assessment to correct any inaccuracies
- Appoint a more competent body to oversee Phase 2 of the UNCAC self-assessment process
- Develop an action plan to address identified gaps and weaknesses in Afghanistan’s anti-corruption framework.

Currently there are efforts underway to enact new legislation and revise older laws, such as the Penal Code, to strengthen Afghanistan’s criminal laws and procedures, including those relevant to anti-corruption efforts. The draft Anti-Corruption Law has been sent to parliament, but its passage has been delayed.

As Afghanistan’s legal framework evolves, it is hoped that many of the vulnerabilities identified in this VCA, particularly inter-institutional coordination, will be significantly mitigated. Beyond the need to reform laws that more clearly articulate corruption crimes and relevant punishments, the VCA Team found that some laws created or exacerbated conflict between agencies.

For example, according to Article 11 of the Law on the Structure and Authorities of the Attorney General Office:

The Attorney General Office reports on performance of its duties to the Parliament and, when requested, to the President. (Translated from Dari)

Based on discussions with numerous anti-corruption stakeholders, including MOI and SAO, the AGO often interprets this provision as not requiring them to share information with other agencies on the progress and outcomes of (corruption) cases. This interpretation effectively mitigates scrutiny on corruption cases once they are sent to the AGO's office. Legal experts consulted by the VCA Team confirm that the AGO's reading of this law is inaccurate as it does not limit the reporting duties of the AGO.

The AGO's interpretation of Article 11 of the Law and Structure of the Attorney General's Office has become a source of conflict between the AGO and SAO. Under Article 17 of the Audit Law, the SAO is clearly empowered to follow-up on corruption cases with the AGO:

In relation to the cases that the Supreme Audit Office refers for prosecution, the Attorney General Office is obliged to report the outcome to the SAO. (Translated from Dari)

This further calls into question the AGO's interpretation of Article 11 on the Law and Structure of the Attorney General's Office. It should also be noted that under Article 4 on the Law and Structure of the Attorney General's Office, the AGO's duties are "dependent on the provisions of law", which means that it is obligated to follow Article 17 of the Audit Law. Manipulation of legal concepts and doctrine has been a significant corruption tool used by justice sector actors in Afghanistan to avoid scrutiny, as well as justify illegal acts or procedures. This blatant misinterpretation of laws seriously hinders coordination between the two agencies and virtually eliminates scrutiny of corruption cases submitted to the AGO by SAO and other agencies.

5. INSTITUTIONAL AND HUMAN RESOURCE ISSUES

There are several entities involved in the development and processing of corruption cases.



The High Office of Oversight (HOO), Ministry of Interior (MOI), National Directorate Security (NDS), and Supreme Audit Office (SAO) all have the ability to develop corruption cases and forward them to the

AGO for prosecution. The Major Crimes Task Force (MCTF), a unit comprised of MOI and NDS investigators is tasked with investigating high-level corruption. Among other activities, these agencies conduct legal analysis and assess reliability of evidence and documentation before forwarding them to the AGO for further investigation and possible prosecution.

5.1. Inter-Agency Coordination

With minor exceptions, the VCA Team found a general lack of coordination and cooperation between the HOO, MOI, NDS, and SAO. This lack of coordination significantly mitigates any benefits that could be derived from combined efforts and leads to duplication of effort.

In addition, the AGO, as discussed earlier, has shown a propensity to misinterpret clearly stated legal obligations to avoid updating the SAO on the progress of corruption cases. It should be noted that a legal framework ideally should not be an obstacle for coordination of anti-corruption efforts, particularly information sharing, if all institutions are seriously dedicated to tackling corruption. Put another way, were these institutions truly dedicated to dealing with corruption, they would find a legal way to coordinate. This raises serious questions of institutional integrity and culture, particularly those institutions that fail to coordinate/cooperate.

Coordination is further mitigated by lack of clearly delineated roles and responsibilities within institutions, which results in internal parallel and overlapping structures that are not conducive to gathering and processing information that could be shared with other anticorruption stakeholders.

