

Drug Trafficking in Afghanistan: Criminalization, Investigation and Prosecution

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List of Abbreviations:

CARICC:	Central Asian Regional Information Coordination Center
CJTF:	Criminal Justice Task Force
CND:	Commission on Narcotic Drugs of United Nations
CNPA:	Counter Narcotics Police of Afghanistan
CNTA:	Counter Narcotics Training Academy of Afghanistan
DOD:	Department of Defense of the United States
DOJ:	Department of Justice of the United States
DSB:	Drug Supervisory Body under the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 1931
DND:	Division of Narcotic Drugs of United Nations
IIU:	Intelligence and Investigation Unit
INCB:	International Narcotics Control Board under the Single Convention of 1961
JWIP:	Judicial Wire Intercept Program
MOC:	Ministry of Counter Narcotics of Afghanistan
MOI:	Ministry of Interior Affairs of Afghanistan
NDCS:	National Drugs Control Strategy of Afghanistan
NIU:	National Interdiction Unit
PCB:	Permanent Central Board Under the International Opium Convention of 1925
SIU:	Sensitive Investigative Unit
TIU:	Technical Investigative Unit
UNDSS:	United Nations Department of Safety and Security (
UNAMA:	United Nations Assistant Mission for Afghanistan
UNODC:	United Nations Office on Drugs and Crimes

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1. Introduction:

Narcotic drugs as a phenomenon affecting the social, economic, political and security aspects of life of societies has been a matter of concern for the individual countries and international community as a whole. Although different countries apparently deal with very specific areas of life of their societies affected by this phenomenon, in general, due to the inter-relation between the said aspects of life, even the impact on a specific area of life in no means remains confined to that specific area and shall spread to the other aspects of life as well. Both the supply and demand sides of drugs have posed imminent threats to the societies and hence has made them to recourse to specific measures for overcoming this challenge. The scope of the problem, whether in the national or international level, is that broad that has proven a mere domestic measure quite insufficient and incomplete, requiring the international community to take legislative and executive actions for tackling it in a quite cooperative manner amongst its actors.

The international community is therefore concerned about the problem of narcotic drugs, particularly drug trafficking, due to its nature as an organized crime and its inseparable nexus with the other organized crimes such as money laundering and financing of terrorism. This problem has led the international actors to take steps for countering this worldwide problem in the form of enactment of international treaties since the beginning of the 20th century. The boldest step for the said purpose is adoption of the tripartite United Nations conventions which is composed of the 1961 Convention on Narcotic Drugs¹ and its 1972 amendment protocol, the 1971 Convention on Psychotropic Substances² and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances³ that are the true indicators of the sincere attention of the international community to this problem. These conventions are still in force and are considered the international legal framework of drugs worldwide.

At the national level, depending on the severity of the problem and contingent on the interest of the states to be protected, countries have taken appropriate measures to overcome the multi-dimension challenges of drugs in the domestic and regional levels.

¹ Single Convention on Narcotic Drugs (30 Mar. 1961)

² Convention on Psychotropic Substances (21 Feb. 1971)

³ Convention Against Illicit Traffic on Narcotic Drugs and Psychopathic Substances (20 Dec. 1988)

Afghanistan, as one of the most affected countries by drugs, has made efforts to overcome this challenge in different stages of its contemporary history. Unlike other patterns of organized crime, drug-related crimes have found their way in the legislation in Afghanistan since the enactment of the first substantive penal code at the beginning of 20th century. However, attention to this phenomenon has been proportionate to the degree of the danger that was posed to the society by different aspects of narcotic drugs in the specific eras. The initial steps of legislation of drug-related offences in early 20th century have been very selective with a high degree of leniency that in turn reveals the low level of threat posed by drug-related offences to the country at that period. The leniency in this era was to that degree that sanctions for such offences were left within the discretion of the administrative bodies with no specific punishment in the laws.⁴ This lack of harshness was slightly shifted in the 1976 penal code with an ongoing selectiveness which was only confined to the demand side of drugs with no provisions regarding the supply side. In other words, only consumption of drugs was marked punishable with no provisions regarding the trafficking of drugs.

The surge of political instability and droughts in the country in late 1970s, intertwined with the international factors, really marked the end of leniency and selectiveness approach towards drug-related crimes and urged a new era of criminalization and regulation of drug-related offences in the country. This truly coincides with the shift of drugs from a recreational phenomenon to a more of commercial product for the purpose of meeting the needs of the elements that were benefiting from this business. Since that time there has been five counter narcotics codes and one recent penal code that all have extensive and broad sense of regulation and prohibition of drug-related crimes both in the supply and demand sides. This gradual harshness is the bold result of the expansion and boom of the problem that currently has made the country as the top producer of opium in the world.

Amongst the other types of drug-related offences, drug trafficking has immensely drawn the attention of lawgiver in the recent years and has mostly witnessed the gradual harshness in the codification process. Ironically drug trafficking was not under any prohibition in the legal framework of Afghanistan for a while. The selectiveness of prohibition on drug-related offences was to that extent that only supplying of it for the domestic use was under prohibition and

⁴ General Criminal *Nezamnama* of Afghanistan (1923). art.131.

production of it for exporting was enjoying the full legalization.⁵ This tendency regarding the drug trafficking survived to exist for several decades until the time that drug trafficking started to boom and hence become a challenge for the state, particularly threatening the security and stability in Afghanistan. The range of domestic and international incidents in the second half of 20th century were of a tremendous impact on the decision of the Afghan government to recourse to a punitive approach towards drug trafficking. It was the year 1990 that the government enacted the first special counter narcotics code penalizing drug trafficking relatively in a harsh manner. Since then, drug trafficking has been prosecuted in the Afghan courts under the 1990 counter narcotics code and the other subsequent codes. Regulation of drug trafficking has witnessed a gradual harshness in the codification process of Afghanistan which is discussed in details in the criminalization of drug trafficking chapter in this dissertation. Nowadays, drug trafficking poses an enormous challenge towards the stability, security, economy and even social life of people in the country. The perpetuation of ongoing battle in the country *inter alia* the other factors is, arguably, stemming from the drug trafficking with both cause-and-effect dimensions.

1.1.Purpose, Method and outline:

The problem of drugs is a widespread challenge with a multi-dimension impact on the life of people in Afghanistan. The scope of the problem is that expanded that has not left any aspect of life unaffected. Even though the Afghan government has endeavored to tackle this problem by recourse to enactment and implementation of numerous laws, policies and strategies, there has not been any significant win in the war against drugs in the country. The starting point of gradual boom of this business really dates back to late 1970s and early 1980s when the government gradually lost control over the areas of poppy cultivation due to the surge of opposition groups in the rural areas of Afghanistan. Since then, Afghanistan, parallel with adoption of laws, has engaged itself with enactment of policies and strategies in different phases for better and smoother implementation of the laws. The recent move of this nature was the enactment of an eight-pillar strategy⁶ that was a multi-dimension document. Despite implementation of the said strategy, there

⁵ Ibid, art.125; Also See: General Criminal Nezamnama of Afghanistan (1927). art.103.

⁶ The eight-pillar strategy of Afghanistan is composed of eradication, interdiction, Law enforcement and judicial reform, public information campaigns, alternative livelihood developments, demand reduction, Institution building and international and regional cooperation. See National Drug Control Strategy, An Updated Five-Year Strategy for Tackling the Illicit Drug Problem, 2006, available at <http://mcn.gov.af/Content/files/NDCS.pdf>

has not been any significant success in coping this problem which is evidenced by the gradual boom of the drug business day by day. The broadness of the scope of the problem and the devastating impact of it on different aspects of life, particularly on the security dimension and the linkage of it with the terrorism even has urged the international community to get involved in the war against drugs parallel to the war against terror. The bold move of this nature was the change of the United States' no-intervention policy in the drug-related issues in 2007. Prior to this date, the United States counter terrorism strategy was not bothering with the drug issues in Afghanistan and the US considered the drug problem to be a domestic issue, falling within the duties of the Afghan government to deal with it. In 2007, the United States government, due to the urgent need, was urged to issue a five-pillar counter narcotics strategy⁷ for Afghanistan which was intended to be implemented parallel to the eight-pillar counter narcotics strategy of Afghanistan. Contrary to the expectations from this strategy, no significant achievements were made by enforcement of this strategy in terms of tackling the problem of drugs in Afghanistan and the problem was rather expanded and perpetuated. Both the Afghan and the United States strategies had different pillars for responding the need of overcoming the varying dimensions of the problem. All the pillars of the said strategies are of a vital importance to be assessed and evaluated. However, due to broadness of the topic from one hand and the existence of numerous scholarly works related to the other pillars on the other hand, the author came up with this decision to focus this dissertation on the law enforcement pillar which is one of the common pillars between the two strategies. Within the law enforcement pillar, the focus of the attention is still narrowed down and is on the criminal aspect of it which covers the criminalization and the investigation and prosecution of the drug trafficking cases within the framework of the special taskforce of narcotic drugs in Afghanistan.

Therefor this Ph.D. thesis focuses on the criminalization, investigation and prosecution of drug trafficking in Afghanistan in the current legal framework of the country. This area has been selected for three specific reasons. First, the phenomenon of drug trafficking is of enormous practical importance in Afghanistan, a country with one of the largest illicit drug economies of the world and, at the same time, very weak criminal justice institutions in general. The current special institutional framework which annually deals with hundreds of relatively high-profile drug

⁷ The United States counter narcotics strategy had five elements namely: eradication, interdiction, judicial reform, public information campaigns and alternative livelihood developments. See United States Counter Narcotics Strategy for Afghanistan, 2007, available at: <https://2001-2009.state.gov/p/inl/rls/rpt/90561.htm>

trafficking cases is of a vital importance to be assessed. This is, particularly, done for the purpose of revealing any potential practical gaps that might exist in the process of work of investigative and prosecutorial institutions. This assessment would reveal the role of the investigation and prosecution of drug trafficking in the over-all war against drugs in the country which is the main focus of this dissertation.

Second, the theme offers the possibility to study and learn from the existing scientific literature on drug trafficking in other countries. Unlike in Afghanistan, where this area is under-developed, there are countless pieces of scholarly research in the other countries that have gone through similar situations regarding the drug trafficking that could be best used for enriching this research.

Third, although drug trafficking in particular and drug crimes in general have been in the center of attention in Afghanistan, no proper scholarly work has been done before regarding the trafficking aspect of this phenomenon from a criminal justice point of view and the area is still considered unrevealed to the ones who are interested in this field, whether in Afghanistan or abroad. Beyond that, there has been no institutional report released by the Criminal Justice Task Force, the responsible authority dealing with the drug trafficking cases, to show the quality of the investigation and prosecution of drug trafficking cases within that system. The only information that could be accessed on their website is the quantity of the cases that they have dealt with on a monthly, quarterly and yearly basis; which is not enough for feeding the need and responding the questions regarding the functionality of the said institution. The tendency of keeping the information and not revealing it to the public, like any other institutions in Afghanistan, is widely practiced in this framework that leads to lack of access to the pertaining information from the said institution. This dissertation thus promises to bring afore new scientific results that will be filling the gap of information regarding the issue for the interested people in Afghanistan and a good source of information for the international scholars who are eager to know about the quality of the work of the existing mechanism.

Considering the multiplicity of the different laws, treaties and conventions, and policies existing to regulate this field, as well as the institutions dealing with investigation and prosecution of this crime, this thesis will look into the investigation and prosecution of drug trafficking. Against this background, the thesis is focused on the question: *Does the Afghan legal framework of*

criminalization, investigation and prosecution of drug trafficking possess adequate tools to tackle the challenge of drug trafficking in Afghanistan?

This research question raises a number of sub-questions, which will need to be addressed as a way of unfolding the general argument of the thesis.

Pertaining to criminalization of drug trafficking, the thesis firstly aims to look at the question: ***What is the status of drug trafficking criminalization in Afghanistan?*** For this purpose, an overview and careful analysis of the relevant laws will be provided to give a clear understanding of the status of criminalization of drug trafficking in Afghanistan. This part of the research will focus on the conceptualization and penalties of drug trafficking in the legislation of Afghanistan.

Secondly the focus is on the question: ***To what extent do the national laws of the country comply with the international obligations of the country arising from treaty obligations?***

To answer this question, an evaluation and deep scrutiny of the bilateral treaties with other countries and international treaties and conventions, to which Afghanistan is signatory or party, such as the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, will also be necessary. The Constitution of Afghanistan in its article 7 considers the treaties and conventions, to which Afghanistan is a party, as the law of the country.⁸ Therefore, these instruments are important to project the real picture of criminalization of drug trafficking in Afghanistan.

Thirdly, the attention is to answer the question: ***What steps should be taken for filling any potential gaps in the arena of criminalization of drug trafficking?***

A close glance at these laws and treaties would reveal the potential gaps and deficiencies that may exist in the system of criminalization of drug trafficking in Afghanistan. For better filling those potential gaps, a set of proposals will be provided, on the basis of positive experiences identified in other countries.

Regarding the investigation and prosecution of drug trafficking, the endeavor is to answer the question:

⁸ The Constitution of Islamic Republic of Afghanistan (2004) Official Gazette 818. Art.7.

Does the existing system of investigation and prosecution of drug trafficking function properly, especially in terms of institution cooperation and coordination?

This question will lead to a deep scrutiny of all the detective and policing institutions that deal with the drug trafficking crime. Besides these national institutions, there are some international policing and investigative bodies such as EUROPOL and Interpol that have the authority of detection and investigation of drug trafficking which shows the essence of an extensive degree of regional and international cooperation in policing and investigating drug trafficking cases.

The extent of cooperation and coordination amongst all these national and international institutions will be especially highlighted in this thesis. The distinction between the jurisdiction of these institutions and the question of overlapping of their tasks and activities will also be addressed. This will also include the process of evidence collection by these institutions and the consideration of the fundamental rights of a suspect or an accused in the process of investigation and prosecution.

What could be done to better improve the functionality of the existing system of prosecution? A precise evaluation and examination of the functionality of all these detective and investigative institutions will display the deficiencies and hence facilitate the drafting of reform proposals.

Pursuant to that the focus would be on answering the question: ***What should be done to fill the potential gaps in the arena of investigation and prosecution of drug trafficking?***

Relevant to this question, a set of proposals will be put forward by the author for overcoming the challenges that might exist in the work of the investigative and prosecutorial institutions in practice.

The methodology utilized in this dissertation is a mixture of desk and field research. The desk research is mostly conducted in the parts of this dissertation that there were some resources available in the form of literature and legislative documents. However, dealing with the practical aspects of investigation and prosecution was in dire need of field research. The reason for recourse to field research in this part was the under-developed status of research in this specific field that does not provide any seeker with even a single article regarding the functionality of the investigative and prosecutorial institutions involved in dealing with the drug trafficking cases.

It should be stated here that the methodology of my research in three main chapters of this dissertation, depending on the nature and type of work and availability of resources, is varying. In the following, the research methodology of each chapter will be provided separately.

In Chapter 2 of this dissertation, different methods are used in three separate sections. In the part related to history, due to the nature of this part, a more narrative approach is utilized for better understanding of different historical periods. This part also includes some analysis pertaining to the assessment of the still existing policies that have been in place since the beginning of the 21st century by the Afghan government or the international community. In part two of this chapter, pertaining to the impact of drugs on the life of people, a more analytical approach is taken to properly analyze the impact of drugs on different aspects of life of people in Afghanistan.

In the chapter related to criminalization of drug trafficking a mixture of descriptive and analytical approaches will be taken into consideration. The section of the chapter that is related to the provisions of the laws of Afghanistan regarding the criminalization of drug trafficking is mostly descriptive with a comparison of the provisions of varying laws in different time periods. The other part of the chapter that is focusing on the reflection of codification policies in the criminalization of drug trafficking in Afghanistan will be quite analytical. In this part the reflection of the policies in the laws pertaining to criminalization of drug trafficking will be analyzed in details.

In the chapter related to the investigation and prosecution of drug trafficking, a mixture of desk and field research will be utilized. The first half of the chapter will be mostly reviewing the articles, laws and policies that deal with the functions and authorities of the investigative and prosecutorial institutions. This part is purely desk research which focuses on the provision and analysis of the said documents pertaining to the work of the said institutions. The second half of the chapter will be mostly field work that comes in the form of interviews with the actors involved in investigation, adjudication, and defense of drug trafficking cases. The interviews are designed in a way to answer the how of the work of the investigative and prosecutorial institutions. The questions in the interviews are mostly qualitative with the only exception of quantitative question regarding the number of cases that each one of the interviewees deal with on a regular basis. A focus group type of interview which was initially planned by the author was not feasible due to the professional barriers and legal constraints that the actors of each one of the institutions had in asserting their views in a mixed group in which actors from the other institutions were present. This is also

important to be stated that the author had the intention of interviewing the personnel of the detective institutions of drug trafficking cases, particularly the intelligence institutions, and despite numerous efforts, the actors of the said institutions did not reveal their readiness to be interviewed. This was mostly due to their reliance on the secret nature of their work.

It is to be clarified here that this dissertation is only focused on the criminalization, investigation and prosecution of drug trafficking cases in the special taskforce of narcotic drugs in Afghanistan. It does not deal with the investigation and prosecution of drug trafficking cases that take place in the general jurisdiction departments of the Attorney General's Office. The line between the jurisdiction of the general jurisdiction and special taskforce is drawn by article 18 of the law Against Narcotic Drugs and Intoxicants and controlling them.

This dissertation is composed of five chapters in total. Chapter 1 and Chapter five are respectively allocated to the introduction and the conclusion of the thesis. Chapters 2, 3 and 4 are the body of the thesis, dealing with different aspects of the issue of drugs in Afghanistan.

Chapter 2 is composed of two distinct parts dealing with two separate issues. Part one of this chapter is allocated to the history of drugs and drug trafficking in Afghanistan. In this part, the endeavor is to find the roots of the problem of drugs in Afghanistan and to assess the shift of drug production from a non-commercial crop to more of commercial one in the course of time. A deep scrutiny of the external and internal factors that, in the course of contemporary history, have been effective in the boom of this business in Afghanistan is also given place in this sub chapter. This part, similarly, contains the discussion of the strategy that the Afghan government has put in to action since 2006 for overcoming the challenge of drugs in Afghanistan. It also includes evaluation of the measures that are taken by the other countries such as the United States and the United Kingdom for tackling the drug problem in Afghanistan in the recent years. Failures and successes of such measures are also concisely provided in this part.

Part two of this chapter is dedicated to the discussion of the impact of drug trafficking on different aspects of life of people in Afghanistan. It deals with the impact of this phenomenon on the security, economic life, and social life of people in the country. In the part related to security, the nexus of this phenomenon with terrorism is also assessed briefly. The intent in this part is mainly

to show the scope of the problem in Afghanistan and to determine the role of investigation and prosecution in tackling the problem of drugs in the country.

Chapter 3 of the dissertation is dealing with the criminalization of drug trafficking in Afghanistan. Due to the fact that a considerable readership of this dissertation might not be familiar with the legal system of Afghanistan, a brief elaboration of the legal system in the country is provided before going into the aspects of criminalization of drug-related offences. In this chapter, a historical development of the measures taken by the governments in Afghanistan for dealing with the problem of drugs in general and drug trafficking in particular is also provided. This part, after brief assessment of the role of Islamic Sharia and traditional rules in Afghanistan before codification of crimes in the country, starts with the criminal code in Afghanistan that for the first time was furnished with the provisions regarding the criminalization of drug-related offences in a quite selective manner and deep leniency. This era of softness of laws on drug issues, which starts from 1925 Nezamnama until 1990 Counter Narcotics law, is composed of general and specific codification regarding drug offences. The first one is the time period when there was only a general penal code dealing with all the crimes including drug-related ones. The second one was the era in which the first ever specific Usulnamas were enacted for dealing with the drug-related issues focusing on a selective criminalization of certain acts pertaining to drug issues. The end of this era of softness begins with the enactment of the first counter narcotics code in 1990 which marks the emergence of harshness of the laws in regard to drug-related issues. The evaluation of provisions of the 1990 law and the other subsequent counter narcotics laws are provided in this chapter for better understanding of criminalization steps in Afghanistan. It should be mentioned that the assessment of the provisions of different codes are confined to the provisions pertaining to drug trafficking due to the broadness of the scope of drug-related issues. In this chapter, a relatively greater emphasis is put on the assessment of the provisions of the current code of counter narcotics and the newly published penal code which would come into force in February 2018, containing penal provisions for drug trafficking. This chapter also elaborates on different policies, such as prohibition, de-penalization, de-criminalization and legalization used for codification of drug trafficking and further assesses the reflection of such policies in the process of codification of drug trafficking in Afghanistan. This chapter concludes with a set of proposals for filling the existing gaps in the system of criminalization of drug-related crimes in Afghanistan.

Chapter 4 of the dissertation is allocated to the investigation and prosecution of drug trafficking cases in Afghanistan. For a better understanding of the investigation and prosecution system in Afghanistan, this chapter first elaborates on the investigation and prosecution system and the pertaining institutions in general. Subsequently, it provides details about the special investigation and prosecution system for dealing with drug trafficking cases. It scrutinizes the existing system of investigation and prosecution by providing details about each institution involved in this field. This part includes elaboration on the detective institutions which are involved in drug trafficking cases for a better understanding of the work of investigative and prosecutorial institutions. A section related to the cooperation and coordination amongst the national institutions themselves and their cooperation and coordination with international institutions are also provided in this chapter. The question of the “how” of the investigation and prosecution regarding drug trafficking cases is further illuminated by a set of interviews with the judges, prosecutors, and the defense lawyers who are dealing with drug trafficking cases. A detailed assessment of the commonalities and differences of views of the three categories of interviewees within their groups and the other two groups are also provided in this chapter. This chapter also contains a set of proposals that are put forth for reforming the existing system of investigation and prosecution of drug trafficking cases.

1.2. Key Concepts

Similar to any other dissertation, there are a number of concepts that need to be defined in this dissertation. Considering the title of this dissertation, there are four main concepts which would be elaborated up on in this part. These terms are drugs, drug trafficking, investigation and prosecution which will be discussed in separate sections in the following. The focus of these definitions would be on those aspects of the concepts that better server the purpose of this dissertation.

1.2.1. Definition of drugs:

Drug is one of the concepts that defining it, due to its ambivalent nature, is quite challenging. This term, due to being shared between medical science and social science, is very hard to be defined

all inclusive. A better approach for defining this term is to provide each one of the medical and non-medical definitions separately. In the following we will provide the definition of this term in the literature, international conventions and the Afghan laws in separate sections.

1.2.1.1. Definition of drugs in the literature

Drug as a phenomenon affecting life of societies, both in positive and negative ways, has been defined differently by various scholars. Due to the broad scope of it, there has been numerous definitions for the term drugs that discussing them in this part will not be possible. For this valid reason, the focus in this part will be on selection of limited number of definitions that would sever the purpose of this dissertation.

Drug mostly is defined in two ways. One is a common definition which does not deal with the question of legality and illegality of it as a social phenomenon and the other is narrower which is concentrated on the issue of illegitimacy of it. The common definition is mostly a medical one as it only focuses on the curative nature of the substances. In this context drug is defined as “Any chemical compound that is used in prevention, diagnoses, treatment, or cure of disease, for the relief of pain, or to control or improve any physiological or pathological disorder in humans...”⁹ As noticed, this definition is concentrated on the preventive and curative aspects of the substance which both are medical concepts. It is precisely not related to the purpose that we have in this chapter as it is not concerned with the issue of prohibition, which is the core concept of our discussion in this dissertation. Although some of the prohibited drugs also have the characteristic of curing diseases and relief of pain, they share the statues of prohibition when used for such purposes.

Another definition provided by Goldstein states: “A drug is any chemical agent that affects biological function.”¹⁰ This definition is really broad and could cover any drug, whether licit or illicit. Since all the medical drugs and prohibited drugs share the characteristic of affecting the biological function, distinction of them based on this definition is not feasible at all. This definition

⁹ Trevor Bennett, Katy Holloway (2005). *Understanding Drugs, Alcohol and Crime*, England, Open University Press, 2.

¹⁰ Avram Goldstein (2001). *Addiction: From Biology to Drug Policy*, Oxford, Oxford University Press, 4.

also does not serve the purpose of this dissertation as it is not of any direct nexus with the phenomenon of prohibited drugs in the societies.

Richard Hamersley in his book *Drugs and Crime* has defined drugs as “substances that have some sort of psychological effect that make people want to take them and are illegal to take in this way.”¹¹ This definition is somehow a narrower definition of drugs which points at the psychological effect and illicitness of the substances. The point of distinction of this definition from the above-mentioned ones is the illicitness of taking them. Although this definition only focuses on the illicitness of taking drugs, yet it implies that any kind of drug that taking it is illegal, it will precisely be forbidden to cultivate, process, traffic and poses it. The following section will be allocated to the definition of the term “drug” in the light of international treaties of the United Nations pertaining to narcotic drugs.

1.2.1.2. Definition of drugs in the United Nations Conventions

Since its establishment, the United Nations has been actively involved in the already started efforts for tackling the problem of drugs worldwide. The efforts of United Nations has been, but not limited to, enactment of conventions that currently make the international legal framework of drug campaign in the world. There has been three international conventions enacted in 1961, 1971 and 1988 that are considered important documents pertaining to drugs in the field of international law. In this section, we will only look at definition of drug in the two of these conventions as the 1971 convention has not provided any definition for the drugs.

The Single Convention of 1961 defines drugs as “any substances in schedule I and II whether natural or syntactic”¹². This definition is only provided for the purpose of this convention as it only covers the substances that come under schedule I and II of this convention. With the option of adding or removing any of the substances from the two schedules of this convention, the likelihood of a substance becoming a drug or ceasing to be a drug is very high. This shows an altering status of drug under this convention.¹³ This definition covers all the listed drugs that are naturally made

¹¹ Richard Hamersley (2008). *Drugs & Crimes Theories and Practices*, Cambridge, Polity Press, 16.

¹² Supra note 1, art. 1(1) j.

¹³ Commentary on the Single Convention on Narcotic Drugs of 1961 (1962). prepared by the Secretary- General in Accordance with paragraph 1 of Economic and Social Council Resolution 914 D (XXXIV), 10

from opium poppy, coca bush or cannabis plant and the ones that are coming in a syntactic form. The attention here is on the chemical structure of the substance rather than on the way that it is made.¹⁴

The 1988 Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances is another UN document that defines drugs. However, this convention further narrows the term by only mentioning narcotic drug. The convention, in its own words articulates that: “Narcotic drug means any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961.”¹⁵ If we take a look at this provision of the convention, it is revealed that the 1988 Convention does not provide a different definition for the drugs and it rather refers to the same definition that is provided by the Single Convention.

Comparison of these two definitions indicate that the tendency in the United Nations document has been to rely on the same definition for the purpose of reducing any confusions in the understanding of the term “drug”.

In the following we would look at the definition of drug in the narcotic related laws of Afghanistan for the purpose of having a practical definition for this term.

1.2.1.3. Definition of drugs in the domestic laws of Afghanistan

In the current legal framework of Afghanistan, the legislations that deals with the narcotic drug issues is the Law against Intoxicating Drinks and Drugs as well as Controlling them and the recently enacted penal code of Afghanistan. Since the recent penal code of Afghanistan only deals with the punishment of drug-related crimes, it does not provide any provisions regarding the definition of terms and concepts. Therefore, there is not any definition provided for the term drugs in this law. The only legislation that has provisions regarding the terms and concepts of the drug field the Law against Intoxicating Drinks and Drugs. This law stipulates that: “Narcotic drugs are those plants, substances and their syntactic that are scheduled under schedule I, II, III and IV of this law.”¹⁶ This definition covers all the substances and plants including their syntactic that are provided under this law which covers all the natural drugs that come from plants and their syntactic

¹⁴ Ibid, 10

¹⁵ Supra note 3, art. 1 (n).

¹⁶ The Law Against Intoxicating Drinks and Drugs as Well as Controlling Them of Islamic Republic of Afghanistan (2010). Official Gazette 1025, art. 5(1).

that are produced in a chemical process. Article 6 of this law further elaborates on the substances articulated as narcotic drugs under the four annexed schedules to the law. This Article, in its own words, stipulates: “The controlled narcotic drugs are the plants and substances and their syntactic that are under schedule I, II and III and the chemicals that are under schedule IV of this law which are categorized as follows:

1. Schedule number I includes the prohibited plants and substances that are not used for medical purposes.
2. Schedule number II includes the plants and substances that are used for medical purposes and are under strict control.
3. Schedule number III includes the plants and substances that are used for medical purposes and are under control.
4. Schedule number IV includes the primary chemicals that are used in manufacturing and processing of narcotic drugs and psychoactive substances.”¹⁷

The definition of drugs provided in article five of this law is the working definition for the narcotic drugs as it creates the legal obligation on all the detective, investigative, prosecutorial, and adjudicative institutions involved in this field to consider and apply this definition in dealing with narcotic drug cases.

1.2.2. Definition of drug trafficking

Drug trafficking as a concern for the international community, has drawn the attention of scholars and organizations to it. This has led to provision of various definitions for this compound term by the scholars and organizations. The term trafficking literally is referred to carrying of drugs from one place to the other. However, this meaning is not serving the purpose of this phenomenon and for that specific reason, the term trafficking is widely defined that includes different aspects of drug-related offences. For better understanding of this phenomenon, we will provide the definition of drug trafficking in the literature, international conventions and domestic laws of Afghanistan in the separate sections.

¹⁷ Ibid, art. 6.

1.2.2.1. Definition of drug trafficking in the literature

Oxford dictionary defines drug trafficking as “the smuggling, distribution and sale of illegal drugs”.¹⁸

This definition by the Oxford dictionary is concise due to not covering cultivation and manufacture of drugs as trafficking. It only suffices to the illicit trade of illegal drugs which covers the sale and distribution of the said drugs.

The United Nation Office for Drugs and Crimes defines drug trafficking as: “a global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws.”¹⁹

The UNODC definition is relatively much broader than the Oxford dictionary definition. This definition, besides the other aspects of drug crimes, includes the cultivation and manufacture which are often not covered by the term trafficking in original meaning. Another important point in this definition is confinement of the prohibition to the drugs that are subject to the drug prohibition laws. This definitely excludes the drugs that are prohibited by the other laws for the purposes other than countering narcotic drugs.

In the upcoming section, we will define drug trafficking under the United Nations Conventions.

1.2.2.2. Definition of drug trafficking in the international conventions

In this part, we will provide the definitions that are provided in the United Nations conventions, dealing with the drug issues worldwide. The 1961 and 1988 conventions are the two international documents that provide definitions for drug trafficking. We will provide the definitions of both conventions separately. The 1961 Single Convention call drug trafficking as illicit trafficking and provides the following definition for it: “Illicit traffic” means cultivation or trafficking in drugs contrary to the provisions of this Convention.²⁰ According to the commentary on this convention the term trafficking is extended beyond trade and distribution and includes manufacture and

¹⁸ Oxford Dictionary available at: https://en.oxforddictionaries.com/definition/drug_trafficking Last visited: 06.06.2020

¹⁹ UNODC website available at <https://www.unodc.org/unodc/en/drug-trafficking/> Last visited: 06.06.2020

²⁰ Supra note 1, art.1(1) L.

production too.²¹ Cultivation, which is considered trafficking under this convention is defined as: “the cultivation of opium poppy, coca bush or cannabis plant.”²² This definition reveals that under this convention, “cultivation” only refers to opium poppy, coca bush and cannabis plant and thus is not extended beyond these three plants.²³

Similar to the 1961 convention, the 1988 convention against illicit traffic in narcotic drugs and psychopathic substances also defines drug trafficking under the term illicit traffic. In the section defining terms of this convention, “illicit traffic” is referred to “the offences set forth in article 3, paragraph 1 and 2 of this convention”.²⁴ In article 3 of this convention, a large number of activities are articulated as acts constituting drug trafficking. These acts include:

- “ i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
- ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
- iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above.
- iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances.
- v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above.”²⁵

If we look at this article, there is a long list of acts that are considered to constitute drug trafficking if committed by anyone. The article even has considered management and financing of such acts as drug trafficking offence. This definition is considered an all-inclusive definition for the drug

²¹ Supra note 13, 11

²² Supra note 1, art. 1(1)(i).

²³ Supra note 13, 8

²⁴ Supra note 3, art. 1 (m).

²⁵ Ibid, art. 3.

trafficking that has become a pattern for many domestic legislations penalizing drug trafficking all around the world.

In the following section, we would look at the definition of drug trafficking under the domestic laws of Afghanistan to find out about incorporation of the activities under these conventions in the domestic laws of the country.

1.2.2.3. Definition of drug trafficking in the domestic laws of Afghanistan

As the law against intoxicating drinks and drugs of 2010 is the governing law in the field of narcotic drugs, we will suffice to the provisions of this law in defining the term “drug trafficking”. In the section defining the terms and concepts, this law defines drug trafficking as: “cultivation of narcotic drugs generating seeds, production, manufacturing, processing, sale and purchase, possession, distribution, commissioning, import, export, trafficking, supplying, use, stocking, concealment of any substances under schedule I, II and III of this law or any activities regarding the chemical substances under schedule IV of this law for the purpose of illegal use, cultivation or production of narcotic drugs and psychopathic substances.”²⁶ This law reiterates the definition of drug trafficking in its article three by stating that: “Anyone who, without having a license, does any of the following activities is considered a perpetrator of drug trafficking and is punishable under this law:

- A. Cultivating drug generating plants, production, manufacturing, processing, sale and purchase, possession, distribution, commissioning, import, export, trafficking, supplying, use, stocking, concealment of any substances or a mixture containing those substances under schedule I, II and III of this law.
- B. Doing any activities enshrined in section A of this article regarding any chemical substance or primary substance for the purpose of illegal use in cultivation, production of narcotic drugs and psychopathic substances.”²⁷

A comparison of the two articles reveals that both articles have provided the definition of drug trafficking with no clear difference. The point that is scarce in both articles is elaboration of any of the activities mentioned in these articles. None of the terms, excluding the term distribution,

²⁶ Supra note 16, art. 5(2).

²⁷ Ibid, art. 3 (1)(2).

mentioned in these two articles are defined or elaborated up on in any of the provisions of the code. Distribution is the only term that is defined under article five of this code as: “transfer or attempt to transfer intoxicants or narcotic drugs from one person to the other.”²⁸ The purpose of the lawgiver from providing no definition for the other terms might have been to leave it within the discretion of the law enforcement authorities to decide about them in a case by case basis. If we take the term cultivation as an example, we can find out that the law has set forth the minimum punishment for cultivation of up to one hectar of land under article 41. If we scrutinize this article, it only sets the maximum of the land which is one hectar and does not provide the minimum land, cultivation of which would be punishable. This reveals that the law giver has left this to the law enforcement authorities to assess that based on the danger that it poses to the society and punish the offenders accordingly.

1.2.3. Definition of Investigation

In order to better elaborate on this term, we will provide some selective definitions of this term in the literature and in the legislative documents of Afghanistan in the following separate sections.

1.2.3.1. Definition of investigation in the literature

The term criminal investigation has been defined by different scholars with different wordings that often introduce the same process or set of acts.

Karl Ask defines it as “Criminal investigation is, in essence, the process of answering questions as to if, how, where, when, why, and by whom a crime was committed.”²⁹

This definition is concentrated on the set of questions that are being answered by the process called investigation and has not provided the relevant authorities that are responsible for this task. Due to lack of clarity, it could even be attributed to the activities of police when taking any actions for answering the above-mentioned questions.

²⁸ Ibid, art. 5(18).

²⁹ Karl Ask (2006). Criminal Investigation: Motivation, Emotion and Cognition in the Processing of Evidence, Goteborg University, 2 available online at: <https://gupea.ub.gu.se/handle/2077/676>

In another scholarly work by Peter, Jan, Joan and Unda the term is: “Defined broadly as the police effort to collect information that will lead to the identification and apprehension of the perpetrator of a crime and that will enable the prosecutor to obtain a conviction.”³⁰

This definition clearly focuses on the activities of the police that in numerous legal systems is not authorized to indulge in investigation and is rather given the task of detection.

The important point here is that, disregarding the authority that is granted with the responsibility of investigation, these two definitions have at least several common points that are as: (1) determining if an offence has been committed; (2) identifying the potential perpetrator; and (3) apprehending the potential perpetrator.

In the following we will provide the definitions of the term investigation articulated in the domestic laws of Afghanistan.

1.2.3.2. Definition of investigation in the domestic laws of Afghanistan

The term investigation is defined in two separate legislations in Afghanistan. The first one is the Law on Detection and Investigation of Crime which defines investigation as: “Evaluation of all aspects of situations related to a case by the prosecutor that, based on the gathered and examined evidence, provides the possibility of decision making regarding the existence or non-existence of the reasons for the referral of the case of the accused to the court.”³¹

Similar to this code, the Criminal Procedure code also defines investigation as: “Evaluation of all aspects of a criminal incident, based on gathered evidence by the prosecutor through questioning and interrogation of accused, hearing the testimony of witnesses and present people in the crime scene, evaluation of gathered evidence for the purpose of determining the occurrence and non-occurrence of the crime, identification of the accused and filling charges against them within the boundaries of the law.”³²

³⁰ Peter W. Greenwood et al (1975). The Criminal Investigation Process Volume III: Observations and Analysis, Rand Corporation, V available online at: <https://www.rand.org/pubs/reports/R1778.html>

³¹ The Law on Detection and Investigation of Crime and the Oversight of Prosecutor’s Office on the Legality of their Implementation (1979). Official Gazette 424, art. 2(4).

³² The Criminal Procedure Code of Islamic Republic of Afghanistan (2014). Official Gazette 1132, art. 4(4).

The two above-mentioned definitions of the term investigation are quite similar to each other with the only difference of the latter being more explanatory than the first one. Although the law on Detection and Investigation of Crime was in force before the enactment of the current constitution, the definition of investigation, similar to that of the criminal procedure code, is in full conformity with the purpose of the Afghan constitution from this term.

Since the definition in the criminal procedure code is more detailed than the law on the detection and investigation, the former would be taken as the working definition for the purpose of this dissertation.

1.2.4. Definition of prosecution

Similar to investigation, there are a number of definitions provided for the term prosecution in the literature and laws that we will focus on each one of them in the separate bellow sections.

1.2.4.1. Definition of prosecution in the literature

The term prosecution is often used in a broader meaning in the literature. Most of the definitions provided by the dictionaries are really focused on the broader meaning of this term which covers the entire process of following a criminal case in the criminal justice system.

Black's Law Dictionary defines prosecution as "a [proceeding](#) instituted and carried on by [due course of law](#), before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime."³³

The Oxford dictionary defines the term as "the institution and conducting of legal proceedings against someone in respect of a criminal charge."³⁴

Both of these two definitions represent the broader meaning of the term prosecution that includes all the process against a criminal conduct.

³³ Black's Law Dictionary online, Second Edition, available at:

<http://thelawdictionary.org/prosecution/>

³⁴ Oxford Dictionary online, available at:

<https://en.oxforddictionaries.com/definition/prosecution>

1.2.4.2. Definition of prosecution in the domestic laws of Afghanistan

The legislative documents of Afghanistan have not provided a definition for the term “prosecution” that fits into the context that the constitution has determined. The Criminal Procedure code of Afghanistan defines legal prosecution as: “Following the criminal incident and the perpetrator of it which includes detection and investigation proceedings of crime, trial and enforcement of the judgment.”³⁵ Scrutinizing this definition reveals that the purpose of the law giver from prosecution in this context is really broad that encompasses all the measures and proceedings that are being taken against a crime and its perpetrators from the detection to the enforcement of the court’s judgment. This definition precisely is not in conformity with article 134 of the Afghan Constitution which granted the duty of investigation and prosecution to the prosecutor. Prosecution in the context of constitution is referring to the activities that being furthered by the prosecutor after receiving the charges sheet from the investigation prosecutor. Despite the fact that prosecution, coinciding with the purpose of the constitution, is not defined in the Afghan laws, we can infer the following definition from the duties of this institution under the criminal procedure code:

“ Prosecution is a set of activities such as: issuing the order regarding the proceedings related to detection and investigation for the purpose of modification or revocation of the measures taken against the accused, determining the characteristics of crime, confirming the charges sheet based on the grounds in the case, preparing the act of indictment, returning the file for completion of investigation and removal of any flaws in it, revoking the charges sheet and ordering for preparation of new one, revoking the charges and ordering dismissal of the case, done by the prosecutor after the referral of the charges sheet by the investigative prosecutor at the end of investigation to the court prosecutor.”

This definition is the closest one to the purpose of the constitution of Afghanistan which grants this duty to the prosecutor. The activities enshrined in this definition are all furthered by the prosecutor from the end of investigation process to the final judgment of the court for the case. For the purpose of this dissertation, this definition is considered the working definition that would be relied upon in the course of the dissertation.

³⁵ The Criminal Procedure Code of Islamic Republic of Afghanistan (2014). Official Gazette 1132, art. 4(34).

2. The cultivation and trafficking of drugs in Afghanistan

Historically, this land currently called Afghanistan (having different names in various parts of history) has not been the host for commercial production of drugs until the last quarter of the 20th century. Primarily since the 18th century a small amount of drugs was being cultivated in this territory that only supplied local demand. Afghanistan, as a country by this name, emerged in the first half of the eighteenth century. Since the beginning of the time that this entity was named Afghanistan, the superpowers of that era, mostly the British Empire and Tsarist Empire, intended to make this territory a buffer state.³⁶ To secure this goal, both empires made efforts to provide financial support to the Afghan state, which led to less dependence of the rulers on the national revenues and thus leaving them less accountable to the public. This primarily led to a distance between the rulers and citizens that in turn caused the local elite to offer a lower level of allegiance to the state. This lack of domestic control, particularly across the border areas, led potential traders to indulge in illicit trade in those areas. Drug cultivation and then trafficking were also imminent results of this lack of control that were exercised limitedly for non-commercial purposes until the Soviet invasion of Afghanistan. Section 2.2.1 of this chapter is allocated to the elaboration of this era in Afghanistan.

The Soviet invasion of Afghanistan provoked the prevalent insurgency against the regime in power to be intensified and thus gain international attention. The war against the Soviets, which was in need of financial resources, rapidly increased the cultivation and trafficking of drugs. The beginning of this war is considered to be the initial step towards commercial production of drugs in Afghanistan.³⁷ The boom of the cultivation and trafficking of drugs in this era is undoubtedly contingent on a series of internal and external factors which will be detailed in Section 2.2.2 of this chapter.

After the fall of the Taliban regime and the establishment of the new administration in Afghanistan, with extensive involvement of the international community, it was expected that drug cultivation

³⁶ Janathan Goodhand (2005). *Frontiers and Wars: A study of Opium Economy in Afghanistan*, Journal of Agrarian Change, vol. (5),193.

³⁷ Citta D. Maass (2011). *Afghanistan Drug Carrier, Evolution from a War Economy to a Drug Economy*, SWP Research Paper, German Institute for International and Security Affairs, Berlin, 5.

and trafficking would be halted. However, the problem of drugs did not cease, but was rather perpetuated in its growth and skyrocketed, to the extent that Afghanistan became the primary supplier of poppies and hashish in the world. All the above-mentioned points are further discussed in part 2.2.3 of this chapter.

The unleashed growth of drug cultivation and trafficking undoubtedly affected numerous aspects of life of people in the country. The undeniable impact of drugs and the reasons behind the rapid growth of this phenomenon in this area will be provided in section 2.3 of this chapter in a manner that each affected area of life will be focused on in the following sequence.

Firstly, the impact of drug cultivation and trafficking is assessed for the security situation of the country with a relatively reasonable scrutiny of linkage between drug trafficking and terrorism. This part contains both causal and consequential impacts of drugs on the security and governance in the country.

Secondly, the impact of this phenomenon is evaluated for the economic situation of Afghan society and the hurdles that the illicit drug economy has created for the people in the country. There is also a modest assessment of the linkage between poverty and cultivation of drugs from a causal relationship point of view.