Parallel structures and overlapping responsibilities also lead to misallocation of human resources in processing and tracking cases. For example, according to the AGO, the lack of staff dedicated to casework results in each prosecutor being responsible for 30-40 cases, which results in significant delays.¹ High case loads ultimately impact the quality of case development, which could also lead to inaccuracies and mistakes. AGO staff admitted that sometimes, due to time requirements, incomplete cases are sent to the court.

5.2. High Office of Oversight

As stated in the introduction to this VCA, the HOO was extremely uncooperative with the VCA Team. The VCA Team contacted the HOO many times for interviews, but they rejected all official requests.

5.3. Attorney General's Office

According to the VCA findings, there are some departments in the AGO that don't appear to have any specific tasks or mandate, and others with excessive workloads. This misallocation of human resources is a common problem in Afghan government institutions. In addition, there appears to be significant duplication of effort within the AGO structure.

For example, there appears to be duplication of effort in the following AGO departments, all of which have similar responsibilities:

1. The Audit Department
2. The Check and Control Department
3. Monitoring of Law Implementation Department

¹ It should be noted that the AGO has officially stated to the MEC that all cases are processed in a timely manner, but has provided no proof or evidence to support this claim.

These departments appear to have almost the same responsibilities or least have mandates similar enough to justify streamlining. Many anti-corruption stakeholders consulted during the VCA process believe that there is a need to re-assess the organizational structure of the AGO and possibly transfer more audit responsibilities and staffing allotments to the SAO.

5.4. Human Resources

Nearly all institutions interviewed cited human resource capacity as a significant weakness in developing, processing, and tracking corruption cases. For example, dealing with corruption cases, or any cases for that matter, requires a highly specific and technical skill set, but many prosecutors in the AGO office lack any relevant legal background and many have only achieved 12th grade level education.

Interviewees noted that while MOI, SAO and AGO have their own training centers, low capacity of their lecturers, low or irregular attendance, and poor monitoring and evaluation of training programs significantly undermine their effectiveness.

Aside from the poor quality of training, respondents also noted that there was limited anti-corruption focused training, including in key technical areas such as auditing. For example, SAO conducts regular audits in each ministry, but there are not enough auditors with specific technical skills in financial auditing. This is significant corruption vulnerability in both identifying and monitoring corruption cases.

While human resource capacity improvements could be made through better recruiting, it would be difficult to develop a unified human resource policy to achieve those goals. MOI and NDS have their own rules and recruiting systems. The HOO and SAO recruitment system is covered under the Pay and Grading Program of the Independent Administrative Reform and Civil Service Commission (IARCSC) civil service system. At the same time, there is a reform program in the SC that covers most of the judges. However many SC employees, including those that would be involved with organizing and processing cases, do not fall under this new system.

The recruiting system in the AGO, despite several efforts over the past few years, is not based on the IARCSC system. Many respondents stated the AGO recruiting system is highly antiquated and susceptible to corruption including external influence in hiring decisions. The result is that approximately 2000 attorneys out of 4500 have un-recognized educational backgrounds or have only graduated from Islamic Madrassas or the 12th grade. Stakeholders consulted during the VCA process suggested that significant reforms are needed in the AGO recruiting and promotion system.

Finally, there appears to be no functioning system to evaluate staff performance.

5.5. Institutional Integrity Issues

The VCA Team conducted interviews with a wide range of staff and relevant bodies, including low to mid-level employees. Many of these employees felt that top-down corruption or external influence from powerful figures made their work useless at times. Respondents stated that cases developed by lower-level staff are susceptible to improper interference by department heads or other high-level staff. Respondents also noted that corrupt actors are rarely punished, at any level, and that committed and dedicated staff are rarely encouraged and promoted.

5.6. Security

Respondents also complained about the lack of security² for auditors/prosecutors who follow up the corruption cases. Most of the prosecutors the VCA Team visited were under threat. For example, according to the Chief Prosecutor's Office in Parwan Province, five former chief prosecutors resigned due to security concerns within a one-year period.