Thirdly, the social impact of drugs on the social life of people in Afghanistan is also scrutinized. In this part, the focus will be on detrimental social impacts such as addiction, health problems, lack of development, and crime rate increase that are caused by drugs in Afghan society.

Part 2.4 of this chapter is allocated to the concepts and their definitions related to this dissertation. In this part, the terms: drug, drug trafficking, investigation, and prosecution are elaborated upon in a detailed way. These definitions are driven by the literature and Afghan laws with an effort to find the practical definition of these terms in the context of Afghanistan.

The method applied in this chapter is different in the three parts of this chapter. In part 2.2, the method is mainly a narrative approach, which is very common in dealing with history; however, efforts are made in different parts of this sub-chapter to use analytical approaches for better elaboration of any potential internal and external incidents that have had an impact on the drug problem in Afghanistan. In part 2.3, which is the evaluation of the impact of the drug problem, a more analytical approach is utilized. The method applied in part 2.4 is a mixture of narrative and

analytical approaches. In discussion of definitions in the literature, a more narrative approach is utilized; however, in the evaluation of definitions under the Afghan laws, a slightly analytical approach is taken into consideration.

This chapter aims to deeply scrutinize the historical realities of drug cultivation and trafficking in Afghanistan for better understanding of the scope and dimensions of the drug problem in the country. This scrutiny will help in revealing the causes for the emergence of the problem and its development over time. Understanding the root causes of the gradual spread of the narcotics problem in Afghanistan would enable us to find better solution for the rapid growing problem of drug cultivation and trafficking in the country. Investigation and prosecution of drug trafficking, being the main topic of this dissertation, is one of the options for dealing with the problem of narcotics in Afghanistan. Comprehending the success and failures of investigation and prosecution of drug trafficking is precisely linked with overall problem of narcotics in Afghanistan. In the absence of clear understanding of the problem, achievements and drawbacks of the investigation and prosecution shall not be assessed in a realistic manner. For this specific reason, a deep analysis of the historical facts would be unavoidable for better securing the aims of this dissertation.

2.1. Historical background

The issue of drugs in Afghanistan has developed in the course of centuries. Evaluating this historical development would require scrutinizing the issue in various parts of the history. For better elaboration and understanding of the growth and scope of the drug problem, we shall assess various historical periods in different sections of this chapter as follows:

2.1.1. From the establishment of Afghanistan until the Soviets invasion

Afghanistan, as a country under this name, was established in 1743 by King Ahmad Shah Durani after consolidating several tribes in the region. Historically, Afghanistan was not known for being a major grower and user of drugs compared to its neighboring countries, Iran and China, where widespread consumption of drugs already existed.³⁸ The earliest signs of drug cultivation could be dated back to the early 18th century in the mountainous Badakhshan region in north-eastern Afghanistan, where drugs were mainly cultivated for local consumption, and later on in the early

³⁸ Ikramul Haq (1996). Pak-Afghan Drug Trade in Historical Prospective, Asian Survey, vol. (36), 948.

20th century in Herat in western and in Nangahar in eastern Afghanistan, which still was very little in quantity and mostly to meet local demand.³⁹ According to some other sources, Kabul and Kandahar were also added to the list of provinces of Afghanistan where poppy was cultivated at the beginning of the 20th century.⁴⁰

This situation of limited production for the local consumption continued until the mid-20th century when production of drugs in Afghanistan became dependent on events in Iran. The problem of addiction in Iran during the mid-20th century became so severe that the Shah's government was compelled to abandon poppy cultivation in Iran.⁴¹ The ban in Iran encouraged Afghan traffickers to penetrate drugs in to Iran through illicit trafficking routes without being fearful of the death penalty waiting for them if caught smuggling. The high demand in the neighboring country and the ease in the process of smuggling drugs into that country, worked hand in hand in creating further enthusiasm on the Afghan side to cultivate drugs as much as demanded.

Besides the above-mentioned market in the neighboring country, another factor that had a significant impact on the growth of drugs in Afghanistan was, arguably, the presence of westerners, ranging from 5000 to 6000 in the country, in the early 70s who were consuming drugs and raising the demand for drugs within the country.

Taking into consideration the low level of demand for drugs domestically, it can be argued that before the Soviet invasion of Afghanistan, the high demand for drugs in Iran and the consumption needs of the westerners in the country can be deemed the main motives for the growth of this business in Afghanistan. It is worth elaborating here that despite the regional need for Afghan drugs on the one hand, and demand from the foreigners use in Afghanistan on the other, the drug trade was not that widespread in the country. The Soviet invasion of Afghanistan is a quite evident turning point for the growth of the narcotics industry in Afghanistan, which will be the center of our discussion in the upcoming section.

³⁹ Matt Weiner (2004). *An Afghan "Narco- State?" Dynamics, Assessment and Security Implications of the Afghan Opium Industry*, Australian National University, Canberra papers on strategy and defense, nr. (158), 19.

⁴⁰ *Supra* note 38, 948.

⁴¹ *Ibid*, 948.

2.1.2. From the Soviet invasion until the establishment of the new administration in 2001

The Soviet invasion of Afghanistan coincided with a number of national and international incidents that, *inter alia* the invasion, had a huge impact on both the expansion of drug cultivation and drug trafficking in the country.

External factors that were responsible for the rapid growth of Afghanistan's drug problem were mainly in the form of shifts in the locations of production among the most famous and prevalent producing regions and the competition for securing the interests of the adversaries of the Cold War in Afghanistan.

Three shifts in the Asian drug market encouraged Afghan producers to take the position of gap fillers. These shifts were caused by: (1) the effective campaign of the Turkish government against drugs in 1974; 2) location shifts of drug production from the Golden Triangle in Southeast Asia (Burma, Laos and Thailand) to the Golden Crescent in Central Asia (Iran, Afghanistan and Pakistan) in the 1970s; and (3) location changes within the Golden Crescent itself.⁴² The locations changes in different localities of the world in the field of drug cultivation and production have had a varied impact, as will be explained in below.

Turkey, under article 6 of New York Opium protocol, was given the title of "traditional opium producing country"⁴³ entitling her to continue production of opium as long as it was controlled by the State. Under this provision of the protocol, Turkey continued licit opium production with an illicit dimension that was resulting into reach of the heroin made in Turkey to the markets in the United States, allegedly leading to an increase of drug use in the US during the Vietnam War.⁴⁴ In the US, it was believed by President Nixon's Administration that 80% of drug used in that

⁴² Supra note 37, 10.

⁴³ Under the United Nations 1953 Opium Protocol of New York, article 6, only Bulgaria, Greece, India, Iran, Turkey, Union of Soviet Socialist Republics and Yugoslavia were allowed to produce opium. These countries were granted the right to continue cultivation of poppy for export under the strict control of the states which were called "traditional poppy producing countries". The reason for this practice was the wide-spread cultivation of poppy in such countries in the past that had made them vulnerable if an ultimate ban was applied on them.

⁴⁴ Jorrit Kamminga (2011). Opium Poppy Licensing in Turkey: A Model to Solve Afghanistan's Illegal Opium Economy, The International Council on Security and Development, 14.

country was coming from Turkey.⁴⁵ Under the US pressure, which was in the form of economic incentives and threats, the Turkish government put a ban on poppy production in 1971. However, this resulted into internal political unrests in the country that provoked a military coup in Turkey.⁴⁶ The new administration in Turkey, in exchange of the funds and incentives received from the United States, committed herself to: ban any cultivation and production of poppy after June 30, 1972, buy all the cultivated crops of the farmers from the year 1971 and enact laws banning any cultivation post 1972.⁴⁷ This ban continued to be practiced with increasing pressure on the government day by day as the issue of opium production was turning into a national prestige for the Turkish politicians and public. Comprehending this reality, the new Turkish administration, coming out of the 1973 elections, declared that it would restart production of poppy under strict control. Turkey restarted poppy production in 1974 with strict control over it that resulted in to no or limited leakage of it to the illicit market at all.⁴⁸ The United States, although reluctant at the beginning, agreed to the licensing policy undertaken by Turkish government as it was ensuring the interest of both US and Turkey as follows:

1. Production under State control would culminate the internal tensions started by the nationalists in Turkey.
2. Production under license would put an end to the shortage of opium for medical purposes that was caused by the ban in Turkey
3. Controlled production would reduce the level of financial demands that the Turkish government had from the United States.⁴⁹

The Success and prosperity of this policy apart from being connected to the sincere attention of the Turkish government internally, was linked to an external factor which was the helping hand of the United Nations to the Turkish government on this account.

When the Turkish government informed the United Nations of licensed cultivation of poppy, the United Nations provided Turkey with the technical assistance to construct a poppy processing

⁴⁵ Ibid, 15.

⁴⁶ Ibid, 15.

⁴⁷ Ibid, 17.

⁴⁸ Martin Jelsma (2011). The Development of International Drug Control: Lessons Learned and Strategic Challenges for the Future, Global Commission on Drug Policies, 6.

⁴⁹ Supra note 44, 20.

plant, tools and resources for the licensed poppy cultivation and trainings and resources for better law enforcement in the country.⁵⁰ Another supportive step taken by the United Nations was the request made by her to the opium-based medicine manufactures in the world to buy their raw opium from Turkey and India.⁵¹ This in turn was a key point in the success of the already started licensing program in Turkey.

The United States, after realizing the non-functionality of pressures that she brought on Turkey, decided to give effect to the United Nations request by enacting regulation 80-20 considering India and Turkey the sole and only markets for the raw opium. Enactment of this act with the support of the United Nations, were the two factors that marked the success of the Turkish policy that is still going on.⁵²

The application of this strict policy by the Turkish government facilitated the shift of this business to some other localities, such as Iran.⁵³ This alteration of locality from Turkey to Iran ultimately after the ban in the latter country on drugs, (provided later in this sub-section) made this business to find its way to Afghanistan. This two-layer shift further increased the level of cultivation and trafficking of drugs in this country.

In the Golden Triangle, a two-folded internal and external strategy took place, which pressured the traffickers to seek alternative locations for pursuing their drug business. The internal efforts were mainly in the form of provision of alternative livelihoods to the farmers. However, the external efforts were concentrated on targeting the main and well-known drug traffickers in the region by the United States, excluding Burma.⁵⁴ The impact of a prolonged drought in the region in the late 70s and early 80s should also not be considered incidental to the reduction of the supply of drugs by this Triangle.⁵⁵ Suppression of the drug trade in the Triangle region in turn encouraged the drug traffickers to move their business to a more drug-friendly climate where more opportunities were

⁵⁰ UNODC (1983). Elimination of Opium Production, Bulletin on Narcotics, iss. (4), 2. Available at: www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1983-01-01_4_page002

⁵¹ Supra note 44, 22.

⁵² Ibid, 23.

⁵³ Supra note 38, 948.

⁵⁴ Supra note 37, 10.

⁵⁵ Supra note 38, 949.

provided for furthering this business. As argued by Alfred McCoy, Afghanistan was better fitting this purpose.⁵⁶

Admittedly, the suppression of drug cultivation and trafficking in the above-mentioned countries, which resulted into a shift of this business from those localities to Afghanistan, is considered to be of a lesser impact as compared to the shift within the Golden Crescent itself.⁵⁷

The shift within the Golden Crescent itself was of a huge impact on Afghanistan as reduction of cultivation in Iran after the Islamic revolution in that country⁵⁸ and reduction of cultivation in Pakistan after the pressures brought on General Zia-ul-Haq⁵⁹ by the US administration both gave rise to an increase of cultivation in Afghanistan.⁶⁰ This was mostly due to the high demand for drugs in the region and that Afghanistan was the only option to fill the gap in the drug market.⁶¹

In Iran, drugs were mostly grown in the relatively autonomous Baluch and Kurdish areas; however, before and after the Iranian revolution, efforts were made to tackle the problem of drugs in that country. The strategy initiated by Reza Shah's regime regarding narcotics control was continued and further intensified by the religious leader of Iran, Ayatullah Khomeini.⁶² These efforts by the Iranian government led to the transformation of this business from Iran to Pakistan, seeking its way to the world market from the famous Karachi port.⁶³ Later pressure placed on Pakistan (which will be discussed in the upcoming section) facilitated the transfer of the cultivation of drugs from Pakistan to Afghanistan, which, due to the war going on in this country, was a safe haven for the drug traders and traffickers.

⁵⁶ Alfred W, McCoy (2003). *The Politics of Heroin, CIA Complicity in the Global Drug Trade*, 2nd edition, Chicago, Lawrence Hill Books, 283.

⁵⁷ Supra note 37, 10.

⁵⁸ In Iran, this was largely based on the strict policies against narcotics that were imposed by the Khomeini Regime after taking power in 1979.

⁵⁹ As a result of the pressure brought on General Ziaulhaq, he issued the 1979 Hudud ordinance that banned the use, production and trafficking of intoxicants in Pakistan

⁶⁰ Supra note 56, 471.

⁶¹ Supra note 39, 20.

⁶² Supra note 56, 444.

⁶³ Supra note 39, 20.

In Pakistan, the 1979 Hodod ordinance issued by General Ziaulhaq, the military dictator of Pakistan, in real terms banned the consumption, production and smuggling of drugs.⁶⁴ As a result of this ban, local demand decreased rapidly and thus left the farmers and producers with stocks of poppy that later on were turned into heroin and introduced into the international drug market. When the stocks were depleted, the demand for raw opium was again increased in order to meet the local and international demands, which in turn required land for the cultivation of poppy. Since it was no longer possible to achieve this in Pakistan, Afghanistan was the most lucrative option for the traffickers through which they could meet growing demand. This in turn accelerated the increase of drug cultivation and production in Afghanistan.

Besides these international shifts affecting the increase of drug cultivation and trafficking in Afghanistan, there were a number of other factors that had a huge impact on the growth of this business in Afghanistan, which were mainly connected to the Soviet invasion to Afghanistan.

2.1.2.1. The Soviet Invasion of Afghanistan:

When the Soviets invaded Afghanistan, the countryside became the main center of resistance against them, resulting in systematic attacks of the Soviets on the villages for the purpose of minimizing the sources of survival to the Mujahidin who were resisting against them.⁶⁵ According to the UNODC report, food production, which was the main source of survival for the villagers, declined almost 70% in the country in the years of Soviets occupation.⁶⁶ This shortage of food and the need for rapid compensation of the loss made the farmers to recourse to cultivating poppy which was more revenue generating and more resistant towards any climate unfriendliness.⁶⁷

On the other hand, during the Soviet occupation of Afghanistan the Mujahidin groups, being backed by the CIA (Central Intelligence Agency of the United States) and ISI (Inter-Services Intelligence of Pakistan) were receiving weaponry and fire-arms through the smugglers who were

⁶⁴ Asad Amir Zada, Harris Robert (2003). *The Politics and Economics of Drug Production on the Pakistan-Afghanistan Boarder*, England, Ashgate, 31.

⁶⁵ Supra note 38, 949.

⁶⁶ UNODC (2003). *The Opium Economy in Afghanistan, An International Problem*, New York, 90. Available at: https://www.unodc.org/pdf/publications/afg_opium_economy_www.pdf

⁶⁷ Supra note 39, 20.

trafficking drugs across Afghanistan and Pakistan borders.⁶⁸ This indicates that the CIA was not only ignoring, but also encouraging the drug trafficking happening between Afghanistan and Pakistan. This was, in reality, another source of income to the Mujahidin groups fighting against Soviets in Afghanistan. It can be argued that the US anti-narcotics policy was overshadowed by the strategic interest of it which was supporting the anti-Soviet movements in Afghanistan.⁶⁹ This systematic drug trafficking, which was being furthered by the Mujahidin groups, turned this business into a very common trade and washed out any stigma that was attached to this illegal business.

The widespread commercial cultivation and trafficking of drugs in Afghanistan, began during the Soviet occupation, but did not diminish after the Soviets withdrawal from Afghanistan in 1988.

2.1.2.2. From the Soviet Withdrawal to the Establishment of Mujahidin Administration:

After the Soviet withdrawal from Afghanistan, both sides of the Cold War stopped their financial support of the groups they backed in Afghanistan, leaving them with the option of securing their own sources of funding for the machinery of the war that was still going on.⁷⁰ President Najibullah tried to minimize the impact of the severance of the financial support from the Soviets by reprinting Afghani banknotes, which ultimately raised a counter effect and resulted in greater inflation in the country.⁷¹ On the other side of the conflict, Mujahidin also faced a similar shortage of financial support when the CIA marked the Soviets withdrawal from Afghanistan as the ultimate victory and thus stopped giving support to the Mujahidin warriors. This shortage of funding led the Mujahidin groups to seek other alternative financial resources for filling the gap. The only suitable option was expanding the cultivation and trafficking of drugs which were already institutionalized country-wide.⁷² Since the amount of CIA funding to the Mujahidin was enormous, filling the gap by relying on drug money was not a simple task and required an expansion of the business. This

⁶⁸ Barnett Rubin (2000). *The Political economy of War and Peace in Afghanistan*, World Development, vol. (28), 1791.

⁶⁹ Supra note 39, 21.

⁷⁰ Supra note 37, 11.

⁷¹ Supra note 68, 1792.

⁷² Janathan Goodhand (2008). *Corrupting or Consolidating the Peace? The Drugs Economy and Post Conflict Peacebuilding in Afghanistan*, International Peacekeeping, vol. (15), 408.

resulted in to a more systematic cultivation and increased external trafficking of drugs through the routes that were traditionally utilized during the Soviets occupation.

2.1.2.3. The Mujahiddin period:

This dilemma continued during the civil war in Afghanistan from 1991 to 1996, when the need for the financial support of the war was still very crucial to the functional war parties. The scope of drug cultivation and trafficking increased dramatically during this period.⁷³ It is argued that between the Soviets withdrawal in 1988 and the Taliban consolidation in 2006 the growth of drug industry thrived.⁷⁴ Evidence of this growth is indicated in the amount of the cultivation of opium from 49,000 hectares in 1992 to 71,000 hectares in 1994.⁷⁵ The war between the Mujahiddin groups in the country exhausted the people to that extent that they preferred the newly emerging movement of the Taliban for the sake of security which was the slogan of this movement.

2.1.2.4. The Taliban Period:

When the Taliban took control of Kabul in 1996, they considered drugs to be a very good revenue-generating crop and started taxing it like other regular agricultural products.⁷⁶ In this period drugs were changed from the status of being an informal source of fueling the war to a more ‘formal’ source of revenue for the state.⁷⁷ This could be supported by the following reasons asserted by Math Weiner:

‘This can be confirmed by a number of indicators: First, a number of anti-Taliban commanders defected to the regime [Taliban] in exchange for continued rights to grow opium. Second, UNODC reports show that, in the period from 1996 to 1999 opium production doubled from 2248 metric tonnes to 4565 metric tonnes. Third, the actions by the Taliban in taxing opium were seen to many as an encouragement and de facto

⁷³ Supra note 66, 90.

⁷⁴ Supra note 39, 22.

⁷⁵ UNODC (2003). Afghanistan Opium Survey, 5. Available at: https://www.unodc.org/pdf/afg/afghanistan_opium_survey_2003.pdf

⁷⁶ Supra note 37, 11.

⁷⁷ Supra note 39, 22.

legitimization of the industry. Furthermore, anecdotally, many farmers at the time claimed that the Taliban forced them to grow poppies or assisted by distributing fertilizers.⁷⁸

The Taliban levied a 10% agricultural tax (*Ushr*) and 20% alms tax (*Zakat*) on drugs.⁷⁹ The taxation of drugs by the Taliban changed this substance from an abandoned and illicit (at least in theory) crop, to a more legitimate one for the first time in the history of Afghanistan. This approach of the Taliban towards drugs continued until July 2000 when cultivation, albeit not trafficking, of drugs was banned by an edict issued by the leader of the Taliban, Mulla Mohammad Omar, on the basis that it was non-Islamic or *Haram*.⁸⁰ Commentators are split about the real motives of the Taliban in reaching this decision. Some argue that this ban was mostly for the purpose of price-adjustment as tremendous amounts of opium were produced in the years before it to suffice the international demand.⁸¹ Others claim that this move is an indicator of the genuine will amongst the Taliban to gain satisfaction of the international community and thus reduce the international pressure placed on them pertaining to opium cultivation and trafficking and some other political accounts.⁸² Whatever the motive was, ban of cultivation did not have any impact on the amount of opium produced in Afghanistan in the year 2000 as Afghanistan was already producing 70% of the entire amount of opium produced world-wide.⁸³

Taking under scrutiny the historical facts established above, we can argue that the commercial production of drugs in Afghanistan, which started in 1979, did not witness any decrease in the periods thereafter. The perpetuation of insurgency in the country further encouraged the participants of it to increase the level of cultivation and production to the fullest extent in order to generate more revenue for themselves. The 9/11 attacks on the United States by Al-Qaida and subsequent attacks of the US Army Forces on the Taliban in Afghanistan marked another era of elevation in cultivation and trafficking of drugs in Afghanistan which will be further elaborated in the upcoming section.

⁷⁸ Ibid, 23.

⁷⁹ Supra note 66, 92.

⁸⁰ Supra note 36, 196.

⁸¹ Supra note 39, 23.

⁸² Supra note 36, 197.

⁸³ Supra note 37, 14.

2.1.3. From the establishment of the new administration in 2001 until now:

The United States military attacks on Afghanistan in 2001 which, resulted in the defeat of the Taliban regime, provided the opportunity for the establishment of a new administration in the country. The new Afghan administration, headed by Hamid Karzai, opened the door for the participation of all the groups who were politically involved in the affairs of the country inside or outside Afghanistan in the past decades including the United Islamic and National Front for the Salvation of Afghanistan (UINFSA)⁸⁴ which was the only resisting group against the Taliban inside Afghanistan from 1996 to 2001. The warriors loyal to United Front acted as the ground forces for the US air force raids on Afghanistan, allowing them conquer Kabul in November 2001.⁸⁵

The new administration, presumably under the international pressure twined with the domestic demand, initially seemed to be committed to the fight against drugs nation-wide. This was evidence by the fact that President Hamed Karzai, soon after becoming the head of Transitional Administration, issued a decree on January 17, 2002 banning the cultivation, consumption and trade of opium.⁸⁶ However, in the case of cultivation, this ban was not timely as the season of cultivation of poppy had already passed for that year. Moreover, the ban *per se* was not proper in time as due to lack of the attention of the Taliban to the economic and social life of people, poppy had become the only source of participation in the economic life of the community for local people and continued to be so after the Taliban were defeated.

The National Drug Control Strategy of Afghanistan enumerates the following factors for disobedience of people to the ban:

⁸⁴ The United and National Front for Salvation of Afghanistan was a resistance front composed of several former Mujahidin groups against the Taliban that only had control over less than 10% of the territory of Afghanistan during the Taliban regime mostly stationed in Badakhshan province and Panjshir valley in northern Afghanistan headed by Ahmad Shah Massoud who was martyred by a suicide attack of Al-Qaida in 2001.

⁸⁵ Supra note 39, 24.

⁸⁶ Michael Nicoletti (2011) Opium Production and Distribution: Poppies, Profits and Power in Afghanistan, De Paul University, College of Liberal Arts and Social Sciences Thesis and Dissertations, 26. Available at: <https://via.library.depaul.edu/etd/74/>

First, opium cultivation was, at this stage, entrenched in the livelihood strategies of farmers, communities and laborers. Second, the ban on cultivation devastated the livelihoods of many farmers and laborers, and thus increased pressure to cultivate again, including in order to repay the opium-related debt. In addition, the ban had raised opium prices and thus encouraged further cultivation. Third, increased availability of wheat and the subsequent reductions in wheat prices meant that opium cultivation was even more lucrative than usual. Finally, cultivation expedited because the fall of the Taliban regime coincided the planting season.”⁸⁷

Banning opium at this stage could not have an outcome except disobedience of the public towards the State.⁸⁸

Britain, being the leading country in counter-narcotics activities in Afghanistan,⁸⁹ was suffering mostly from the opium produced in Afghanistan, as it was claimed that 85% of the heroin seized in UK was Afghan produced opium.⁹⁰ In 2002 and 2003 the British Government started a compensated eradication program in which they were providing 350\$ for any *Jreb* of land to the farmers who themselves initiated the destruction of their poppy crops.⁹¹ However, the proposed money was very little compared to 3000\$ per acre that was expected by the farmers involved in the drug cultivation.⁹² The difference in financial gain, coming from the program, and expectations of the farmers led to the failure of this program in its initial years.

⁸⁷ Ministry of Counter Narcotics (2006). National Drug Control Strategy, An Updated Five-Year Strategy for Tackling the Illicit Drug Problem, 33. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/36443/fco_nationaldrugcontrolstrategy.pdf

⁸⁸ Supra note 86, 27.

⁸⁹ Under the concept of “Lead Nations” United Kingdom was the leading country in the field of counternarcotic post 2001 like the other counterparts who were responsible for the other specific fields such as United States being responsible for training the National Army, Germany being in lead of National Police training and Italy being responsible for the Judicial Sector reform.

⁹⁰ Supra note 36, 197.

⁹¹ Vanda Felbab-Brown (2016). No Easy Exit: Drugs and Counter Narcotics Policies in Afghanistan, Foreign Policy and Brookings, Brookings Institution, 6.

⁹² Janathan Goodhand (2005). Frontiers and Wars: A study of Opium Economy in Afghanistan, Journal of Agrarian Change, vol. (5), 198.

The US intervention in Afghanistan, which purported to be centered around defeating Al-Qaida, initially disregarded counter narcotics as an integral part of the military objectives, as it was assumed that indulging in the war against drugs would distract military attention away from finding intelligence information about Al-Qaida and the Taliban.⁹³ It is even claimed by some senior officials of the US government that they warned the US administration about the scope of the drug problem in Afghanistan and recommended US intervention in the form of military operation against drugs; however, there was no action taken by the senior officials of the Department of Defense (DOD) in the US administration.⁹⁴ It was arguably believed by decision makers in the US administration that narcotics is a domestic issue of Afghanistan and should be dealt with accordingly. It was even said by US commander General Tommy Franks in 2002 that the issue of narcotics is related to Afghanistan and this country itself should solve it.⁹⁵ The US instead relied on the local commanders and warlords who were deeply involved in, and dependent on drug trafficking since the 1980s, for the purpose of using them as the front line against Al-Qaida and the Taliban.⁹⁶ This approach led to a further strengthening of the commanders and warlords which enabled them to exercise extensive control in their domains, including the drug trafficking activities. This tendency continued until 2005 when the US realized that winning the war against insurgency without winning the war against drugs would be impossible.⁹⁷

The increasing pressure within the US administration and the later gradual boom of poppy cultivation in Afghanistan urged some officials in the US in the year 2005 to push for a poppy eradication campaign. Availing that pressure, a campaign was launched in Afghanistan from 2005 to 2009, with a subsequent issuance of a new counternarcotic strategy by the US government in 2007. One of the parts of this strategy was eradication which was mostly accomplished in a manual form on the ground with no aerial spraying as it was rejected by the Afghan cabinet.⁹⁸ The reason

⁹³ Vanda Felbab- Brown (2016). No Easy Exit: Drugs and Counter Narcotics Policies in Afghanistan, Foreign Policy and Brookings, Brookings Institution, 6.

⁹⁴ A report to the Committee on Foreign Relations of the United States Senate (2009). Afghanistan's Narco-War: Breaking the Link Between Drug Traffickers and Insurgents, One Hundred Eleventh Congress, First Session, 5.

⁹⁵ Abdul Saleem Achak (2014). Social and Economic Impact of Narcotics in Afghanistan, International Journal of Thesis Projects and Dissertations, vol. (2), 56.

⁹⁶ Supra note 91, 6.

⁹⁷ Supra note 95, 56.

⁹⁸ Supra note 94, 7.

for this rejection by the cabinet was apparently connected to the bad effects of it on the life of local people that in turn could have given a propaganda tool into the hands of the Taliban. However, Assistant Secretary of State, Bobby Charles claims that this was mainly done by the cabinet for securing the benefit and the source of wealth of some of the cabinet members who were alleged to be involved in narcotics business.⁹⁹

The Failure of the eradication policy and hence counter effects of it are considered by Vonda Felbab as follows:

1. They did not bankrupt the Taliban. In fact the Taliban reconstituted itself in Pakistan between 2002 and 2004 without access to large profits from drugs, rebuilding its material base largely from donations from Pakistan and the Middle East and from profits from another illicit economy, the illegal traffic of licit goods between Pakistan and Afghanistan.
2. Eradication strengthened the Taliban physically by driving economic refugees in to its arms.
3. Eradication alienated the local population from the National Government as well as from local tribal elites that agreed to eradication, thus creating a key opening for the Taliban mobilization.
4. Crucially, eradication undermined the motivation of the local population to provide intelligence on the Taliban to the counter insurgents, while it motivated the population to provide intelligence to the Taliban.
5. The local eradicators themselves were in the position to best profit from counternarcotic policies, being able to eliminate competition- business and political alike- and alter market concentration and prices, at least in the short term and within their area of operations.¹⁰⁰

The limited success of the eradication process and the fact that eradication itself made people to turn against the NATO and US forces from one hand and the Afghan Government from the other hand, urged the United States to focus on the other ways and means of dealing with the Afghan narcotics problem that were incorporated in the five-fold strategy¹⁰¹ of the US for fighting the narcotics problem in the country.¹⁰²

⁹⁹ Ibid, 7.

¹⁰⁰ Supra note 91, 8.

¹⁰¹ The United States counter narcotics policy had five elements namely: eradication, interdiction, law enforcement and judicial reform, public information campaigns and alternative livelihood developments.

¹⁰² Adel Teregulova (2015). Anti-drug Strategies in Afghanistan With a Special Emphasis on Alternative Developments, Department of Society and Globalization, Roskilde University, 14.

Interdiction, which was the second link in the chain, was another option undertaken by the United States to tackle the problem of narcotics in Afghanistan. Interdiction, which mainly target trafficking and processing, included attacking drug laboratories, destroying stocks and storages of drugs, apprehending drug traffickers, seizing drugs and chemicals, and conducting undercover operations.¹⁰³

The effectiveness of interdiction in Afghanistan has been limited in success as the justice sector in general and the court system in particular was very weak. The low capacity and corruption of the Afghan justice sector is to that extent that only a limited number of the 562 arrest cases and prosecutions led to trial and hence conviction and most of them resulted into temporary detention and thus release in exchange of bribes.¹⁰⁴ Another flaw of the US led interdiction was the focus of this process only on the Taliban-related traffickers as it was only designed from a counterinsurgency point of view rather than a counternarcotic one.¹⁰⁵ The only impact that such selective eradication had was on the logistical chain of the Taliban as it was becoming more complicated and difficult for them to plan and execute their destroying activities.¹⁰⁶ This presumably could be considered minimal and non-success-oriented in account. The eradication that post-2014 is being solely furthered by the Afghan counternarcotic police, is widely folded with corruption as most of the big traffickers are finding their ways out of prisons by bribing the authorities.¹⁰⁷

Promoting alternative livelihoods was another option; however, difficult to be sold on Afghan farmers knowing that poppies would roughly generate six times more than any other crops that they could harvest alternatively.¹⁰⁸ Alternative livelihoods tendency apparently seems quite

¹⁰³ Joseph Kaminski (2012). The Importance of Historical Understanding: Evaluating the Strengths and Weaknesses of the Current Counter-narcotics Policy in Afghanistan, Review of International Law and Politics, 123. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359215

¹⁰⁴ Ibid, 123

¹⁰⁵ Supra note 91, 8.

¹⁰⁶ Ibid, 9.

¹⁰⁷ Joseph Goldstein (2014). Bribery Frees a Drug Kingpin in Afghanistan, Where Cash overrules Justice, New York Times. Available at: <https://www.nytimes.com/2015/01/01/world/asia/bribes-free-drug-kingpin-in-afghanistan-where-cash-often-overrules-justice.html>

¹⁰⁸ Supra note 103, 123.

attractive; however, as a tool for reduction of drug problem, they seem to have many shortcomings such as time-frame, cost and effectiveness.¹⁰⁹ The alternative livelihood programs in Afghanistan initially included short-term cash for work projects, comprehensive agricultural and business development projects and high visibility programs with 120 to 150 million USD expenditure per year.¹¹⁰ Due to the fact that finding a product to be as profit-generating as poppy was impossible, the agricultural aspect of the policy was paid less attention and the main focus of it was on high visibility programs and short-term cash for work projects mainly coming in the form of public-interest oriented projects such as electricity and roads and providing employment opportunities for the people for reduction of their dependency on the proceeds of drugs.¹¹¹ However, it should be admitted that building roads and water dams would be welcomed by the people in localities but would never be of that nature to reduce people's economic dependency on the poppy.¹¹² It is well understood that alternative livelihood programs often do not respond very quickly and mostly require a longer period of time to become a substitute for narcotics in societies. The first phase of alternative livelihood campaign which was started by Brits in 2002 failed in its early years as it was not designed to meet the needs of the farmers. The second phase of this campaign that was initiated in 2007 by the Americans after the issuance of their new counternarcotic strategy was also facing shortcomings practically as the 2014 transition and partial withdrawal of the US military forces resulted into reduction of the attention to this field. The seven-year period between 2007 and 2014 was not sufficient for the success of this program compared to Thailand which took 30 years for institutionalization of such efforts. Moreover, the cost dimension of this program was another barrier which the government of Afghanistan was not able to incur after the 2014 transition as based on the US strategy the amount of money allocated for this campaign was 120 to 150 million USD per year which was exceeding the total amount of annual budget of the Afghan Ministry of Counter Narcotics. Furthermore, implementation of such programs would be in dire need of security which is really scarce in the drug-dominated areas in the southern Afghanistan.

¹⁰⁹ Supra note 102, 14.

¹¹⁰ Thomas A. Schweich (2007). United States Counter narcotics Strategy for Afghanistan, US Department of State, 17. Available at: <https://2001-2009.state.gov/documents/organization/90671.pdf>

¹¹¹ Supra note 95, 57.

¹¹² Vanda Felbab-Brown (2007). Opium Licensing in Afghanistan: its Desirability and Feasibility, Foreign Policy at Brookings, Policy Paper no. (1), 6.

Public information campaign was another pillar of the US policy which was designed to help the government of Afghanistan raise awareness amongst the population regarding the mal-impact of narcotics on their social, economic, and political life and the law enforcement measures that could be taken against the ones who are disobedient to the pertaining laws.¹¹³ This was aimed to achieve sustainable reduction of cultivation and production of the poppy through public information and education. Based on the UNODC report in 2007, this campaign was relatively successful as some northern provinces like Balkh witnessed some reduction which in part was connected to public information efforts.¹¹⁴ However, it should be admitted that the success of this campaign is only marked in the northern provinces which are more secure and stable. There is no evidence of success of such programs in the southern provinces which are relatively more unstable and insecure.

Another dimension of the US policy for fighting narcotics in Afghanistan was the judicial reform/prosecution pillar. For achieving this goals, the US government has helped the Afghan Government to establish especial policing institutions such as: Sensitive Investigation Unit (SIU) tasked with working under-cover and obtaining confidential informants, Technical Investigative Unit (TIU) with legal authority to do wiretapping, and National Interdiction Unit (NIU) responsible for executing search warrants, seizures and arrests.¹¹⁵ The establishment of the Afghan Criminal Justice Task Force (CJTF) in 2005 was another law enforcement effort that was accomplished with the help and support of the US government. The CJTF is composed of a policing department, special prosecution department and a two-level, primary and appeal, court tasked with investigation and prosecution of narcotics cases. The special counternarcotic tribunal would handle any narcotics cases in which more than 2 kgs of narcotics are involved.¹¹⁶

The Afghan government has an eight-pillar plan¹¹⁷ for handling the narcotics problem. The five pillars of it are exactly the above-mentioned dimensions of the US counternarcotic strategy. The remaining three pillars are namely demand reduction, institution building and international and

¹¹³ Supra note 95, 57.

¹¹⁴ Supra note 110, 17.

¹¹⁵ United States Counter narcotics Strategy in Afghanistan (2010). A report to the United States Senate Caucus on International Narcotics Control, One Hundred Eleven Congress, Second Session, 29. Available at: https://fas.org/irp/congress/2010_rpt/counternarc.pdf

¹¹⁶ Supra note 110, 18.

¹¹⁷ Supra note 87, 21.

regional cooperation. These three pillars of the plan are also financially supported by the US government.

The demand reduction part of the plan aims to reduce the number of drug users in the country through treatment of the addicts. This is mostly furthered with the help of *Mullas* and *Muftis* who issue *Fatwas* regarding the devastating outcomes of narcotics use.¹¹⁸

This part of the plan arguably may not have a huge impact on the narcotics campaign in Afghanistan as the boom of narcotics problem in Afghanistan is not contingent on the national demand and the nexus is rather with the international demand that Afghanistan has no influence on it. Even if the national drug demand is extremely reduced, still the problem of narcotics would remain with the same scope. Therefore, any success of the Afghan government in this part would be of a minimal impact on the problem domestically.

The institution building efforts focus on helping and supporting the involved institution in the overall campaign against narcotics in Afghanistan. This includes building the capacity of judicial and non-judicial institutions that are involved in the war against narcotics in Afghanistan in order to properly further the campaign.¹¹⁹

International and regional cooperation is another dimension of the plan that the government of Afghanistan has undertaken to put efforts for its materialization. Since narcotic is a global concern, it certainly requires international and regional cooperation of the neighboring countries for better tackling of the issue.¹²⁰ The incredible achievements in this part are the formation of Central Asian Regional Information Coordination Center (CARICC)¹²¹ that acts as an intelligence information sharing mechanism in the region. Moreover, Afghanistan is now an active participant in UNODC-led meetings such as Inter-Governmental Technical Committee (IGTC) and Senior Law Enforcement Officers (SLEO).¹²²

Considering all the five dimensions of the US counternarcotic strategy and the eight pillars of the Afghan government plan, it could be argued that each one of these dimensions and pillars have

¹¹⁸ Supra note 110, 19.

¹¹⁹ Ibid, 19.

¹²⁰ Supra note 87,23.

¹²¹ Supra note 110, 20.

¹²² Supra note 87, 23.

played a role in the campaign against narcotics in Afghanistan. However, none of them individually has been of a tremendous impact to mark a remarkable success in this campaign. Each one has had its own shortcomings that have made the war against narcotics very slow and in most cases failed.

2.2. Impact

The widespread expansion of cultivation, production and trafficking of drugs in Afghanistan has had an irreparable impact on different aspects of life of people in this country. This impact in some parts of the country has been so immense that has not left any aspect of life unaffected. Commonly in the world the drug problem is composed of three layers which includes production, trafficking and abuse as a devastating chain and this chain becomes more catastrophic when all the three circles of the chain align together to form a deadly composition.¹²³

As stated in the previous section of this chapter, this clandestine enemy has not grown overnight. It has rather developed and nourished throughout the period of a series of unpleasant activities during which Afghanistan was at war either against the foreign invaders or the proxies of the superpowers in the region.¹²⁴ The political economy of conflict, to be perpetuated and sustained, was in dire need of illicit activities and was further intertwined with the illicit activities. The weak central government in the capital of the country, Kabul, has been unable to exercise effective control over the borderlands which mostly rooted in the lack of a professional and functional border police or guards, something that Afghanistan historically did not enjoy the presence of.¹²⁵ Considering the geographical position and the integration of the borderlands into regional trading and smuggling networks, the local influential actors of the said borderlands have often been inclined towards a relatively stronger ties to the alike people in the surrounding states namely

¹²³ Tehmena Maqbool (2014). Drug Trafficking: A Non-Traditional Security Threat to National Security of Pakistan, Institute for Strategic Studies, National Defense University, vol. (VII), 7.

¹²⁴ Mark Shaw (2007). Drug Trafficking and the Development of Organized Crime in Post-Taliban Afghanistan, Afghanistan's Drug Industry, Structure, Functioning, Dynamics and Implications for Counter-Narcotics Policy, Washington DC, Diane Publishing, 189.

¹²⁵ George Gavrillis et al (2015). Afghan Narcotrafficking The State of Afghanistan's Borders, Joint U.S.- Russia Working Group on Afghan Narcotrafficking, EastWest Institute, 10. Available at: <https://www.eastwest.ngo/sites/default/files/ideas-files/Afghanistan-Borders.pdf>

Pakistan in the south and east, Iran in the west, and Central Asia in the north and northeast than to the ones ruling in Kabul.¹²⁶

The ironic part is that the influential actors and authorities in the border areas in the course of several decades had their own tendency of border control, collection of customs duties and policing of borders in a manner to ensure their best interest.¹²⁷ Their lucrative economic activities, which understandably were largely illicit, were depending on relatively hinder-free cross-border trade, a phenomenon that was both the cause and consequence of weakness of the government in Kabul.¹²⁸

The loose border control and eagerness for the interest of the local actors *inter alia* have helped the drug business to grow rapidly which in turn has had many negative implications on the social, economic, political and security aspects of life in different parts of the country. Although Afghanistan currently has the border police and other law enforcement bodies, the tendency of illicit cross border trade of drugs is still widely practiced. This is evidenced by the UNODC reports that indicate that overwhelmingly the drugs are being cultivated, produced and trafficked in the border provinces in comparison with the other provinces. According to the said reports, almost 95% of drugs in Afghanistan are being cultivated, produced and trafficked in the border provinces.

In the following, we will briefly assess the impact of drug trafficking on different aspects of life of people in Afghanistan. As the scope of the impact is so broad that affects almost all aspects of life, for summarizing the discussion, the focus would be on the security, economic and social impacts of this phenomenon.

2.2.1. The impact of drugs on the security

Although drug trafficking is termed as the non-traditional threat to the security of people and states by numerous scholars,¹²⁹ its inseparable nexus with terrorism in Afghanistan has altered that to a more traditional and imminent threat to the public security. Beyond the fact that drug trafficking *per se* creates unrest and instability in the societies, the linkage between the drug traffickers and terrorist groups in Afghanistan makes it a high-level threat to the peace and security of the country.

¹²⁶ Supra note 124, 189.

¹²⁷ Supra note 125, 10.

¹²⁸ Ibid, 10

¹²⁹ Supra note 123, 4.

The National Drug Trafficking Policy of Afghanistan divides the high-level traffickers into two groups namely the ones with links with the terrorists and the ones with no links with the terrorists. In the words of the policy “Traffickers that have links with terrorism are those who are engaged in smuggling of large quantities of narcotics and are financially supporting terrorist organizations. These traffickers encourage farmers to cultivate poppy, they produce and process drugs, and they organize and manage the trafficking by hiring locals. The money that is earned via these activities is used in funding insurgent groups and deteriorating security.”¹³⁰ This indicates that there is sufficient nexus between drug trafficking and terrorism in Afghanistan which can be evidenced by a raid on a drug trafficker's house in Kabul which resulted into finding satellite phones used to call suspected terrorists in other parts of the world such as Turkey, the Balkans and Western Europe.¹³¹ This in no words would mean that the major traffickers who are not linked with the terrorists are posing no threat to the security of the country. They also endanger the security and stability by paying shares to the terrorist groups, bribing the officials and pressuring the locals for securing their financial benefits. Unlike the low-level traffickers that only pose social and health dangers to the Afghan society, the mid-level traffickers also play a major role in destabilizing the public security although lesser in degree in comparison with the high-level traffickers.

The business of drugs is currently furthered by many influential people who are only concerned about securing their own interest, no matter what the negative consequences might be. In fact, a substantial number of warlords and local commanders either directly sponsor or are otherwise involved in the drug industry.¹³² This unholy mission is not furthered alone by the Afghan warlords and traffickers and is rather furthered with substantial and direct involvement of alike criminal groups from outside Afghanistan, which in turn strengthens Afghan warlords and facilitates furthering the business of exchange between drugs and guns in the benefit of insurgent groups. This coalition of national and international elements thus has spawned a devastating criminal activity that threatens the integrity and capacity of the state in offering the required security to its

¹³⁰ Supra note 87, 18.

¹³¹ Lowry Taylor (2006). The Nexus of Terrorism and Drug Trafficking in the Golden Crescent: Afghanistan, Pennsylvania, Carlisle Barracks, 8.

¹³² Cristopher Ward, William Byrd (2004). Afghanistan's Opium Drug Economy, SASPR Working Paper Series, World Bank, 36. Available at: <http://documents.worldbank.org/curated/en/158651468767124612/Afghanistans-opium-drug-economy>

citizens.¹³³ In other words it could be asserted that warlords, drug dealers, and terrorists, at least in regard to drug trafficking, work together to promote insecurity and undermine the capacity of the state, even if their interests may vary, to a large extent, in non-drug-related affairs.¹³⁴ The joint activity of all these elements has largely weakened the state and has really vanished the role of state in the drug dominated areas. Diminishing the capacity of the state precisely has immense and deteriorating implications on security, politics, and state-building. Security wise, with the powerful presence of the warlords in the localities, being fortified with the drug money, the government cannot enhance the security and stability of the localities due to lack of interest of influential people in security and thus fails to fulfil its job as the responsible authority to provide the public with essential security. Politically, the government cannot be deemed as the only and sole powerful body who freely exercises its powers within its territory as the sovereignty of the state is being challenged by the powerful elements of those localities which often oppose the state agendas in their domain of influence. As a result, the state remains ineffective and weak in security which paves the ground for an environment in which the drug industry can develop.¹³⁵

From a causal and consequential point of view, drug production and drug trafficking are effects as well as causes of insecurity and political instability. They develop under weak and malfunctioning states and perpetuate that weakness and fragility of the state by financing insurgency and warlordism.¹³⁶ The situation in Afghanistan shows that how the government is weakened by the drug trafficking elements and how the weakness of the government is being abused for flourishing the business of drugs in the country. This can be evidenced by the UNAMA report, in which it is enshrined that almost 98% of the opium cultivation was concentrated in Helmand, Kandahar, Uruzgan, Dai Kundi, Zabul, Farah and Nimroz, where security conditions are classified as high or extremely risky by the United Nations Department of Safety and Security (UNDSS).¹³⁷ This

¹³³ Ibid, 1.

¹³⁴ Ibid, 36.

¹³⁵ Supra note 132, 35.

¹³⁶ Jonathan P. Caulkins, Mark A.R. Kleiman, Jonathan D. Kulick (2010). Drug Production and Trafficking, Counterdrug Policies, And Security and Government in Afghanistan, Center on International Cooperation, New York University, 5. Available at: <https://www.opensocietyfoundations.org/uploads/e40843de-8085-4e1e-93fa-096a643cef96/cic-drug-trafficking-20100706.pdf>

¹³⁷ UNODC (2008). Afghanistan Opium Survey, 24. Available at: [https://www.unodc.org/documents/crop-monitoring/Afghanistan Opium Survey 2008.pdf](https://www.unodc.org/documents/crop-monitoring/Afghanistan%20Opium%20Survey%202008.pdf)

indicates that the insurgents and terrorist groups first destabilize a region and then continue the business of drugs without fear of being questioned for their illegal activities. The business of drugs financially supports Taliban activities as they receive 70 to 500 million dollars per year from this business. This shows that a large portion of the income, through which the Taliban destabilize Afghanistan, is coming from the drug economy.¹³⁸

Besides that, unstable security situation in different parts of the country played a vital role in shaping the farmers decision to cultivate the poppy , as the insurgents, abusing the lack of governmental control in their localities, were able to persuade and in some cases even threaten the farmers to recourse to cultivation of poppy against their will.¹³⁹

The insurgents, for the purpose of banning the government from eradication of poppy fields, often launch attacks on the security forces in the season that eradication should take place.¹⁴⁰ This is the reason that before and during the harvest period of poppy, there are often systematic attacks by the insurgents in the southern and western provinces, where almost all the poppy grows.¹⁴¹

Moreover, another factor, emerging from drug trafficking, that has an evident impact on the security and stability of the country is intimidating or corrupting the officials of enforcement agencies, particularly the security forces.¹⁴² Similar to other criminalized activities, but on a massive scale, the drug industry is largely involved in corruption and dramatically hinders the good governance through bribing the government officials in different levels. There is enough support for this assertion that many officials in the government are benefiting from or are involved in drug business one way or the other. This happens in Afghanistan in two ways: one that the official receives a certain share of the benefit from the traffickers and the other that the official

¹³⁸ Vanda Felbab Brown (2010). The Drug Economy in Afghanistan and Pakistan, and Military Conflict in the Region, The National Bureau of Asian Research, 13. Available at: <https://www.nbr.org/publication/the-drug-economy-in-afghanistan-and-pakistan-and-military-conflict-in-the-region/>

¹³⁹ UNODC (2006). Afghanistan Opium Survey , 7. Available at: https://www.unodc.org/pdf/research/AFG05%20_full_web_2006.pdf

¹⁴⁰ UNODC (2010). Afghanistan Opium Survey, 10. Available at: [https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan Opium Survey 2010 web.pdf](https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan%20Opium%20Survey%202010%20web.pdf)

¹⁴¹ UNODC (2011). Afghanistan Opium Survey, 6. Available at: [https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan opium survey 2011 web.pdf](https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan%20Opium%20Survey%202011%20web.pdf)

¹⁴² Supra note 136, 5.

receives a certain amount of money regardless of what the benefit of the trafficker might be. The local police commanders are often pointed at regarding this issue. It is flagrant enough that without cooperation of the police elements with the traffickers, such a large-scale transfer may not be possible.

In summary, the nexus between the Taliban, as the main insurgent group in Afghanistan, and the drug business has created complex hindrances towards provision of security by the state in the country. The financial benefit that the Taliban receive from this business really enables them to fuel their war machine and challenge the government in a broad scale. Moreover, the nexus between the Taliban and the other warlords and traffickers in different parts of the country pose a greater risk to the security of the public. This triangle of Taliban, warlords and drug traffickers is a real security challenge for Afghanistan that overcoming that would require a systematic campaign against them.

2.2.2. Economic impact of drugs

Drug trafficking nowadays is one of the largest trades around the world that economically its income is much greater than the oil trade in total and second only to the fire arms business.¹⁴³ This gigantic scope of the drug business certainly has a huge impact on the economy of the countries, particularly the ones in which the entire chain of cultivation, production and trafficking takes place. Afghanistan as a country that is on the top of the list of poppy cultivating and producing countries in the world is greatly affected by the financial implications of this illicit business and the economy of the country is largely influenced by this phenomenon.

The economic impact of drugs on Afghanistan became more devastating when the country failed as a result of the soviet invasion. In an agricultural economy, where agriculture was making almost more than half of the economy of the country, the destruction of almost major part of agricultural land and its related infrastructure on the one hand and the disappearance of the markets for the agricultural products ended up in a drastic rural impoverishment.¹⁴⁴ By early 90s, Afghans had joined the Haitians and the Somalis who were experiencing a long-lasting hanger and became the third lowest country in terms of GDP.¹⁴⁵ As the arable lands were destroyed and the farmers had no other options to make their primary livelihood with, poppy cultivation became one of the viable options which was more profit-generating and more resistant towards the climate unfriendliness

¹⁴³ Supra note 123, 7.

¹⁴⁴ Supra note 132, 9 &10.

¹⁴⁵ Ibid, 9 &10.

in comparison to the traditional crops. Although there was a strong religious stigma attached to the cultivation of the poppy, it did not hinder the growth of this business and opium production, thus, became accepted as a better alternative livelihood strategy for filling the shortage of revenues as a result of destruction of agricultural lands.¹⁴⁶

This was the time that Afghanistan started to become the primary producer of poppy in the world. For a better assessment of the impact of this phenomenon on the economy of the country, a comparison of the number of hectares of land that were used for production of poppy from 2002 to 2015 would be provided here.

In 2002, the total land that was used for cultivation of poppy in Afghanistan was between 69,000 hectares (ha) to 79,000 ha, with a mean estimate of 74,000 ha.¹⁴⁷ In 2003 the total area that was allocated to opium poppy cultivation in Afghanistan increased from 74,000 hectares to 80,000 hectares which was showing an increase of 6000 ha, indicating an 8% increase in the cultivation.

¹⁴⁸ For the first time in 2003 the UNODC reports included a percentage of the total population of Afghanistan who were involved in the cultivation of opium. The report indicated that 264,000 families were involved in opium cultivation. Taking into account that each family would have 6-7 member in Afghanistan, it can be argued that opium poppy cultivation plays a vital role in the livelihood of about 1.7 million rural people, forming almost 7% of the total population of Afghanistan which was estimated 24 Million in this year.¹⁴⁹ The number of hectares further increased in 2004 from 80000 ha to 131000 ha which was setting a record of 51000 ha increase in the lands allocated for cultivation of poppy. This presented a 64% increase in 2004 which was showing an unprecedented boom of drug cultivation.¹⁵⁰ In 2004, the number of families involved in opium poppy cultivation increased by 35% and reached 356,000 families. This number represented almost 2.3 million persons, which was forming 10% of the total population in Afghanistan.¹⁵¹ 2005, unlike the previous years, was showing a decrease in the number of hectares

¹⁴⁶ Ibid, 9&10.

¹⁴⁷ UNODC (2002). Afghanistan Opium Survey, 4. Available at: https://www.unodc.org/pdf/publications/afg_opium_survey_2002.pdf

¹⁴⁸ Supra note 75, 7.

¹⁴⁹ Ibid, 7.

¹⁵⁰ UNODC (2004). Afghanistan Opium Survey, 3. Available at: https://www.unodc.org/pdf/afg/afghanistan_opium_survey_2004.pdf

¹⁵¹ Ibid, 5.

of land used for poppy cultivation. The land under poppy cultivation was decreased from 131000 ha to 104000 ha which was showing a 21% decrease in comparison with 2004, although way more than 2002 and 2003.¹⁵² In 2005, the number of families involved in opium poppy cultivation declined by 13% to 309,000. This number represented about 2 million of population which was 8.7% of the total population in Afghanistan.¹⁵³ The decrease in area was temporary as it further increased from 104000 ha to 165000 ha in 2006 which was setting a new record of cultivation in Afghanistan. This was representing a 59% increase in the land allocated for poppy cultivation.¹⁵⁴ In 2006, almost 448,000 families were involved in opium poppy cultivation, compared with 309,000 families in 2005. This indicated an increase of 45%, estimated total of about 2.9 million persons or 12.6% of Afghanistan's total population.¹⁵⁵ 2007, showing a 17% increase in the poppy cultivated land was setting another record of increase. The area under opium poppy cultivation in Afghanistan increased from 165,000 ha to 193,000 ha.¹⁵⁶ In 2007, the survey estimated that 509,000 families were involved in opium poppy cultivation compared to 448,000 families in 2006 which was showing a 14% increase.¹⁵⁷ In 2008, once again the cultivated land decreased from 193000 ha to 157000 ha which was indicating a 19% reduction in comparison with 2007 and 2% reduction compared with 2006.¹⁵⁸ In this year, the total number of families who were involved in cultivating opium poppy was around 366,000, which was representing a reduction of 28% compared to 2007.¹⁵⁹ In 2009, the decrease of land occupied by poppy cultivation continued its pace. It further decreased from 157000 ha to 123000 ha which was showing a 22% decrease in comparison with 2008. This was the minimum

¹⁵² UNODC (2005). Afghanistan Opium Survey, 3. Available at: https://www.unodc.org/documents/crop-monitoring/Afghanistan/afg_survey_2005.pdf

¹⁵³ Ibid, 6.

¹⁵⁴ UNODC (2006). Afghanistan Opium Survey, 3. Available at: https://www.unodc.org/pdf/research/AFG05%20_full_web_2006.pdf

¹⁵⁵ Supra note 139, 6.

¹⁵⁶ UNODC (2007). Afghanistan Opium Survey, 9. Available at: https://www.unodc.org/documents/crop-monitoring/AFG07_ExSum_web.pdf

¹⁵⁷ Ibid, 14.

¹⁵⁸ Supra note 137, 7.

¹⁵⁹ Ibid, 16.

area of land under opium cultivation since 2005.¹⁶⁰ This year represented a third fewer households' involvement in opium cultivation. Only 245,000 families, or 6.4 per cent of the total Afghan population, grew the opium poppy in 2009.¹⁶¹ In 2010, the area used for poppy cultivation did not change from 2009 and still was occupying 123000 ha of land.¹⁶² The number of families growing opium also remained relatively constant at 248,700 households in 2010 compared to 245,200 in 2009, an increase of only 1%.¹⁶³ Similar to 2010, the area used for poppy cultivation in 2011 also remained relatively similar. However, in 2012, once again there was a 18% increase in the cultivated land which was showing the level of the land 154000 ha.¹⁶⁴

In 2013, a new record of cultivation was created. The total area under opium poppy cultivation in 2013 reached 209,000 hectares, which was showing a 36% increase from 154000 ha in the previous year.¹⁶⁵ The total area under opium poppy cultivation in Afghanistan was estimated at 224,000 hectares in 2014, a 7% increase from the previous year which was a new record in the history of cultivation in Afghanistan.¹⁶⁶ This increase did not continue in 2015 as this year witnessed a 19% decrease from the previous year. The total area under opium poppy cultivation was estimated at

¹⁶⁰ UNODC (2009). Afghanistan Opium Survey, 7. Available at: https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan_opiumsurvey2009_web.pdf

¹⁶¹ Ibid, 9.

¹⁶² Supra note 140, 9.

¹⁶³ Ibid, 9.

¹⁶⁴ UNODC (2012). Afghanistan Opium Survey, 11. Available at: https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan_OS_2012_FINAL_web.pdf

¹⁶⁵ UNODC (2013). Afghanistan Opium Survey, 10. Available at: https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan_opium_survey_2013_web_small.pdf

¹⁶⁶ UNODC (2014). Afghanistan Opium Survey, 6. Available at: <https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan-opium-survey-2014.pdf>

183,000 ha in this year.¹⁶⁷ However, the increase once again continued in 2016 in which the estimated land reached 201000 ha which was indicating a 10% increase from the previous year.¹⁶⁸ This comparison of land allocated for cultivation of poppy indicates that although there were years in which a temporary decrease was experienced, that in no ways was representing a real decrease in cultivation. A simple comparison of the land used for cultivation of poppy in 2002, which was 74000 ha, and in 2015, which was 183000 ha, would show that cultivation of poppy has significantly increased in this over a decade period. This certainly was followed by an increase in production and trafficking of drugs in this country. Moreover, the percentage of the population that were involved in cultivation of opium in Afghanistan also indicates the number of people who are directly affected by the economic implications of drugs. The indirect economic impact of this phenomenon would include a way greater percentage of the population of Afghanistan. Similar to the alteration of cultivation of poppy, the price of this crop also fluctuated in the course of years. The price that was reportedly \$30 per Kg elevated dramatically to \$300 per Kg in early 2001 which was showing a ten –time increase with a further increase of up to \$700 per Kg until the second half of 2001.¹⁶⁹ Soon after September, when the 9/11 took place, as a result of the United States air strikes and closure of the Afghan borders, opium prices declined quickly to about US\$100 per kg. In early 2002, once again the average price for Afghan fresh opium increased to \$350 per Kg.¹⁷⁰ In 2003, the price was \$295 per Kg which was showing a decrease in the prices.¹⁷¹ The average price for opium at the time of harvest in 2004 faced a dramatic decline and amounted to \$92 per Kg which was showing a 69% decrease compared to last year.¹⁷² In 2005, the price for fresh opium at the time of harvest reached \$102 per Kg which once again was representing an 11% increase in comparison with the last year.¹⁷³ In 2006, the prices decreased 8% and went down to

¹⁶⁷ UNODC (2015). Afghanistan Opium Survey, 6. Available at: <https://www.unodc.org/documents/crop-monitoring/Afghanistan/ Afghan opium survey 2015 web.pdf>

¹⁶⁸ UNODC (2016). Afghanistan Opium Survey, 6. Available at: <https://www.unodc.org/documents/crop-monitoring/Afghanistan/Afghanistan opium survey 2016 cultivation production.pdf>

¹⁶⁹ Supra note 147,5.

¹⁷⁰ Ibid, 5.

¹⁷¹ Supra note 75, 8.

¹⁷² Supra 150, 5.

¹⁷³ Supra note 152, 6.

\$94 per Kg.¹⁷⁴ . The price of fresh opium at harvest time further declined in 2007 and reached \$86 per Kg indicating a 9% decrease that 2006.¹⁷⁵ Based on the annual village survey, the decline of the price of fresh opium still continued in 2008 and reached 70 \$ per Kg, which was 19% lower than in 2007.¹⁷⁶ In 2009, the price decline hit its lowest since 2001 dry and declined to 64\$ per Kg and was indicating a 9% of decline than the previous year.¹⁷⁷ This was the last year of decline in the prices as the price started elevating once again since 2010. In 2010, opium price at harvest time increased to 169 \$ per Kg from 64\$ in 2009, which was showing an elevation of 164%.¹⁷⁸ The price further develop by 43% in 2011 and reached 241\$ per Kg from 169\$ per Kg.¹⁷⁹ In 2012, once again the price went down by 49% and reached \$124 per Kg at the time of harvest.¹⁸⁰ In 2013, the price of opium somehow remained similar to 2012 and did not change significantly. The report even confirms a slight reduction in the price that was not really considerable.¹⁸¹ The trend of reduction of opium price continued in 2014 and reduced from \$124 per Kg to \$108 per Kg which was showing a 13%. drop¹⁸² The price further declined in 2015 which reached \$70 per Kg, representing a 33% decline which was the lowest price since 2009.¹⁸³ In 2016, once again the price elevated by 57 % and reached \$110 per Kg.¹⁸⁴

The above-mentioned prices are all indicating the farm gate price of opium which is quite lower in comparison with the actual price of opium in the world. These prices are often set by the traffickers who are in control of this business in Afghanistan. Annually 120 tons of heroin of Afghan origin reaches Western Europe, forming three quarters of the heroin market in Europe with a value of 30 billion dollars which was seven times more than the total GDP of Afghanistan.¹⁸⁵

¹⁷⁴ Supra 139, 8.

¹⁷⁵ Supra note 156, 14.

¹⁷⁶ Supra note 137, 17.

¹⁷⁷ Supra note 160, 7.

¹⁷⁸ Supra note 140, 10.

¹⁷⁹ Supra note 141, 60.

¹⁸⁰ Supra note 164, 11.

¹⁸¹ Supra note 165, 10.

¹⁸² Supra note 166, 6.

¹⁸³ Supra note 167, 7.

¹⁸⁴ Supra note 168, 7.

¹⁸⁵ Supra note, 8.

While if we see the farm gate price of the opium in Afghanistan, in 2012¹⁸⁶, 2013¹⁸⁷, 2014¹⁸⁸ and 2015¹⁸⁹, it was only forming 4% of the GDP of the country. If we compare this amount of cash with what the Afghan farmers receive, it hardly makes 1% of the profit generated by this lucrative business.

Everywhere in the world when the economic aspect of drug cultivation is taken into debate, this fundamental point which is whether opium cultivation is a poverty coping strategy, which is adopted for lack of viable alternatives by the poor population, or it is a fast growing and lucrative illegal business that attracts the attention of the farmers, come in to mind.¹⁹⁰ It certainly is both as different people who are involved in this business may have inclination towards one of the two realities. In Afghanistan the decision to cultivate opium poppy in a given year is determined by variety of factors which are concentrated on the lack of viable alternatives. Most of the poppy growers in 2015 which made 71% of them, named economic reasons as major influencing factor for poppy cultivation.¹⁹¹ They mostly pointed at the low income from cultivation of other crops and dominance of poverty in their localities which hinders them from providing primary means of life for their families. Another 28% also mentioned poverty and lack of income as motivators of opium cultivation; however, mostly relying on agronomic and ecological reasons such as good harvest from poppy production or favorable ecological conditions for poppy cultivation.¹⁹² In Afghanistan the opium economy is a survivor for many of the poor, particularly those who are in debt to the drug traffickers from which it is almost impossible to escape and which may require life-impacting decisions like losing land and other assets and in some harsh cases even giving up daughters to the traffickers to whom they are in debt.¹⁹³ The way that this debt comes into existence is through a kind of sale agreement which is called *Salam*. *Salam* is in fact the current sale of the future harvest for a discounted price in exchange of an immediate access to cash.¹⁹⁴ Farmers who

¹⁸⁶ Supra note 164, 11.

¹⁸⁷ Supra note 165, 10.

¹⁸⁸ Supra note 166, 6.

¹⁸⁹ Supra note 167, 7.

¹⁹⁰ Supra note 132, 2.

¹⁹¹ Supra note 167, 8.

¹⁹² Ibid, 8.

¹⁹³ Supra note 132, 36.

¹⁹⁴ Steven Oliver (2006). Restructuring in Afghanistan's Narco-Economy: Farmer Choice, 2006, 18. Available at: <https://econweb.ucsd.edu/~v2crawford/Oliver06Essay.pdf>

are in need of cash often enter into such agreements with the traffickers for the next harvest which leads to obliging them to cultivate poppy even if they want not doing so. In 2014, almost 33% of the farmers had outstanding loans with an average size of 981\$. This indicates the broadness of the problem that almost one third of the farmers are in debt that even if they decide to not cultivate opium, they still would be forced to do so for repayment of their loans. This tendency is intentionally taken by the drug traffickers to guarantee cultivation of poppy by the farmers in the upcoming years.

To summarize, it could be stated that in the areas that drugs are being cultivated and produced, the economy has become very dependent on drugs that without that, it will not be possible for many rural people to further their lives. Although drug economy provides income for many rural families in the localities, people have no other alternatives to utilize if they get rid of drug cultivation. Currently the government is not in such a position to create alternative opportunities for the people in the localities which further justifies the recourse of people to the cultivation of drugs. This poses a devastating danger to the economy of the country that is largely agricultural and if not attended well, would change the economy of the entire country to a narco-economy.

2.2.3. Social impact of drugs

Social impact of drugs on the societies has been one of the main topics of discussion in the recent years. Drugs can have countless negative impacts on the social life of people that could take a direct or indirect form. The main social impacts of drugs on the societies are but not limited to addiction, lack of development, health diseases and increase in the crime rate.

Drug addiction has been one of the main social challenges in Afghanistan. Parallel to the increase in poppy cultivation, opium consumption has also witnessed a sharp increase in Afghanistan in the recent years. The negative physical and emotional implication of drug use are expected to have a significant and devastating effect on the development of the country in the future.

According to the 2005 UNODC report, almost one million population of Afghanistan (3.8 % of the total population) were drug addicts, from which 740000 were male and 120000 female, forming 12.1% of total male population and 2.1% of total female population of the country.¹⁹⁵

¹⁹⁵ UNODC (2005) World Drug Report. Available at:
https://www.unodc.org/pdf/WDR_2005/volume_1_web.pdf

Amongst the addicts, 60000 of them were children which were making 0.7% of total population of children in Afghanistan.¹⁹⁶ Amongst the users 150,000 were taking opium, 50,000 were addicted to heroin, 520,000 were using hashish, 180,000 were taking pharmaceutical drugs, and 160,000 were consuming alcohol.¹⁹⁷

According to 2009 survey by UNODC in Afghanistan, almost 8% of 15-64 years old are drug users, which is twice of the global average for this age.¹⁹⁸ The current 2.65% opiate prevalence rate in Afghanistan is one of the highest rates worldwide.¹⁹⁹ According to the 2009 survey, the number of opium users increased from 150000 in 2005 to 230000 in 2009, showing a 53% increase and the number of heroin addicts since 2009 was more than doubled that reached 140000, showing a 140% of increase compared to 50000 in 2005.²⁰⁰

Based on a study that was done for the assessment of the impacts of drug use on user and their families, it was found that there were a number of other social impacts of addiction that were on the family and children of the addicts. The study revealed that drug use led to domestic violence; which was confirmed by the assertion of half of the interviewees that they were hit by the family member who was drug addict.²⁰¹ Unemployment was another impact of drug use that was affirmed by the interviewees asserting that 60% of their family member who had jobs before addiction, lost their jobs because of their addiction.²⁰² Moreover, almost 50% of interviewed people said that they had been forced to borrow money by the drug user in the family and almost 70 per cent said that they had financial difficulties in the family as a result of drug use by a family member.²⁰³

¹⁹⁶ Ibid,

¹⁹⁷ Ibid,

¹⁹⁸ Ministry of Counter Narcotics, Ministry of Public Health, UNODC (2009). Drug Use in Afghanistan, Survey Available at: <https://www.unodc.org/documents/data-and-analysis/Studies/Afghan-Drug-Survey-2009-Executive-Summary-web.pdf>

¹⁹⁹ UNODC (2013). Word Drug Report Available at: <https://www.unodc.org/lpo-brazil/en/drogas/relatorio-mundial-sobre-drogas.html>

²⁰⁰ Supra note 198,

²⁰¹ UNODC (2014). Report on Impacts of Drug Use on Users and their Families in Afghanistan, 7. Available at: https://www.unodc.org/documents/data-and-analysis/Studies/Impacts_Study_2014_web.pdf

²⁰² Ibid, 7.

²⁰³ Ibid, 7.

The impact of addiction on children of the family has also been really severe. Children who had an addict in their families were not only banned from school, but also were forced to work for making money which in some cases even had led to the illness of the forced child.²⁰⁴

Lack of development is another devastating social impact of drugs on the Afghan society. The link between opium cultivation and lack of development is shown in 2012 UNODC opium survey by the fact that the non- poppy growing villages have almost 90% boys school and 75% girls school which is much higher than the 61% boys school and 19% girls schools in poppy growing villages.²⁰⁵ Although lack of accessibility of education for children is really detrimental for the future development of society, absence of schools for girls in almost 80% of poppy growing villages is a great concern from a development point of view.²⁰⁶ This, arguably, is due to the fact that the children in poppy growing villages are banned from school for the purpose of working on the farm to avoid hiring other people for furthering the work.

A further social impact of drugs is health problems in Afghanistan. One of the dangerous diseases that emerges from drug use is HIV. The 2012 world bank report declares that number of HIV reported patients in Afghanistan reaches to 1250; however, the report considers the actual number between 2000 and 3000 patients. There might be very many of the HIV patients in Afghanistan that due to the stigma attached to it , do not report to the public health authorities.²⁰⁷ Commonly, the drug users in Afghanistan did not use injection as a way of consuming drugs. However, this has changed as a result of many Afghan addicts returning from Iran and Pakistan who used to use injection.²⁰⁸ This is becoming more and more common which may have a very bad impact on the growth of HIV in Afghanistan.

Increase in the crime level is another social impact of drugs in Afghanistan. Crimes such as murder, robbery and corruption are some patterns that are increased as a result of drug problem in Afghanistan.²⁰⁹ According to the 2009 UNODC Drug Use report, almost 80% of the 92 prisoners in Kandahar's Sarpoza Prison have claimed use of drugs in the past. Amongst them 50 respondents which makes 55% of the prisoners interviewed, claimed consuming drugs in their life time, with

²⁰⁴ Ibid,8.

²⁰⁵ Supra note 164, 12.

²⁰⁶ Supra note 165, 11.

²⁰⁷ Supra note 95, 57.

²⁰⁸ Ibid, 57.

²⁰⁹ Ibid, 57.

19 of them claiming to have taken opium, 9 of them heroin, and the remaining 6 consuming both of them.²¹⁰

Similar to male addicts, female addicts in Afghanistan have also been involved in commission of different types of crimes which ranged from smuggling to prostitution and selling children.²¹¹

According to a 2008 report issued by Afghanistan Independent Human Rights Commission, 2.17% of female drug addicts who were interviewed have been arrested on smuggling charges. The report quotes one of the addicts who says “my husband was a drug smuggler. He wanted me to help him with his business. In order to get me help him, he accustomed me with drugs. Now I am involved in drug smuggling, though my husband has died. This is the means of getting drugs for myself.”²¹²

AIHRC report further asserts that some female addicts even committed crimes such as prostitution and selling their children in order to make money or obtain drugs. “I had to take care of two of my nieces, my brother’s daughters. I had to sell them to provide my drugs”²¹³ Said one of the interviewees for this report.

In summary we can say that the social impact of drugs is really immense in Afghanistan. In a county that more than half of the population is young, the spread of drug use amongst the youth will have irreparable implication for the future of the country. Moreover, the lack of development, particularly in the form of lack of availability of education for boy and girls, shall have detrimental impacts on the social life of people in the future. Furthermore, in a county that the health services are quite scares and low, drug-related diseases, particularly the incurable ones, would endanger the life of many ordinary people who are even not using drugs. Finally, the lack of access to drugs for the addicts would certainly urge them to recourse to violent activities which creates countless problems for the people in the society.

2.3. Conclusions:

If we take a close look at the history of drugs and its trafficking in Afghanistan, we can easily find out that this problem has been of a gradual increase nature. Although in some years, the drugs

²¹⁰ Supra note 198.

²¹¹ Supra note 95, 57

²¹² Afghanistan Independent Human Rights Commission (2008). Report Available at: <https://www.refworld.org/publisher,AIHRC,ANNUALREPORT,,483bebd42,0.html>

²¹³ Ibid.

cultivation and production have declined temporarily, the actual reduction has never been witnessed in the four decades of the contemporary history of the country. The scope of the problem, particularly in the last decade, has been that broad that even with the help and support of the international community, Afghanistan has not been able to tackle the problem.

The government of Afghanistan, with the help of leading countries which are involved in the war against terror such as the United States and Britain, has put into action many plans and strategies starting from eradication and ending with international cooperation. However, in reality, none of those plans and strategies has been of a positive impact on the war against narcotics. The evidence for that is the fact that Afghanistan still is providing 93% of the heroin demands of the world.

Each one of the pillars of the Afghan plan besides having their own shortcomings such as eradication provoking people to stand against the state, interdiction being selective and only targeting Taliban related traffickers, alternative livelihood being time taking, and demand reduction being of less nexus with the problem of narcotics in Afghanistan have one common problem which is cost-effectiveness. Apart from prosecution option which is being accomplished by the existing system of investigation and prosecution within the criminal justice system of Afghanistan, all the other pillars require a separate budget for their sustainability and success.

Moreover, amongst the eight pillars of the Afghan plan, the only one that has a legal dimension is the law enforcement/ prosecution pillar. The remaining seven pillars mostly deal with the narcotics issue from a social point of view which could be great options for a sociology-oriented PhD.

The impact of this phenomenon on different aspects of life of people in Afghanistan is that severe that is quite irreparable in the near future of the country. The emergence of narco-terror groups in the country are posing long lasting security threats to the country by creating more distance between the people and the government. The failure of the government to provide security to people is another drawback that severely damage the image of the state in the eyes of the public.

The emergence of the narco-economy is one of the main challenges that taking care of it would require systematic and long-lasting alternative programs by the government which in the current situation of the government seems quite unfeasible.

More importantly, the social impact of the drugs on the Afghan people is that harsh that repairing them would require another generation. The most important negative implication is deprivation of children from having access to school which would be quite irreparable in the short time.

More importantly that, the scope of the issue of campaign against narcotics in Afghanistan is that wide that would be completely out of the scope of a thesis to cover all aspects of it. Assessing each one of the eight pillars of the Afghan government plan for tackling the problem of narcotics would certainly require a separate dissertation. All these issues are so broad that dealing with them would require separate dissertations.

For the above-mentioned reasons, the main focus of this dissertation will be on the investigation and prosecution of drug trafficking in Afghanistan. It should be admitted that dealing with investigation and prosecution would certainly require a tangential elaboration of institution building and international and regional cooperation which are the two other pillars of the plan. In the institution building efforts, any investigative and prosecutorial institutions that are assisted to build their capacity for dealing with the drug-trafficking cases are taken under proper scrutiny. In the arena of international and regional cooperation, any convention or agreements that are linked to any judicial cooperation amongst the states such as extradition treaties would be of a vital importance to this dissertation.

3. The criminalization of drug-trafficking in Afghanistan

Afghanistan, as one of the countries that are broadly suffering from the narcotic drugs trade since the late 20th century, has inclined towards a more punitive approach for dealing with the drugs problem it faces. This has urged the governments in power to enact a sequence of counter narcotic laws periodically. The trafficking of drugs, with a variable degree of penalization, has undoubtedly been the centre of attention of most of these legislative documents since the initial efforts to criminalize drug-related offences in Afghanistan.

This chapter of the dissertation is allocated to reviewing the criminalization of drug trafficking in light of the criminal justice system of Afghanistan and the international treaties and conventions. Despite the existence of the inseparable nexus between criminalization of drug trafficking and other drug-related offences, this chapter only deals with the criminalization of drug trafficking in Afghanistan, with other areas falling beyond the scope of this chapter.

This chapter is composed of an introduction to the legal status of drug trafficking in the counter narcotics laws, international treaties and conventions and a theoretical analysis of the policies that are reflected in the process of the codification of drug trafficking offences in Afghanistan.

In the section on drug trafficking in the legislation, the main focus will be on providing the provisions of all the counter narcotics codes regarding the criminalization of drug trafficking from the beginning of the 20th century in Afghanistan. This will also include an elaboration of various innovations that are brought in the legislative documents in the ongoing attempt to criminalize drug trafficking in Afghanistan.

The part pertaining to the international legal framework of drug trafficking, the focus shall be on elaborating up on the international legal framework of drug trafficking which includes the abrogated and in-force international conventions and agreements that have been enacted for countering the problem of narcotic drugs worldwide. There will also be a concise elaboration on the compliance of Afghanistan with its treaty obligations. In this part the light would be shed up on the extent that Afghanistan has been able to fulfil its treaty obligations so far.

The theoretical analysis will first establish the theoretical framework for dealing with the drug offences. Thereafter, it will scrutinize the approaches that are mostly taken in the process of the codification of drug trafficking in Afghanistan. This part would reveal the role of any of the policies in regard to the campaign against the drug trafficking in Afghanistan.

The methodology for this chapter may vary from section to section as at times a more narrative approach will be followed in explaining the drug trafficking provisions of the counter narcotics code and a more analytical approach will be followed in the theoretical analysis of the policies when looking at drug trafficking offences. In the part related to international legal framework, the attention shall be shifted from a mere explanatory approach to a more critical analysis of the existing treaty law and its impact on drug control in general and drug trafficking in particular in Afghanistan.

Since a significant proportion of this dissertation's readership may not be familiar with the legal system of Afghanistan, in particular the hybrid system of Afghanistan, a brief introduction to the legal system of Afghanistan, focused on the sources of criminalization in the country, will be provided in below.

Afghanistan has a hybrid legal system in which *Islamic Shari'a* and the civil law (continental) system function parallel to each other. This maxim is also applicable to the field of criminal law. In order to understand the domain of *Shari'a law* in relation to state law with regards to criminal issues, we have to first briefly classify crimes according to the *Islamic Shari'a*. Under Islamic criminal law, crimes are divided in to three main categories namely: *Hudud*, *Qisas (Diyat)*, and *Ta'zir*.²¹⁴

Hudud crimes are those acts that the crimes and their punishments are determined by the textual sources of *Islamic Shari'a* namely *Quran* and *Sunnah* and no one, including the Islamic ruler, has the authority to increase, decrease or pardon them.²¹⁵ There are seven of these crimes which are:

²¹⁴ Tahir Mahmood (1996). *Criminal law in Islam and the Muslim World*, New Delhi, Institute of Objective Studies, 47.

²¹⁵ Sayyid Ahmad Najati Sanad (1991). *The Theory of Crime and Criminal Responsibility in Islamic Law*, Chicago, Office of International Criminal Justice, 53.

theft, highway robbery, adultery and fornication, alcohol drinking, apostasy, defamation and rebellion.²¹⁶

Qisas (an eye-for-an-eye punishment) and *Diyat* (compensation) crimes are those acts and omissions that *Islamic Shari'a* has provided specific punishments for them; however, the right of pardoning them rests with the victim (in case of injury) or the relatives of the victim (in case of murder).²¹⁷ Crimes under this category all relate to types of crimes that result in murder, assault and injuries.²¹⁸

Ta'zir crimes are those acts and omissions that Islamic Shari'a has neither criminalized, nor has provided any explicit punishment for them directly in the *Quran*²¹⁹ or the *Sunnah*²²⁰; however, criminalization and determining the punishment for them is left in the hands of the rulers who, in the light of circumstances, could penalize certain acts and omissions that endanger Islamic societies.²²¹ Crimes other than *Hudud* and *Qisas*, all fall under this category of crimes.

Under the hybrid legal system of Afghanistan, *Hudud* and *Qisas* crimes are penalized based on the provisions of the two textual sources, the *Quran* and the *Sunnah*, of *Islamic Shari'a* and the *Ta'zir* crimes are left to the state penal laws to penalize whatever act or omission that require criminal law intervention. This is clearly stated in article one of the penal code of Afghanistan, which articulates:

²¹⁶ Ibid, 53.

²¹⁷ Anwarullah (2006). The Criminal Law of Islam, India, Kitab Bahavan, 53.

²¹⁸ Ibid, 53.

²¹⁹ *Quran* is the first textual source of Islam which in terms of hierarchy stands on the top of all the Islamic sources. This is the book that reflects the words of God that set the most important commands and prohibitions in the arena of Islam.

²²⁰ The *Sunnah* is the second textual source of Islamic *Shari'a* that is second in hierarchy after *Quran*. The *Sunnah* is referred to the sayings, acts and tacit approval of the Prophet.

²²¹ Yahaya Yunusa Bambale (2003). Crimes and Punishments Under Islamic Law, Ikega, Malthouse Press Limited, 96.

“This code only deals with *Ta’zir* crimes. *Hudud*, *Qisas* and *Diyat* crimes shall be dealt with according to the *Hanafi*²²² *Jurisprudence of Islamic Shari’a*.”²²³

This article clearly indicates that the criminal code enacted by the state of Afghanistan, under no circumstances, would be extended to *Hudud* and *Qisas* crimes and crimes of these two categories would be solely dealt with according to *Islamic Shari’a*.

From what we have looked at above, the domain of the *Shari’a* and state laws are clearly separated from each other. However, the complication arises when the 2004 Constitution of Afghanistan arguably once again opens the door of *Islamic Shari’a* for the criminalization of the *Ta’zir* offences.

The Constitution in its article 130 stipulates that:

“In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of *Hanafi Jurisprudence*, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.”²²⁴

This provision of the constitution, in the views of some judges, once again extends the hands of *Hanafi Jurisprudence* to the field of *Ta’zir*, which is deemed to be in clear violation of the principle of the legality of crimes and punishments, enshrined in article 27 of the 2004 Constitution and Articles 2 and 3 of the Penal Code of Afghanistan. This provision has created two views amongst the legal scholars and judges. According to one view, which is dominant amongst the judges, this provision allows the judges to prosecute and convict the accused by referring to *Hanafi Jurisprudence* when an act or an omission is not penalized in the penal laws of the country as the text of the article has not excluded criminal matters from this provision. The other view, which is mostly from legal scholars in the country, is relating this provision to non-criminal matters and thus is inclined towards exclusion of criminal matters by referring to two arguments: Firstly, that

²²² There are four major Sunni schools of *Fiqh* (Islamic Jurisprudence) which are *Hanafi*, *Shafi’i*, *Maliki* and *Hanbali*. *Hanafi* school of *fiqh* is established by Nu’mān son of Thābit who was famous to Abu Hanifa. This school of *fiqh* is affiliated to him and derived from his name. Afghanistan, Pakistan and Turkey are the countries in which this school of *fiqh* is predominant.

²²³ Penal Code of Afghanistan (1976). Official Gazette 347, art. 1.

²²⁴ Supra note 8, 130.

in the text of the article, there is only mention of judges, from where the non-criminal cases are being initiated, with no mention of the police and the prosecutors, to which the criminal cases are being referred. In their view, this textual fact indicates that this provision is not covering the criminal cases. Secondly, by referring to the legislative history of this article, the drafters claim that the text of the article was copied from the Egyptian Civil Code, drafted by Abdul Razaq Alsanhuri, which was only related to the civil issue and not entailing the criminal issues. Although, based on the above-mentioned reasons, it is clear enough that this provision of article 130 of the constitution is not including the criminal matters²²⁵, but in practice, due to the believe of judges regarding the application of this article to criminal matters, it is still applied in different cases for which there are no provisions in the penal laws of Afghanistan.²²⁶

In regard to the criminalization of drug offences, all of the offences, excluding the consumption of alcohol, which is one the *Hudud* crimes, fall under *Ta'zir* for which the state has the discretion of criminalization based on the needs of the society. This discretion has enabled the state to take penalization steps arguably in the light of the realities within the country and international demands.

Providing this brief information regarding the criminalization system in Afghanistan, in the next section, the literature review part of the chapter would be elaborated upon.

3.1. The Legislative Developments:

Until the beginning of the 20th century, in a considerable number of the countries of the world which were suffering the drug problems, a *de facto* legalization regarding the supply and demand of the narcotic drugs was commonly practiced.²²⁷ The beginning of the 20th century is marked as the turning point for the codification and criminalization of this phenomenon around the world.

²²⁵ Mandana Knust Rassekh Afshar (2006). The Case of an Afghan Apostate- The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution, Max Planck Yearbook of United Nations Law, vol. (10), 601.

²²⁶ A clear example of this would be the case of Parwiz Kambakhsh, an Afghan young journalist who was convicted to 20 years of imprisonment for the act of blasphemy which is not penalized in the criminal codes of Afghanistan. Available at: <http://www.sacw.net/article157.html>

²²⁷ Daniel Reuben Yablon (2011). The effect of Drug Decriminalization in Portugal on Homicide and Drug Mortality Rates, University of California Berkeley, 3. Available at: https://www.econ.berkeley.edu/sites/default/files/yablon_daniel.pdf

This approach could clearly be witnessed both at international and national levels. At an international level, the already started international efforts resulted in the enactment of the first ever international convention by the name of the Opium Convention of 1912, which was succeeded by a range of international conventions and protocols, some of which, such as the 1961 and 1988 conventions, are still in control of the drug regime in the world. Similarly, at a national level, most of the countries of the world, after realizing the danger and negative impacts of the drugs on the social, cultural, economic and even political life of their societies, resorted to a more regulatory and, in most cases, punitive approach towards narcotics.

Afghanistan was also one of the countries to start the first phase of codification and regulation of drug-related activities in the third decade of the 20th century. It should also be noted that Afghanistan started a gradual criminalization of drug-related activities starting with criminalization, in a limited and selective manner, in 1923 and ending with a relatively harsh penalization in the 2010 counter narcotics code, which is in force until now. This gradual severity is mirrored in the legislative documents enacted during this period in Afghanistan.

As the evaluation of the criminalization of drug-related activities would be very broad and hence out of the scope of this dissertation, the focus will be solely focused on the criminalization of drug-trafficking in the light of legislative documents of the country.

In the following section the status of the criminalization of drug trafficking from the 1923 *Nezamnama* until the recent enacted laws will be provided. The discussion is divided into two parts: The first part would deal with the *Nezamnamas* and *Usulnamas* enacted in Afghanistan in a concise manner and, the second part is allocated to the extensive study of criminalization of this phenomenon by the counter narcotics codes in the country.

3.1.1. Drug trafficking before the enactment of the first Counter Narcotics code in 1990

This period of criminalization of drug trafficking was mostly for the purpose of the fulfilment of international obligations arising from international conventions to which Afghanistan was a party. At this stage, the problem of drugs in Afghanistan was not so severe as to require a severe penal reaction by the society. On the one hand, the scope of the problem was not so broad as to be tackled with harsh punishments. While on the other hand, the problem was not so stigmatized as to push

the governments towards strict penalization. All of the penal provisions of the laws enacted during this period had one commonality, which was leniency towards the offenders.

In the following, all the legislative documents of this period that deal with drug trafficking would be briefly taken under scrutiny.

3.1.1.1. The 1923 Criminal *Nezamnama*

This is the first *Ta'zir* code in the history of Afghanistan that dealt with the issue of drugs. This code penalized only the manufacture, use and import of alcohol and other intoxicants, leaving the export of drugs to the other countries legal.