6. CASE PROCESSING/TRACKING

Both the SAO and MOI noted the failure of the AGO to provide feedback/progress reports on cases submitted for prosecution. For example, a provincial level financial embezzlement case was submitted by MOI to the AGO several months ago. After numerous refusals to provide updates, the MOI sent a letter objecting to the lack of cooperation. The AGO sent back a letter threatening to prosecute MOI staff for abuse of authority. As a result of this kind of attitude, many cases are submitted to the AGO that simply disappear from the scrutiny of interested anti-corruption stakeholders.

The SAO has noted that 284 corruption cases have been sent to the AGO but they have only received progress reports on 33 cases.

6.1. Interference

As has been noted in previous VCAs, improper interference by influential people, including members of Parliament, ministers, etc. was a recurring theme. Regardless of the use of paper or electronic filing systems, cases can still be interfered with, particularly at the investigation stage, before they become formalized. Respondents stated that Kabul Bank remains the iconic example of the harmful role that high-level interference plays in the processing of most corruption cases.

6.2. Case Registration/Management

Registration of new cases is done by hand. This is a significant corruption vulnerability given the backlog of cases to be entered into the Case Management System (CMS) (see below). Before they are entered into the CMS, these documents are highly susceptible to forgery, alteration, etc.

The computerized CMS was designed to minimize duplication and manipulation and generally streamline the tracking process for criminal cases, including corruption cases. The VCA Team found that there were significant technical capacity deficiencies, particularly in data entry, that contribute to case backlogs. It should be noted that CMS staff training is still ongoing and that the VCA Team found no significant vulnerabilities in the CMS after cases are entered.

During a visit to Parwan Province there were only two people who worked on CMS data-entry. This lack of staff with the requisite training is a significant cause of the backlog of cases to be entered into the CMS, which includes cases from 2012-2014. Interviewees noted that many of the case files do not contain the requisite information required to enter complete information into the CMS. It was also noted by numerous respondents that the AGO case registration forms needed to be updated to comply with new the Criminal Procedure Code as well as align with the CMS.

While entering all existing and future cases into the CMS should be a priority, it should be noted that any case management system, whether electronic or paper-based, is only as effective as the institutions that use them. Best practice suggests that institutional reforms, including the human resource, organizational

² It should be noted that "security" in this context was defined not only in term of insurgent threats, but by threats issued by powerful individuals.

structure, and coordination deficiencies identified in this VCA should be implemented before the benefits of a given CMS can be fully realized.

7. RECOMMENDATIONS/CONCLUSION

Nearly all vulnerabilities identified in this VCA have been addressed through a range of MEC recommendations. These recommendations can be found in the Civil Service Administration, Government Audit and Oversight, Justice Sector, and Government Wide Approach to Anti-Corruption sections of the MEC's Monitoring and Evaluation Tool. These recommendations address broad legal gaps and weaknesses, the need for comprehensive case management reform, capacity building of key anti-corruption institutions, and civil service reform.

Through consultation with a range of stakeholders, several vulnerabilities remain requiring new recommendations.

- Any institution that submits a corruption case for prosecution should receive a confirmation receipt from the AGO with a unique case number and time/date stamp for tracking purposes.
- The Committee also recommends, as part of future human resources reform within the AGO and SC, that salaries be raised to attract more qualified applicants among the next generation of justice practitioners.

The key observation is that Afghanistan's legal and institutional framework is not conducive to adequately addressing corruption, including processing/tracking corruption cases, due in large part to lack of coordination/cooperation among key stakeholders and the need for major human resource and intra-institutional reforms.

It is worth re-iterating the collateral effects that cases such as Kabul Bank, one of the largest financial frauds in human history, have on dedicated staff members of key anti-corruption institutions in Afghanistan and the general public. As mentioned earlier, it remains an iconic example of the failure of Afghan institutions to mitigate high-level external influence on the disposition of justice. Until external influence issues are addressed, including those that contribute to the growing corruption case backlog, even the most sweeping legal and institutional reforms will not be enough to mitigate the harmful effects that these deficiencies have on the Afghan public's faith in government and the civic virtue of its public servants.

There is a point at which analysis of legal gaps/weaknesses can divert our attention from more fundamental justice sector issues. By focusing too much on the anti-corruption legal framework in Afghanistan, we might easily come to the conclusion that legal gaps/weakness are responsible for the lack of coordination/cooperation among government entities in the processing of corruption cases. But as mentioned earlier, legal frameworks could not be used as an excuse for the lack of coordination/cooperation if key government entities, including the Supreme Court, were truly dedicated to addressing corruption. Based on our observations, these entities are just as likely to manipulate, misinterpret, or misapply laws to avoid cooperation and to avoid scrutiny of their procedures.

One needs to look no further than Afghanistan's growing corruption case-backlog, the Kabul Bank case, or the Haji Lal Jan Ishaqzai case³, to grasp the very real possibility that the current cadre of government

³ Haji Lal Jan Ishaqzai is a convicted drug-lord who allegedly paid upwards of a 14 million USD bribe to get out of prison. Several Afghan officials believe that the Supreme Court is implicated in his release. See December 31st 2014 New York Times Article: *Bribery Frees a Drug Kingpin in Afghanistan, Where Cash Often Overrides Justice*

justice sector personnel, to whom the international community has devoted hundreds of millions of dollars training over the past decade, is the real problem.

8. RESOURCES

- The Audit Law (2013).
- The Constitution of Afghanistan (2004).
- The United Nation Convention against Corruption (UNCAC) 2003.
- The Penal Code (1976).
- The Law on the Structure and Authorities of Attorney General Office (2014).
- Law on Monitoring the Implementation of the Anti-Corruption Strategy (2008).
- United Nation Convention against Corruption (UNCAC)

- International Transparency, CPI 2013. Accessed at 15, December 2013.
<http://www.transparency.org/cpi2013/results>.
- TOLONEWS. Accessed at 27. December 2014.
<http://www.toloneWS.com/en/afghanistan/17622-nato-official-warns-corruption-could-scare-off-donors>.
- Conducted information on consultation meetings and focus groups
- Exclusive interview with authorities in Ministry of Interior Affairs, Supreme Audit Office, Attorney General Office, Independent Bar Association, University Professors, Parliament members and Parwan provincial court and other relevant national and international organizations.

Annex I

Islamic Republic of Afghanistan
The Supreme Court
General Administration of Judiciary

To: MEC

It is written in response to your letter 2125 of 23/11/2014:

Having followed the instruction of the respected Supreme Court the content of MEC's letter submitted to the Scrutiny Committee of General Directorate of Scrutiny and Studies. Judicial scrutinizers made this comment on the issue.

MEC has introduced a number of people in its letter and requested to monitor and evaluate administrative corruption cases being sent through AGO to courts from start to finish.

Regarding the issue it should be noted that while a case is submitted to the court, proceeding the case and issuing judgment falls within the remit of authorized court and participation of MEC's members together with judicial members of courts in whatever mean it may be, is interference in courts' authorities. Pursuant to article 122 of Constitution: "no law and under no circumstances may exclude a case or area out of the authority of judicial branch as limited by this constitution and delegate which to other authority". In addition, pursuant to article 19 of Law on Organization and Jurisdiction of Courts:" court is independent in the course of proceeding a case, and issues its order on the basis of satisfactory reasons within the boundary of law's provisions. Proceeding and issuing order takes place on the principle of impartiality and parties' equality against law".

Therefore, MEC's request has no legal justification concerning the aforementioned issue. Nevertheless, the entity may continually carry out this monitoring and evaluation on cases to achieve whatever is desired via AGO which is part of executive branch.

The scrutinized comment together with the history of the issue submitted to the meeting of High Council of Supreme Court and approved by its resolution 417.

The aforementioned issue was written for your attention.

With regard

Dr. Abdullah Ataee

General Administrator of Judiciary