Article 125 of this *Nezamnama* stipulated that:

“In Afghanistan, the manufacture, use, and import of alcohol and other intoxicants excluding the hashish and Bang that are the products of Afghanistan, is strictly forbidden. Only use and trade of them (*hashish* and bang) for the purpose of domestic use is prohibited. Exporting of them to the other countries is not prohibited.”²²⁸

This provision of the code clearly indicated that the purpose of the drafters of this law was to only ban the consumption of *hashish* and *bang* within the country, while not criminalizing the export of them to the other countries, revealing a lenient trend towards drug trafficking. More specifically, it reveals that the trafficking of *hashish* and bang from Afghanistan to the other countries was explicitly allowed by the text of the law.

The punishment for the use of *hashish* and bang was articulated in article 131 of this *Nezamnama* stating that:

“Consumers of *hashish* and bang who are below age of 25 would receive 25 to 39 lashes and if the age of the consumer is above 25, he or she would receive 50 to 75 lashes. The ones who are addicted to *hashish* and bang would be exempt from the punishment for 2 years and after 2 years would receive a punishment of 50 to 75 lashes. The addicts of opium would only be subject to preaching.”²²⁹

²²⁸ Supra note 4, art.125.

²²⁹ Ibid, art.131.

This article only provided the punishment for the use of *hashish* and bang, while for the other activities related to drugs, there was no criminal liability which strongly supports the notion that drug trafficking was not penalized at this stage. This makes it clear that drug trafficking probably was not a concern for Afghanistan at that era.

3.1.1.2. The 1927 Criminal *Nezamnama*

This *Nazamnama*, similar to its predecessor, continued the legal status of the trafficking of drugs in Afghanistan. Article 103 of this *Nezamnama*, which was the exact copy of the 1923 *Nezamnama*, only banned the use, manufacture and import of the drugs, allowing for the export of hashish and bang to remain legal in Afghanistan.²³⁰

Article 109 of this *Nezamnama*, established the penal provisions for citizens who consumed hashish and bang in the country, sufficing to only mention the word *Ta'zir* for the punishment of such offenders.²³¹ This lack of a specific penalty for the use of drugs left the scope of the punishment to the hands of the judges who could determine the punishments arbitrarily.

This provision of the 1927 *Nezamnama*, in comparison with the 1923 *Nezamnama*, is relatively backward in terms of the principle of legality. The 1923 *Nezamnama* at least, was predictable in terms of the punishment allowing citizens to foresee the outcome of their actions. However, the 1927 *Nezamnama* was not of that characteristic as it was leaving the punishment to the hands of the judges who could exercise a full discretionary power over it.

Furthermore, the punishment of *Ta'zir* that was articulated in article 109 of this *Nezamnama* was confined to the consumption of *hashish* and bang within the country, leaving the other activities outside the scope of penalization. Drug trafficking, once again, was not under the focus of this legal document and therefore still kept its status of no penalization.

²³⁰ General Criminal *Nezamnama* of Afghanistan (1927). art.103.

²³¹ *Ibid*, art.109.

3.1.1.3. The 1956 Opium *Usulnama*

This *Usulnama* is the first legislative document in Afghanistan that directly deals with the issue of narcotics generally and opium in particular. The prior legislative documents were mostly general criminal codes that were tangentially dealing with the drugs in the country.

This legislation was mostly for the purpose of licensing opium cultivation rather than criminalizing the trafficking of drugs. Article 7 of this law stipulated the ban on the use of opium and the penal provisions regarding the sale and purchase of opium without involvement of the government. The penal provisions, in the words of the *Usulnama* itself, were confined to the seizure of traded opium coupled with any other punishments in the light of circumstances.²³² However, except seizure, there were no other punishments prescribed in this *Usulnama* and the discretion of setting the other punishments in excess of seizure was referred to the Provincial Consultative Assembly, which was a traditional consultative body, to determine the punishment for such offenders.²³³

This article was the one and the single penal provision of this *Usulnama*, but with no provision for penalization of drug trafficking *per se*. From the provisions of this *Usulnama*, it is clearly understood that the use of opium and the uncontrolled sale and purchase of it that could lead to accessibility and hence use of it within the country was a greater concern to the drafters of this legislation in comparison with the trafficking of drugs. Since drug trafficking was not so widespread and systematic during that era, the drafters of this legislation even did not pay any close attention to it and thus allowed it to remain legal.

3.1.1.4. The 1957 *Usulnama* for Prohibition of Cultivation, Trade, Import and Export of Opium

This *Usulnama* was the first legal document of its kind that was extended beyond the prohibition opium to the ban on its trade, export and import. This document introduced the provision by which the use of opium was restricted to the medical use under the strict control of the government. Although it does not directly penalize the trafficking of drugs in the country, the ban on the trade,

²³² Opium *Usulnama* of Afghanistan (1956). art. 7.

²³³ Opium *Usulnama* of Afghanistan (1976). the Appendix to art. 7.

export and import of opium²³⁴ could be counted among the early signs of the penalization of this phenomenon in Afghanistan.

An interesting point worthy of note about this *Usulnama* is the deferral of the penalties for the violators of this legal document to another penal code²³⁵ that did not exist at all. This provision reveals that in spite of the existence of initial signs of the criminalization of drug trafficking in this law, there has not been any penal provision in the law to really punish the acts of export and import of drugs in the country.

It could be inferred that the purpose of the drafters of this *Usulnama* may have been meant to refer the punishment of trafficking to the 1927 Criminal *Nezamnama*; however, the lack of any penal provisions in that *Nezamnama* regarding the trafficking of drugs would still keep such an inference void.

It is also worth mentioning here that, up to this stage of the codification in Afghanistan, no actual penalties could be found with regards to drug trafficking.

The only law that provided the actual penalties for the trafficking of drugs was the Law on the Prevention of Trafficking in Afghanistan enacted in 1970. This code was a general law for the penalization of trafficking with no initial aim of being limited to the trafficking of drugs.

Article 1 of this law defined trafficking as:

“... production, import, export, sell, purchase and transport of any forbidden goods or any goods under the sole control of the government without the permission of the government...”²³⁶

This definition certainly covered acts such as the import, export and trade of opium as stated in article 1 of the 1957 *Usulnama*.

The penal provisions of this law for prohibited goods with a value of more than 10000Afs (equivalent to \$150 in the current currency) was starting from 1 to 6 years of imprisonment²³⁷ with

²³⁴Usulnama for Prohibition of Cultivation, Trade, Import and Export of Opium of Afghanistan (1957). art. 1.

²³⁵ Ibid, art. 4.

²³⁶ The Law on Prohibition of Trafficking (1970). Official Gazette 151, art. 1.

²³⁷ Ibid, art. 13.

the maximum application in case of an alliance between a minimum of three people for trafficking.²³⁸ The commission of trafficking in the capacity of the master mind of a criminal network would have increased the punishment by 200%²³⁹ with a further increase of 250% if committed in the capacity of a government employee.²⁴⁰

These penal provisions indicate that the range of punishment in this code started from 1 year of imprisonment with the maximum possibility of 15 years. Although it was the first stage of penalization of trafficking in Afghanistan, the punishment established in this code is relatively severe. The reason for this severity was arguably not for the trafficking of drugs itself, but rather for the purpose of reducing the trafficking of fire arms. The trafficking of fire arms by the Marxist groups in Afghanistan after the Decade of Democracy starting in 1964, was of greater concern to the government, which might have provoked the state to implement such severe and strict penal provisions regarding the trafficking in the country.

3.1.1.5. The 1976 penal code

This code, enacted in 1976, is still the dominant code in the area of crimes and punishments in Afghanistan. Although it is considered a comprehensive code within the arena of criminal matters, there are many shortcomings in this code that one of them could be the lack of any provisions regarding the issue of drug trafficking in Afghanistan. The only penal provisions in this code pertaining the issue of narcotic drugs is regarding the use of alcohol and other intoxicants which are provided under chapter 18, articles 349 to 352. The penalties provided for the use of alcohol under different circumstances, ranges from 3 to 12 months of imprisonment and/or a cash fine of 3000 to 12000Afs.

To conclude, until this stage the only codification that provided penal provisions for the trafficking of drugs in Afghanistan was the Law on the Prevention of Trafficking enacted in 1970. The other legislative documents of the country either did not criminalize drug trafficking or, despite criminalization, did not provide any penalties for it.

²³⁸ Ibid, art. 14.

²³⁹ Ibid, art. 15.

²⁴⁰ Ibid, art. 16.

The next section of this chapter will deal with the period that specific codes were enacted for criminalization of drug trafficking in Afghanistan, which start with the 1990 counter narcotics code and ends to the 2010 counter narcotics code.

3.1.2. Drug trafficking after the enactment of the 1990 Counter Narcotics code

This was the era in which drug trafficking in Afghanistan was already turned to a big concern for the country and the world. The existing penal provisions that were tangentially dealing with the problem of drug trafficking in Afghanistan, considering the scope of the challenges, were not sufficient enough to tackle the problem. A dire need was felt for the enactment of comprehensive codes to deal with the problem properly. For the sake of this essence, the following codes were enacted consecutively since 1990 in the course of our decades in Afghanistan, which will be elaborated on in the following sections.

3.1.2.1. The 1990 Counter Narcotics Code

This code is characterized as the first specific and comprehensive code regarding narcotics in Afghanistan. The provisions of this code not only cover cultivation, use and possession but also trafficking of drugs. The enactment of this code is noted as the first ever movement towards practical penalization of drug trafficking in a specific code.

The provisions of this code regarding the trafficking of drugs, enshrined in chapter 3 from article 12 to 37, are quite explanatory and detailed in comparison with their predecessors. Article 13(2) of this law defines drug trafficking as:

“Production, process, sell and purchase, supply, import, export and transport (of drugs) without permission of the government”²⁴¹

For the first time in this law, the quantity of drugs was the maxim based on which the severity of the punishment of the offender could be determined. Moreover, the type of the substance also had an impact on a fluctuation of the degree of the punishment for offenders. Article 20 of this code, determining the punishment of opium trafficking, articulated the punishment of 24 hours to 1 year of imprisonment for someone who smuggled up to 50g of opium with an increase of 1 to five years of imprisonment if the quantity of drugs trafficked was over 50g up and up to 1kg. The punishment

²⁴¹ Counter Narcotics Code of Afghanistan (1990). Official Gazette 741, art. 23.

could have aggravated from five to seven years of imprisonment if the smuggled drug was from 1 to 10 kg, with a further aggravation from 7 to 20 years of imprisonment in case the quantity of drugs was exceeding 10 kg.²⁴²

Article 21 of this code, specifying the punishment of smuggling of hashish, stipulated imprisonment of 24 hours to 3 months for smuggling of up to 50g, with the option of increasing the punishment from 3 to 12 months of imprisonment if the quantity was more than 50g, but not beyond 1kg. Smuggling 1 to 10 kg was itself a justification for increasing the prison time from 1 to five years, which could have been increased to five to 15 years if the drug trafficked was more than 10 kg.²⁴³

According to article 22 of this code, the punishment for the trafficking of chemical derivatives of narcotic drugs ranged from 1 to 20 years of imprisonment in a way that trafficking of up to 10gr was punishable by 1 to 2 years of imprisonment, reaching two to five years of imprisonment for the smuggling of 10 to 50gr. A long imprisonment of five to 15 years could have been applied on the smuggler of 50gr to 1kg of it with a possible extension of punishment up to 20 years of imprisonment if the smuggled drug was slightly more than 1kg.²⁴⁴

Based on article 23 of this code, if someone committed the trafficking of other narcotic drugs, depending on the specific circumstances, they could face imprisonment of 1 to 15 years.²⁴⁵ Seized drug, regardless of the quantity, shall be confiscated by the court.²⁴⁶ The confiscation of the vehicle used for the transportation of the drugs was mostly dependent on the quantity of drugs as if the quantity of heroin was more than 500gr, opium exceeding 20kg and other drugs equivalent to the half of the price of the vehicle, the transportation tool was subject to confiscation.²⁴⁷ However, in a situation that the driver had provided a special place for transporting the drugs in his vehicle, regardless of the quantity of the drugs mentioned, the vehicle could have been confiscated.²⁴⁸

²⁴² Ibid, art. 20.

²⁴³ Ibid, art. 21.

²⁴⁴ Ibid, art. 22.

²⁴⁵ Ibid, art. 23.

²⁴⁶ Ibid, art. 24.

²⁴⁷ Ibid, art. 29.

²⁴⁸ Ibid, art. 30.

Article 31 and 32 of this code dealt with the knowledge of the driver or the owner of the vehicle, in the presence of which, they could be exposed to the accomplice liability.²⁴⁹ The impact of alliance of two or more than two people for trafficking was aggravation of the punishment to the fullest extent.²⁵⁰

If the crime was committed through a criminal network, by government officials or through facilitation provided by government officials, a punishment of 16 to 20 years imprisonment was applicable to the offender.²⁵¹

It should be noted that the maximum punishment for trafficking provided in this law was execution, which was only applicable if a murder was committed in the course of drug trafficking.²⁵²

If we scrutinize the above-mentioned articles, we could assert that in aggravation and mitigation of the punishment of drug trafficking, some factors, namely: the quantity of the substance, the type of the substance, the alliance made for trafficking, the commission of the crime in an organized manner and the involvement of the government officials have had a role in this law. The only instance in which these factors did not have any impact on its aggravation and mitigation was the case of murder in the course of trafficking that was punishable by execution. This was due to the fact that murder, regardless of being connected to the drug trafficking or not, automatically requires the severest punishment.

It is worth mentioning here that the severe penalization of drug trafficking in this era mostly stemmed from the corresponding enactment of this law with a dramatic boom in drug trafficking as a result of a reduction in foreign aid to the two sides of the warring country. This issue is discussed in more detail in chapter II of this dissertation.

3.1.2.2. The 2000 Counter Narcotics Code

This code was enacted during the era of the Taliban in Afghanistan for the purpose of showing their will for tackling the problem of drugs in Afghanistan. This code, in most parts, is the copy of

²⁴⁹ Ibid, art. 31,32.

²⁵⁰ Ibid, art. 33.

²⁵¹ Ibid, art. 34,35.

²⁵² Ibid, art. 25.

the 1970 counter narcotics code provisions. However, when it comes to the parts concerning penalties, the code has left that to the Islamic *Shari'a*.

Trafficking under article 12 (2) of this code is defined as:

“Production, process, sell and purchase, supply, import, export and transport (of drugs) without permission of the *Islamic Imarat*”²⁵³

The only change to this article is replacing the term “government” from the 1990 code with the “*Islamic Imarat*”, which was the name for the Afghan government at that time.

Regarding the trafficking of drugs, article 20 of this code stipulated that:

“Anyone who commits the crime of drug trafficking shall be punished according to the provision of *Islamic Shari'a*.”²⁵⁴

Subsequent to this, article 21 provided that: “Anyone who commits the crime of trafficking of derivatives of drugs shall be punished according to the provision of Islamic Shari'a.”²⁵⁵

If we scrutinize these two articles of the code, we realize that the principle of legality, which is at the heart of criminal law in Afghanistan, is violated. These provisions do not give any predictability to the citizens to really understand what their punishment might be under the legal system of the country. The referral of punishment to Islamic *Shari'a* still will not heal the wounds as the existing provisions in the field of *Shari'a* vary from jurist to jurist and thus do not provide a clear definitive approach. This led to a lack of a uniform application of the laws during the Taliban regime in Afghanistan in a way that the same offence could have been punished in one part of the country different from the other as a result of relying of the judges on the opinion of different Islamic jurists. The only situation that a clear punishment is provided for is when a murder is committed in the course of trafficking. Article 24(2) of this code provides that: “If as a result of resistance of the traffickers, the law enforcement personnel or the ones who help the law enforcement personnel get killed, the traffickers shall be convicted to *Qisas* or execution.”

²⁵³ Counter Narcotics Code of Islamic Imarat of Afghanistan (2000) Official Gazette 793, art. 12.

²⁵⁴ Ibid, art. 20.

²⁵⁵ Ibid, art. 21.

In summary it could be stated that in terms of provisions other than penalties, this code is a verbatim copy of the 1990 counter narcotics code with the only change being the name of the Afghan government to Islamic Imarat and the punishment under the law being deferred to punishment by Islamic Shari'a.²⁵⁶ However, in regard to the punishment of drug trafficking, this code by mere referral to the Shari'a, has provided no considerable punishment that would require any scrutiny. This clearly indicates that enactment of such a code with no major differences with its predecessor would only show a waste of time on codification and the only reason that the government of that time might have had for this codification was the fact that the previous code was enacted during the communist regime, which was not acceptable to the Taliban, ideologically. It could be argued that this code has not played a vital role in the process of criminalization of drug trafficking in Afghanistan and this is evidenced from the fact that there were no changes that were not found in the previous counter narcotics code.

3.1.2.3. The 2003 Counter Narcotics Code

This code was enacted during a time period that the international community had a considerable contribution and influence on the codification process in Afghanistan. At the time of enactment of this code, heroin was at the most popular of its production and trafficking in the country that urged the drafters of this code to have separate rules for the trafficking of heroin in it for the first time in the evolving criminalization process for drugs in Afghanistan.

Article 24(2) of this code provides the definition for the drug trafficking as follows:

“Production, process, sell and purchase, supply, import, export and transport (of drugs) without permission of the Government”²⁵⁷

Article 25 of this code provides the punishment for the trafficking of opium. This article stipulates that the punishment for the trafficking of opium if the quantity of the substance is less than 50gr would be short imprisonment, which is between 24 hours to 1 year of imprisonment with a possible increase of the punishment from one to five years of imprisonment if the quantity of substance is

²⁵⁶ Ahmad Reza Sadiqi (2012). Evaluation of the theories of criminology regarding the drug-related offences, 3. Available at: <http://criminal-science.blogfa.com/post/14>

²⁵⁷ Counter Narcotics Code of Islamic Republic of Afghanistan (2003). Official Gazette 813, art. 24.

beyond 50gr and less than 1 kg.²⁵⁸ This article further stipulates that the period of imprisonment would go from five to seven years if the substance is between 1 to 10 kg with a further aggravation of the imprisonment from 7 to 20 years if the quantity of the substance exceeds 10 kg.²⁵⁹

The punishment for the trafficking of heroin is provided in Article 26 of this code. This article established that if the quantity of heroin is less than 10gr, the imprisonment of 1 to 3 years would be given to the offender that could then be increased to three to five years of imprisonment in case the quantity of the substance ranges from 10 to 50gr.²⁶⁰ It also provides that trafficking of the substance from 50gr to 1kg in quantity would result in a punishment of 7 to 15 years with the further possibility of rising from 16 to 20 years imprisonment if the quantity is exceeding 1Kg.²⁶¹

Anybody who commits the crime of *hashish* trafficking would be subject to the following punishments, according to article 27 of this code: Imprisonment for 24 hours to 3 months would be given to someone who smuggles a quantity of *hashish* not exceeding 50gr with a gradual increase of the punishment from 3 months to 1 year if the quantity of the substance is not less than 50gr and not more than 1kg.²⁶² The punishment of one to five years would be applied to someone who smuggles a quantity of between 1 to 10kg with the possible aggravation from five to 15 years if the quantity goes beyond 10kg.²⁶³

This code has taken a further step by providing in article 28 that the trafficking of other narcotic drugs not covered in the previous articles, depending on the quality and quantity of the substances and in the light of circumstances, would result in a punishment of 1 to 15 years imprisonment.²⁶⁴

With regards to the issues of the transportation of drugs, knowledge of the offender, alliance for trafficking, commission of trafficking in an organized manner and involvement of the government officials in the commission of the crime, this code has mirrored the provisions of the 1991 counter narcotics code.²⁶⁵

²⁵⁸ Ibid, art. 25.

²⁵⁹ Ibid, art. 25.

²⁶⁰ Ibid, art. 26.

²⁶¹ Ibid, art. 26.

²⁶² Ibid, art. 27.

²⁶³ Ibid, art. 27.

²⁶⁴ Ibid, art. 28.

²⁶⁵ Ibid, art. 32-43.

One of the innovations of this code, regarding the confiscation of the transportation vehicle, is granting the discretion of confiscation of a vehicle to the court when the quantity of the drugs is less than the minimum for confiscation in article 34 that was not provided under article 29 of the 1991 counter narcotics code.²⁶⁶

Furthermore, enumerating the two conditions for confiscation under article 38 of this code that are: The subject of confiscation should amount to the proceeds of crime or utilized in be used in the process of the commission of a crime is considered another innovation under this law that was not enshrined in the previous counter narcotics code.²⁶⁷

A very vital point that is considered to be an innovation in this code is the stipulation of the issue of recidivism in drug trafficking cases, whether inside or outside the country, that required application of the maximum punishment on the offenders.²⁶⁸ This provision was not articulated in any of the predecessors of this country narcotics code.

If we hold the above-mentioned articles of this code under scrutiny, it will be found out that apart from the above-mentioned innovation in this code, all the other provisions, including the punishments for the quality and quantity of substances, other than heroin that was not provided at all the previous codes, are a verbatim copy of the provisions of the 1991 code. It is also noteworthy that this code, for the first time, took the further step of the penalization of heroin trafficking in Afghanistan. The main reason for this articulation was that at the time of the enactment of the previous counter narcotics codes, opium was trafficked to the neighboring countries as a raw material from where it was reconstituted into heroin in the labs there. However, at the time of the enactment of this code, there was a sufficient number of heroin processing labs in Afghanistan in which the raw opium could have been processed to heroin. This led to the widespread accessibility of heroin across Afghanistan that was trafficked to other destinations in the world from this location.

Furthermore, this code, like the previous counter narcotics code, also considered the factors relating to the quality and quantity of the substances trafficked, the criminal conspiracies involved

²⁶⁶ Ibid, art. 34.

²⁶⁷ Ibid, art. 38.

²⁶⁸ Ibid, art. 44.

in the trafficking, commission of the crime in an organized manner and the involvement of government officials to be very vital in terms of determining the punishment for the offenders. It also determines the punishment of execution for the traffickers who commit murder in the course of trafficking.²⁶⁹

A close glance at the provisions of this code regarding the trafficking of drugs indicates that the range of punishments determined for the trafficking in this code entirely cover the minimum and maximum of the punishment in the legal system of Afghanistan, starting from 24 hours of imprisonment and ending with execution in the most severe instances.

Due to the involvement of international experts in the process of the codification of this document, it was assumed that this code would be all inclusive and comprehensive for the field of drugs in Afghanistan. However, the shortcomings and weaknesses of this code were revealed soon after its enactment that paved the way for the enactment of a new code in 2005.

3.1.2.4. The 2006 Counter Narcotics Code

Enactment of this code coincided with the shift in the policy of the United States administration regarding the narcotic drugs in Afghanistan. Until this time the US administration used to consider the drug problem in Afghanistan to be a domestic problem and hence it was not included in the counter insurgency policy. The shift in the US policy regarding the drugs in Afghanistan, fortified the need for enactment of a new counter narcotics code, that parallel to the new US strategy, arguably could provide the means and tools for dealing with the narcotics problems in Afghanistan in a better way.

This code, both from a formatting point of view and a penalties point of view, followed a different approach in comparison to its predecessors that could be comprehended in the followings. Regarding the definition of drug trafficking, article 15 of this code, in its own words, defines drug trafficking as:

²⁶⁹ Ibid, art. 31.

“Any person engaging in the following acts without a license or authorization issued according to the provisions of this law has committed a drug trafficking offense and shall be punished in accordance with the provisions of this law:

(a) The production, manufacture, distribution, possession, extraction, preparation, processing, offering, sale, delivery, brokerage, dispatch, transportation, importation, exportation, purchase, concealment, or storage of any substance or mixture containing a substance listed in Tables 1 through 3 annexed to this law;

- (b) Any of the operations in paragraph 1 of this article in relation to any chemicals or precursors listed in Table 4 for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances.”²⁷⁰

This definition of drug trafficking, compared with the other ones in the previous counter narcotics codes, is quite comprehensive and broad. The terms: distribution, possession, delivery, brokerage, concealment, and storage are acts that have found their way to the definition of drug trafficking for the first time. The only part that is not incorporated in this article is the phrase “without permission of the government” that used to be included in all the other definitions of drug trafficking in the former codes.

Regarding the punishment of drug trafficking, this code provides the following punishments for the trafficking of drugs:

“1. Whoever commits a drug trafficking offense involving the following quantities of heroin, morphine, or cocaine, or any mixture containing those substances, shall be sentenced as follows:

- (i) Less than 10 grams: Imprisonment for between 6 months and one year, and a fine of between 30,000 Afs and 50,000 Afs.
- (ii) Between 10 grams and 100 grams: Imprisonment for between one and three years, and a fine of between 50,000 and 100,000 Afs.

²⁷⁰ Counter Narcotics Law of Islamic Republic of Afghanistan (2006). Official Gazette 875, art. 15.

- (iii) Between 100 grams and 500 grams: Imprisonment for between three and five years, and a fine of between 100,000 Afs and 250,000 Afs.
 - (iv) Between 500g and 1kg: Imprisonment for between seven and ten years, and a fine of between 300,000 Afs and 500,000 Afs.
 - (v) Between 1kg and 5kg: Imprisonment for between ten and fifteen years, and a fine of between 500,000 Afs and 1,000,000Afs.
 - (vi) Over 5kg: Life imprisonment, and a fine of between 1,000,000 Afs and 10,000,000Afs.”
2. Whoever commits a drug trafficking offense involving the following quantities of opium or any mixture containing that substance shall be sentenced as follows:
- (i) Less than 10 grams: Imprisonment for up to three months, and a fine of between 5000 Afs and 10,000 Afs.
 - (ii) Between 10 grams and 100g: Imprisonment between six months and one year, and a fine of between 10,000 Afs and 50,000 Afs.
 - (iii) Between 100g and 500g: Imprisonment for between one and three years, and a fine of between 50,000 and 100,000 Afs.
 - (iv) Between 500g and 1kg: Imprisonment for between three and five years, and a fine of between 100,000 Afs and 500,000 Afs.
 - (v) Between 1kg and 5kg: Imprisonment for between five and ten years, and a fine of between 500,000 Afs and 1,000,000 Afs.
 - (vi) Between 5kg and 50kg: Imprisonment for between ten and fifteen years, and a fine of between 700,000 Afs and 1,500,000 Afs.
 - (vii) Over 50kg: Life imprisonment and a fine of between 1,500,000 Afs and 5,000,000 Afs.
3. Whoever commits a drug trafficking offense involving the following quantities of the substances or any mixture containing substances listed in Tables 1 through 4, with the exception of heroin, morphine, cocaine, and opium, shall be sentenced as follows:
- (i) Less than 250 grams: Imprisonment for up to three months, and a fine of between 5000 Afs and 10,000 Afs.

- (ii) Between 250 grams and 500g: Imprisonment for between three months and six months and a fine of between 10,000 Afs and 50,000 Afs.
 - (iii) Between 500g and 1 kg: Imprisonment for between six months and 1 year, and a fine of between 50,000 Afs and 100,000 Afs.
 - (iv) Between 1kg and 5kg: Imprisonment for between one and three years, and a fine of between 100,000 Afs and 500,000 Afs.
 - (v) Between 5kg and 10kg: Imprisonment for between five and ten years and a fine of between 500,000 Afs and up to 1,000,000 Afs.
 - (vi) Over 10kg: Imprisonment for between ten and fifteen years, and a fine of between 1,000,000 Afs and 1,500,000 Afs.
4. Subject to imprisonment term not exceeding 20 years, any person who, during the course any of the offenses set forth in paragraphs 1, 2, and 3 of this article, directs, controls, organizes, finances, or guides three or more persons, shall be sentenced to penalties twice as severe as the maximum penalties prescribed under the sub-paragraphs of paragraphs 1, 2, and 3 of this article.²⁷¹

The first innovation that is new in this code is the omission and addition of some quantities pertaining to the different types of drugs. In the previous code, with regards to heroin, morphine and cocaine between 10gr and 1kg, there was only a quantity of 50gr which is replaced now by 100gr and 500gr. A quantity of 5kg is also added that previously was only 1kg. The quantity of opium in the previous code ranged between less than 50gr to more than 10 kg with only mention of 1kg in between. However, in this code the range was less than 10gr and more than 50kg with the quantities of 100gr, 500gr, 1kg and 5kg in between. This code does not directly talk about *hashish* and instead covers all of the drugs, other than heroin, morphine and cocaine, under the same provisions that *hashish* is also part of them. This change in the quantity of the substance was mostly for the purpose of the adjustment of fair and just punishments for the offenders of drug trafficking.

Moreover, a considerable decrease is seen in the punishments for the trafficking of different quantities of various types of drugs. For instance, the punishment for trafficking of less than 10gr

²⁷¹ Ibid, art. 16.

quantity of heroin in the previous code was 1 to 3 years of imprisonment, which was quite severe in comparison to the current punishment of 6 months to 1 year in this code. This decrease could be found in all the provisions regarding the trafficking of heroin, morphine and cocaine. Ironically, although there is a change in the quantities of opium in the current code that is different from the previous code, there is not a considerable change of punishment with regard to different quantities. It could be asserted here that the leniency towards the offenders in this code is mostly covering the minor traffickers and rarely could be used by the major traffickers who smuggle huge quantities of drugs.

Furthermore, the other innovation in this code affiliated to drug trafficking is the stipulation of cash fines parallel to the imprisonments that are being given to the offenders. The amount of a cash fine, depending on the severity of the harm to the society, was ranging from 5000Afs (\$70) up to 10000000Afs (\$150,000).

Paragraph 4 of the above-mentioned article considers the organizing, controlling and financing of more than three people in the commission of drug trafficking as an aggravating factor that even justifies application of almost twice of the actual amount of the punishment provided that it does not exceed 20 years of imprisonment, which is the maximum period of imprisonment in the legal system of Afghanistan. This is exactly the paraphrase of the provision in the previous code that determined the punishment of 16 to 20 years of imprisonment for someone who committed drug trafficking in an organizational manner.

This code, in the case of involvement of more than one person in trafficking, tries to distinguish between the two situations when the share from the proceeds of crime of each offender is known or unknown. If the share is known, then every individual of them would be punished depending on the amount of their share; however, if the quantity is not known, then each one of them would receive a punishment as if they have individually smuggled the entire quantity of the drugs.²⁷² This is a new provision in this code.

The other innovation to this code is the provision that determines the equivalent punishment of principle offenders to the ones who attempt, conspire or get engaged in any preparatory acts of

²⁷² Ibid, art. 17.

crime of trafficking.²⁷³ This provision for the first time has found its way to the counter narcotic system of Afghanistan. The use of weapons in the course of the commission of drug trafficking is also penalized by five to 10 years of imprisonment or a cash fine of between 500,000 Afn to 1000000 Afn.²⁷⁴

The issues of the confiscation of the property, recidivism of offences, and transportation of drugs which leads to confiscation of the vehicle are similarly penalized like the previous of 2003 counter narcotics code with the only difference that the quantity of the transported drugs that would justify the confiscation of the vehicle is dramatically decreased in this law.²⁷⁵

The new provision that is mentioned for the first time in this counter narcotics code is the stipulation of a ban on the possibility of parole, probation and judicial leniency for the offenders of drug trafficking crimes.²⁷⁶ Furthermore, the other restriction that is articulated in this code is the prohibition on 20 days' home leave that according to article 37 of the Law on prisons and detention centers of Afghanistan is grantable to almost most of the prisoners in the light of circumstances.²⁷⁷

This code, despite being subject to some important innovations, was still considered not sufficient for the need of the field in Afghanistan and almost four years after its enactment, a new counter narcotics code in 2010 came into force that continued the already started journey of drug trafficking penalization in the country.

3.1.2.5.The 2010 Law Against Intoxicating Drinks and Drugs as well as Controlling them:

This code was enacted in 2010 for the purpose of dealing with the narcotic drugs problem in Afghanistan. Ironically, this code does not provide a definition of drug trafficking and rather directly goes to the punishment of drug trafficking in Afghanistan.

²⁷³ Ibid, art. 18.

²⁷⁴ Ibid, art. 22.

²⁷⁵ Ibid, art. 28.

²⁷⁶ Ibid, art. 31.

²⁷⁷ Ibid, art. 30.

Article 42 to this code states:

“1. Whoever commits a drug trafficking offense involving the following quantities of heroin, morphine, or cocaine, or any mixture containing those substances, depending on the quantity of substance and in the light of circumstances shall be sentenced as follows:

- (i) Less than 10 grams: Imprisonment for between 6 months and one years
- (ii) Between 10 grams and 100 grams: Imprisonment for between one and three years
- (iii) Between 100 grams and 500 grams: Imprisonment for between three and five years
- (iv) Between 500g and 1kg: Imprisonment for between five and ten years
- (v) Over 1kg: On the top of 10 years of imprisonment, one additional year of imprisonment for any excessive 500gr

2. In situations under 1(v) of this article, the maximum punishment shall not go beyond 20 years.”²⁷⁸

If we compare this article to the provisions regarding this issue in the previous code, we can see that this code has verbatim copied the text of the 2006 code in section (i)(ii) and (iii). However, in section (iv) this code has changed the minimum of the punishment from seven years to five years. Moreover, this code has merged the last two sections of article of the 2006 code and has changed the term “beyond 5kg” to “beyond 1kg”, with a change in the punishment from 16 to 20 years to a gradual increase of the punishment starting from 10 years to 20 years for any additional quantity of the drugs. This is a bold step in this code which limited the discretion of the judges in terms of unjust application of the law by adding a formula for increasing the punishment to a fixed degree for any additional fixed quantity of drugs. It is worth noting here that this code has omitted all the cash fines that were enshrined in the previous code and has only the imprisonment as the only reaction of the society towards the offenders.

²⁷⁸ Supra note 16, art. 42.

Regarding the trafficking of opium this code in its article 43 provides:

1. Whoever commits a drug trafficking offense involving the following quantities of opium or any mixture containing that substance depending on the quantity of the drugs and in the light of circumstances shall be sentenced as follows:

- (i) Less than 10 grams: Imprisonment for up to two months
- (ii) Between 10 grams and 100g: Imprisonment between 2 months and six months
- (iii) Between 100g and 500g: Imprisonment for between six months and one years
- (iv) Between 500g and 1kg: Imprisonment for between one to three years
- (v) Between 1kg and 5kg: Imprisonment for between three and eight years
- (vi) Over 5kg: On the top of 8 years of imprisonment, six additional months of imprisonment for any excessive 500gr

2. In situations under 1(vi) of this article, the maximum punishment shall not go beyond 20 years.”

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Comparison of this provision with the provisions of the 2006 code reveals that the drafters of this code have taken a very lenient approach towards the offenders of this crime, particularly minors who are traffickers. The best example of this leniency can be seen in the punishment of trafficking of 100gr to 500gr of opium, which previously was punished by one to three years and now is punishable by 6 months to one year. Similar to article 42 of this code, the provision in article 43 have also limited the discretion of the judges by limiting their authority and making them bound by the formula of increasing the punishment. The other change in the article of this code is that it omitted all the cash fines that were articulated next to the imprisonment terms in the previous code and has left imprisonment as the only reaction of the society towards the offenders.

Article 46 and 47 of this code stipulates that the punishment for the trafficking of *hashish* and drugs other than heroin, morphine, cocaine and hashish as follows:

²⁷⁹ Ibid, art. 43.

1. Whoever commits a drug trafficking offense involving the following quantities of hashish, depending on the quantity of drugs and in the light of circumstances, shall be sentenced as follows:
 - (i) Less than 10 grams: Imprisonment for up to one months
 - (ii) Between 10 grams and 100g: Imprisonment between one months and two months
 - (iii) Between 100g and 500g: Imprisonment for between two months and three months
 - (iv) Between 500g and 1kg: Imprisonment for between three months to six months
 - (v) Between 1kg and 5kg: Imprisonment for between six months to 1 year
 - (vi) Over 5kg: On the top of one year of imprisonment, three additional months of imprisonment for any excessive 500gr
2. In situations under 1(vi) of this article, the maximum punishment shall not go beyond 15 years.²⁸⁰
3. Whoever commits a drug trafficking offense involving the following quantities of the substances or any mixture containing substances listed in Tables of this code, with the exception of heroin, morphine, cocaine, opium and hashish shall be sentenced as follows:
 - (i) Less than 250 grams: Imprisonment for up to one month
 - (ii) Between 250 grams and 500g: Imprisonment for between one to three months
 - (iii) Between 500g and 1 kg: Imprisonment for between three months and 1 year,
 - (iv) Between 1kg and 5kg: Imprisonment for between one and three years
 - (v) Over 5kg: On the top of three years of imprisonment, three additional months of imprisonment for any excessive 500gr

²⁸⁰ Ibid, art. 46.

2. In situations under 1(v) of this article, the maximum punishment shall not go beyond 10 years.”²⁸¹

If we compare these two articles with the provisions of the previous code, this code, unlike the 2006 code, has separated trafficking of *hashish* from the other drugs. Similar to the other provisions of this code, articles 46 and 47 have also followed the direction of leniency towards minors in traffickers by reducing their punishments. These two articles have also confined the limits of the judge’s discretion with regards to sentencing the offenders by providing the formula for quantity-dependent increase of the punishment. The lack of provisions regarding the cash fine is also a characteristic of these two articles in comparison to the predecessor code.

The innovation that was introduced in this code is the punishment of those trafficking alcoholic drinks for the first time in the counter narcotics code. Article 45 of this code states:

1. Whoever commits an alcohol trafficking offense, depending on the quantity of drugs and in the light of circumstances, shall be sentenced as follows:
 - (i) Less than 1 liter: Imprisonment for up to two months
 - (ii) Between 1 and 10 liters: Imprisonment between two months and six months
 - (iii) Between 10 and 50 liters: Imprisonment for between six months and one year
 - (iv) Between 50 to 100 liters: Imprisonment for between one to three years
 - (v) Between 100 to 500 liters: Imprisonment for three to eight years
 - (vi) Over 500 liters: On the top of eight years of imprisonment, six additional months of imprisonment for any excessive 50 liters

2. In situations under 1(vi) of this article, the maximum punishment shall not go beyond 15 years.”²⁸²

²⁸¹ Ibid, art. 47.

²⁸² Ibid, art. 45.

Prior to this point, the other counter narcotics codes did not provide any provisions about the trafficking of alcohol and it was mostly left to the law on prevention of trafficking that was dealing with it generally as well as other goods.

This law regarding the punishment of two or more people who commit the crime of trafficking together, has not followed the aggravation approach and has instead determined that the punishment of each individual would be in the light of the specific circumstances.²⁸³ However, if this crime is committed as a conspiracy, in which one or more than one person is funded, controlled or organized, the funder, the instigator and organizer would receive twice of the punishment of an ordinary offender, provided that the punishment does not exceed 20 years imprisonment.²⁸⁴

The punishment of confiscation of transportation vehicles and recidivism of offences in this law are subject to the same provisions that the 2006 counter narcotics code provided for them.²⁸⁵ The only addition is regarding the transportation of a minimum of 25 liters of alcohol that would also make the vehicle subject to confiscation.

Pertaining to the issues of alliance, association and attempt to commit drug trafficking, this law has referred the issue to the 1976 penal code of Afghanistan which is a comprehensive criminal code regarding the general principles of criminal law.²⁸⁶

This code affirms the position of the 2006 code regarding the prohibition on use of probation; however, it takes a different approach regarding the situations that mitigation or judicial leniency exist by articulating that the punishment could not exceed two thirds of the maximum punishment.²⁸⁷ This is a step further that was not allowed regarding the drug trafficking cases in the previous laws.

²⁸³ Ibid, art. 49.

²⁸⁴ Ibid, art. 58.

²⁸⁵ Ibid, art. 59,60.

²⁸⁶ Ibid, art. 50.

²⁸⁷ Ibid, art. 63.

3.1.2.6.The 2018 Penal Code

The new Penal Code of Afghanistan was published on the official gazette on May 15th of 2017, determining the date of entry into force of it 15th of February 2018, in the words of the presidential decree by which the code was published. This code has brought all the penal provisions of different laws of Afghanistan that were scattered previously under one code which is inclusive of all the penal provisions in the legal system of Afghanistan excluding the *Sharia* related punishments which are governed by the Islamic criminal law. The drug trafficking crimes are also placed under chapter 5, Volume II of this code.

In the followings, we will provide the provisions of this code pertaining to the drug trafficking and a brief comparison of these provisions with the 2010 counter narcotics code.

Article 302 of this code provides the punishment for trafficking of heroin, morphine and cocaine by stipulating that:

“(1)Whoever commits a drug trafficking offense involving the following quantities of heroin, morphine, or cocaine, depending on the quantity of substance and in the light of circumstances shall be sentenced as follows:

1. Less than 10 grams: Imprisonment between 6 months and one years
2. Between 10 grams and 100 grams: Imprisonment between one and three years
3. Between 100 grams and 500 grams: Imprisonment between three and five years
4. Between 500g and 1kg: Imprisonment between five and ten years
5. Over 1kg: On the top of 10 years of imprisonment, an additional 6 months of imprisonment for any excessive 500gr. In this situation, the term of imprisonment shall not go beyond 30 years.

(2) Anyone who traffics the substances containing heroin, morphine and cocaine, depending on the amount of the said substances in the mixture shall be punished in accordance with paragraphs 1 to 5 of this article. ”²⁸⁸

Comparison of this provision of the code with the provision regarding the trafficking of heroin, morphine and cocaine under the 2010 counter narcotics code reveals some slight alterations that are made in the new code. The first point in the new code is the separation of heroin, cocaine and morphine from the mixed substances that contain these drugs which were under the same provision under the previous code. Under the previous code the total amount of the mixed substance was taken into consideration regardless of the amount of heroin, morphine and cocaine in it while in the current code, only the amount of these drugs in the mixed substance would determine the punishment and not the entire amount of the mixed substance. The second point of alteration is the addition of 6 months of imprisonment for any excessive 500gr of heroin, morphine and cocaine over 1Kg, which used to be one year of addition in the previous code. The third point amended in the new code is the maximum of the years of imprisonment that is 30 years and used to be 20 years in the previous code. In the legal system of Afghanistan, prior to the enactment of the new penal code, the maximum term of imprisonment was 20 years, and beyond that was execution. However, in the current code, this term is extended to 30 years with limiting the execution to a number of specific crimes.

Regarding the trafficking of acetic anhydride and synthetic, the code articulates that:

(1) Anyone who traffics acetic anhydride, depending on the amount of substance shall be punished as follows:

1. If the amount is up to 250gr/cc, an imprisonment between 6 months to 1 year or a cash fine between 30000Afs to 60000Afs.
2. If the amount of substance is more than 250gr/cc up to 500gr/cc, an imprisonment between 9 months to 1 year.
3. If the amount of substance is more than 500gr/cc up to 1Kg/liter, an imprisonment between 1 to 2 years.

²⁸⁸ Penal Code of Islamic Republic of Afghanistan (2017). Official Gazette 1260, art. 302.

4. If the amount of substance is more than 1kg/liter up to 5kg/liter, an imprisonment of two to five years.
 5. If the amount of substance is more than 5kg/liter up to 10kg/liter, an imprisonment of five to seven years.
 6. If the amount of substance is more than 10kg/liter, on the top of seven years of imprisonment, for any excessive gram/cc of the substance an addition of 1 day imprisonment. In this situation, the term of imprisonment shall not exceed 16 years.
- (2) Anyone who commits trafficking of synthetics (Amphetamine, Meta amphetamine, ecstasy MDMA), depending on the amount of substance would be punished as follows:
1. If the amount of substance is up to 5gr/cc, an imprisonment of 6 to 9 months or a cash fine of 30000Afs to 60000Afs.
 2. If the amount of substance is five to 10gr/cc, an imprisonment of 9 months to 1 year.
 3. If the amount of substance is 10 to 50gr/cc, an imprisonment of one to five years.
 4. If the amount of substance is 50 to 100gr/cc, an imprisonment of five to 10 years.
 5. If the amount of substance is more than 100gr/cc, on the top of 10 years of imprisonment, for any excessive gr/cc there shall be an additional 1 day of imprisonment. In this situation, the maximum of the imprisonment term shall not go beyond 16 years.”²⁸⁹

A close glance to this article of the code reveals that this code has taken an innovative approach in terms of criminalization of trafficking of acetic anhydride in bringing them under separate provisions from the other drugs. Under the 2010 code and the ones prior to it, acetic anhydride was criminalized under the same provisions for drugs other than heroin, cocaine, morphine, opium and hashish.

²⁸⁹ Ibid, art. 303.

Moreover, a least lenient approach is also taken in regard to the punishment of trafficking of these substances in comparison to the 2010 code. Under the 2010 code trafficking of up to 250gr/cc of such substances was punished by maximum of 1 month imprisonment which now is elevated to 6 months to 1 year for the same amount under the current code. Similarly, for the quantity of 250 to 500gr/cc, the determined punishment was between 1 to 3 months of imprisonment while it is 9 months to 1 year under the new code. This tendency of aggravation of punishment is followed till the end the provisions regarding the acetic anhydride which ended with a minimum of 7 years of imprisonment with an addition of 1 day imprisonment for any excessive gram/cc of the substance with a cap of 16 years, which used to be minimum 3 years of imprisonment with an addition of 3 months of imprisonment for any excessive 500gr/cc with a cap of 10 years. Based on this calculation, for an excessive 500gr/cc of this substance, the 2010 code had foreseen 3 months (90 days) of imprisonment which currently for the same amount is 500 days of imprisonment under the new code.

Furthermore, the second part of this article which criminalizes the trafficking of synthetic has introduced a completely new set of provisions that is not comparable with any of the provisions under the 2010 code. The only provisions under the 2010 code that are close to these provisions is the one related to heroin, morphine and cocaine that still is less severe than the punishment for the synthetic under the current code. This harshness of the law is due to the fact that the traffickers of the synthetics were enjoying the lenient punishments with the other categories of the drugs that were under lesser degrees of punishment and that had resulted into the increase of trafficking of such drugs in the country.

Pertaining to the criminalization of opium trafficking, the penal code stipulates as follows:

- (1) Anyone who commits crime of opium trafficking, depending on the amount of substance and in the light of circumstances shall be sentenced as follows:
 1. If the amount is less than 10gr, a cash fine of 30000af to 60000Afs
 2. If the amount is from 10 to 100gr, an imprisonment of 6 months to 1 year.
 3. If the amount is from 100gr to 500gr, an imprisonment of 1 to 2 years.
 4. If the amount is from 500gr to 1kg, an imprisonment of 2 to 3 years.
 5. If the amount is from 1kg to 5kg, an imprisonment of three to five years.

6. If the amount is more than 5kg, on the top of five years of imprisonment, for any excessive 500gr and additional 6 months of imprisonment. In this situation, the maximum of imprisonment term shall not exceed 16 years.

(2) Anyone who traffics opium mixed with the other substances, depending on the amount of opium in the mixture, shall receive a punishment based on paragraph 1 to 6 of this article.”²⁹⁰

Comparison of these provisions of this code with the same of the 2010 code reveals both mitigation and aggravation aspects in the current code. The existence of three mitigating factors in this article are: Firstly, the change of two months of imprisonment to a cash fine between 30000Afs and 60000Afs for trafficking of lesser than 10gr of opium. Secondly, the reduction of punishment of trafficking of 5kg of opium from eight years to five years. Thirdly, bringing the cap of punishment from 20 years to 16 years of imprisonment.

Meanwhile, there have been a number of aggravations in the current code that are: the increase of the punishment of trafficking of 10 to 100gr from 2 to 6 months of imprisonment up to 6 to 12 months, elevation of the punishment of 6 to 12 months to 1 to 2 years for trafficking of 100 to 500gr of opium and the addition of 2 to 3 years of imprisonment for trafficking of 500gr to 1kg or opium which was 1 to 3 years under the previous code.

In regard to trafficking of hashish, the code has the following articulations:

- (1) Anyone who commits crime of hashish trafficking, depending on the amount of substance and in the light of circumstances shall be punished as follows:
 1. If the amount of substance is less than 25gr, a cash fine of 5000Afs.
 2. If the amount of substance is more than 25gr up to 100gr, a cash fine of 5000Afs to 30000Afs.
 3. If the amount of substance is more than 100gr up to 500gr, an imprisonment of 6 months up to 1 year.
 4. If the amount of substance is more than 500gr up to 1kg, an imprisonment of 1 to 2 years.

²⁹⁰ Ibid, art. 304.

5. If the amount of substance is more than 1kg up to 5kg, an imprisonment of 2 to five years.
 6. If the amount of substance is more than 5kg up to 20kg, an imprisonment of five to 7 years.
 7. If the amount of substance is more than 20kg, on the top of 7 years of imprisonment, an additional 6 months of imprisonment for any excessive 1kg. In this situation, the maximum of imprisonment shall not exceed 10 years.
- (2) Anyone who traffics hashish mixed with the other substances, depending on the amount of hashish in the mixture, shall receive a punishment based on paragraph 1 to 7 of this article.”²⁹¹

Similar to the other provisions of this code, this article also entails a number of mitigating and aggravating factors in comparison with the 2010 code. There are two mitigating factors in this article that are: bringing the trafficking of up to 100gr of hashish under the cash fine which used to be subject to up to 3 months of imprisonment and reducing the cap of maximum punishment from 15 years to 10 years of imprisonment. The aggravating point in this article is the increase of the punishment of trafficking of amounts more than 100gr in a gradual manner which used to be far less under the 2010 counter narcotics law.

The penal code regarding the punishment of trafficking of drugs other than heroin, morphine, cocaine, acetic anhydride and synthetic, opium and hashish has the following provisions:

- (1) Anyone who traffics the drugs on the tables of the law against intoxicating drinks and drugs and controlling them other than heroin, morphine, cocaine, acetic anhydride and synthetic, opium and hashish shall, in the light of circumstances, receive the following punishments:
 1. If the amount of substance is less than 100gr/cc, to an alternative to imprisonment or a cash fine of 5000Afs to 30000Afs.
 2. If the amount of substance is more than 100gr/cc up to 250gr/cc, an imprisonment of 6 months.

²⁹¹ Ibid, art. 305.

3. If the amount of substance is more than 250gr/cc up to 500gr/cc, an imprisonment of 9 months up to 1 year.
 4. If the amount of substance is more than 500gr/cc up to 1kg/liter, an imprisonment of 1 to 3 years.
 5. If the amount of substance is more than 1kg/liter up to 5kg/liter, an imprisonment of 3 to five years.
 6. If the amount of substance is more than 5kg/liter, on the top of five years of imprisonment, an additional 6 months of imprisonment for any excessive 500gr/cc. In this situation, the maximum of imprisonment shall not go beyond 10 years.
- (2) Anyone who traffics the mixture of drugs on the tables of the law against intoxicating drinks and drugs and controlling them other than heroin, morphine, cocaine, acetic anhydride and synthetic, opium and hashish, depending on the amount of substances on the tables, shall be punished in accordance to paragraph 1 to 6 of this article.”²⁹²

This article has some innovative points that can take either a mitigating or aggravating status in comparison with the previous law. Under this article the amount less than 250gr is split to less than 100gr and more than 100gr; the former coming under the cash fine or alternative to punishment and the latter coming under and imprisonment of 6 months which in total was subject to 1 month of imprisonment under the former law. This provision is a mitigation for less than 100gr whereas an aggravation for more than 100gr. The amounts more than 250gr are under a constant increase of punishment which shows a clear harshness of the law on the traffickers in comparison to the 2010 counter narcotics law.

The bold point in this comparison is the lack of existence of any separate provisions in regard to the alcohol trafficking and incorporation of it under this article which used to be under a separate provision in the former counter narcotics code.

²⁹² Ibid, art. 305.

A general assessment of these provisions of penal code indicate that except a limited number of occasions, the code has taken a harsh tendency in dealing with trafficking of different narcotic drugs. This is evidenced by the increase of the punishment of trafficking of any of the substances while compared to the previous counter narcotic law. This harshness is mostly the result of the abuse of the leniency in the previous laws that was taken best use of by the traffickers.

In the following section, the international framework of drug trafficking would be provided that would be followed by an assessment of the status of Afghanistan in this framework.

3.2. The international legal framework and its impact on Afghanistan

If we take a close look at the history of narcotic drugs in the world, it dates back even to the the beginnings of humanity, when they first became familiar with the plants around them and started using them for food and medication purposes.²⁹³ However, the phenomenon of drug trafficking as a problem for the world was initially recognized in the international arena in the Opium wars of the 19th century and the Shanghai conference of the early 20th century in which the international community emphasized the need for an international mechanism for tackling this problem.²⁹⁴ This conference, participated in by only 13 countries²⁹⁵, due to discrepancies of views of the participant countries, could not create the intended international mechanism.²⁹⁶ This commission only resulted into a set of nine non-binding resolutions that were not of that power to create any obligations for the state parties to it.²⁹⁷ Realization of this desire was postponed to the 1911 Hague Conference resulting into enactment of the first ever 1912 International Opium Convention, the principles of which, despite being abrogated, are in control of the international drug control mechanism in the world so far.²⁹⁸ There have been numerous treaties such as 1925 Hague Convention, 1931 Hague

²⁹³ Mohammad Reza Saki (2001). *Narcotic Crimes from the Viewpoint of National and International Law*, Tehran, Shabuk, 278. Translated by author from Persian to English.

²⁹⁴ Suniti Kumar Chatterjee (1981). *Legal Aspects of International drug Control*, Hague, Martinus Nijhoff, 13-43.

²⁹⁵ The participating countries to this commission were, United States of America, Great Britain, France, Russia, Italy, Germany, Netherlands, Persia Iran), China, Portugal, Siam (Thailand), Japan

²⁹⁶ Supra note 294, 41.

²⁹⁷ Ibid 37-39

²⁹⁸ Daniel, Heilmann (2013). *Narcotic Drugs and Psychotropic Substances*, Oxford Public International Law, Oxford University Press, 2013, para. 6. Available at:

<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1069>

Convention, and 1936 Hague convention, enacted since 1912 in the international arena; however, all these treaties enacted before 1961 convention are abrogated by this treaty and the other subsequent ones.²⁹⁹ Hence, in the following we will elaborate up on treaty law existing in the arena of drug control in a way that first we will provide a brief historical background of pre 1961 treaties in one section and then in another section would draw our focus on post 1961 treaties that form the existing international structure of drug control.

3.2.1. Drug trafficking in the light of international treaties and conventions

Drug trafficking, being a crime of international concern, has made countries in different phases of the history to recourse to some bilateral and multilateral treaties. A deeper study of all these treaties shall be out of the scope of this chapter; however, an effort shall be put in to action for a brief and concise reflection of the provisions of these treaties in this research paper.

In the following section the treaty law governing the drug control in general and drug trafficking in specific would be taken in to scrutiny. The first part would focus on the time period between the enactment of the first International Opium Convention in 1912 and the establishment of the United Nations which is more of a historical nature. The Second part shall address the time period starting from the establishment of the United Nations until now.

3.2.1.1. Treaties between 1912 and the establishment of the United Nations (historical background):

Although the 1912 convention is considered to be the first multilateral treaty in the history of fight against narcotic drugs, the preamble of this treaty in its own words considers creation of this document a 'step further on the road opened by the international Commission of Shanghai of 1909'³⁰⁰. The language of the text indicates that efforts were made before and at the Shanghai conference and establishment of this treaty but never resulted in to establishment of any treaty. This treaty, established by 6 countries namely Germany, United States of America, China, France,

²⁹⁹ Supra note 1, para. 1.

³⁰⁰ International Opium Convention (23 Jan. 1912) Hague, Preamble

United Kingdom and Ireland in 23 January of 1912³⁰¹, aimed to establish the ‘gradual suppression of abuse’³⁰² of all the narcotic drugs and their derivatives as a ‘humanitarian endeavor’³⁰³ in the international arena. From the language of the text of the convention it could be easily understood that the participants of this treaty mostly intended to just bring some limitations on the trade of narcotic drugs and restrict trade of it to some ‘authorized persons’³⁰⁴ and specified ‘towns, ports and other localities’³⁰⁵ for ‘medical and legitimate purposes’³⁰⁶. This indicates that the first ever treaty was not creating any firm obligations on the participants to fully tackle the problem of narcotic drugs as it was only stipulating that if the state party is ready to prohibit export and import of it should prohibit it and in the absence of such readiness could only restrict it³⁰⁷. It could have emerged from the difference of the set of interests for the participating states which resulted in the ratification of this treaty by a limited number of states³⁰⁸ before the beginning of World War I.³⁰⁹ This limited number of states ratifying the convention did not last long as the peace treaty of Versailles, signed in 1919, required adherence of all its signatories to the articulations of the Hague Opium Convention.³¹⁰ The convention, based on its article 23, was supposed to enter into force after ratification of the party states; however, the Hague Opium Convention of 1912 came in to force after the establishment of the League of Nations in 1919.³¹¹ This requirement resulted in the increase of the number of party states to the above-mentioned convention up to 60 states.³¹²

Besides the impact of Versailles treaty, another important factor that influenced the growth of vitality of the Convention was the stipulation of the responsibility of state parties to the League of

³⁰¹ Ibid, preamble.

³⁰² Ibid, preamble.

³⁰³ Ibid, preamble.

³⁰⁴ Ibid, art. 5.

³⁰⁵ Ibid, art. 2

³⁰⁶ Ibid, art. 9

³⁰⁷ Ibid, art.7 and 8

³⁰⁸ Only China, Norway, Netherlands, US and Honduras ratified this treaty before the beginning of World War I

³⁰⁹ Supra note 298, 7.

³¹⁰ UNODC (2008). A Century of International Drug Control, 7. Available at:

https://www.unodc.org/documents/data-and-analysis/Studies/100_Years_of_Drug_Control.pdf

³¹¹ Supra note 294, 45.

³¹² Supra note 298, 7.

Nations Covenant to grant a general supervisory role to the League regarding the enforcement of agreements pertaining to narcotic drugs.³¹³

If we take this convention in to scrutiny, we can easily find the phrase “shall use their best endeavor to” in different articles that shows a non-binding nature of some provisions of it. ³¹⁴ In short, the convention due to adherence of some of the parties to their interest, coming from opium manufacture and trade, was not enforced as was aimed.³¹⁵ Nonetheless, the Hague Opium Convention being the first treaty in its kind is of a vital importance in the field of drug control and is considered to be a step of success in the war against narcotic drugs in the world.

It is worth mentioning here that the League of Nations put a really important step by creating the Advisory Committee on the Traffic in Opium and other Dangerous Drugs in 1919.³¹⁶ The purpose of this committee was specified as “to secure the fullest possible cooperation between the various countries in regard to the matter...”³¹⁷ This cooperation amongst the countries was mainly in the light of the Opium Convention of 1912 as this was the only existing international document dealing with the problem of drugs in the world.³¹⁸

It should be noted that Afghanistan was not a participant of the Hague Conference and did not become a party to this Convention until May 5, 1944. The reason behind that was mainly opium, although being cultivated, not being a concern for Afghanistan at that time and Afghanistan was not even considered a country involved in this field.

These efforts of the League of Nations regarding the war against drugs even paved the ground for the adoption of another convention on February 11, 1925, called the Agreement Concerning the Suppression of the Manufacture of, Trade in, and Use of Prepared Opium. ³¹⁹

³¹³ Covenant of the League of Nations (1920), art. 23 (c).

³¹⁴ Supra note 294, 51.

³¹⁵ Ibid, 52.

³¹⁶ Ibid, 74.

³¹⁷ Ibid, 58.

³¹⁸ Ibid, 76.

³¹⁹ David Bewley Taylor, Martin Jelsma (2011). Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation, Transnational Institute, Series on Legislative Reform of Drug Policies, nr (12), 2.

The treaty entered into force on July 28, 1926.³²⁰ This document also called itself to be ‘on the grounds of humanity’³²¹ one more step further for the ‘gradual and effective suppression’³²² of narcotic drugs.

This treaty for the first time made the importation, sale and distribution of opium the monopoly of governments and put an end to commissioning by individuals in regard to opium by altering commissioning to a salary-based service.³²³

Regarding the traffic of narcotics, it only required the contracting powers to directly exchange information amongst themselves.³²⁴

Afghanistan was not a party to this agreement and therefore no rights or obligations were created for this country by this agreement.

Simultaneous to the above-mentioned agreement, there was another convention adopted on February 19, 1925 by the name of the International Opium Convention. This convention was adopted for further completion and strengthening of The Hague Opium Convention of 1912 as the trade and manufacture of opium was still continued and required stricter rules and supervision.³²⁵ This convention came in to force on September 25 of 1928 and was ratified by 61 countries.³²⁶

The major step taken by this convention regarding control of drug trade was the stipulation of the requirement of obtaining an export and import authorization for any single importation and exportation.³²⁷ Granting an authorization often required a set of information regarding the type of substance, port of departure and entry and the amount of the substance which could easily bring the trade of drugs under control.³²⁸

³²⁰ Agreement Concerning Manufacture of, Trade in and Use of Prepared Opium (Feb. 1925). Geneva, preamble.

³²¹ Ibid, preamble.

³²² Ibid, preamble.

³²³ Ibid, art. 1.

³²⁴ Ibid, art 8

³²⁵ International Opium Convention (1925). Geneva, preamble.

³²⁶ Ibid, preamble.

³²⁷ Ibid, art 12 and 13

³²⁸ Supra note 294, 120.

One of the most important innovations of this treaty was creation of Permanent Central Board (PCB).³²⁹ The party states were bound to report to the board the amounts of production, consumption, stocks and confiscated opium and coca in their countries annually.³³⁰

Afghanistan was not a party to this convention and hence no rights and obligations were created by this convention for the country.

As the previous conventions from a practical point of view did not fully tackle the problem of manufacture and distribution of drugs, a new convention by the name of Geneva Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs was enacted in 1931.³³¹ The said convention entered in to force on July 9, 1933 and was ratified by 66 countries.³³² This convention in its own words was a supplement to The Hague Convention of 1912 and the Geneva Convention of 1925.³³³ This convention aimed to bring “the limitation of the manufacture of narcotic drugs to the world’s legitimate requirements for medical and scientific purposes and by regulating their distribution”.³³⁴ Under this convention the Drug Supervisory Body (DSB) was created with the task of collecting an estimate of national drug requirements of the countries³³⁵ based on which the limits for the manufacture of drug for countries was determined by this body.³³⁶ This convention also empowered Permanent Central Board to exercise further control on the states export and import beyond the extent of their stated needs in the submitted estimates.³³⁷

This Convention intended to reduce the illicit trade of narcotic drugs of different kinds by putting limitation on trade of such substances. However, mostly the limitation on trade for the purpose of reducing the illicit trade gave counter result and resulted in to the development of illegal market

³²⁹ Supra note 325, art. 19.

³³⁰ Ibid, art 22

³³¹ Supra note 319, 4.

³³² Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (1931). Geneva,

³³³ Ibid. art. 24.

³³⁴ Ibid, preamble

³³⁵ Ibid, art. 5.

³³⁶ Supra note 319, 4.

³³⁷ Supra note 332, art. 14.

for the drugs.³³⁸ This was mainly due to the fact that there was no clear definition of the word “estimates” in the convention and was solely left to the hands of parties to the Convention.

Afghanistan became a party to this Convention on July 21, 1935³³⁹ and was fulfilling its obligations arising from this convention by sending its estimates annually to the Permanent Central Board.

Subsequent to the above-mentioned conventions, not very long before the beginning of World War II a new convention under the name of Convention for the Suppression of the Illicit Traffic in Dangerous Drugs was enacted in 1936.³⁴⁰ This Convention entered in to force on July 10, 1947 and 36 states became party to it.³⁴¹ This Convention required the party states to take necessary measure for harshly penalizing any acts stipulated in article 2 of the Convention.³⁴² The only penal provision provided directly in this convention is the seizure and confiscation of drugs and any other instruments intended for the commission of the acts that came under article 2 of this Convention.³⁴³

The unique step taken in this convention for the purpose of drug control was the stipulation of judicial and legal cooperation amongst the states regarding the extradition of drug criminals.³⁴⁴ This convention, unlike its predecessors which were mainly focusing on controlling illicit drugs, really put a step further and considered trafficking as an international crime punishable by penal sanctions.³⁴⁵

Due to the above-mentioned prerogatives, this convention desired to gain success in combating the illicit traffic of drugs as it was specifically related to the suppression of illicit traffic of drugs;

³³⁸ Supra note 319, 4.

³³⁹ Supra note 332, art. 5.

³⁴⁰ Supra note 398, 10.

³⁴¹ Convention for the Suppression of the Illicit Traffic in Dangerous Drugs (1936). Geneva, preamble.

³⁴² Ibid, art. 2

³⁴³ Ibid, art. 10

³⁴⁴ Ibid, art. 7-10

³⁴⁵ Jay Sinha (2001). The History and Development of the Leading Drug Control Conventions, Report prepared for the Senate Special Committee on Illegal Drugs, Parliamentary Research Branch, 15-16.

however, due to the coincidence of ratification of this convention right at the beginning of World War II, the convention was only signed and ratified by a limited number of states.³⁴⁶

Afghanistan was not a party to the said Convention and hence there were no rights and obligations created by this Convention for Afghanistan.

It is to be noted that although each one of the afore-mentioned conventions had their shortcoming and difficulties, with an unbiased evaluation we can assert that each one of them have had their own impact in the campaign for controlling drugs, officially started in 1912 by ratification of first ever convention for drug control. All the above-mentioned conventions are abrogated now and are not in force anymore; nonetheless, they all have been very successful in the process of development of a framework for the drug control.

The following section will elaborate up on the framework of drug control in general and drug trafficking in particular after the establishment of the United Nations.

3.2.1.2. Treaties from the establishment of the United Nations until now (existing Structure):

Beginning of World War II was the point in which the enforcement of existing pre-war treaties faced decay. The legal framework of drug control which was established in 1912 and strengthened by the League of Nations was weakened by World War II.³⁴⁷ Nonetheless, the existing structure of drug control which was in place before beginning of the war did not diminish by the shadow of war and could survive the demise of its supporter, the League of Nations.³⁴⁸ After World War II, there was a need for supervising of the survived structure of drug control by an international organization.

The Lake Success Protocol signed in 1946, accomplished this task and transferred the responsibility of drug control from the League of Nations to the newly established United

³⁴⁶ Only Belgium, Brazil, Canada, China, Colombia, Egypt, France, Greece, Guatemala, Haiti, India, Romania and Turkey signed and ratified the convention.

³⁴⁷ Supra note 293, 302.

³⁴⁸ Heather L. Kiefer (2009). Just Say No: The Case Against Expanding the International Criminal Court Jurisdiction to Include Drug Trafficking, Int'l Comp. L. Rev. (157), 159.

Nations.³⁴⁹ The United Nations, unlike the League of Nations started to shift from a centralized institutional enforcement to a more treaty facilitating position as drug control was not specifically articulated in its charter.³⁵⁰ The United Nations gave the task of Opium Advisory Committee of the League of Nations to the two newly established bodies, namely the UN Commission on Narcotic Drugs (CND) and the UN Division of Narcotic Drugs (DND).³⁵¹

Another important step that was put further in the field of drug control by the United Nations was the Paris Protocol in 1948³⁵² that entered into force on December 1, 1949. This Protocol was tasked to fill the gaps of 1931 convention and cover the other synthetics of drugs stipulated in the said convention.³⁵³ This protocol was a step of success as is evidenced by the fact that the entire major drug manufacturing states became party to it and many non-party states applied the provisions of this protocol.³⁵⁴ It is worth stating here that Afghanistan became a party to this protocol on November 19, 1948.

A further development that took place in the campaign against drug was the New York Protocol of 1953³⁵⁵ which came in to force on March 8, 1963. This protocol could take three main steps namely, establishing the principle of limitation of opium production, restricting the right of

³⁴⁹The Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs concluded at the Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925, and 13 July 1931, at Geneva on 26 June 1936 signed at Lake Success, New York, 11 December 1946, 12 UNTS 179

³⁵⁰ Supra note 348, 160.

³⁵¹ UNODC (1966). Twenty Years of Narcotics Control Under the United Nations, 8. Available at: https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1966-01-01_1_page002.html#n01

³⁵² Supra note 298, para. 11.

³⁵³ Protocol Bringing under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as Amended by the Protocol Signed at Lake Success, New York, on 11 December, 1946, Signed at Paris on 19 November 1948, 44 UNTS 277.

³⁵⁴ Neil Boister (2001). Penal Aspects of the UN Drug Conventions, Netherlands, Kluwer Law International, 41.

³⁵⁵ Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and use of Opium (23 Jun. 1953) New York, 3.

production to 7 states³⁵⁶ and providing the board with comprehensive enforcement power.³⁵⁷ However, since most of the countries were collecting tremendous amounts of revenue from this trade, the process of ratification of this protocol was delayed.³⁵⁸ Hence, the United Nations Single Convention superseded this protocol in terms of the time and could only come into force in 1964.³⁵⁹ Afghanistan was not a party to this protocol; however, the fact that this protocol restricted the opium producing countries only to 7 countries and Afghanistan while being a producer of opium at this time was not amongst them, affected the country which resulted into proposal of Afghanistan to the third session of Commission on Narcotic Drugs of the UN to be considered one of the producing countries next to the 7 countries.³⁶⁰ The proposal of Afghanistan was communicated to the Secretary General to be included in the list of the countries, but Afghanistan in the thirteen session of the Commission withdrew its claim.³⁶¹

The existence of numerous treaties for regulating the drug control led the international community to work for a unified and single international document and as a result of such efforts; the Single Convention on Narcotic Drugs of 1961 was ratified.³⁶²

In the following section, the three pillars of drug control enacted under the supervision and control of the United Nations will be taken into consideration in detail.

3.2.1.2.1. Single Convention on Narcotic drugs of 1961

On 3 August 1948 the Economic and Social Council of the United Nations after an extensive evaluation regarding narcotic drugs adopted a resolution³⁶³ requesting the Secretary General of the United Nations to prepare a draft of a single convention.³⁶⁴ The product of these efforts was adoption of the 1961 Single Convention. This Convention was intended to aim limitation of

³⁵⁶ According to article 6 of the New York Protocol, only Bulgaria, Greece, India, Iran, Turkey, Union of Soviet Socialist Republics and Yugoslavia were allowed to produce opium.

³⁵⁷ Supra note 354, 41.

³⁵⁸ Supra note 293, 303.

³⁵⁹ Supra note 319, 5.

³⁶⁰ Supra note 351, 8.

³⁶¹ Ibid, 8.

³⁶² Supra note 298, 12.

³⁶³ ECOSOC (1943). Resolution 159 IID(VII).

³⁶⁴ Supra note 293, 303.

production of drugs, codification of all the existing conventions enacted since 1912 in to one convention and simplifying the existing structure of drug control in the world.³⁶⁵ However, the convention according to its preamble centralized on the following objectives:

“Desiring to conclude a generally acceptable International convention replacing existing treaties on narcotic drugs, limiting such drugs to medical and scientific use, and providing for continuous cooperation and control for the achievement of such aims and objectives.”³⁶⁶

This Convention came in to force on December 13, 1964 with 153 states party to it so far. By the entry in to force of this Convention, all the previous conventions and agreements were terminated and replaced.³⁶⁷

The said convention requires the party states to take into consideration all the four annexed lists of the substances under control and make them obliged to report to the Secretary General of the United Nations any changes to the controlled substances.³⁶⁸

This convention has specific provisions regarding the traffic of drugs requiring the state parties to take appropriate steps for prevention and suppression of illicit traffic, to assist and cooperate amongst each other for any related matter, and to ensure that any cooperation is done in a speedy manner.³⁶⁹

The penal provisions of this convention are stipulated in article 36, 37 and 38 of the convention sequentially articulating the penal provisions, seizure and confiscation, and measures against abuse of drugs.³⁷⁰

One of the strong points of this convention is that, unlike its predecessors that were solely focused on the supply issue, this treaty pays attention to the issue of demand too.³⁷¹

³⁶⁵ Supra note 354, 42. See also supra note 319, 5.

³⁶⁶ Supra note 1. Preamble.

³⁶⁷ Ibid, art. 44.

³⁶⁸ Ibid, art. 1 and 2.

³⁶⁹ Ibid, art. 35.

³⁷⁰ Ibid, art. 36,37 and 38

³⁷¹ Mellissa Bull (2008). *Governing the Heroin Trade From Treaties to Treatment*, London, Ashgate, 101.

In deed we have to admit that the penal provisions were very unique in this convention and none of the convention enacted before this, had such a provision stipulating the penal aspect of the problem.³⁷² These provisions have further been developed by the 1971 and 1988 Conventions which we will discuss them later in this chapter.

This convention, besides having many progressive and developing provisions, has some flaws and drawbacks too.

One of the gaps in this convention is non-stipulation of a provision which would lead to acceptance of any notifications from non-party states concerning the amendments to any of the four schedules of the Convention.³⁷³

The other flaw that could be found in this convention is the weak mechanism of control of cultivation of drugs as it requires the states to curtail and ultimately eliminate the drug-producing plants; however, due to the costs of elimination for the states, some developing states have avoided becoming a party to this convention.³⁷⁴

Afghanistan became a party to it on March 19, 1963 and has fulfilled its obligations arising from this convention to some degree.

Afghanistan as a party to the 1961 Single Convention has the following obligations to fulfill. The general obligations stipulated in article 4 of the Convention require the state parties to this Convention to take specific legislative and administrative measures for enabling the state parties to carry out the provisions of this convention, to cooperate with other states and to limit the production, manufacture, export, import, distribution of, trade in, use and possession of drugs to medical and scientific purposes.³⁷⁵ Afghanistan, in regard to this specific provision of the Convention has taken some appropriate steps which are indicated by legislation of drug problems in different stages. The adoption of the 1990 Counter Narcotics law³⁷⁶ is considered the first step towards fulfillment of obligations regarding legislation of necessary laws under this Convention. Although enactment of legislation that authorizes a specific executive organ within the government

³⁷² Supra note 319, 9.

³⁷³ Supra note 294, 354.

³⁷⁴ Supra note 354, 45.

³⁷⁵ Supra note 1, art. 4.

³⁷⁶ Supra note 241.

was a requirement under this article,³⁷⁷ the said law in Afghanistan did not provide for such a specific executive agency and rather sufficed by establishing a joint commission tangentially responsible for this task.³⁷⁸ Regarding the issue of cooperation, this law required the state to enter into agreements with other states and international organization for a better cooperation³⁷⁹; however, it is not specifically in the field of cooperation required by the convention for fighting the illicit traffic of drugs³⁸⁰ and extradition of illicit traffickers.³⁸¹ Even though it is not explicitly articulated, it could be inferred from the penalization of cultivation, production, consumption, trafficking, and possession of drugs in this law that it intended to restrict it only for medical and scientific purposes.

The subsequent Counter Narcotics Law³⁸² enacted in 2000 shows another step towards fulfillment of general obligations of Afghanistan arising from article 4 of the 1961 Single Convention. This law also sat forth establishment of a commission as the executive national agency responsible for dealing with the narcotic drugs.³⁸³ This commission was not fully serving the purpose of the requirement of the Convention.

It also provided for signing of agreements with other states and international organizations for strengthening cooperation in the field of campaign against narcotic drugs.³⁸⁴ However, this step was only for the purpose of cultivation and not international cooperation intended by the Convention. Limiting the drugs to only medical and scientific purposes in this law is also inferred from criminalization of cultivation, production, trafficking, trade and consumption of drugs as it is not explicitly provided in the law.

The enactment of 2004 Counter Narcotic Law³⁸⁵ was a step further in showing the commitment of the Afghan government for accomplishing its obligations under article 4 of the Single Convention

³⁷⁷ Commentary on the Single Convention on Narcotic Drugs (1973). United Nations, New York, 108.

³⁷⁸ Supra note 241, art. 7.

³⁷⁹ Ibid, art. 11

³⁸⁰ Supra note 1, art. 35 (b)(e). See also Supra note 377, 109.

³⁸¹ Ibid. art. 36 (2)(b). See also Supra note 377, 109.

³⁸² Supra note 253.

³⁸³ Ibid, art. 7.

³⁸⁴ Ibid, art. 11.

³⁸⁵ Counter Narcotics Law of Islamic Republic of Afghanistan (2004). Official Gazette 813

of 1961. This law also provided establishment of a commission responsible for administering the issues related to narcotic drugs in Afghanistan with a slight difference from the previous laws and that was establishment of a separate commission for each single province.³⁸⁶ This executive body, like the ones under the two previous laws, was also an institution with limited functions that was not letting it to act in accordance with the purpose of the Convention. This law also required the state to enter into agreements with other states and international organizations for the purpose of cooperation³⁸⁷ which again was not in the manner intended by the Convention. By penalizing any other activities related to narcotic drugs, it could be inferred that this law has also restricted narcotic drugs to only medical and scientific purposes.

In the year 2006, new Counter Narcotics Law³⁸⁸ was enacted in Afghanistan for compliance with its international obligations. Besides the Drug Regulation Committee³⁸⁹ established under this law, there was a ministry by the name of Counter Narcotics Ministry, already established as the executive body responsible for coordination of drug-related activities. This law for the first time contained a provision which explicitly requires the licensing of the cultivation, consumption, import, export, and any other activities related to narcotic drugs for only medical and scientific purposes.³⁹⁰

The last piece of legislation that currently governs the field of narcotic drugs was enacted in 2010 under the name of the Law against Intoxicating Drinks and Drugs and their Control.³⁹¹ This law is also a step towards compliance of Afghanistan with its international obligations arising from the 1961 and other related conventions. This law also foresees establishment of Commission of campaign against drinks and drugs which is responsible for all coordination and cooperation in the national level.³⁹² For the first time a drug committee tasked with evaluation of drugs to be placed in one of the four annexes of the 1961 Single Convention was established.³⁹³ For the first time this law stipulated as an obligation of the state to enter into agreements with other states and international organizations for better cooperation in the fight against

³⁸⁶ Id, Art. 18

³⁸⁷ Supra note 257, art. 22.

³⁸⁸ Supra note 270.

³⁸⁹ Ibid, art. 5.

³⁹⁰ Ibid, art. 7(4).

³⁹¹ Supra note 16.

³⁹² Ibid, art. 7.

³⁹³ Ibid, art. 9.

illicit traffic of narcotics and extradition of accused people.³⁹⁴ The restriction of drugs to only medical and scientific purposes is also enshrined in this law,³⁹⁵ which falls under the general obligations of states party to 1961 Single Convention.

The other important obligation that arises from the 1961 Single Convention is the issue of reporting to the Secretary General on the United Nations by the states in regard to the working of convention in the country and the text of laws for better implementation of the Convention.³⁹⁶ Practically, Afghanistan has annually furnished this report to the Secretary General. However, if we look in to the laws enacted in Afghanistan in the field of narcotic drugs since 1990, all the laws are silent about this requirement and have not made it the responsibility of state except the law promulgated in 2010 which makes this a duty of the state to report to the Secretary General about the working of 1961, 1971 and 1988 conventions.³⁹⁷

There are some other provisions in this Convention which require states to furnish the INCB with an annual report regarding the estimates of drug requirements³⁹⁸ and statistical returns.³⁹⁹ For fulfillment of these obligations, as evidenced by the reports annually published by the International Narcotics Control Board, Afghanistan has made efforts to furnish the board with the required reports. However, information provided in the INCB reports indicates that Afghanistan was not discharging this task flawless and even has failed in several years to furnish the Board with such reports.⁴⁰⁰

Bringing limitations on production, cultivation and manufacture of drugs to the extent determined in paragraph (1) of article 19 of the 1961 Convention is another duty imposed on the states by this convention.⁴⁰¹ Afghanistan in this specific regard has been very unsuccessful as the statistics provided on

³⁹⁴ Ibid, art 65(3).

³⁹⁵ Ibid, art.2(3).

³⁹⁶ Supra note, art. 18.

³⁹⁷ Ibid, art.65(6).

³⁹⁸ Supra note 1, art. 19.

³⁹⁹ Ibid, art. 20.

⁴⁰⁰ The INCB reports available at <https://www.incb.org/incb/en/publications/annual-reports/annual-report.html> start from the 1980 until now. A close glance to these reports show that from 1980 until 2001 the reporting system from Afghanistan was full of drawbacks. In the words of these reports, due to insurgency going on in the country, having a realistic estimate was not a simple task. At the same time providing statistics was equally challenging to the state as control was not exercised in all parts of the country by the state. According to the report published in 1987,1988 and 1989, the board had no information from Afghanistan: meaning that the country was not reporting to the board at all. There was only one report in 1990 that was furnished to the board and then until 2001 there was no report issued to the board. From 2001 until now, the reports furnished to the Board are much better in terms of estimates and statistics.

⁴⁰¹ Supra note 1. art. 21, 21bis and 22.

the UNODC report of 2014 indicate that cultivation of opium from 1994 to 2014 has grown from 71000 ha to 224000 ha country wide.⁴⁰² Regarding the production, the amount of opium produced in Afghanistan in 1994 that was 3200 tons⁴⁰³ increased to 6400 tons in 2014.⁴⁰⁴ This gradual increase shows the failure of Afghanistan in furthering this task as required by the Convention.

In regard to actions to be taken by states party to this Convention against illicit traffic of drugs⁴⁰⁵, Afghanistan has not been very successful and has failed to take appropriate actions. According to UNODC 2015 drug report, the traffic of drug cultivated and produced in Afghanistan is still continuing from the three traditional routes namely the Balkan route, northern route and southern route.⁴⁰⁶

The other responsibility laid on the state parties to this convention is requiring them to penalize acts enshrined in article 36 (1) of this Convention.⁴⁰⁷ Afghanistan since the enactment of its first law in 1990 has fulfilled this obligation and penalized almost all the acts mentioned in the said article. This could be noticed in all the laws regulating narcotic drugs starting from 1990 Counter Narcotics law until the current law which was enacted in 2010. It should be mentioned here that the process of penalization was not complete at the beginning and has developed gradually.

Relying on the above-mentioned analysis we could argue that Afghanistan, although not quite successful, has tried to fulfill its obligations arising from this convention. Admittance is required here that Afghanistan mostly has fulfilled its obligations on the paper and practically a high degree of failure is being noticed in fulfillment of these obligations. The failure in this field which in many respects has been beyond the control of the Afghan governments is connected to many reasons that would be elaborated up on in a separate chapter.

The single convention is considered to be the cornerstone of international legal framework of drug control in the world. This convention, due to being widely accepted and ratified, is considered to be a unique document in the declared war against the narcotic drugs.

⁴⁰² Supra note 166.

⁴⁰³ Supra note 147.

⁴⁰⁴ Supra note 166, 31.

⁴⁰⁵ Supra note 1, art. 35.

⁴⁰⁶ UNODC (2015). World Drug Report, 41. Available at:
https://www.unodc.org/documents/wdr2015/World_Drug_Report_2015.pdf

⁴⁰⁷ Supra note 1, art. 36 (1).

It is worth mentioning that this convention was amended by a protocol in 1972 for the purpose of strengthening the existing international framework of drug control.⁴⁰⁸ For this specific purpose, the 1972 Protocol added two new paragraphs to article 9 of the Single Convention of 1961 to better strengthen the position of INCB.⁴⁰⁹ This amendment protocol is introducing mechanisms for technical and financial assistance amongst the state parties.⁴¹⁰ It also stipulates establishment of educational and scientific research centers for improving the combat against illicit traffic of drugs.⁴¹¹ Afghanistan became a party to this protocol on February 19, 2015. Due to very recent accession of Afghanistan to this protocol, there are no records of any compliance of Afghanistan to this international instrument.

We can summarize here that although it was expected that the 1961 convention be inclusive of all the provisions in the arena of drug control, the reality proved that there was a dire need for enactment of the 1971 convention.

3.2.1.2.2. The 1971 Convention on psychotropic substances

For a long period of time the attention of the international community was solely focused on the narcotic drugs and tangential focus was being given to psychotropic substances. This tendency was changed when the world community realized that with the development of technology in the pharmaceutical fields, some substances could be produced that could even be more dangerous than the traditional narcotic drugs.⁴¹² The Commission on Narcotic Drugs while reviewing the issue came to this conclusion that the 1961 Single Convention was not directly covering these substances and hence required a separate attention to be paid to control of this phenomenon.⁴¹³ Initially there was a proposal for amending the 1961 Single Convention and adding psychopathic substance to it; however, this was rejected due to the fact that many complications could have been brought to the 1961 Convention.⁴¹⁴ Creation of complications was quite contrary to the objective of the 1961 Convention which was simplifying the drug control system in the world. As a result of the close

⁴⁰⁸ Supra note 298, 19.

⁴⁰⁹ Amended Protocol on Single Convention on Narcotic Drugs (1972). art. 2.

⁴¹⁰ Ibid, art.14.

⁴¹¹ Ibid, art. 38.

⁴¹² Supra note 354, 330.

⁴¹³ Supra note 298, para. 20.

⁴¹⁴ Supra note 354, 45.

attention of the WTO and other related organizations, this issue was brought in to the attention of the United Nations and ultimately the 1971 convention was adopted.⁴¹⁵ This Convention came into force on August 16, 1976 with 185 states party to it.

This convention aimed to combat the use of psychotropic substances by restricting them to the legitimate use, requiring cooperation of state parties to deal with such substances, and confining the efforts within the framework of the United Nations.⁴¹⁶

This convention, similar to the 1961 convention, has listed all the prohibited substances in to four lists that are annexed to the said convention.⁴¹⁷ The most important provision of this convention related to this paper is the issue of illicit traffic control that the convention has required the cooperation and coordination of parties in this regard.⁴¹⁸ The penal provisions of this convention are articulated in article 22 of the convention that mostly focuses on imprisonment and other types of liberty deprivation.⁴¹⁹ It should be articulated here the licensing requirement under this convention is not only for production but also for carrying and possession of these substances.⁴²⁰

Afghanistan became a party to it on May 21, 1985 and has put endless efforts to fulfill its obligations arising from it. Although Afghanistan was a party to this Convention at the time of adoption of 1990 and 2000 Counter Narcotic laws, the psychopathic substances are not articulated in these two laws. The law that stipulated these substances for the first time was the 2004 Counter Narcotics law. Following that the two other laws namely the 2006 and 2010 have elaborated on the issue respectively in more details.

The obligation of restricting these substances to only medical and scientific purposes under this convention is enshrined explicitly in the 2006⁴²¹ and 2010⁴²² laws and implicitly in the 1990, 2000 and 2004 laws. However, the actual practical restriction which is the desire of the Convention is not materialized in Afghanistan so far.

⁴¹⁵ Ibid, 330.

⁴¹⁶ Supra note 2, Preamble.

⁴¹⁷ Ibid, art. 2.

⁴¹⁸ Ibid, art. 21.

⁴¹⁹ Ibid, art. 22.

⁴²⁰ Supra note 293, 331.

⁴²¹ Supra note 270, art. 7(4).

⁴²² Supra note 16, art. 2(3).

The requirement of obtaining a license for manufacture and trade of such substance is another obligation imposed on state parties to this Convention. Afghanistan at least has made obtaining a license as an obligation for manufacture and trade of such substances under the 2004⁴²³, 2006⁴²⁴ and 2010⁴²⁵ Counter Narcotics laws.

The Convention also requires the state parties to furnish a report to the Secretary General of the United Nations changes in their laws, abuse and illicit traffic of psychopathic substances⁴²⁶ which accordingly is enshrined in the 2010⁴²⁷ Counter Narcotic law of Afghanistan. This report is practically being furnished to the Secretary General annually.

Furnishing an annual report to the INCB is another obligation of the state parties under this Convention.⁴²⁸ Afghanistan, except when the war in the country has not permitted, has often tried to furnish the board with the required reports.⁴²⁹

The other obligation enshrined in this convention is the requirement of penalization of the all the acts articulated under article 22 of this Convention.⁴³⁰ Afghanistan has fulfilled this obligation by penalizing all the acts articulated in this Convention in the pertaining laws adopted in 2006 and 2010.

If we take in to consideration the above-mentioned analysis, we could argue that Afghanistan, at least on the paper, has tried to fulfill its obligations; however, in practice most of these obligations are not fulfilled and require close attention of the governments to them in the future.

⁴²³ Supra note 257, art. 7.

⁴²⁴ Supra note 270, art. 7.

⁴²⁵ Supra note 16, art. 11.

⁴²⁶ Supra note 2, art. 16(1).

⁴²⁷ Ibid, art. 65 (6).

⁴²⁸ Supra note 2, art. 16(4).

⁴²⁹ Afghanistan has furnished INCB with the required report regarding this convention in 1986, 1990, and 2001 until now. See at <https://www.incb.org/incb/en/publications/annual-reports/annual-report.html>

⁴³⁰ Supra note 2, art. 22.

3.2.1.2.3. The 1988 Convention against Illicit Traffic in the Narcotic Drugs and Psychotropic Substances

Until late 70s, the existing system of drug control under the United Nations was working well especially after the enactment of the 1971 convention and the derivations occurring from the two afore-mentioned conventions were not that serious to be a problem for the international community.⁴³¹ However, the beginning of 80s was the time when there was a boom of illicit traffic of drugs and other related substances which resulted into the idea of having a new convention to be centralized on the issue of illicit traffic of narcotic drugs and other substances.⁴³² This Convention was adopted at a time when production of narcotic drugs was increasing day after day, endless illicit revenues were generated by this trade that could destabilize the states and make them corrupt, and extensive cooperation was needed for dealing with such problems.⁴³³ Based on these needs in the international level, the Commission on Narcotic Drugs was tasked by the General Assembly of the United Nations to prepare a draft of such convention which resulted in to enactment of the 1988 convention.⁴³⁴

This Convention came into force on November 11, 1990 and 190 states are party to it so far.

The purpose of this convention was to promote and enhance the cooperation and coordination amongst the party states to it for a better way to cope with the illicit traffic of narcotic drugs and other substances with sovereign equality, territorial integrity and non-intervention in the domestic affairs of other states.⁴³⁵ This Convention, in its own words, is considered to be a supplement to the 1961 and 1971 conventions for countering the problem of illicit traffic of drugs.⁴³⁶

The most important part of this convention is the crimes and penalties part of this convention. The crimes enshrined in this convention are also required to be codified in the national legal system of the party states.⁴³⁷ This convention penalizes production, manufacture, extraction, preparation,

⁴³¹ Supra note 310, 67.

⁴³² Supra note 293, 335.

⁴³³ Supra note 3, Preamble.

⁴³⁴ Supra note 298, 24.

⁴³⁵ Supra note 3, art. 2.

⁴³⁶ Ibid, Preamble.

⁴³⁷ Ibid, art. 3.

offering, distribution, sale, delivery, brokerage, dispatch, transport, transit, export, import, cultivation, and possession of all types of narcotic drugs and their derivatives.⁴³⁸ The Convention also penalizes organization, management and financing of the above-mentioned acts, conversion, transfer, acquisition, possession and use of property coming from them and concealment and disguise of the true source and nature of the property derived from any of the afore-mentioned acts.⁴³⁹ Any conspiracy, incitement and association is also considered subject to penalization under this Convention.⁴⁴⁰

The issue of jurisdiction is also a vital point in this convention as the states are required to prosecute whatever acts penalized in this convention within their national legal framework.⁴⁴¹

The sanctions considered to be given to the offenders under this convention are in the form of principle punishments such as imprisonment, complementary punishments such as confiscation and pecuniary sanctions, and security measures such as rehabilitation and treatments.⁴⁴² This Convention has considered all the offences enshrined in article 3(1) of it to be extraditable and specifically be mentioned in any extradition treaty concluded between party states.⁴⁴³ Mutual legal assistance is another important provision of this convention stipulate in article 7 of it.⁴⁴⁴ This provision is considered to be unique in this Convention has it was the first time this issue is articulated in this Convention and previous efforts in the two other international documents namely 1961 and 1971 for stipulation of this provision had failed.⁴⁴⁵

Afghanistan became a party to this Convention on February 14, 1992 and to a limited degree has acted in compliance with this Convention. The obligation of reporting to the Secretary General is fulfilled by Afghanistan from the time of ratification of this Convention.

The issue of penalization of the acts under this convention is deeply taken in to consideration in the adopted laws of the country. The laws adopted from 1990 until 2006 have all taken this point

⁴³⁸ Ibid, art. 3.

⁴³⁹ Ibid, art. 3.

⁴⁴⁰ Ibid, art. 3.

⁴⁴¹ Ibid, art. 4.

⁴⁴² Ibid, art. 3 para 4.

⁴⁴³ Ibid, art. 6.

⁴⁴⁴ Ibid, art. 7.

⁴⁴⁵ Supra note 354, 301.

of penalization into consideration; however, not to that details and elaboration that the 2010 law has done. The Law against Intoxicating Drinks and Drugs and Their Control adopted in 2010 has penalized almost all the mentioned acts under article 3 of the 1988 Convention.⁴⁴⁶ This law has penalized the cultivation⁴⁴⁷, traffic⁴⁴⁸, import and export, use and possession⁴⁴⁹ and even illicit consumption⁴⁵⁰ of drugs and its derivatives. The law has also considered alliance, association and attempt to commit such crimes punishable.⁴⁵¹ The most important step in the arena of penalization in this law is criminalization of management, organization, controlling and financing of the any acts enshrined in the 1988 Convention.⁴⁵²

The other requirement of this law is the issue of extradition which is not considered in any of the adopted counter narcotics laws of Afghanistan. This shows a failure of Afghanistan in this specific regard.

The concluding remarks about this convention is that it is unique in its kind as it sets a framework in the international arena that is mostly concerned with the illicit traffic of narcotic drugs and other similar substances. We can summarize that the penal provisions of this convention are considered the corner stone of the existing mechanism for tackling the drug trafficking problem in the world.

In the following part, the theoretical basis for criminalization of the drug trafficking and the application of these theories and policies in codification of drug trafficking in Afghanistan will be explored.

3.3. Theories of drug control and their reflection in the Afghan legislation

In the war against drugs, there are certain theories and policies that could be utilized for the purpose of better campaigning against drugs. These theories and policies range from a strict prohibition to full legalization. Societies, depending on their needs, would have recourse to some or all of these theories in the process of dealing with the drug problems. In this part I will first elaborate on each

⁴⁴⁶ Supra note 16, art. 41- 64.

⁴⁴⁷ Ibid, art. 41.

⁴⁴⁸ Ibid, art. 42-47.

⁴⁴⁹ Ibid, art. 52.

⁴⁵⁰ Ibid, art. 57.

⁴⁵¹ Ibid, art. 50.

⁴⁵² Ibid, art. 58.

one of these theories and policies in section one and then in section two I will scrutinize the application of each one of these theories within the criminal justice system of Afghanistan regarding the drug offences.

3.3.1. Theoretical basis for the regulation of drug offences

As the success of the war against narcotic drugs is the main goal in the criminal justice system of every single country of the world that suffers from the problem of drugs, there have been numerous theories introduced by different scholars of the field and tested by the governments within the criminal justice systems around the world. Since these theories and tools, called theories or policies, vary from one extreme end of strict criminalization to the other extreme end of full legalization, with the de-criminalization in the middle, I will focus this study on each one of them with the differences of views regarding the understanding of them. It is worth mentioning that besides these three afore-mentioned policies, there are some other ones such as de-penalization and regulation that would also be dealt with in the following.

The first and the most commonly practiced approach is the strict prohibition in which all acts and omissions pertaining to drugs, such as the use, manufacture, possession, transportation, supply, sale, and purchase of drugs is considered criminal.⁴⁵³ This currently most prevalent drug control regime was not at the center of attention for several centuries when drugs were used for medical and physical strength purposes until the harmful nature of them to the human body and negative impacts of them on the societies were revealed in the late 19th and early 20th centuries.⁴⁵⁴ This was the first time that the initial signs of the criminalization of drugs could be found in the legal systems of the countries, although neither widespread nor comprehensive.⁴⁵⁵ This model, the dominant prohibitionist model, is one extreme of the war on drugs. This model seeks to get rid of the use of some specific substances considered harmful or morally hazardous, assuming that the state has the right to impose on its citizens its own values pertaining to moral and health issues.⁴⁵⁶ It is built on

⁴⁵³ Bob Douglas, Alex Wodak, David McDonalds (2012). *Alternatives to Prohibition, Illicit Drugs: How We Can Stop Killing and Criminalizing Young Australians*, Report of the Second Australia 21 Roundtable on Illicit Drugs, University of Melbourne, 5.

⁴⁵⁴ Supra note 256, 1.

⁴⁵⁵ Mansour Rahmdil (2007). *Criminal Policy of Iran Towards Drug Crimes*, Tehran, Samt, 34.

⁴⁵⁶ Jose Campero et al (2013). *From Repression to Regulation: Proposals for Drug Policy Reform*, Bogota, Friedrich Ebert Stiftung, 38.

the notion that if all the drugs are eliminated, the chances of abusing or even using them would be scarce and to reach this goal, we have to stop the supply of drugs by banning its cultivation, production and commercialization, which makes them expensive and therefore difficult to obtain.⁴⁵⁷ This gradual- developing tendency towards strict prohibition, started in the early 20th century, has continued its developing pace until the current time. There are only a limited number of derogations from this trend in some localities of the world that is mainly due to the lack of responsiveness of a strict prohibition policy in those localities, which are very limited in number.

This policy, despite seeming very clear and straight, is quite ambivalent in reality. Apparently this policy is assumed to serve the purpose effectively by halting the criminals and their networks; however, the results are quite contrary as the other side of the spectrum, revealing the generation of unlimited revenue that the criminal gangs obtain as a result of prohibition and hence high prices of drugs in the market.

De-criminalization is the second in the range of policies for fighting the drug problem in a criminal justice system. De-criminalization is a process by which the specific acts are removed from the scope of criminal law and dealt with according to the civil law.⁴⁵⁸

Drug decriminalization, which is intermediate to legalization and strict prohibition, is a third way which represents a level of drug enforcement, under which the use of drugs and their possession for personal use are legal and they are addressed as administrative or health issues rather than going through the criminal court system yet the supply, trade, and sale of it would still remain illegal and under strict penalization.⁴⁵⁹ This model is between the two extremes which are based on public health and a user's human rights. Based on the harm reduction policies it is assumed that the elimination of consumption is really impossible, and for this reason the focus is on limiting its harmful impacts by promoting de-criminalization to prevent users from being isolated and marginalized in their societies.⁴⁶⁰ A clear instance of this model is found in the policies utilized in

⁴⁵⁷ Ibid, 38.

⁴⁵⁸ Supra note 453, 5.

⁴⁵⁹ Supra note 227, 3.

⁴⁶⁰ Supra note 456, 38.

the Netherlands for the de-criminalization of the use and possession narcotics while the trade, manufacture and supply of it is still criminalized.⁴⁶¹

Although this policy has worked in some jurisdictions like the Netherlands, Portugal, and Washington State in the US, it is still criticized by some commentators by arguing that the only solution to truly get rid of those problems is the legalization of all aspects of drugs.⁴⁶² As they argue that half-way measures such as de-criminalization may often fail, and if such a failure takes place, there will be a stronger push for more strict drug laws by claiming that decriminalization was tried and did not succeed at all.⁴⁶³ The reason for the lack of success of these half-way policies is due to the fact that they retain the incentives in the illegal market as there still might be a high demand for drugs due to de-criminalization of the use of it.⁴⁶⁴

Legalization of drugs is the other policy and theory that has drawn the attention of policy makers in the war against drugs. Legalization is referring to a situation in which certain behaviors are neither considered a crime nor an act dealt with by the civil laws anymore, unless a harm is given to someone as the result of a behavior.⁴⁶⁵ The main purpose of legalization is to liberalize both the demand and supply side of the drug trade, providing the ground for drug transactions to take place in a legally regulated manner.⁴⁶⁶ Legalization is truly at the other extreme which seeks the total liberalization of the drugs market, a libertarian policy which takes its roots from the idea of market's ability to regulate itself believing on the principle that the state cannot and, more clearer, should not intervene with people's decision to use their desired substances, even if the substance is proven to be harmful.⁴⁶⁷ This reflects the view that psychoactive drugs could be traded under the rules of the market, just like an ordinary good, and any harm inflicted by a third party as a result of use of drugs by a user who is under the influence of drugs is punishable: meaning that

⁴⁶¹ Ibid, 38.

⁴⁶² Mark Thornton (2007). Prohibition versus Legalization Do Economists Reach a Conclusion on Drug Policy? The Independent Review, 417–433. Available at: https://www.independent.org/pdf/tir/tir_11_03_05_thornton.pdf

⁴⁶³ Ibid, 417-433.

⁴⁶⁴ Ibid, 417-433.

⁴⁶⁵ Supra not 453, 5.

⁴⁶⁶ Supra note 227, 3.

⁴⁶⁷ Supra note 456, 38.

consumers are allowed to use drugs, but they must feel responsible for the harmful consequences of their actions that might cause damages to a third party which used to be the legal regime for tobacco until recent years in some countries.⁴⁶⁸ For justification of this policy, it is often claimed that the resources and funds allocated for the campaign of drug prohibition are really marvelous, with very limited success and if these resources are spent for public awareness and medical purposes, it could prove very efficient.⁴⁶⁹

This policy, although well supported by some scholars, has not been applied anywhere in the world. This might be due to the extreme nature of it that would certainly lead to an unleashed drug dominated world.

Besides the three above-mentioned theories there are two other policies that have been introduced by some scholars for dealing with the drug problem. One of the two is de-penalization which refers to a situation when the severity of the punishment for certain acts is reduced.⁴⁷⁰ Despite the assumption by some scholars that de-penalization is a type of or quite similar to de-criminalization, it could be different from de-criminalization in the way that in de-criminalization the criminal nature of the acts is totally washed out; however, in de-penalization, there is only a reduction in the punishment while the criminal nature of the act is still existence This policy has been quite widely used in different jurisdictions in regard to different offences.

The other policy in the line is regulation which refers to a situation when a strict controlled legal market for drugs is established as is the case with pharmaceutical drugs and tobacco products at the current time.⁴⁷¹ The purpose of this regulation is imposing strict rulings on some drugs that despite being allowed are under extensive control by the government. This tendency is commonly being practiced with regards to the drug-related activities all around the world.

Overall, the purpose of all these policies is to halt the problem of drugs at a national level and in turn at an international level. All these policies have some common goals that could be summarized as:

⁴⁶⁸ Ibid, 38.

⁴⁶⁹ Supra note 256, 5.

⁴⁷⁰ Supra note 453, 5.

⁴⁷¹ Ibid, 5.

“Reduce harm caused by drug use to drug users

Reduce harm caused by drug users to non-users

Minimize harm caused by anti-drug policies to drug users and third parties

Minimize the profits from the drug trade that accrue to organized crime and other illegal actors

Minimize the share of drug-related income obtained by the state observing the first four objectives, to fund public health policies and the fight against organized crime.”⁴⁷²

Although the aim of all the above-mentioned policies might be similar in theory, in practice any one of these policies may have a quite different result. This could be a better argument if it is stated that all these policies are tools and means for reaching the goal that ultimately is the reduction or, in the best scenario, elimination of the drug problems from the world.

Having elaborated on the existing policies in the field of dealing with the drug problems, in the following section the application of each one of these policies will be assessed in the counter narcotic codes of Afghanistan.

3.3.2. The reflection of the policies in the counter narcotic laws of Afghanistan

Afghanistan started the codification of drug-related offences nearly a century ago. In the process of the codification of drug offences, criminalization policy has been quite dominant in comparison with the other policies. However, in different phases of codification, we can point at some occasions when the other policies regarding the war against drugs, such as de-penalization, regulation and legalization, have also found their way into the criminal justice system of Afghanistan. For a better understating of these policies in the codification process of drug offences, we will elaborate on the reflection of these policies in separate sections. It should be kept in mind that since the topic of this chapter is about the criminalization of drug trafficking, the focus of this part would also be solely on the application of these policies in the field of drug trafficking.

⁴⁷² Supra note 456, 40.

3.3.2.1.Criminalization policy:

This policy has been utilized in Afghanistan extensively in the war against drugs. The early signs of it could be found in the first criminal *Nezamnama* of Afghanistan in 1923 which was the first *Ta'zir* code dealing with the crime of drugs. Prior to this, drug-related offences, which were mostly confined to the consumption of it, were criminalized by the Islamic Shari'a in Afghanistan. However, the quality and quantity of criminalization has varied at different phases of the codification, which has already been elaborated on in the section 3 of this chapter.

3.3.2.2. De-criminalization policy

De-criminalization, which commonly is exercised in the demand dimension of the drug trade, ironically could be traced in the supply side of the drug business in Afghanistan. Although, it is argued that there is no sign of de-criminalization in the criminal justice system of Afghanistan at all⁴⁷³, an early sign of it could be seen in the 1923 *Nezamnama* article 125 which accepts the export of *hashish* and bang and removes any criminal responsibility attached to these acts as long as they are not supplied for use within the country.⁴⁷⁴ There might be a counter argument that the export of hashish and bang was not criminalized by any code in the past and since there was no criminalization, there would be no room for de-criminalization. This counter argument is void as the dominant law before enactment of this code regarding the drug offences was the Islamic Shari'a in which use, possession and trade of narcotic drugs of any kind was already penalized with the only difference that the punishment was left to the hands of judge due to being Ta'ziri crimes. This example of de-criminalization was once again affirmed in the 1927 criminal *Nezamnama*⁴⁷⁵ and kept this status until the enactment of the first counter narcotics code in 1990 in which both the supply and demand sides of drug trafficking were criminalized. Besides the above-mentioned pattern of de-criminalization, we do not see any other examples of it in the criminal justice system of Afghanistan.

⁴⁷³ Supra note 256, 4.

⁴⁷⁴ Supra note 4, art.125.

⁴⁷⁵ Supra note 230, art. 103.

3.3.2.3. Legalization policy:

Although the full legalization, including all aspects of drug-related offences, is neither practiced nor feasible, legalization under certain circumstances and conditions and for determined purposes has been practiced in different parts of the world. Afghanistan is one of those countries in which examples of a legalization of this nature can be found. The first occasion of it can be found in the counter narcotic codes of 1990, 2000, 2003 and 2006 respectively in article 13, 12, 24 and 15 of them. These articles relate to the definition of drug trafficking in which all the activities related to drugs as long as it is done by the permission of the government is considered to be legal. The scope of the permission of the government and the purpose of it varied amongst the counter narcotics laws. Article 13 of both the 1990 and 2000 counter narcotics laws were confining the limits of this license to only medical purposes and solely to the Ministry of Public Health, which was banning the issuance of a license to any private entities and any purpose other than medical.⁴⁷⁶ The 2003 and 2006 counter narcotic codes in their article 7 expanded the issuance of the license from the Ministry of Public Health to any natural or legal person without holding a governmental title.⁴⁷⁷ These two laws further developed the scope of this licensing to educational, and research purposes beyond medical purposes respectively in article 12 and 14.⁴⁷⁸ The 2010 counter narcotics law in its article 11, beyond affirming the position of its predecessor laws, expanded this legalization to industrial purposes too.⁴⁷⁹

Beyond this, no further signs of legalization can be found in the counter narcotic laws of Afghanistan in regard to drug trafficking.

3.3.2.4. De-penalization policy

De-penalization which refers to reduction of the penal responsibility of the offence, can be found in the counter narcotic laws of Afghanistan on different occasions. The initial sign of it could be found in the reduction of a punishment for heroin trafficking in the 2006 counter narcotics code compared to the 2003 code. In 2003 code the punishment of trafficking of heroin in quantities of less than 10gr was 1-3 years of imprisonment, 10 to 50gr was three to five years and 50gr to 1kg

⁴⁷⁶ Supra note 241, art. 13. See also supra note 253, art.13.

⁴⁷⁷ Supra note 257, art. 7. See also Supra note 270, art. 7.

⁴⁷⁸ Ibid, art. 12. See also Supra note 270, art. 14.

⁴⁷⁹ Supra note 16, art. 11.

was 7-15 years of imprisonment.⁴⁸⁰ In 2006 code, it was changed for less than 10gr from 6 months to 1 year, 10 to 100gr from 1 to 3 years, 100to 500gr from 3-5 years and 500gr to 1kg from 7 to 10 years of imprisonment.⁴⁸¹ It shows a clear reduction of the punishments in all the quantities between these two codes. This de-penalization in 2006 code was further affirmed by the 2010 counter narcotics code which is still in force.

Similarly, the punishment of opium trafficking was also considerably reduced in 2010 code, compared to the 2006 code. Under the 2006 code the punishment of opium trafficking for less than 10gr was 24 hours to 3 months, 10 to 100gr was 6 months to 1 year, 100 to 500gr was 1-3 years, 500gr to 1kg was 3-5 years and 1 to 5kg was five to 10 years of imprisonment.⁴⁸² These punishments were reduced in the 2010 code for less than 10gr from 24 hours to 2 months, 10 to 100gr from 2 to 6 months, 100 to 500gr from 6 months to 1 year, 500 to 1kg from 1 to 3 years and 1 to 5kg from 3 to 8 years of imprisonment⁴⁸³ which indicates a major reduction of the penalties in the later law.

Moreover, with regards to the trafficking of *hashish* and drugs other than heroin, morphine, cocaine, and opium a leniency of punishment could be seen from a comparison of the 2006 and 2010 counter narcotic codes. Although the 2010 code has changed the minimum quantity of these substances from 250gr to 10gr, the reduction of punishment is evidenced by the fact that the maximum punishment for the trafficking of up to 1kg of *hashish* and other substances is set at 1 year of imprisonment⁴⁸⁴ which is much less than the punishment of 3 years for the same amount in the 2006 counter narcotics code.⁴⁸⁵

Another occasion of the reduction of punishment in the counter narcotics codes of Afghanistan is the removal of the cash fine punishment in the 2010 code, which was previously introduced by the 2006 law.

⁴⁸⁰ Supra note 257, art. 26.

⁴⁸¹ Supra note 257, art. 14.

⁴⁸² Ibid, art. 14.

⁴⁸³ Supra note 16, art. 43.

⁴⁸⁴ Ibid, art. 46.

⁴⁸⁵ Supra note 470, art. 14.

3.3.2.5. Regulation policy

This policy is mainly used for the purpose of regulation of tobacco and pharmaceutical drugs, is not utilized in the codification process of drug trafficking in Afghanistan. The reason for a lack of usage of this policy in Afghanistan is due to the fact that the above-mentioned drugs are not regulated by the counter narcotics code. Moreover, the usage of tobacco in Afghanistan is not regularized in general. There is quite a high degree of freedom with regards to the use of such substances, which is evidenced from no ban on smoking of tobacco even in covered areas. The role of this policy is precisely could not be found in the field of drug trafficking codification in Afghanistan.

3.4. Conclusion

If we take a close look into the process of criminalization of drug trafficking in Afghanistan, we can conclude that the criminal justice system of the country has followed a quite punitive policy in dealing with such acts.

Although, the punitive tendency has never failed to dominate the war on drugs in general, and drug trafficking in particular, in Afghanistan, the degree and level of harshness and severity of the reaction towards the offenders has varied in all the legislative documents of the country. This process started with leniency in the laws before the enactment of the 1990 counter narcotics code with a more gradual and evolving severity in the laws enacted after the entry into force of this law.

There has been only a number of derogations from this gradual intensification of the punishment in the case of drug trafficking that are referred to as de-penalization in the war against drugs. This de-penalization has taken place only in the current counter narcotics code of Afghanistan which is enacted in 2010. This law took a slightly lenient approach towards the punishment of trafficking of certain substances which most likely has been the result of the counter effects of the application of harsh punishments on the offenders of such offenses. It should also be mentioned here that the steps of de-penalization taken in this code were mostly pro minor traffickers, which could be

evidenced by the reduction of the punishments for the lesser quantities of drugs being trafficked in comparison with the larger quantities.

The numerous occasions of legalization of drug trafficking that have taken place in Afghanistan were solely for the purpose of admission of forbidden acts and omissions, including the import and export of drugs which is considered trafficking in an ordinary situation, for the medical, educational and research needs that are common all over the world. Legalization other than the above-mentioned instances cannot be found in the criminal justice system of Afghanistan. Therefore, the legalization has been of minimal impact on the assessment of success and failure of the war against drugs in Afghanistan, particularly the case of drug trafficking.

In regard to the international framework of drug trafficking, the system has evolved since the adoption of 1912 Hague Opium Convention and every single international instrument adopted since then has had an impact in the process of strengthening the existing mechanism of drug control at that time. Although the body of treaty law existing pre-establishment of the United Nations has become abrogated, it had a vital role in shaping the post-establishment of the United Nations mechanism which currently regulates the drug control machinery.

The existing international mechanism, under the supervision of the United Nations has been somehow effective; however, it has experience some shortcomings and drawbacks that are evidence by the still continuing problem of narcotic drugs in quite considerable number of countries.

Despite the existing tripartite treaty mechanism of drug control being the sole responsible treaty body in the world, the adoption of national legislations in different countries of the world has been really effective and helpful. The laws adopted in the countries have driven the existing three conventions to become practical and hence fortify the fight against drugs in the national and international levels.

Afghanistan as a country, recently being at the centre of attention, has been a part of the international mechanism existing both before and after the establishment of the United Nations. It is to be mentioned here that the degree and scope of involvement of Afghanistan in these international mechanisms has varied in different time periods under the fluctuation of seriousness of the problem in the country. Before the establishment of the United Nations, Afghanistan has

only been party to the 1912 Hague Opium Convention and 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs. However, after the establishment of the United Nations, Afghanistan has been a party to all the three main conventions of drug control. The impact of each of those international documents have been quite significant in the process of codification of drug trafficking in Afghanistan.

Afghanistan has put efforts to fulfil its obligations arising from these conventions but the real success in terms of compliance with these treaty obligations has still remained an aspiration for the country.

The point that is worth established here is that Afghanistan, with its very harsh and punitive approach, has tried to deal with the problem of drug trafficking. However, this penal approach has not enhanced or fortified the effective application of the other pillars of the overall policy of war against drugs such as interdiction, eradication, legal awareness, and alternative livelihoods. The lack of harmony between the mere penalization and all these other pillars has proven to be very naive, which has made the war against drugs in general and drug trafficking in particular not successful. Afghanistan, with a dramatic inclination towards law enforcement, particularly the penalization and prosecution aspect of it, and not properly paying attention to the other pillars of the policy has made the entire process to undergo an evident failure. This war would succeed only if all the pillars of war against drugs are furthered in a quiet harmony.

One of the main flaws of the criminalization process in Afghanistan is the rapid changes in the laws regarding the penalties of the drug trafficking. These changes, ironically, are not in the form of an amendment and mostly take place in the form of enactment of a new code. The enactment of the three consecutive counter narcotics codes in a period of 7 years is an evident example of existence of this tendency in the criminal justice arena. This clearly indicates the superficial nature and lack of depth of these codes that are not drafted with the scrutiny and preciseness that they should have been. The non-consideration of the theoretical frameworks of criminalization and the extensive practice of legal transplantation in almost all of these laws might be the main reason behind a lack of stability in these laws to rule the domain and remain in force for a longer period of time. This approach in codification would precisely have an impact on the application of laws in the phase of investigation and prosecution which will be elaborated on in the upcoming chapter of this dissertation.

4. The investigation and prosecution of drug trafficking in Afghanistan

Afghanistan, as one of the most affected countries by the narcotic drugs, has made endless efforts to tackle this problem for half a century, with a greater emphasis in the last 17 years. The measures that the country has taken in the recent years varies from a pure law enforcement approach to a set of prolonged social, economic and cultural programs that have had various degrees of impact on the war against drugs. The success and failure of all these measures have been largely interconnected to each other to the extent that success and failure of none of these measures can be easily assessed independent of the others. However, a deep scrutiny of each one of these measures would certainly unveil the unrevealed realities of the pertaining approach which can be common amongst some or all the measures. Since the other measures are not the topic of this dissertation, our focus in this chapter is on the investigation and prosecution of drug trafficking in Afghanistan. This would enable us to assess the impact of this process in the war against drugs in Afghanistan particularly post 2001.

Structurally this chapter is divided in to different parts, each part focusing on a particular issue related to the investigation and prosecution of drug trafficking. Since most of the readers of this dissertation are outsiders who, understandably, are not familiar with the criminal justice system of Afghanistan, there is a brief elaboration on the general system of investigation and prosecution in Afghanistan for the purpose of providing the reader with the basics of the criminal justice system in the country. This brief discussion of the system is expected to enable the readers to distinguish the specific system of investigation and prosecution of the drug trafficking from the general existing mechanism for the investigation and prosecution of other crimes under the criminal justice of the country. Subsequent to that is a detailed elaboration on the specific system of investigation and prosecution of drug trafficking cases which is being furthered within the specific criminal justice task force in the country. For a solid understanding of this specific system, all the law enforcement institutions, whether national or international, that are directly or indirectly involved in the pertaining activities are examined. Moreover, the policy making institutions, whose work is of a nexus to the law enforcement activities in general and investigation and prosecution in particular, are also discussed in this part. Besides that, a set of interview which have been conducted in Afghanistan from the pertaining investigative and adjudicative institutions is also given place in this chapter. This part includes the interviews and analysis of them which is followed

by provision of a set of recommendations for filling the gaps that are arguably existing in the investigative or prosecutorial system or any other parts that have impact on such activities.

Methodologically this chapter is composed of desk and field work. The field work part is composed of a set of interviews that were conducted by the author with the prosecutors, judges and defense lawyers of the criminal justice taskforce, the special body dealing with drug cases. Due to limited number of the personnel of the said task force, only five prosecutors which makes 30% of all the prosecutors of this institution and 6 judges that comprises 40% of all judges of this institutions have been interviewed by the author. Equivalent to the number of judges and prosecutors, five defense lawyers were also interviewed in this field work. A set of interviews was also planned to be conducted with the technical detective institution such as IIU and SIU detectives; however, relying on the classified nature of their work, no one from these institutions showed readiness to be interviewed in this process. It should be clarified here that since the focus of this dissertation is on the investigation and prosecution of drug cases in the special mechanism within the criminal justice task force and not on the general mechanism of dealing with the drug cases, there has not been any interview conducted with the personnel of the latter institution.

4.1. Criminal investigation and prosecution in Afghanistan: An overview

The constitution of Afghanistan has divided the labor amongst the relevant institutions dealing with crimes in discovery and investigation phases by stating that:

“Discovery of crimes is the duty of the police and investigation and prosecution are conducted by the Attorney’s Office in accordance with provisions of the law.”⁴⁸⁶

Although the constitution of Afghanistan has solely attributed the duty of discovery of the crime to the police, the Criminal Procedure Code of Afghanistan has extended this duty to the National Directorate of Security by stating that:

“The discovery of crime is executed by the police or national directorate of security.”⁴⁸⁷

Taking into consideration the above-mentioned provisions of the laws of Afghanistan, there are two points that need to be elaborated up on.

⁴⁸⁶ Supra note 4, art.134.

⁴⁸⁷ Supra note 32, art. 80.

The first point that needs to be raised here is that if the constitution has not foreseen any institution for discovery of crime other than the police, it might be worthy to know what has caused the division of discovery of crime between the police and the national directorate of security in the criminal procedure code of Afghanistan. This division of duty has, arguably, stemmed from the nature of the crimes that these two separate institutions discover. The discovery of the ordinary crimes falls within the responsibilities of the police while the discovery of crimes against internal and external security of the country, due to their sophisticated nature, is left to the national directorate of security.

The second point to be focused on here is that these provisions of the law in Afghanistan indicate that the only actions that the police and the national directorate of security can take regarding a crime is discovery of it, with no possibility of doing any investigations regarding the said phenomenon. Technically these provisions really limit the work of the police and the national directorate of security to discovery of crimes that apparently emerges from a narrow meaning of the term “investigation” in the laws of Afghanistan. However, the term “investigation” in a broader context would definitely encompass parts of the measures that the police or the national directorate of security take during the discovery of crime.

It is safe to say that the only stipulation that tangentially relates the duty of investigation to the police or national directorate of security is found in article 145(2) 7 of the Criminal Procedure Code which states that the prosecutor can seek the cooperation of the police and the national directorate of security in the case under investigation.⁴⁸⁸ Beyond this, there is no provision in the legal system of Afghanistan that levy the duty of investigation on the police or the national directorate of security in the country.

When the crime is discovered by the above-mentioned authorities, they are duty bound to report the case to the prosecutor who, according to the constitution, is duty bound to investigate the a crime⁴⁸⁹ and submit all the gathered documents and evidence to the prosecutor within 72 hours for the purpose of investigations.⁴⁹⁰

The duty of prosecutor to investigate a crime is also affirmed by the Criminal Procedure Code by stating that:

⁴⁸⁸ Ibid, art. 145 (2) 7.

⁴⁸⁹ Supra note 4, art.134.

⁴⁹⁰ Supra note 32, art. 87.

“(1) The investigation of the felony and misdemeanor crimes is compulsory and is accomplished by the prosecutor in the presence of the defense lawyer of the suspect or accused.”⁴⁹¹

This provision explicitly relates the duty of investigation to the prosecutor who does it in accordance with the provisions of the law and upon receiving the case and its related documents from the police or the national directorate of security, would start the investigation of the case. Furthermore, it obliges the prosecutor to further the investigations regarding the felonies and misdemeanors with no discretion of dismissing the case in the investigation phase. The only discretionary power that the prosecutor can exercise in the phase of investigation is suspending the investigation under specific circumstances that are stipulated in the law.⁴⁹² The prosecutor is bound by the law to end the investigation of a felony in 75 days, misdemeanor in 27 days and obscenities in 10 days.⁴⁹³ However, the term of investigation could be extended by the Attorney General’s office to 180 days for felonies and 90 days for misdemeanors, provided that the accused is not in detention.⁴⁹⁴ Arguably based on the above-mentioned provisions of the laws of Afghanistan, the intention of the lawgiver has been to draw a clear line between the institutions that do the discovery and investigation of crimes by confining the discovering institutions to the primary activities that do not fit under the definition of investigation.⁴⁹⁵

Up on completion of the investigation, the second fold of the prosecutor’s duty, which is the prosecution, comes to action. This phase starts right after the act of indictment is prepared by the investigative prosecutor and submitted to the prosecutorial prosecutor. The duty to prosecute, enshrined in the constitution, is also stipulated in the Criminal Procedure Code of Afghanistan as one of the fundamental duties of the prosecutor in the legal system of Afghanistan.⁴⁹⁶ In the phase of the prosecution, unlike the investigation phase, the prosecutor is granted with some

⁴⁹¹ Ibid, art. 145 (1).

⁴⁹² Ibid, art. 162.

⁴⁹³ Ibid, art. 149.

⁴⁹⁴ Ibid, art. 149.

⁴⁹⁵ Ibid, art. 80.

⁴⁹⁶ Ibid, art. 168.

discretionary powers that entitles them to dismiss the case and do not refer it to the court when there are no sufficient grounds for referral.⁴⁹⁷

Ultimately when the prosecutor affirms the act of indictment, they are duty bound to submit the case to the authorized court for adjudication.⁴⁹⁸ Although submission of the case to the court marks the end of the investigation period, still the door for complementary investigation is open when it is deemed necessary and the prosecutors are under compulsion to re-open the investigation on the specific case.⁴⁹⁹ On the contrary, unlike the investigation that principally is ended when the case is referred to the court, the prosecutorial duty of the prosecutor is continued until the case is under process in the court system.

It is worth mentioning here that the system that was briefly elaborated up on above was the general system of investigation and prosecution in Afghanistan which does not include the investigation and prosecution of drug-related cases. Drug-related cases are subject to a special system of investigation and prosecution which is solely focused on such cases within the boundaries of a special counter narcotics taskforce. The special nature of this system requires a deep scrutiny of all the special institutions which would be dealt with in the upcoming sections of this chapter.

4.2. Adjudicative and policy making institutions dealing with drug trafficking

The drug problem, being one of the main challenges in Afghanistan, has urged the government of Afghanistan to launch a broad campaign for countering it. Part of this campaign is establishment of numerous institutions that are particularly created for tackling the problem of drugs from a law enforcement point of view. Besides that, there are a handful of institutions that are not solely focused on tackling the drug problem but in the course of their activities, do get involved in countering drugs. These institutions, whether directly or indirectly involved in drug campaign, are either part of the law enforcement institution's chain or policy making institutions. Since the mechanism of dealing with the drug crimes, institutionally and procedurally, is not identical to that of the other crimes in Afghanistan, it is compelling to scrutinize the system in depth. In the

⁴⁹⁷ Ibid, art. 169 (1).

⁴⁹⁸ Ibid, art. 175(1).

⁴⁹⁹ Ibid, art. 177.

followings, we will elaborate up on the work of each one of these institutions in details in the way that the concentration would first be on the law enforcement institutions and then on the policy making institutions.

4.2.1. Detective, investigative and prosecutorial institutions

Unlike the other crimes, drug-related crimes are processed in a very special mechanism that is solely focused on drug-related offences. The existence of special bodies for detection, investigation, prosecution and adjudication of drug cases is a recent phenomenon that has been in action since the establishment of the counter narcotics police in 2003 and the counter narcotics task force in 2006. Prior to this date, the drug-related cases were also subject to the procedure that was in ground for the other crimes. It should be mentioned here that although this thesis does not cover the detection of drug crimes, elaboration on these institutions would pave the way for better recognition of strengths and weaknesses of the investigative and prosecutorial institutions. For better understanding of these institutions, we will first elaborate on the detective institutions and then on the investigative and prosecutorial institutions subsequently.

4.2.1.1. The counter narcotics police (CNPA)

Within the Afghan National Police (ANP), CNPA is a specialized body that is established in 2003 under the Ministry of Interior Affairs.⁵⁰⁰ Based on the law “CNPA is professionally responsible for the detection of drug crimes and other related offences and duty bound to arrest the suspects of those crimes.”⁵⁰¹ Similarly, according to the National Police Strategy, CNPA is tasked with the collection of intelligence and investigation⁵⁰² of offences pertaining to cultivation, trafficking and illicit production of drugs with a special mandate to detect, eradicate and interdict drugs as a

⁵⁰⁰ United States Department of States, Bureau for International Narcotics and Law Enforcement Affairs (2016). International Narcotics Control Strategy, Drug and Chemicals Control, vol. (I), 93. Available at: <https://2009-2017.state.gov/j/inl/rls/nrcrpt/2016/vol1/253235.htm>

⁵⁰¹ Supra note 16, art.12(1).

⁵⁰² Investigation in this context is used in a broad meaning that includes all the activities that take place from the detection to the investigation and prosecution phase. It is not affiliated with the technical term that is used in the constitution of Afghanistan, confined to the activities of the prosecutor.

prompt response to the boom of narcotic drugs in the country.⁵⁰³ Furthermore, the National Drug Control Strategy bounds the CNPA to prepare an annual list of the drug traffickers and major landowners who are involved in cultivation of drugs.⁵⁰⁴ The strategy further obliges the CNPA to pursue the low-lever, mid-level and high-level drug traffickers and arrest them in the light of the pertaining laws.⁵⁰⁵ One of the bold steps of the strategy is imposing the responsibility of campaigning against the laundered money that is the proceeds of drug trafficking crimes.⁵⁰⁶

The CNPA, in furthering its detective mission, is bound to conduct its duties within the time limits provided for in the law. As we have two set of investigative institutions dealing with the drug cases depending on the quantity of the drugs, the CNPA also has two separate time limits within which should complete its detective task. If the quantity of the drugs is reaching the amount articulated in article 18(1)(2)(3) of the Law against Intoxicating Drinks and Drugs⁵⁰⁷ and is seized outside Kabul, the CNPA is required to complete filling the case and reporting about it to the local prosecutors officer within 72 hours.⁵⁰⁸ In such cases that are detected outside Kabul province, if a suspect is arrested, the CNPA is required to hand over the suspect to the CNPA's central office in Kabul within 12 days.⁵⁰⁹ However, the time limit would be different if the case is detected in Kabul. In this situation, the CNPA would be required to hand over the case and the suspect to the prosecutor's office within the Criminal Justice Task Force in 72 hours. Moreover, if the quantity of seized drugs is not amounting to that of mentioned in article 18(1)(2)(3) of the Law against Intoxicating Drinks and Drugs, the CNPA would be required to submit the case within 72 hours to the local prosecutors' offices that generally have jurisdiction on the drug trafficking cases.⁵¹⁰ In this specific case, the CNPA would not process the case through the Criminal Justice Task Force which only has jurisdiction over the cases in which there a certain amount of drugs involved.

⁵⁰³ Ministry of Interior Affairs (2011). Afghan National Police Strategy, para 67. Available at: <http://old.moi.gov.af/en/page/5076>

⁵⁰⁴ Ministry of Counter Narcotics (2013). National Drug Control Strategy, 2013-2017, 9.

⁵⁰⁵ Ibid, 9.

⁵⁰⁶ Ibid, 10.

⁵⁰⁷ Supra note 16, art. 18 (1)(2)(3).

⁵⁰⁸ Ibid, art. 14(4).

⁵⁰⁹ Ibid, art. 14(4).

⁵¹⁰ Ibid, art. 14(5).

Structurally, CNPA has 6 departments which are:

- a. Tactical Operations Center
- b. CNPA Headquarter Intelligence Department
- c. Specialized Units Directorate
- d. Provincial Directorate
- e. Laboratory
- f. Special Guard Force and Detention⁵¹¹

The CNPA within its organizational structure has many specialized bodies such as National Interdiction Unit (NIU), Sensitive Investigative Unit (SIU) and Intelligence and Investigation Unit (IIU) that would be further elaborated up on, in the upcoming sections. The officers of CNPA, pursuant to the 6 week general training for the ANP, receive a five week special training at the Counter Narcotics Training Academy (CNTA).⁵¹² These trainings really equip them with the skills to detect and investigate the narcotic related crimes.⁵¹³ The CNPA, beyond the central office in Kabul, has provincial offices where the trained officers of this entity are being deployed.⁵¹⁴ In the districts and provinces the CNPA serves under the command of the Provincial or District Chief of Police.⁵¹⁵ Apart from the legal provisions that make the CNPA subordinate to the Provincial and District Chief of Police, there is another main factor that enhances the influence of the said authorities over the CNPA which is the flow of the CNPA funds in the provinces and districts through the provincial and district police headquarters' channel.⁵¹⁶ Due to sensitive nature of their duties, their service under the command of Provincial or District Chief of Police has made them really vulnerable to the extent that has made the Ministry of Counter Narcotics to propose the

⁵¹¹ Special Inspector General for Afghanistan Reconstruction (2014). Counter narcotics Police of Afghanistan: US Assistance to Provincial Units Cannot be Fully Tracked and Formal Capability Assessments Are Needed, 15-12 Report, 2. Available at:

<https://www.sigar.mil/pdf/audits/SIGAR-Audit-15-12.pdf>

⁵¹² U.S. Department of State, Bureau of International Narcotics and Law Enforcement Affairs (2012). International Narcotics Control Strategy Paper Afghanistan, para. 8. Available at:

<https://2009-2017.state.gov/j/inl/rls/nrcrpt/2012/vol1/184098.htm>

⁵¹³ U.S. Department of Defense (2013). Report Towards Progress and Stability in Afghanistan, 40. Available at: https://archive.defense.gov/pubs/November_1230_Report_FINAL.pdf

⁵¹⁴ Supra note 512, para. 8.

⁵¹⁵ Police Law (2005). Official Gazette 862, art. 4.

⁵¹⁶ Supra note 512, 2.

independence of the ANPA in the National Drug Strategy of the Country.⁵¹⁷ The vulnerability of the CNPA in the provinces and districts mostly stems from the fact that they are often tasked by the Provincial or District Chief of police to the duties that are of no nexus with countering narcotics.⁵¹⁸

Apart from the CNPA which is the leading authority for the fight against drugs within the framework of MOI, there are a number of other policing institutions under the MOI such as but not limited to the Ordinary Police, Border Police and Customs Police. These institutions can also deal with detective activities and get involved in arrest of the traffickers and seizure of the drugs.⁵¹⁹ However, they are bound to handover the case to the CNPA within any delay.⁵²⁰ It is worth mentioning here that, excluding the CNPA, all the other above-mentioned policing institutions get involved in the detective activities of drug crimes in the course of furthering their ordinary policing duties and are not solely confined to the drug trafficking field duty wise.

Moreover, there are two other special law enforcement and policing institutions within the MOI that are given the duty of dealing with drug seizure and drug traffickers arrest that are Special Counter Narcotics Unit and Narcotics Elimination Unit.⁵²¹

The CNPA, apart from the general duties that are articulated for in the Police Law, is duty bound to accomplish some particular tasks through the special bodies that would be scrutinized in the following sections.

⁵¹⁷Ministry of Counter Narcotics (2012). Anti-Drug Trafficking Policy, Targeting High Value Drug Traffickers and their Networks, 15. Available at:

http://mcn.gov.af/Content/files/LE_En.pdf.

⁵¹⁸ Supra note 512, para. 8.

⁵¹⁹ Supra note 16, art. 14(1).

⁵²⁰ Ibid, art. 14(2).

⁵²¹ Ibid, art. 14(1).

4.2.1.1.1.Sensitive investigative unit (SIU)

SIU is a CNPA detective law enforcement unit with the mandate of carrying out sensitive and complex investigations, built on the intelligence information gathered by the Technical Investigative Unit, regarding the drug cases.⁵²² The SIU also relies on another source of intelligence which is the Afghan Judicial Wire Intercept Program (JWIP) through which SIU intercepts roughly around 45000 calls quarterly which creates a substantial amount of evidence for the courts in the national and international levels.⁵²³ This component is composed of 78 members who are trained well and vetted in a special process which composes polygraphs and background checks.⁵²⁴ In the course of its conduct, SIU mostly detects important and major drug trafficking organizations operating country-wide and take certain actions against them by referring them to the Afghan criminal justice system.⁵²⁵ Beyond the above-mentioned activities, SIU officers are involved in managing the informants, launching undercover activities and operations, gathering and seizing the evidence, and arresting the alleged offenders.⁵²⁶ Officers of this unit receive one to two additional weeks of training on the top of the five-week training that is provided for all the CNPA officers.⁵²⁷ There is a sub-division in the SIU called the SIU- Financial Investigation Team (SIU-FIT) which investigates financial misconducts that are affiliated to narcotics and are alleged to be providing financial support for fueling the insurgents' machine.⁵²⁸

⁵²² Kristen Boon, Aziz Huq, Douglas Lovelace (2012). Terrorism Commentary on Security Documents, US Approaches to Global Security Challenges, vol. (124), Oxford University Press, 374.

⁵²³ Supra note 500, 94.

⁵²⁴ Supra note 522, 374.

⁵²⁵ U.S. Department of Justice (2011). Statement of Thomas M. Harrigan Before the Senate Caucus on International Narcotics Control, United States Senate on Counter narcotics Efforts in Afghanistan, 4. Available at: http://www.justice.gov/dea/pr/speeches-testimony/2012-2009/110720_herrigan_hearing.PDF.

⁵²⁶ Ibid, 4.

⁵²⁷ Kristine Ziems (2014). The Role of Law in Afghanistan, A Primer for Practitioners, Afghanistan's Counter narcotics Institutions, Agencies and Activities Within the Criminal Justice Sector, vol. (5), 8.

Available at: http://touchpointidg.com/wp-content/uploads/2015/01/5.2-GIRoA-CN-Institutions-Agencies-and-Actiities_FEB_2014.pdf

⁵²⁸ Ibid, 8.

In summary, it is safe to be asserted that this unit is the operational body of the CNPA which furthers the majority of complex operations for which intelligence information is gathered by the other divisions of CNPA.

4.2.1.1.2. Technical investigative unit (TIU)

TIU is a very small and technical body of CNPA which is composed of eight officers who are mostly furthering in-office technical operations such as wiretapping that are authorized by the courts.⁵²⁹ The eight officers of TIU are often selected from the SIU members based on their technical abilities in communication interception.⁵³⁰ Their interception activity is furthered within the (JWIP) which was approved by the Afghan government due to being helpful in tracking the drug trafficking organizations.⁵³¹

4.2.1.1.3. Intelligence and investigation unit (IIU)

IIU is an intelligence gathering unit which is mostly focused on arrests, undercover operations and wiretapping activities.⁵³² Unlike the other CNPA sub-divisions that are established and supported by the Drug Enforcement Agency (DEA) of the United States, IIU is an intelligence gathering unit that is established and mentored by the United Kingdom's Serious Organized Crime Agency.⁵³³

4.2.1.1.4. National interdiction unit (NIU)

National Interdiction Unit (NIU) which is considered the tactical body of CNPA is capable of launching independent interdiction operations and seizures in the environments where the level of threat is very high.⁵³⁴ The NIU, with its 442 members, is also capable of launching arrest and search warrants in the high-threat zones.⁵³⁵ During the year 2015, NIU in collaboration with SIU conducted almost 267 operations that was mostly targeting individual smugglers and drug

⁵²⁹Supra note 522, 374.

⁵³⁰ Supra note 527, 8.

⁵³¹ Ibid, 8.

⁵³² Ibid, 8.

⁵³³ Supra note 522, 374.

⁵³⁴Supra note 500, 93.

⁵³⁵ Supra note 522, 374.

trafficking organizations.⁵³⁶ All the operations of NIU are launched under the capacity of CNPA and the Afghan law, which from one hand shows the development of capacity of Afghanistan and from the other hand adds to the legitimacy of Afghan institutions in the eyes of public.⁵³⁷

Due to the broad scope of their work, an additional seven-week training is also provided for the members of the NIU to equip them with the professional skills such as interviewing, investigating and surveillance techniques and further technical operations related to firearms and operating helicopters.⁵³⁸ The NIU, in furthering its duties, fortifies the SIU in a number of operational activities such as providing behind the scene security for the undercover members while meeting the drug traffickers and destroying the drug processing laboratories and stocks through air operations.⁵³⁹

An examination of the tasks of these detective institutions indicates that they all are involved in very professional and complicated activities.

4.2.1.2. The prosecution

The prosecution office is an independent organ within the executive branch of the government which exercises its duties in accordance with the law.⁵⁴⁰ The prosecutors are duty bound to investigate crimes, file charges against suspects, follow the case in the court, and oversee the investigation of crime process, enforcement of the final verdicts of the courts and incarceration places.⁵⁴¹ The prosecution of drug cases, due to existence of special task force, is being furthered in a slightly different manner. There is a division of labor between the general prosecution departments and the special prosecution department for drug cases which is furthering its duties within the special task force of drugs. In the following, a brief elaboration on the two types of institutions would be provided.

⁵³⁶ Supra note 500, 94.

⁵³⁷ Supra note 525, 3.

⁵³⁸ Supra note 527, 7.

⁵³⁹ Supra note 525, 3.

⁵⁴⁰ The Law on Structure and Authority of the Attorney General Office of Islamic Republic of Afghanistan (2013). Official Gazette 1117, art. 4.

⁵⁴¹ Ibid, art. 3.

4.2.1.2.1. The special prosecution department for drug crimes

This special prosecution department for the drug cases has been established by the government of Afghanistan, as part of the Criminal Justice Task Force, in 2005. The mandate of this department is to investigate and prosecute drug offences across the country. This department can only investigate and prosecute a case if the substance amounts to:

- a. Two or more that two Kg of Heroin, Morphine, Cocaine or any other substance containing Heroin, Morphine and Cocaine
- b. Ten or more than ten Kg of Opium or any other substance containing Opium
- c. Fifty or more than 50 Kg of Hashish or any other substance containing one of drugs enlisted in list number 1,2,3 and 4 of the drugs attached to the counter narcotics law.
- d. Fifty or more than fifty liters of alcoholic beverages.⁵⁴²

This provision of the law clearly indicates that the jurisdiction of the special prosecution department is only limited to the serious cases in which the amount of drugs is reaching to a certain level. If the amount of drugs is lessor that the quantity enshrined in the code, the cases fall within the jurisdiction of the general prosecution departments in the provinces.⁵⁴³

Similar to the other prosecution departments, this department is also bound by the law to complete its investigations within 27 days in misdemeanor crimes and within 75 days in felony crimes with the possibility of extension of this term to 90 days in misdemeanor crimes and 180 days in the felony crimes⁵⁴⁴, provided that the suspect is not in detention.

This department has a considerable caseload that is being dealt with on a daily basis. Based on the statistics provided on the website of the Criminal Justice Task Force, from 2012 to 2016 this department has investigated and prosecuted almost three thousand cases. According to their reports in the year 1390 (March 2011 to march 2012) 602 cases, in the year 1391 (March 2012 to march 2013) 551 cases, in the year 1392 (March 2013 to march 2014) 636 cases, in the year 1393 (March 2014 to march 2015) 711 cases and in the year 1394 (March 2015 to march 2016) 510 cases have

⁵⁴² Supra note 16, arts. 17 and 18.

⁵⁴³ Ibid, art. 17.

⁵⁴⁴ Supra note 32, art. 149(1)(3).

been investigated and prosecuted in this department.⁵⁴⁵ These numbers only show the cases that have found their way to the courts and do not include the cases that are dismissed in the investigation and prosecution phases.

The analysis and scrutiny of the functions of this department would be provided in the upcoming sections of this chapter.

4.2.1.2.2. The general jurisdiction units of the Attorney General's Office

As stated earlier, the general jurisdiction units of the Attorney General's Office in the provinces have the authority to investigate and prosecute the drug cases. They can exercise jurisdiction on the cases in which the amount of drug is less than the quantity that is enshrined in article 18(1) of the Law against Intoxicating Drinks and Drugs as Well as controlling them.⁵⁴⁶ Since the drug cases are dealt with parallel to the other criminal cases, unlike the special prosecution department for drugs, the general jurisdiction departments do not have a special procedure for dealing with the drug cases.

Since discussion of the process of investigation and prosecution of drug cases in the general jurisdiction units of Attorney General's Office might require extensive elaboration of the criminal justice system of Afghanistan in general, the focus of this dissertation is solely on the investigation and prosecution of drug trafficking cases that are furthered by the Criminal Justice Task Force. Therefore, we would refrain from focusing on the investigation and prosecution of drug cases in the general jurisdiction units of the Attorney General's Office.

⁵⁴⁵ Criminal Justice Task Force of Islamic Republic of Afghanistan, Annual Reports. Available at: <http://cjtf.gov.af/category/reports-annual/>

⁵⁴⁶ Supra note 16, art. 17.

4.2.2. The role of the other law enforcement and policy-making institutions in the investigation of drug-trafficking

The broadness of the scope of drug problem in Afghanistan has urged the government of Afghanistan to create several institutions for law enforcement, policy making and coordination of the war on drugs in the country. Some of these institutions are created solely for the purpose of war on drugs and some others are general institutions that in the course furthering their duties are getting involved in the war against drugs. In the following we will discuss each one of these institutions in brief.

4.2.2.1. Ministry of Counter Narcotics

This Ministry was established in 2005 replacing the existing Counter Narcotics Directorate (CND) which was established in 2002 within the framework of National Security Council of Afghanistan.⁵⁴⁷ In its own wording of the Law against Intoxicating Drinks and Drugs as well as Controlling them, “The MCN, as the leading institution, has the responsibility of coordinating the affairs related to campaign against intoxicants and narcotic drugs and evaluation of the implementation of this law and the National Drug Control Strategy of Afghanistan in consultation with the other relevant institutions.”⁵⁴⁸ The mandate of the MCN is “to coordinate all counter-narcotics activities and programs of the Government of Afghanistan with other Ministries, independent bodies, and other concerned organizations”⁵⁴⁹ The MCN also has the responsibility for coordination, evaluation and implementation of the National Drugs Control Strategy (NDCS) in the concerned Ministries and organizations.⁵⁵⁰ According to the law, all the relevant institutions are required to report to Counter Narcotics Ministry regarding the issues related to drugs on a monthly basis or

⁵⁴⁷ Official Website of the Ministry of Counter Narcotics of Islamic Republic of Afghanistan, Available at: <http://mcn.gov.af/en/page/1835/history-mcn>

⁵⁴⁸ Supra note 16, art. 4.

⁵⁴⁹ Ibid, art. 65(1).

⁵⁵⁰ Ibid, art. 65(2).

when required.⁵⁵¹ The MCN is required to evaluate the reports of the relevant institutions and report to the government about the results on a quarterly basis.⁵⁵²

The above-mentioned provisions of the law indicate that the Counter Narcotics Ministry is a policy-making and coordinating institution which is duty bound to coordinate the drug-related activities in the country. In fulfilment of these duties, this Ministry, in line with the other involved institutions, create some policies and strategies that are important in the war against drugs in Afghanistan. The National Drug Control Strategy and the Drug Trafficking Policy are the two important documents that would show the role of MCN in the field of law enforcement which we would deal with them in the following.

4.2.2.1.1. The National Drug Control Strategy

As stated earlier, the Counter Narcotics Ministry is a policy making institutions with a solely coordinating and policy making mandate in the war against drugs in Afghanistan. This policy making nature of its work has made it distant from the task to further any law enforcement mission *per se*. However, there are a set of obligations enshrined in the National Drug Control Strategy that would indicate the role of this ministry in the field of making policies that would further help the law enforcement institutions in accomplishing their task in a better manner. One of the duties that the NDCS puts on the shoulders off MCN is making the National Anti-Drug Trafficking Policy for a better campaign against drug trafficking in Afghanistan.⁵⁵³

Furthermore, The NDCS obliges MCN, in coordination with other involved institutions, to prepare the action plan for recognition and arrest of major land owners which is a helping hand in controlling the drugs in Afghanistan.⁵⁵⁴

Moreover, the duty to prepare an action plan for targeting the assets of the drug traffickers is another task that is referred to the MCN under the NDCS which includes confiscation of all the proceeds of crime that the traffickers have obtained through drug trafficking.⁵⁵⁵

⁵⁵¹ Ibid, art. 65(4).

⁵⁵² Ibid, art. 65(5).

⁵⁵³ Supra note 504, 9.

⁵⁵⁴ Ibid, 10.

⁵⁵⁵ Ibid, 10.

Another obligation that NDCS gives to the MCN is the preparation of an annual plan for the eradication of poppy which is being practically furthered under the supervision of the governors in the provinces.⁵⁵⁶

From these provisions of the NDCS it is clearly revealed that the duty of the Ministry of Counter Narcotics in the field of law enforcement is solely policy making and there is no direct involvement of this Ministry in the actual enforcement of the law.

4.2.2.1.2. The Anti-Drug Trafficking Policy

This policy is prepared in the light of the NDCS of Islamic Republic of Afghanistan. The Anti-drug Trafficking policy, in its own words, sets the following objectives for the institutions involved in the war against drugs:

- “ - 30% reduction in drug trafficking in the first three years of this policy’s implementation
- Increasing drug seizure rate (from currently 0.5-1.5 % to 12% - 25% in five years)
 - Taking necessary measures to target high value drug traffickers and increase the current arrest level from 1300 small traffickers to 2000 small, middle and high value traffickers.
 - Increasing precursors seizure rate 30-50%
 - Improving poppy eradication process
 - Implementing current bilateral and multilateral agreements with regional countries
 - Creating better coordination for improving security and better border control
 - Improving conditions of drug prisoners
 - Making trial of major traffickers’ public in order to affect other drug trafficking networks.”⁵⁵⁷

This policy sets some specific duties for the MCN that are as follows:

First of all, the policy articulates that, since there is no clear distinction between minor and major drug traffickers in the law, there should be proper ways of differentiating them from each other in the light of strategies and policies.⁵⁵⁸ This could be better accomplished by the ministry of counter narcotics in the relevant policies and strategies of this ministry.

⁵⁵⁶ Ibid , 11.

⁵⁵⁷ Supra note 517, 14.

⁵⁵⁸ Ibid, 15.

The policy also requires the MCN, in coordination with the Ministry of Interior Affairs, to create a governmental vehicle stop and search procedure and send it for the approval of the Council of Ministers.⁵⁵⁹ This is mostly due to the common believe that the governmental vehicles, due to not being subject so search, are mostly transporting drugs.

Besides that, under this policy, MCN is obliged to develop a strategy for identifying and prosecution of governmental officials who are involved in drug trafficking.⁵⁶⁰ Although the law does not except the government officials from prosecution, in practice, this is changed to a culture that government officials are shielded behind their governmental positions. For a better campaign against drugs, this tendency should be terminated rapidly.

Similar to NDCS, this policy also puts the duty of annually drafting a list of the major landowners and preparing clear guidelines for targeting them on the MCN.⁵⁶¹ It is argued in the policy that the main focus of the law enforcement institutions is mostly on the minor landowners which is proven to be not very effective at all. The purpose of the policy is to shift the focus from the minor landowners to the major landowners for a better campaign against drugs in the country.

If we take a close look to these provisions of the Anti-Drug trafficking policy, it can be easily revealed that, similar to the provisions of the NDCS, all the law enforcement- related activities given to the MCN under this policy are not merely law enforcement and rather are confined to policy making and coordination.

In conclusion, we could summarize that the MCN, in the course of furthering its duties, is neither involved in the law enforcement activities in general nor in the investigation and prosecution activities in particular. It rather furthers its duties in a sole policy making and coordinating manner.

4.2.2.2. Ministry of Interior Affairs

Ministry of Interior Affairs (MOI) is the law enforcement body of Afghanistan which furthers the duty of law enforcement in Afghanistan. This ministry is also responsible for the law enforcement in the field of counter narcotics through its Deputy Ministry for Counter Narcotics. Based on the vision of this ministry, the MOI is responsible for “fighting cultivation, production and trafficking

⁵⁵⁹ Ibid, 30.

⁵⁶⁰ Ibid, 25.

⁵⁶¹ Ibid, 24.

of drugs until achieving the goal of a drug-free Afghanistan.”⁵⁶² According to the Police Law of Afghanistan, inter alia the other obligations, the Afghan police, which is the executive body of the MOI, is responsible to: “fight against the cultivation of poppies and marijuana, smuggling and drug trafficking, production, import and consumption of intoxicants, and for their prevention.”⁵⁶³ The Deputy Ministry of Counter Narcotics has prioritized its duties in the following order:

1. Implementation of the Action Plan in accordance with the Ministry’s 10-year Vision and the Law;
2. Upgrading CNPA’s capacity, professionalism and training in Counter Narcotics work;
3. Increasing the efficiency of operations across the country, and TOC leadership capacity building;
4. Targeting main traffickers and drug trafficking organizations;
5. Targeting main heroine/narcotics process centers and/or factories;
6. Organizing major operations in order to eliminate armed drug traffickers in the border areas;
7. Strengthening regional cooperation, information exchange, and joint cross-border operations with neighboring countries;
8. Attempting total elimination of poppy cultivation across the country, recreating the Poppy Eradication Unit, and disrupting production in affected provinces; and,
9. Strengthening borders, entry ports, customs units, airport security, placing professional police in the aforementioned locations in order to prevent drug trafficking.”⁵⁶⁴

This list of priorities of Deputy Ministry of Counter Narcotics indicate that this institution, beyond the detection of the drug-related crimes, has a set of other law enforcement, policy making and coordinative activities. These non-detective activities of this body are of vital importance for the success of the war against drugs in Afghanistan and the region.

⁵⁶²Ministry of Interior Affairs of Islamic Republic of Afghanistan (1392). Ten-Year Vision for the Afghan National Police: 1392-1402, Available at: <http://moi.gov.af/en/page/5718/5729>

⁵⁶³ Supra note 515, art. 5(7).

⁵⁶⁴Ministry of Interior Affairs of Islamic Republic of Afghanistan, Official Website of the Ministry, Available at: <http://moi.gov.af/en/page/3177/deputy-ministries/narcotics>

Besides the in-country activities of the Deputy Ministry for counter narcotics, this institution is responsible for some extraterritorial activities such as:

“Signing of agreements in the field of law enforcement, exchange of intelligence information, conducting simultaneous border patrols, conducting simultaneous border operations, conducting operations based on the mutually provided information, and settlement of counter narcotics officers in the neighboring, regional and world countries.”⁵⁶⁵

For furthering these duties, the Deputy Ministry of Counter Narcotics has central and provincial offices that are responsible for the campaign against drugs in the country. In the provinces, the Counter Narcotics Police is furthering its mission under the command of Provincial Directorate of the Police. However, in the capital, their duties are accomplished under the command of the Deputy Ministry for Counter Narcotics. The functions and duties of the Counter Narcotics Police is elaborated in section 4.3.11 of this chapter.

To summarize, we could say that the Deputy Ministry of the Counter Narcotics has a range of activities and missions that would go way beyond the detective task and those activities are of a tremendous importance in the area of law enforcement of counter narcotics.

4.3. Cooperation and coordination

The broadness of the scope of the drug war and the involvement of multiple institutions in this war has made the existence of cooperation and coordination amongst the relevant institutions quite essential. This cooperation and coordination, whether in the national or international level, is very vital for the success of the war against drugs. Although the cooperation and coordination pertaining to the law enforcement should be at the center of the debate, the existence of cooperation and coordination in policy making arena is very crucial to our discussion in this part. In the fooling, we will discuss the issue in separate sections.

⁵⁶⁵ Supra note 504, 10.

4.3.1. Cooperation and coordination amongst national institutions

Domestically, there are a number of law enforcement and policy making institutions that are involved in the campaign against drugs. These institutions vary from a mere policing institution to important ministerial bodies that are furthering different aspects of the war against drugs. A brief scrutiny and evaluation of these institutions would be of a vital importance which would be done in the following.

4.3.1.1. Cooperation and coordination in law enforcement activities

Generally the Afghan National Police, National Directorate of Security, Attorney General's Office and the Judiciary have distinct duties and responsibilities which are required to be furthered in a close cooperation and coordination.⁵⁶⁶ In the field of campaign against drugs, this cooperation and coordination is intended to exist amongst all the involved institutions in any particular level.

The legal framework of cooperation and coordination explicitly is articulated in the pertaining laws of the country in every level of law enforcement activities. In the policing level, parallel to the CNPA, there are a number of other institutions such as the border police, national directorate of security and the ordinary police of Afghanistan who have the duty of seizure of drugs and arrest of suspects of drug cases.⁵⁶⁷ However, they all are bound to accomplish this task for the purpose of cooperating with CNPA and submitting the arrested suspects and seized drugs to the CNPA.⁵⁶⁸ This tendency shows that the law recognizes the urgency of the situation in particular cases and gives the duty to institutions other than CNPA to further this task. However, the further technical aspect of the work is required to be done solely by the CNPA.

In the technical phase of the detection, there are a set of institutions namely SIU, TIU, NIU and IIU with the duty of doing very sensitive and professional work of detection of crime and the primary investigations. A first glance to the activities of these institutions may alert us of existence of any overlap in their tasks, whereas, there is no such an overlap in their activities. They all further their activities in a very professional manner with the SIU furthering investigative activities, IIU

⁵⁶⁶ Supra note 562.

⁵⁶⁷ Supra note 16, art. 4(1).

⁵⁶⁸ Ibid, art. 4(2).

involved in intelligence activities, TIU doing mostly wiretapping and NIU conducting interdiction activities in the campaign against drugs.

The investigation and prosecution institutions are also possessing enough coordination and cooperation in furthering their duties. In this phase, since the pertaining institution is a specialized organ, the coordination and cooperation with the technical detective institutions is sufficiently established.⁵⁶⁹ The detective technical institutions continue their cooperation with the prosecutors throughout the process of investigation based on the request of the prosecutors.⁵⁷⁰

This indicates that legally and practically there is a degree of cooperation and coordination amongst the law enforcement institutions. Although the laws have set certain boundaries for each one of the institutions, this does not intend to reduce the cooperation and coordination which is paramount to the success of all the relevant institutions in the war against drugs. It rather encourages further cooperation and coordination of their activities while understanding the boundaries of their activities that are enshrined in the law.

4.3.1.2.Cooperation and coordination in policy making

Similar to the field of law enforcement, cooperation and coordination in the arena of policy making is crucial for better furthering of the campaign against drugs. From a framework point of view, there is a legal framework that requires the involved policy making institutions to cooperate and coordinate their activities. The law requires that a body under the name of the High Commission against Intoxicating Drinks and Narcotic Drugs should be established in the country. This Commission is composed of the Minister of Counter Narcotics as the chair, Deputy Minister of Interior Affairs as the deputy chair, Deputy Attorney General, Deputy Minister of Finance, Deputy Minister of Justice, Deputy Minister of Public Health, Deputy Minister of Culture and Information, Deputy Minister of Pilgrimage and Religious Affairs, Deputy Minister of Agriculture, Deputy of the local governance directorate and Deputy of National Directorate of Security as members.⁵⁷¹ Although the purpose of the commission in the words of the law is for “better implementation of

⁵⁶⁹ Interview: Head of Criminal Justice Taskforce of Islamic Republic of Afghanistan (October 2016, face to face)

⁵⁷⁰ Ibid

⁵⁷¹ Supra note 16, art. 7(1).

the law and effective campaign against intoxicants and narcotics drugs”⁵⁷², the unrevealed goal of cooperation and coordination from the establishment of this commission cannot be ignored. The activities of the above-mentioned institutions are required to be in coordination with the leading institution, which is the Ministry of Counter Narcotics. The national directorate of security is required to gather intelligence information and reports and submit it to the ministry of counter narcotics and ministry of interior affairs.⁵⁷³ Moreover, the ministry of public health, in consultation with the ministry of counter narcotics, is obliged to undertake demand reduction programs in the country.⁵⁷⁴ Furthermore, the ministries of information and culture, public health and pilgrimage and religious affairs, in consultation with the ministry of counter narcotics, are required to conduct informative and awareness programs regarding the drug cultivation, trafficking and consumption.⁵⁷⁵

A close glance to the duties of the above-mentioned institutions indicate that in the field of policy making the laws are keen to establish an effective cooperation and coordination amongst the relevant institutions. As discussion of the practical aspects of cooperation and coordination in this field is out of the scope of this dissertation, we will suffice to this extent and avoid any further discussion of this topic.

4.3.2. Cooperation and coordination between the national and international institutions

Drug problem in general and drug trafficking in particular, due to the trans-border impacts of them, have drawn the attention of the world community in the recent years to recourse to establishment of several regional cooperative and coordinative institutions. These specific institutions are established parallel to the already-existing institutions which are generally responsible for the coordination and cooperation in different fields that criminal matters, particularly drug issues, could also fall within their mandate. Afghanistan, due to producing a major part of opium of the world, has been part of some of these mechanisms. In the following, we would elaborate on such institutions, to which Afghanistan is affiliated, in the field of law enforcement.

⁵⁷² Ibid, art. 7.

⁵⁷³ Ibid, art. 65(7).

⁵⁷⁴ Ibid, art. 65(8).

⁵⁷⁵ Ibid, art. 65(10).

4.3.2.1.Cooperation and coordination in law enforcement activities

Generally, the Afghan laws require the national law enforcement institutions of Afghanistan to coordinate and cooperate with the similar institutions of the other nations when it is deemed necessary. The Afghan Police law, in its own words, duty bounds the Afghan police to “maintain cooperation and contact with border police of the neighboring nations in accordance with the international treaties; and to maintain cooperation and contact with the police of the foreign countries in accordance with the rules of Interpol.”⁵⁷⁶ Although Afghanistan has become a member of Interpol in October 2002, there has not been any involvement of this institution in the field of drugs in Afghanistan. This is mainly due to the fact that the policing activities pertaining to drugs in Afghanistan are being furthered under the supervision of the United States and Britain and arguably they are not pro involvement of the said institution in this field.

Another bold step that Afghanistan has taken in this regard is gaining the observer status in the Central Asian Regional Information and Coordination Center (CARICC) which is established for the exchange of information regarding the drug trafficking amongst the Central Asian countries. The objectives of this center in the words of its charter is:

- “1. Coordination of the efforts of the Member States in combating illicit drug trafficking at the regional level;
2. Establishment of the mechanisms of cooperation between competent authorities of the Member States;
3. Facilitation of the enhanced cooperation between the competent authorities of the Member States in combating trans-border organized crime associated with illicit drug trafficking;
4. Assistance in organizing and undertaking joint operations, investigations, including controlled deliveries;
5. Collection, storage, protection, analysis and exchange of information to combat illicit drug trafficking;
6. Assistance in standardizing information systems, including the databases of competent authorities of the Parties;
7. Development of the procedures on systematized accumulation of information, design

⁵⁷⁶ Supra note 515, art. 5(20)(21).

- and development of the Centre's database;
8. Introducing standard information exchange format and systems;
 9. Installation and operation of advanced software for information analysis;
 10. Analysis of the drug situation and development of appropriate recommendations;
 11. Assistance to the competent authorities of the Parties, as well as other states whose territory is used for illicit production and trafficking of narcotic drugs, in the implementation of anti-drug programs as requested;
 12. Assistance in the harmonization of the legal and regulatory framework of the Member States in the sphere of combating illicit drug trafficking;
 13. Holding conferences, training, and seminars pertaining to the enhancement of methods to combat illicit drug trafficking and strengthen international cooperation in this effort.”⁵⁷⁷

Although Afghanistan is not a member of this center, it has shown its willingness to cooperate with its northern neighboring countries. This is indicated in creation of a desk at the Regional Cooperation Department of Foreign Ministry of Afghanistan which solely is responsible for coordination with the members of this center in the field of law enforcement.

Afghanistan has also been part of the triangular initiative amongst Afghanistan, Iran and Pakistan which has been facilitated by UNODC. Under this initiative the said countries undertook an increase in the joint planning for better improving their analytical and operational capacity and further cooperation of their activities in the campaign against narcotic drugs.⁵⁷⁸

Beyond that, Afghanistan was part to the agreement between Russia, Tajikistan, Pakistan and Afghanistan that was made in December 2010 in Moscow. The purpose of said agreement was to fortify cooperation amongst those nations in the war against drugs.

Relying on the mentioned legal framework and the practical steps that Afghanistan has taken regarding the cooperation and coordination in the area of law enforcement, we could assert that

⁵⁷⁷ Regulation on Central Asian Regional Information and Cooperation Center, Available at: www.caricc.org/index.php/en/caricc/legal-basis/regulations-on-caricc

⁵⁷⁸ Agreement to Halt Drug traffic: Afghanistan, Iran and Pakistan, Available at: www.loc.gov/law/foreign-news/article/afghanistan-iran-pakistan-agreement-to-halt-drug-traffic/

the government of Afghanistan, to the extent feasible, has made efforts to be part of any mechanism in which the campaign against drugs has been under focus.

4.4. Investigation and prosecution in practice

Understanding the practical aspect of the work of these institutions was not feasible without conducting fieldwork. In the following, I will provide a general overview of the fieldwork and pursuant to that, there will be the analysis of the fieldwork followed by a set of recommendations for the said institutions.

4.4.1. General overview of the fieldwork:

Although Afghanistan is a country in the forefront of the drug problem in the world, there has not been any scholarly research about some aspects of the problem of drugs which investigation and prosecution of drug trafficking is one of them. Moreover, there has not been any institutional report about the assessment of the investigation and prosecution in the CJTF that could have helped scholars to use it as a source of information. Scarcity of any scholarly work on the one hand and lack of any institutional report on the other hand urged the author to recourse to a field work for the purpose of filling the gap of information regarding the work of this institution. The specific purpose of conducting this field research was to seek answers for the research questions of this dissertation which were:

Does the criminal justice system of Afghanistan possess enough tools and capacity to deal with the investigation and prosecution of drug trafficking?

What shortcomings, if any, exists in the system that has made it unable to reduce drug trafficking in Afghanistan?

In order to achieve this goal a set of one-on-one interviews with the actors of the institutions that were either directly involved in investigation and prosecution or were in contact with that process was conducted. The specific reason for the confinement of this field work only to interviews was the fact that the author's aim was to gain access to very specific information that could have only been obtained by direct and explicit questions from the actors of the involved institutions, not by questionnaires or any other means of field work. Since the interviews were mostly done with the prosecutors, judges and defense lawyers who were dealing with the drug trafficking cases in the framework of the Criminal Justice Task Force of Afghanistan, the different status of the

interviewees really rule out the option of focus groups to have recourse to. It is worth mentioning that initially conducting interviews with the technical detective institutions such as IIU and SIU was also part of the field work plan; however, due to the sensitive and intelligence nature of the tasks of these institutions, the author did not succeed to conduct these interviews despite numerous efforts. Unlike the prosecutors and defense lawyers who are directly implicated in the investigation and prosecution of drug trafficking cases as the two sides of the case, the judges are not involved in this process *per se*. However, their exposure to the results of investigation and prosecution, referred to them by the prosecutors, puts them in a better position of judging the how of the investigation or prosecution process. For this specific reason they were also included in the circle of interviewees of this field work.

Approaching different categories of interviewees had different procedures depending on the institution to which they were affiliated. The judges, prosecutors and defense lawyers, respectively affiliated to the Supreme Court, Attorney General's Office and the Afghanistan Independent Bar Association, either had a specific procedure or no procedure at all for interviewing them. The interview with the judges required written permission of the Supreme Court of Afghanistan which was obtained by the author for making the interviews feasible. For the purpose of confidentiality, the judges even requested the author to not mention their names in any reference to them. In the contrary, for interviewing the prosecutors and defense lawyers, there was no permission of the higher authorities required but they also refrained from granting the permission to the author to use their names while referencing them relying on the security reason.

Due to the limited number of personnel in the Criminal Justice Task Force, the author only interviewed six judges and five prosecutors which respectively make 45 and 30 percent of all the judges and prosecutors of this institution. From amongst the defense lawyers, five of them were interviewed which makes a considerable percentage of the defense lawyers who are involved representing drug trafficking cases.⁵⁷⁹ Gender wise, the interviewees included one female judge with no female prosecutor. Amongst the defense lawyers, 3 of them were female out of 5. This is

⁵⁷⁹ Due to independence of the lawyers that allows them to practice whatever area of law that they are interested in, it is not certain how many lawyers really represent drug trafficking cases. There are only a limited number of lawyers who solely are focused on the drug trafficking cases and these lawyers are the ones who are being paid by the legal aid organizations to represent the drug cases *pro bono*.

a true representation of presence of female in the related organs. The number of female judges and prosecutors is very limited in comparison with their presence in the profession of defense lawyering. Each one of the interviews, regardless of the category of the interviewees, took 20 to 25 minutes.

In these interviews the interviewees were facing a set of pre-articulated questions that were oriented to the purpose of the author for gaining relevant information from them. The number and type of questions were partly different from each one of the categories with some specific common questions that all were asked for the purpose of finding out the differences of their answers depending on their profession. There were 12, 9 and 8 questions that were respectively asked from the prosecutors, judges and defense lawyers.

In the following, an analysis of these interviews would be provided with a focus on interview of each categories.

4.4.2. Analysis of the fieldwork:

In order to draw better conclusions from this fieldwork, it is vital to analyze the interviews of the three category of interviewees separately. This tendency is taken due to the difference of some of the questions from the different categories.

4.4.2.1. Interviews with the prosecutors:

The prosecutors, besides the general questions that were related to their introduction, the years of service and number of cases that they deal with, were asked the following questions that would need to be analyzed, comparing the opinions of each one of the five interviewed prosecutors with each other.

1. What percentage of the cases that you deal with are drug trafficking cases?
2. What are the main challenges towards your tasks as an investigator and prosecutor?
3. Do you consider the existence of special bodies for investigation of drug cases useful or not?
4. How much coordination exists between your institution and the two other detective units (SIU and IIU) in the process of investigation?
5. How many of the cases that you investigate involve high- level traffickers?

6. What percentages of the cases that you investigate and prosecute find their way to the court?
7. Based on what you said, the investigation and prosecution of the drug trafficking cases are furthered well in the system. Why it does not have any impact on reduction of drug trafficking in Afghanistan?⁵⁸⁰

In regard to the question of the percentage of the drug trafficking cases, two of the prosecutors had no record of dealing with a case related to drugs that has not been drug trafficking case.⁵⁸¹ The two others asserted that 95% of the cases that they have investigated have been drug trafficking and the remaining 5% were cases that were related to cultivation and other aspects of drug crimes.⁵⁸² Only one prosecutor out of five believed that the cultivation and other aspects were making only 10% of the cases that he deals with, leaving the 90% to the drug trafficking cases.⁵⁸³ The three prosecutors who had the record of dealing with other aspects of drug crimes admitted that all the cases that they deal with are initiated and detected as drug trafficking cases and in the course of investigations, they find out about the other aspects of drug crimes and then deal with it.

These assertions are made in the presence of article 3 of the Law against Intoxicating Drinks and Drugs and their Control which considers all aspects of drug crimes as drug trafficking in defining drug trafficking.⁵⁸⁴ It is worth mentioning that none of the prosecutors in their interviews referred to or mentioned this article.

⁵⁸⁰ Fieldwork plan, Questions for the Prosecutors (September 2016)

⁵⁸¹ Interview: Prosecutor No.1. and No.2 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁵⁸² Interview: Prosecutor No.3. and No.4 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁵⁸³ Interview: Prosecutor No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁵⁸⁴ Supra note 16, art. 3.

In response to the questions related to the challenges towards their tasks, all five of the prosecutors mentioned their security as the main and fundamental challenge of their work.⁵⁸⁵ This challenge was not limited to themselves as it was often extended to their families too. They even mentioned two cases of assassination of the prosecutors and two occasions of kidnapping of family members. The other challenge that was mentioned by four of the prosecutors was the shortcomings of the cases in the detection phase that were mostly coming from the provinces which included the lack of evidentiary means.⁵⁸⁶ One of the prosecutors also mentioned the reduction of the logistical support to this institution by the donors after 2014 which in his words has a major impact on their functionality.⁵⁸⁷ The most important point in these answers was the issue of shortcomings in the cases that they receive from the detective institutions which in another question later on all the prosecutors have praised the existence of great cooperation and coordination between them and the detective institutions.

Regarding the usefulness of existence of special bodies for dealing with drug crimes, all the five prosecutors unanimously considered that a great achievement. They all asserted that this has made the actors of this institution to become more professional and has left them with enough time to deal with the cases timely.⁵⁸⁸

Pertaining to the question of coordination and cooperation with the detective institutions, all the prosecutors considered that to be to the required extent.⁵⁸⁹ They even mentioned that the work of the detective institutions really help them in the phase of investigation and they often build their cases on the findings of the technical detective institutions namely IIU and SIU. These assertions were made while in the previous questions four out of five of the prosecutors complained about

⁵⁸⁵ Interview: Prosecutor No.1. No.2, No.3, No.4 and No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁵⁸⁶ Interview: Prosecutor No.1. of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁵⁸⁷ Supra note 585.

⁵⁸⁸ Ibid

⁵⁸⁹ Ibid

the existence of shortcomings in the work of the detective institutions regarding the cases that they receive from them.⁵⁹⁰

Responding the question of percentage of high-level drug traffickers in the cases that they deal, they really had varying opinions. One of the prosecutors believed that the ratio was 95% and 5 %, the latter showing the high level traffickers.⁵⁹¹ Two of the prosecutors considered that to be 10% high-level traffickers and 90% mid-level and low-level traffickers.⁵⁹² The two other prosecutors who were holding managerial positions indicated a higher percentage of involvement of the high level traffickers in the cases that they investigate. The respectively mentioned 20% and 40% of their cases involving high-level traffickers.⁵⁹³ They even mentioned two names as Haji Watan and Son of Haji Lal Jan as the two high-level traffickers who have been prosecuted in this institution. They argued that the fact that the number of high-level traffickers are less in comparison to the mid and low level traffickers is not related to them as they only prosecute the cases that are brought to them by the detective institutions and when there is a high-level trafficker involved in a case, they prosecuted it similar to the other cases with no distinction. They also justified the prosecution of less number of high-level traffickers by claiming that almost all the high-level drug traffickers are residing outside Afghanistan or in the insecure areas that the Afghan government does not have any control there. If we focus on the difference of the opinion of the prosecutors, we can find out that the managerial and non-managerial positions of the prosecutors had its impact on their responses to this question. The ones with the managerial positions tried to show the percentage of high-level traffickers higher. Whereas the others did not try to do so by providing lower percentage of prosecution of high-level traffickers in their responses.

The question of percentage of the cases that find their way to the court was answered quite similar by all the prosecutors. Four of the prosecutors mentioned that 90% of the cases that they deal with,

⁵⁹⁰ Ibid

⁵⁹¹ Interview: Prosecutor No.4 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁵⁹² Interview: Prosecutor No.3 and No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁵⁹³ Supra note 581.

find their way to the court.⁵⁹⁴ Only one of the prosecutors said that all the cases that he has dealt with have found their way to the court with no exceptions.⁵⁹⁵ The reason for this high percentage, according to their words, was the handover of the cases to them with the required evidentiary means by the detective institutions. These words were asserted when in a previous question, the proper handover of the cases by the detective institutions was questioned by the prosecutors. This clearly indicated the over reliance of the investigative institutions on the work of the detectives.

The question regarding the non-reduction of drug trafficking despite the well-functioning system of investigation and prosecution, based on their words, was answered quite identical by all the prosecutors. They all connected the boom of drug trafficking in the country to the security, social, economic and political factors.⁵⁹⁶ They do not believe that their function has had any impact on the boom of drug trafficking even as a tangential factor.

4.4.2.2. Interviews with the judges:

Similar to the prosecutors, the judges were also asked a set of questions that were composed of general and specific questions. The general questions that were related to the common aspects of their work would not be elaborated here and thus the focus would be on the following specific questions:

1. What are the main gaps, if any, that you see in the work of investigative and prosecutorial institutions?
2. Do you consider the existence of special bodies for investigation and prosecution of drug cases an opportunity or a challenge?
3. What percentage of the cases that you deal with are drug trafficking cases?
4. What percentage of the cases that you adjudicate are involving high-level traffickers?
5. What percentage of the cases that you adjudicate are leading to conviction and how many to acquittal?
6. Are the rights of suspect and accused of drug cases protected in the system?

⁵⁹⁴ Supra note 585.

⁵⁹⁵ Supra note 591.

⁵⁹⁶ Supra note 585.

7. If the system, in your words, is working this well, then why the drug trafficking is not reduced in the country and rather is growing day by day?⁵⁹⁷

The judges also had some common and some distinct answers to each one of these questions that we will analyze them bellow.

In response to the question of existence of any gaps in the work of detective and investigative institutions, the judges agreed over the existence of gaps in the work of said institutions. In the detection phase, all the six judges agreed that most of the cases are not reaching the prosecutors in the time limit of 72 hours determined by the law.⁵⁹⁸ Each judge individually pointed at lack of identity of the witness(s) of the case,⁵⁹⁹ lack of permission of the court in some cases⁶⁰⁰ and non-presence of defense lawyers as the other gaps in the detection phase.⁶⁰¹ In the technical aspect of the work of the detective bodies, three of the judges considered the code reading system problematic as it is not based on a professional coding system.⁶⁰² For example: the word twenty would mean 20kg of drugs to them which would be very unrealistic in the cases that drugs are not seized with the suspect. The gap that all the judges agreed over the existence of in the investigation and prosecution phase was the over-reliance of the prosecutors on the work of the technical detective bodies.⁶⁰³ Connecting this issue with the lack of acquittals by the judges would be of vital outcome that need to be taken into consideration.

⁵⁹⁷ Fieldwork plan, Questions for the Judges (September 2016)

⁵⁹⁸ Interview: Judge No.1. No.2, No.3, No.4, No.5 and No.6 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁵⁹⁹ Interview: Judge No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶⁰⁰ Interview: Judge No.4 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶⁰¹ Interview: Judge No.1 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶⁰² Interview: Judge No.2, No.3, and No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶⁰³ Supra note 598.

Regarding the question of special institutions being a challenge or an opportunity, all the judges unanimously asserted that the special system of adjudicating the drug crimes is great opportunity that has led to enhancement of professionalism and rapidity of the work.⁶⁰⁴

The question of the percentage of the cases that are drug trafficking amongst all their cases was answered by all the six judges considering all their cases as the drug trafficking cases.⁶⁰⁵ However, only two of the judges mentioned that under article 3 of the Law against Intoxicating Drinks and Drugs and their Control, all the aspects of drug crime are considered drug trafficking by definition.⁶⁰⁶ Two of the judges mentioned that in the course of their adjudication, if there are any other crimes committed by the offenders, they would also deal with them.⁶⁰⁷

Responding the question of percentage of involvement of high-level drug traffickers in their cases, the judges presented varying numbers. Three of the judges mentioned 10% of all their cases involving high-level traffickers.⁶⁰⁸ One judge considered that 5% of all his cases⁶⁰⁹ whereas another raised that up to 20% of all his cases.⁶¹⁰ One of the judges argued that there has never been any case involving a high-level trafficker as his understanding from high-level trafficker was only international mafia of drugs.⁶¹¹ All the judges provided non-existence of residence of the high-level traffickers in Afghanistan or residence of them in insecure areas as the reasons for not being brought into prosecution.⁶¹² However, only one judge said that there are people in the high-ranking positions of the three branches of the government that are involved in the drug trafficking that for

⁶⁰⁴ Ibid.

⁶⁰⁵ Ibid.

⁶⁰⁶ Interview: Judge No.2 and No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶⁰⁷ Interview: Judge No.2 and No.6 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶⁰⁸ Interview: Judge No.2, No.3 and No.4 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶⁰⁹ Supra note 599.

⁶¹⁰ Interview: Judge No.6 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶¹¹ Supra note 601.

⁶¹² Supra note 598.

security reasons nobody can even mention their names.⁶¹³ The examples of the highest ranking officials that were prosecuted in the system were not going beyond the chief of provincial police or military generals. It should be mentioned here that the reason for difference of the percentage provided by each judge was depending on their definition of high-level drug trafficker which was varying to each one of them.

Answering the question of percentage of the convictions and acquittals in their cases, three of the judges only had 5% of their cases leading to acquittals.⁶¹⁴ Amongst them was one judge who only had three acquittals in three years of work with a work load of minimum of three cases per week.⁶¹⁵ Two of the judges had no cases that had led to acquittals during the time that they had worked as judges. The reason, put forth by them, for the lack of acquittals was the existence of sufficient evidence regarding all the cases that are processed to them.⁶¹⁶ If we compare this issue with the gaps that the judges mentioned in the work of detective institutions, the over-reliance of the prosecutors on the work of detective institutions and the fact that all the cases that the prosecutors investigate find their way to the court, there should be some other factors that make the judges to reduce the number of their acquittals. The allegations regarding the judgments being quantity oriented rather than quality is not proven by any firm and reliable evidence.

In regard to the question of observance of the rights of suspect and accused in the system, all the six judges believed that no other institution in the country is of a better reputation in terms of protection of such rights.⁶¹⁷ They even claimed that this is one of the great achievements of this special system for drugs that is admitted by defense lawyers too.

Regarding the non-reduction of drug trafficking despite the success of the investigation and prosecution, based on their claim, all the judges believed that the boom of drug trafficking was

⁶¹³ Interview: Judge No.2 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶¹⁴ Interview: Judge No.2, No.4, No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶¹⁵ Supra note 601.

⁶¹⁶ Interview: Judge No.3 and No.6 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶¹⁷ Supra note 598.

affiliated to the lack of security, lack of economic opportunities and lack of will in the international community to end this business.⁶¹⁸ Two of the judges believed that even if they are able to punish all the drug traffickers in Afghanistan, still the drug trafficking problem would not diminish as long as the international mafia are involved in it.⁶¹⁹

4.4.2.3. Interviews with the defense lawyers:

The defense lawyers as the other side of the case that notice major gaps and challenges in the investigation and prosecution system were also part of the interviews. In the interviews with them, apart from the general questions, the following specific questions were also asked:

1. What are the main challenges towards your tasks as a defense lawyer regarding the drug cases?
2. What percentage of the cases that you represent are drug trafficking cases?
3. What percentage of the cases that you represent are involving high-level traffickers?
4. What are the gaps in the process of detection to adjudication of drug cases in the work of different institutions?
5. In your opinion, what are the main reasons for the growth of the drug trafficking in Afghanistan?⁶²⁰

The defense lawyers also had similar or varying positions regarding the different questions that were posed to them which we will analyze them in the following.

In regard to the challenges posed towards their work, all the five defense lawyers that I interviewed had certain challenges facing them while furthering their work. All five of them considered lack of access to the crime scene and their client at the detection level as a big challenge for them.⁶²¹ They asserted that this shortage often leads to not being able to prepare a strong defense for their clients. They say that in their absence in the detection phase, their clients may make assertions that

⁶¹⁸ Ibid.

⁶¹⁹ Interview: Judge No.2 and No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face) The interviewee disagreed for their name to be mentioned.

⁶²⁰ Fieldwork plan, Questions for the Defense Lawyers (September 2016)

⁶²¹ Interview: Defense Lawyers No.1. No.2. No.3, No.4 and No.5 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

would be recorded by the technical detective institutions and hence would be used against them later in the process. Two of them complained about the invented rules by the prosecutors to not share the name of prosecutor with their clients while the law has bound them to share every single piece of information with their clients.⁶²² They claim that the prosecutors have made this rule for security reasons that would not help at all as the client, one way or the other, may encounter the prosecutor of his or her case. One of the defense lawyers, who was a female, pointed at some baseless allegations that are pointed at the defense lawyers pertaining corruption which is ruining the defense lawyers, particularly women.⁶²³ This would hinder the capacity of the lawyer to provide his or her client with a proper defense.

Responding to the question of percentage of the drug trafficking cases amongst their cases, three of the lawyers said that almost all the cases that they deal with are drug trafficking cases as they only represent drug cases.⁶²⁴ One of them said that 40 to 50% of the cases that she represents is drug cases that are solely drug trafficking cases.⁶²⁵ Another lawyer mentioned that 30% of his cases are drug trafficking cases with no other aspects of drugs, except drug trafficking, being involved in that 30%.⁶²⁶

Answering the question of percentage of their cases involving high-level drug traffickers, three of the lawyers said that they have never represented a high-level traffickers arguing that such cases would not go beyond 2 % of all the cases being adjudicated in the system.⁶²⁷ The two others have only had 2 % of the cases in which high level traffickers were involved.⁶²⁸ They all argued that the

⁶²² Interview: Defense Lawyers No.1 and No.5 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶²³ Interview: Defense Lawyers No.2 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶²⁴ Interview: Defense Lawyers No.1. No.2 and No.5 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶²⁵ Interview: Defense Lawyers No.3 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶²⁶ Interview: Defense Lawyers No.4 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶²⁷ Interview: Defense Lawyers No.3, No.4 and No.5 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶²⁸ Interview: Defense Lawyers No.1 and No. 2 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

system is really busy with prosecuting the low-level and mid-level traffickers and there aren't more than some famous cases such as Haji Watan and son Haji Lal Jan cases in which high-level traffickers are involved.

Pertaining to the question of gaps in the work of detective and investigative institutions, all five of them considered the special system of investigation and prosecution as a way of convicting suspect and accused.⁶²⁹ One of the lawyers even called the system to be ceremonial rather than providing justice.⁶³⁰ They also unanimously said that the prosecution is over-relying on the work of the detective institutions which in the words of one of them has really hindered the duty of the prosecution to collect evidence for and against the suspect.⁶³¹ Three of the defense lawyers considered the system really punitive in which there are no or lack of dismissals in the investigation level and no or scarcity of acquittals in the adjudication level.⁶³² Two of the defense lawyers accused the system for being only focused on procedural justice while ignoring substantive justice.⁶³³ They accepted that the procedural rights of the suspect and accused are being protected in the system; however, that should not give them the right to violate substantive justice at all. One of the defense lawyers criticized the lack of any supervision of the intelligence gathering institutions due to the secret nature of their work.⁶³⁴ He claimed that the court which is required to watch the legality of their actions is that amazed by their work that never questions them for any shortcomings. One of the lawyers pointed at the non-consideration of article 64 of the Law against Intoxicating Drinks and Drug and their Control which required the prosecutors to request up to half of the punishment from the courts in case of cooperation of the suspect or accused.⁶³⁵ In her

⁶²⁹ Supra note 621.

⁶³⁰ Interview: Defense Lawyers No.1 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶³¹ Supra note 621.

⁶³² Interview: Defense Lawyers No.1. No.2 and No.5 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶³³ Interview: Defense Lawyers No.3 and No.4 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶³⁴ Interview: Defense Lawyers No.5 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

⁶³⁵ Interview: Defense Lawyers No.2 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

view, lack of consideration of this provision is a real gap in the system that leads to lack of cooperation of suspect and accused with the system.

Responding to the question of reasons for the growth of the drug trafficking in Afghanistan, all five of them admitted the role of economic, social, security and political problems, did not ignore the role of shortcomings in the investigation, prosecution and adjudication of drug trafficking cases in the growth of this phenomenon. They all believed that lack of prosecution of high-level traffickers, the non-existence of dismissals and acquittals and orienting towards harsh punishments to the low-level and mid-level traffickers also play a vital role in the growth of this business as it reduces the lack of trust in the system.⁶³⁶ One of the defense lawyers even questions the will of the American and British actors of the Criminal Justice Task Force which is a vital reason for the growth of this business.⁶³⁷

4.4.2.4. Analysis of trans-category commonalities and differences of opinions:

Although different categories of interviewees, besides facing a number of similar questions, were asked some different questions, in the course of answering questions, they touched upon the issues from which the differences and similarities of their opinions could be revealed. There were three questions with the same wordings that all the three categories were asked.

The first was the question regarding the percentage of the drug trafficking cases amongst all the cases that they deal with. There was a consensus of opinion amongst all the three categories that almost all the drug cases that they deal with are drug trafficking cases. The slight difference that existed in their opinions was emerging from their understanding of drug trafficking which was already defined in article 3 of the counter narcotics code. As stated earlier, amongst all the interviewees, only two judges pointed at that specific article in their responses.

The second question was regarding the percentage of the cases involving high-level drug traffickers. Although all the interviewees, regardless of their categories, admitted the involvement of lower number of high-level traffickers in comparison with the low-level and mid-level traffickers in the cases that they deal with, the percentages that they were referring to was varying.

⁶³⁶ Supra note 621.

⁶³⁷ Interview: Defense Lawyers No.4 (January 2017, face to face) The interviewee disagreed for their name to be mentioned.

It ranged from 2% to 40%, the lowest coming from the defense lawyers and the highest from the prosecutors, leaving the judges in the middle with more inclination toward the view of the defense lawyers. This could have been realistic if the difference was only between the opinion of the judges and prosecutors which in that case would have showed the highest rate of dismissal of such cases in the prosecutorial level. However, the involvement of the defense lawyers in the investigation and prosecution level with a different view and the lack of dismissal records in the prosecutorial level proves this argument really naïve. The identical percentages presented by the defense lawyers and the judges show that the percentage of involvement of high-level traffickers in the cases dealt with and presented by a number of prosecutors is quite unrealistic.

The third shared question was regarding the reasons for the lack of reduction of drug trafficking in Afghanistan despite the success of the law enforcement system in the words of judges and prosecutors. In responding to this question, the judges and the prosecutors agreed that the boom of drug trafficking in Afghanistan was mostly linked with the security, economic, social and political issues, denying any impact of their work on the growth of this phenomenon. Contrary to that, the defense lawyers, besides admitting the impact of social, economic, security and political factors on the spread of this business, were also considering the lack of prosecution of high-level traffickers, lack of dismissals and acquittals and imposing harsh punishments on the low-level and mid-level traffickers as the factors with a maximal impact on the expansion of drug trafficking. If we look at this issue in the light of data provided in chapter two of this dissertation about the scope of the problem, one can easily understand that the impact of these shortcomings in the process of investigation and adjudication are not of that severe in comparison to the factors that were mentioned by the judges and prosecutors.

There were three other questions that were asked only from the two categories of the interviewees with the one common between the defense lawyers and judges and the two others between the judges and the prosecutors.

In response to the question between the judges and defense lawyers with was regarding the gaps in the work of detective, investigative and prosecutorial institutions, both categories agreed regarding the existence of some gaps and failures in the work of detective institution such as code reading challenges and preparing the evidence, and in the work of investigative institutions such as over-reliance of them on the work of detective institutions. However, the defense lawyers also

pointed at some other gaps that were not mentioned by the judges. These gaps were enumerated as lack of dismissals, focusing on procedural aspects and ignoring substantive justice, ignoring mitigating aspects of the law for the accused and orienting towards a very punitive approach by the prosecutors. In responding the other part of this question which was regarding the work of adjudicative bodies, the defense lawyers also criticized the judges by drawing the attention to the lack of acquittals and reliance of the judges on the work of the detective and investigative institutions without any due scrutiny that is required from the judges. This assessment reveals that the shortcomings in the work of the detective, investigative and adjudicated institutions cannot be ignored.

Answering one the questions regarding the percentage of the cases being dismissed or acquitted in the prosecutorial or adjudicative levels, both categories of judges and prosecutors agreed that the number of dismissals and acquittals were at the minimum level. Although the defense lawyers were not asked this question directly, in responding the other questions they referred to the lack of dismissals and acquittals as failures of both institutions. The shared view of all the three categories indicate that this tendency is extensively practiced in the system.

In response to the second shared question between the judges and the prosecutors, pertaining to the special bodies being a challenge or opportunity, both categories considered that to be an opportunity as it has had an impact on enhancing the professionalism and speed of their work. They also praised the existence of due cooperation and coordination amongst these special bodies. Despite the fact that defense lawyers were not asked this question, in tangent of answers to the other questions, they did not consider that an achievement *per se* by calling it ceremonial. An impartial assessment of the work of these institutions would make it flagrant that the existence of special bodies for dealing with the drug trafficking cases is safe to be called an achievement relying on the cooperation and coordination that exists in the system. This in no words would mean ignoring the shortcomings of this system.

One of the questions that was only posed to the judges was the protection of the rights of suspect and accused in the special system. The prosecutors and the defense lawyers were not asked this question directly; none the less, they still touched up on the issue in other questions that they were asked. The vital point here is the agreement of all these categories of interviewees about the good protection of the rights of suspects and accused in processing of the cases in the system. The only

critics that were posed by the defense lawyers regarding this issue were the non- presence of the defense lawyers in the detection level and the ceremonial aspects of this tendency in the system. This should be cleared that if the system is failed in another aspect, it should not be criticized for something that it does properly. Protection of rights is one of them that should be praised in the system rather than being criticized.

4.4.2.5.The positive and negative aspects of the investigation and prosecution process in regard to the drug trafficking cases:

Taking into consideration the analysis of the interviews from the pertaining institutions, we can draw some positive and negative conclusions. In the following, we would first elaborate the positive points and then the negative aspects of the work of such institutions.

4.4.2.5.1. Positive aspects:

There were numerous positive aspects in the work of the investigative and prosecutorial institutions that we would focus on each one of them separately in the followings:

Existence of good coordination and cooperation amongst the relevant institutions:

The existence of fruitful cooperation and coordination amongst the institutions involved in the drug trafficking cases is one of the great achievements of the Criminal Justice Task Force. This was one of the points that was collectively agreed by all the interviewees from the prosecutors, judges and defense lawyers. The cooperation and coordination sometimes turns to become over-coordination and over-cooperation which was criticized by the defense lawyers as a way of indicating the system as a mechanism for convicting people rather than an impartial one. The high degree of cooperation and coordination amongst these institutions mostly is due to the focus of their activities solely on the drug cases.

Non violation of the procedural rights of suspect and accused:

Unlike the other investigative and prosecutorial institutions in Afghanistan, this institutions is famous for the observance of the procedural rights of suspect and accused. This is one of the points that even the defense lawyers admired about the work of this institution. In the phase of investigation and prosecution the suspect and accused are provided with all the due process rights such as access to defense lawyers and translators, awareness of the charges against them, the right

to remain silent and any other similar rights. The only drawback that the defense lawyers pointed out at, was lack of access to the defense lawyers at the stage of detection particularly in regard to the cases that are coming from the provinces. This cannot be affiliated as a shortcoming to the system as there might not be any defense lawyers available in such provinces. This in no words is the claim that application of procedural justice in the drug trafficking cases inevitably leads to the substantive justice as the opposite may be the outcome in many occasions.

Existence of well-equipped technical institutions for dealing with the drug trafficking cases:

Criminal Justice Task Force is one of the unique institutions in the country that has access to very sophisticated and modern technological devices which in turn provides the ground for best use of material evidence in the process of investigation and prosecution. They are getting best use of the technical labs that are provided with the support of the United States and Britain. Beyond that, this institution is rightful to use many other technical devices that the other institution are not enjoying it. Legally, only in drug cases and crimes against internal and external security of the country the authorities are allowed to recourse to the wiretapping and other technological devices which has been very helpful in furthering investigative activities of these institutions. This is considered one of the great points in the process of furthering the activities of this institution.

4.4.2.5.2. Negative points:

Besides the positive points that the process of investigation and prosecution of drug trafficking cases have in Afghanistan, there are number of negative points that are attached to the work of these investigative and prosecutorial institutions. In the followings, we would briefly elaborate up on those negative points.

Over-reliance of the prosecutors and judges on the findings of technical institutions:

One of the main drawbacks of the process of investigation and prosecution in this institution is that the prosecutors and judges over-rely on the findings of the technical detective institutions. Although prosecutors claim that the reason for this reliance is the precise and trustworthy work of the detective institutions, it can be easily questioned based on the fact that almost all the cases that are sent to the prosecutors by the detective institutions are finding their way to the courts without

any exceptions. Despite the fact that judges slightly accept this as a flaw, they still build majority of their judgments on the findings of those institutions. Some judges even accepted that in the process of wiretapping, the coding system of detective institutions is not very systematic and rationale. They exemplified the mentioning of number in the phone conversation by the drug traffickers as the number of kilo grams of the drugs involved in that case. This would turn to a big problem when the drugs are not seized with the arrest of suspect and accused. The defense lawyers are very critical of this as they consider this as a hindering factor on the trustworthiness of the investigative and adjudicative institutions. This in turn creates this assumption that innocent individuals may be convicted in this system due to over-reliance on the evidentiary tools, authenticity of which is questionable even by the judges.

Orientation of the system towards harsh penalties:

Giving hard penalties to the offenders of the drug trafficking crimes is another flaw that is found in the system, dealing with the drug trafficking in Afghanistan. Although the punishments are already articulated in the law, the prosecutors and judges still have the option of requesting and giving the minimum punishment for the offenders. This is totally the opposite as in the majority of the cases, the punishments are often in the maximum level of the range that the law has provided. The judges claim that this is due to the provisions of the law that has not given them the authority to give the minimum punishment to the offenders. They refer to article 63 of the counter narcotics code where it is articulated that “In the cases of mitigation and judicial leniency, the punishment cannot be less than the two thirds of the maximum punishment for the crime.”⁶³⁸ They argue that unless the situation is under the provisions of article 64 of the counter narcotics code, which allows them reduce the punishment to the half of the maximum of punishment in the case of cooperation of suspect and accused, they cannot bring any significant reduction in the punishment.

Lack of recourse to the lenient provisions under article 64 of the counter narcotics law:

According to this provision of the counter narcotics law, when the suspect and accused in the process of detection, investigation or adjudication cooperates with the responsible authorities which results into revealing or arrest of the other drug traffickers, the prosecutor can request the

⁶³⁸ Supra note 16, art, 63 (2)

court to reduce the punishment up to half of the minimum of the punishment for the act.⁶³⁹ Based on the claim of the defense lawyers, the prosecutors often do not recourse to this article even if there is a considerable cooperation of the suspect or accused with them in the process of investigations. In a very limited number of cases the prosecutors' recourse to this provision by requesting an insignificant reduction in the punishment. This arguably reduces the likelihood of cooperation of the suspect and accused with the authorities while the said cooperation is very vital for the institution in detecting the criminal gangs. The importance of this cooperation becomes more flagrant when we notice that majority of the traffickers who are prosecuted in the system are the transporters rather than the actual traffickers. The cooperation of the transporter would be quite fruitful in guiding the authorities in finding the high-level traffickers.

Non consideration of cultural values in investigation and adjudication of drug cases:

This issue arises regarding the alliance in drug trafficking crimes. There are a number of people in the prisons who are convicted to alliance in drug trafficking crimes. These people were the host of a drug trafficker who has been arrested in the house of this person for possession and trafficking of drugs. According to the culture of Afghanistan, you cannot search your guest under any circumstances. The prosecutors and judges claim that it is the provision of the law under article 50 of the counter narcotics code that has obliged them to punish accomplices. However, if we look at this provision of the code, it stipulates that: “Anyone for the purpose of committing crimes articulated in this law... knowingly helps [the offender] in the equipping, facilitating and complementary acts [of the crime] as a result of which the crime is committed is subject to the same punishment that is given to the principle offender.”⁶⁴⁰ If we scrutinize this provision, we can realize that there are two important points in this provision. The first one is that the accomplice should have sufficient knowledge of the criminal act and the second one is that the act should have come to existence as a result of the cooperation which is requiring establishment of causal relationship. If the knowledge and causal relationship are not proven in the case, no one could be punished as an accomplice. The prosecutors, without proving these two counts, suffice to the existence of the drugs with the guest in the house of the host and build their indictment and judgment on that which often leads to punishment of innocent individuals.

⁶³⁹ Ibid, art, 64(1)

⁶⁴⁰ Supra note, art, 50 (2)

Focus of the investigation and prosecution on the low-level and mid-level traffickers and lack of access to the high-level traffickers:

One of the main flaws of the investigation and prosecutions system of Afghanistan is its focus on the low-level and mid-level drug traffickers with no access on the high-level traffickers. The Anti-Drug Trafficking Policy of Afghanistan has also concentrated on this issue and has insisted on shifting the focus of the investigation and prosecution to the high-level traffickers as they comparably pose more threats to the society than the minor traffickers. This policy divides the high-level traffickers into two groups: one only focusing on the profit and income and the other keen on utilizing the income in terrorist and anti-state activities.⁶⁴¹ The policy considers the latter group to be an imminent and serious threat to the society in comparison to the other one.⁶⁴² According to their estimates there are around 50 to 100 high-level traffickers in Afghanistan that have not been brought to justice so far. The prosecutors and judges also admit that majority of their cases, which makes from 90 to 95 % of their cases, are related to the low-level traffickers. These figures also seem unrealistic as in their interviews almost all the prosecutors and judges denied investigation or adjudication of a case in which high-level drug traffickers have been involved. Unless the high-level traffickers are prosecuted and punished, the drug trafficking problem would still continue as they can hire new low-level and mid-level traffickers who are in need of money for furthering their lives amongst the people.

Nonexistence or lack of dismissals and acquittals in the process:

Another failure that is attributed to the system of investigation and prosecution of drug trafficking is the lack of dismissals in the prosecutorial level and lack of acquittals in the adjudication level. Almost all the cases that are referred to the prosecutors by the police for investigation and prosecution are leading to preparation of act of indictment and hence find their way to the court. The prosecutors claim that it is due to the existence of sufficient evidentiary proofs for each one of them that are properly gathered by the detective authorities. This tendency would immensely undermines the value and importance of the investigations, the purpose of which is to reveal the

⁶⁴¹ Supra note 517, 18.

⁶⁴² Ibid, 15.

unknown aspects of the cases and leads to earlier dismissal of the cases of preparation of act of indictment.

Similarly, in the adjudication phase, based on the assertion of the judges, almost all their cases end up in conviction of accused. This court is even famous for being a court of conviction rather than court of justice. Some of the judges of this court even consider that as a pride that they do not have any acquittals for the ones who are prosecuted within the criminal justice taskforce. From justice point of view, it is important that fair procedures applied in the system lead into fair outcomes. However, considering this course of action in the system, it could be safe to say that this is impossible that all the ones who are brought before the system are criminals and this in no words can be considered a pride for an institution.

4.4.2.6.Recommendations for the reform of the system:

Considering the analysis of the field work and reviewing the positive and negative aspects of the existing system, the following recommendations are put forth by the author for better reforming of the system:

1. The investigative and prosecutorial institutions should reduce their reliance on the work of detective institutions:

The over-reliance is one of the main challenges of the investigative and adjudicative institutions that has had a negative impact on the image of the said institutions. The defense lawyers have played a major role in projection this image as the witnesses of such over-reliance. This is spread in a way that the entire system is there to just confirm the work of the detective institutions, particularly the technical ones, and are not paying attentions to the duty of scrutinizing the facts and circumstances. It is assumed that the prosecutors have forgotten their duty of collecting and assessing all the evidence for and against the suspect and accused by just turning in to a layer in the system for confirming the work of detective institutions. Similar to that, the judges, as the guardian of legality, are assumed to have forgotten their duty of impartiality and have turned to become part of the conviction system which is mostly the job of prosecutors. Continuation of this situation would certainly over shadow the good work of the criminal justice task force which is responsible for dealing with the drug cases. A close attention to the problem would be of a vital importance for reviving the great image of these institutions in the eyes of public.

2. There should be an increased number of dismissals and acquittals in the prosecution and adjudication phases:

The dismissals in the investigation phase and acquittals in the adjudication phase are rare phenomena that exist in the counter narcotics criminal justice task force. Almost all the cases investigated by the prosecutors are finding their ways to the court system which indicates that the prosecutors are there in the system to just prepare the acts of indictment and refer the cases to the court. This has raised a high degree of criticism towards the system which introduces the system as a mechanism for conviction of anyone who is brought before them. Increasing the number of dismissals in the investigation level would make the system gain trust of people. This would show that the prosecutors are not only trying to file charges in case of sufficient evidence, but also to dismiss when there is not sufficient evidence for filing charges.

Similar to that is the adjudication phase where there aren't any cases of acquittal or a very limited number of them. The ironic part is that the judges consider lack of acquittals as a great achievement for themselves which is quite the opposite. The judges who do not have acquittals in their record of judgments are often considered to be part of the conviction system rather than providing justice to the accused. Increasing the number of acquittals in the judgments of the court would build this trust that judges are not part of the conviction system and are there to ensure justice to the ones who are brought before them.

3. The investigative and prosecutorial institutions should draw their focus on the high-level traffickers instead of low and mid-level traffickers:

One of the main recommendations of this dissertation is concentration of investigation and prosecution of the criminal justice task force on the high-level and mid-level traffickers. Although it has been claimed by the prosecutors that 5% to 40% of the cases that they deal with are related to the high-level traffickers, in reality, they cannot recall any cases in which a high-level trafficker has been investigated and prosecuted. This indicates that the percentage mentioned by the prosecutors is a mere assertion with no realistic basis. Based on the claim of the criminal justice task force, on an average, almost 10s of cases are being investigated and prosecuted per week by the said institution. However, the number of drug traffickers and drug trafficking cases are increasing day by day which mostly emerges from the fact that the main drug traffickers who are

the real beneficiaries of this business are enjoying full impunity due to not being fearful of being brought to justice. In defense of this situation, the prosecutors often argue that detection of drug crimes are being furthered by the detective institutions and they only investigate and prosecute the cases that are brought to them, whether they are involving low-level or high-level trafficker. This argument can be countered by the fact that the criminal justice task force is a special body for dealing with the drug crimes and this status gives them more opportunity to strategically focus the attention of the task force on the high-level traffickers in the entire system from the detection phase to the adjudication phase. This could efficiently take place in the existence of high level of cooperation and coordination which, based on the claim of all the actors of criminal justice task force, is extensively exercised amongst the institutions within the task force.

Unless this shift of focus of investigation and prosecution is taken into consideration, and then acted upon,, the investigation and prosecution of drug trafficking cases shall not be of any importance role in the overall war against drugs.

4. The system should value the cooperation of suspect and accused by recourse to leniency within the limits of the counter narcotics code:

Lack of recourse to leniency enshrined in the code was one of the challenges that the defense lawyers mostly pointed at in their interviews. In their view, the prosecutors often do not give value to the cooperation of the suspect and accused in the process of investigation and prosecution which in turn discourages the cooperation of the suspect and accused. It is proven that valuing cooperation of the suspect and accused in organized crimes is very important for the success of law enforcement institutions. Existence of leniency in cases of cooperation of suspect and accused in drug trafficking cases would encourage the suspect and accused to more cooperation with the task force which in turn would lead to shedding light on the hidden angles of the cases. As has been asserted by the defense lawyers, their clients often refrain from cooperation with the prosecutors when they know that they will not enjoy the leniency that the laws have foreseen for their cooperation. For that specific reason they avoid cooperating with the prosecutors as they gain nothing in exchange of the antagonism of the ones against whom they make assertions in the process.

5. The prosecutors should request the minimum of punishment enshrined in the law for the ones who are just transporters and not real traffickers:

In the criminalization system of Afghanistan, there is always a minimum and maximum of punishment foreseen in the law for consideration of the mitigating and aggravating factors of the cases by the prosecutors and judges. Although the prosecutors themselves agree that majority of the ones who are being prosecuted in the system are ordinary carriers who do it for providing their primary means of life, they often recourse to requesting the maximum punishments for such offenders. This is often criticized by the defense lawyers who consider that quite unjust for such offenders. According to the defense lawyers, the general tendency in the system is to give harsh punishments to the offenders regardless of the usefulness or benefits of it to the offenders. In other words, the system is inclined towards retribution approach with a minimum attention to the rehabilitation of the offenders. This has turned the system to conviction machine with a high degree of inclination towards harsh punishments. A tendency of this nature would, arguably, be more useful for the high-level traffickers for deterring the others from committing drug trafficking and not for the ones who commit such crimes as a result of economic and social pressures on them.

A more lenient approach towards the ordinary offenders would certainly increase the credibility of the system and generate this hope that the system is punishing the offenders considering the usefulness and benefits of the punishments for the offenders and the society.

4.5.Conclusions:

Considering the institutional framework of the system and the fieldwork conducted for better assessment of the Criminal Justice Task Force, we can conclude that the system of investigation and prosecution of drug trafficking, common enough, has its own strengths and weaknesses.

The existing system of investigation and prosecution of drug trafficking, which is the one and only system with that special character, is really sophisticated and complex. The existence of several special detective bodies with the ordinary and technical duties, besides fortifying the professionalism of the work of this institution, is apparently causing some duplications in the first glance. However, the scope of action and authority of each one of these institutions is designed in a way that minimizes the degree of such duplication. This system is eligible to be praised for its great cooperation and coordination if not for any other points. This cooperation and coordination extends beyond the national institutions to the identical institutions in the neighboring countries which are bound to fight against drugs.

Practically, the system is furthering its work with a very high load of casework. In the practical aspect, the system has some flaws and drawbacks that some of them are intrinsic to the work of the institution and some others to the external factors for which the institution cannot be blamed.

The over-reliance of the prosecutors on the work of the detective intelligence institutions and lack of consideration of the cooperation of the suspect or accused which leads to reduction of the punishment for them based on the law are the two examples of the internal drawbacks of the system that requires the close attention of the said institution to it. Ignoring such flaws would precisely hinder any success of this institution in the eyes of the public which is irreparable for a public institution.

Besides that, there are a number of flaws and drawbacks that are connected to the external factors that the investigative and prosecutorial institutions would not be able to overcome them in spite of their endless efforts. The harshness of the punishment for the drug traffickers is one of the patterns that is solely connected to the provisions of the law and unless the law is amended, the prosecutors can take any practical step about it. Admittedly, this could only be a flaw of the prosecution if it emerges from non-recourse of the prosecutor to the mitigating factors despite their existence in the provisions of the law. Another example of the flaws that is of a minimal relevance to the prosecutor is the extensive prosecution of the low-level and mid-level drug traffickers in the system. The prosecutors only deal with the cases that are referred to them by the detective institution and if no high-level trafficker is referred to them by the said institutions, the burden is not carried by the prosecutors. Even the detective bodies cannot be blamed for this point due to the relevance of the issue to many other factors such as political, security, economic and social.

In summary we could claim that reforming the flaws in the work of the investigative and prosecutorial institutions would be very vital for gaining the trust of the public. However, unless the other aspects of the problem are not attended, this tendency would not be proven helpful at all.

5. Conclusions and recommendations for reform

Considering the broader picture of drug trafficking and the pertaining factors in its growth in Afghanistan, we can conclude that the role of investigation and prosecution of drug trafficking in the campaign against drugs, despite the need to be very vital, has been quite tangential. This is mainly due to the fact that on the one hand the impact of the factors such as lack of security, lack of job opportunities, lack of control of the government on the localities, lack of rule of law and so on involved in the boom of drug trafficking is immense on this field. On the other hand, the existence of shortcomings in the process of investigation and prosecution of drug trafficking has also played a role in reducing the impact of these processes in to a minimum level.

In the following, firstly there would be a conclusive assessment of all the pillars of the policy for tackling the problem of drugs in Afghanistan for bolding up the failures of each one of the pillars in the campaign against drugs. Secondly, the concluding remarks regarding the criminalization of drug trafficking in the domestic laws of the country and the conformity of Afghanistan with its international obligations will be provided. This will include a set of proposals and recommendations for the reform of criminalization of the said offenses. Thirdly, a conclusion of the assessments regarding the process of investigation and prosecution of drug trafficking in the criminal justice task force will be provided, followed by a set of proposals and recommendations for the reform of the system. Finally there will be concluding points regarding the role and impact of the investigation and prosecution of drug trafficking in the overall war against drugs.

As stated in chapter 2, the problem of drugs in Afghanistan has not been indigenous since the beginning and a number of external factors have had considerable impact on the growth of this phenomenon. The scope of the problem since 2001 has grown to that extent that has urged the Afghan government and its international allies to recourse to adoption of strategies in the light of counter narcotic laws for overcoming the challenge of the growth of the drug problem in Afghanistan. The eight-pillar policy by the Afghan government, five of which were shared with the United States counter narcotics strategy, had its own flaws and drawbacks in each and every one of the pillars. Eradication, being the first pillar of the Afghan and the US strategy, was initially furthered with success. However, the fact that it was making people turn against the US and the Afghan military forces in the localities made the decision makers to minimize or in some cases stop utilizing it and focus on the other pillars instead. Alternative livelihood was the other shared

pillar of the US and Afghan strategies that was not containing expected success due to time limitations, lack of cost effectiveness and lack of security. It was only implemented systematically for a limited number of years which was not sufficient, compared to the number of years that such projects have gained success in the other parts of the world. It also lacked cost effectiveness as any other competing crop with the opium was six times lesser in price than the said crop and the budget allocated for this purpose was way beyond the budget of the MCN per year. Similarly, security which is quite essential for the success of this endeavor was quite challenging particularly in the localities that this crop was extensively cultivated. Public awareness as the other joint pillar of the two strategies was also not enjoying the required success as it was in dire need of security and could only give relatively good results in the secure provinces in the northern Afghanistan, with not considerable achievements in the southern, eastern and south western Afghanistan. Interdiction/ law enforcement, as the fourth joint pillar of both strategies, was also intertwined with the lack of success due to lack of security and selective nature of it. Mostly the bulk of the opium was coming from the insecure areas that the Afghan government and the US forces did not have control over and thus making interdiction even impossible in some cases. Moreover, the interdiction under the US strategy, due to being designed from a counterinsurgency point of view, was only targeting selective groups who were affiliated to the terrorists and not dealing with the warlords and other major traffickers. Justice reform/ prosecution, as the last joint effort, was the other pillar of the strategy that due to being affected by many factors was not successful in outcome. Although the system was technically equipped and a large number of low-level traffickers were prosecuted in it, the actual expectation from it which was at least reduction of drug crimes in general and drug trafficking in particular was not achieved. The real flaws of the investigation and prosecution system will be provided later in this section.

The three other pillars of the strategy by the Afghan Government, which were not shared with the US strategy, had also their own drawbacks. Demand reduction was not really serving the purpose as the problem of drugs in Afghanistan was mostly due to the international demand and not the local. The in-country demand was arguably making a quite limited portion of the demand compared to the international one. Institution building was the other pillar that apparently was successful due to establishment of several institutions for dealing with the drugs; however, was not quite successful due to not achieving the goal behind establishment of such institutions which was reduction of drug crimes. Regional and international cooperation, which was the last pillar of

the strategy, has been at the center of attention of the Afghan government and since then Afghanistan has become a member of Central Asian Regional Information Coordination Center (CARICC) and the UNODC-led meetings such as Inter-Governmental Technical Committee (IGTC) and Senior Law Enforcement Officers (SLEO) which all are for countering drug trafficking in the international and regional level. However, from the result point of view, none of these initiatives have helped the reduction of the drug-related crimes in Afghanistan and the problem is still perpetuated and even developing day by day.

To connect the conclusive assessments of the two strategies to the impact of the drug phenomenon on Afghanistan, it can be concluded that the success of all the pillars of the strategies, which indeed were designed to be all inclusive, were hindered by a set of barriers that lack of security and economic dependency of local people on cultivation of poppy, which certainly are fueled by the drug mafia, have been marked as the most influential ones. The impact of drugs on the security and economic situation of the people has been so immense that did not allow any pillars of the Strategy to gain the required success. It is quite flagrant that any multi-pillar strategy can not be successful in one pillar while the other pillars are not generating the demanded results. Both the Afghan and the US counter narcotics strategies could have been successful if the security and economic challenges that were affected by the drugs were not that broad and devastating.

In the arena of criminalization of drug trafficking, the two separate time periods of regulation of drug-related offences have contained quite different characteristics. The first era that started from pre-codification in Afghanistan and continued until the enactment of the first counter narcotics code in 1990 is marked by the leniency and selectiveness of it which precisely emerges from the lowest degree of danger posed by drugs to the country. Unlike this era, the post-1990 is of the character of gradual harshness and severity which indicates the inclination of the law makers towards a more punitive approach in dealing with drug offences. In the process of codification of drug trafficking, the law makers either have scarcely utilized the other policies such as de-criminalization and de-penalization or have not recourse to them at all. This lack or scarcity of recourse to the said approaches, which are essential in a codification process, have made the pertaining laws to be a sole product of criminalization policy with a tendency of gradual harshness. This assertion is well evidenced in the subsequent laws that have been enacted since 1990 with even a greater emphasis in the newly enacted penal code which will come in to force in February

2018. Since there is no legislative history of the counter narcotics laws available in Afghanistan to show the real purpose of the drafters from selection of this punitive approach and inclination towards harsh punishments, it can be inferred that the drafters of all these codes have been of this belief that by increasing the harshness of punishment, they can gain success in the campaign against drug trafficking. However, in the world of realities, this tendency is proven to be quite useless as it is flagrant enough that the number of drug trafficking cases not only have not decreased by the enforcement of these laws but rather have increased to a large extent and is still continuing its growth. It can be claimed that the law makers in Afghanistan at the time of drafting of the new laws pertaining to narcotic drugs have rarely bothered themselves with an all-inclusive assessment of the failures of the previous laws and mostly have relied on their personal assessments that were not of a scientific value. They arguably have not considered the economic, cultural, security and geographical factors of the society that are really vital in a codification process. Each one of the counter narcotics laws have introduced more punitive approaches and harsher penalties for responding the problem of drug trafficking that has not been useful at all. Similar to the national obligations for criminalization of drug trafficking, there have also been international obligations on the government of Afghanistan to penalize drug trafficking as an offense of transnational character. This international obligation became more compelling with the tripartite treaty mechanism under the United Nations namely the 1961, 1972 and 1988 conventions, adoption of which really coincided with the growth of drug-related crimes in Afghanistan. In the field of criminalization, Afghanistan has fulfilled its obligations arising from these convention by penalizing any single act required by the said conventions to be penalized. However, regarding the enforceability of the enacted laws, there has not been any considerable and fruitful endeavor on the Afghan side.

In summary, it can be concluded that Afghanistan is not facing any shortage of laws in regard to criminalization of drug trafficking offence as there are subsequent laws enacted for regulating this field. However, the enforcement of the laws and the outcomes that are expected to be achieved by enforcement of these laws are still quite aspirational. Lack of those required characteristics of the law in the legislative documents pertaining to drug trafficking will certainly hinder application of the laws in practice which will be elaborated up on later on in this part.

The following recommendations are proposed for the betterment of criminalization process for a potential amendment process that might take place for the reform of the counter narcotics laws:

1. Recourse to the policies of codification of drug crimes other than pure penalization:

The fact that the mere focus of the law makers in Afghanistan has only been on the criminalization policy, has left the other policies unattended and hence has made the system not quite responsive. The law makers should shift their focus towards de-criminalization, de- penalization and regulation of drugs in Afghanistan in the situations where criminalization has not provided the required response. There is a dire need that the system of criminalization should be assessed to find out that in what specific situations recourse to the other policies of codification may come up with better responses.

2. The focus of codification should be shifted from a gradual increase of the punishments to gradual decrease of the punishments:

As the gradual harshness in the criminalization process of drug trafficking has not worked well, the focus of the law makers is needed to be shifted towards more realistic and enforceable punishments. A quite extensive and specific research is required to take place for determining the gaps and draw backs of the current system of criminalization to find out why despite the harsh punishments existing for the perpetrators of drug trafficking crimes, the number of drug trafficking crimes is increasing day by day. It should also be understood that if there is any nexus between the harshness of the punishment and the recidivism of the offenders.

3. Cooperation of the suspect and accused should be valued more in the law

Since drug trafficking is an organized crime and cooperation of the suspect and accused in such crimes is proven quite vital, the counter narcotics laws should have provisions that value this cooperation. Although article 64 of the law against narcotic drinks and drugs as well as controlling them stipulates this provisio by giving this discretion to the prosecutor to request the minimum of the punishment from the court in cases of cooperation of accused, it should be further developed and create a mechanism in which the cooperators could enjoy more reductions of the punishment and even some other privileges such as protections against any dangers that might be posed to the cooperator for their cooperation. Currently, the law does not provide any protection mechanism for the cooperators and has only sufficed to giving the discretion to the prosecutor to request

reduction of the punishment. This provision has two flaws in it: Firstly that it is only a discretion and not an obligation to the prosecutor to request such leniency from the court which gives the prosecutor the right to refrain from doing that even if the accused cooperates. Secondly even if the prosecutor makes such a request from the court, there is no obligation on the court to consider such request as the law does not require the judge to give such request any effect in issuing its judgment. For these specific reasons, a very direct and specific provision is required to institutionalize the value of such cooperation in the system.

4. More discretionary powers of leniency should be enshrined in the law for the judges

As there are maximum and minimum punishments enshrined in the provisions of the laws, the judges were considering that a barrier for themselves to exercise a higher degree of leniency towards the ones who are in need of such leniency. The judges asserted that there are occasions in which they know the status of the accused who is in need of more leniency; however, due to the provisions of the law that has set the minimum of punishment, they cannot give a lesser punishment for such a person in their verdict. This problem can only be resolved through amendment of the codes to bring the minimum of punishment a bit lower in order to give more discretion to the judges to consider the circumstances and surroundings of the cases and the status of the accused while making their judgments. This is precisely needed for this system as almost all the ones who are prosecuted in the system are the ones who are hired to transport drugs for a little money with which they could further their family life.

5. Quite distinct provisions should be enshrined in the laws for the ordinary traffickers and the organizers

Although there is difference of punishment for the ordinary traffickers and the organizers in the law, it is still within the limits of maximum punishment articulated in the provisions. A solution for this will be articulation of quite different punishments for the ordinary traffickers and the organizers. The fact that the organizers receive the bulk of the benefit of this lucrative business justifies articulation of quite different and relatively harsher punishments for such offenders. Making them all subject to the same provisions with the only difference of minimum and maximum punishment would not serve the justice very well.

This is to be emphasized here that these reforms can only be applicable by the amendment of the existing laws dealing with the issues of drugs in Afghanistan. The legislatures could bring reforms in this specific field by thoroughly assessing the challenges of the laws in the arena of practice and add or omit some certain provisions in the laws to better serve the justice in the practical phase of the pertaining laws.

In the arena of investigation and prosecution, there are two separate issues that need to be attended to in this conclusion. Firstly is the Criminal Justice Task Force for the drug-related offences and its functionality. Secondly is the concluding remarks regarding the impact of these shortcomings on the role of investigation and prosecution in the overall campaign against drugs in Afghanistan. In regard to the Criminal Justice Task Force it can be asserted that it is a great achievement in post-Taliban Afghanistan. This was a quite admirable initiative that a general consensus exists about. Technicality of the institutions, speed of trial process, consideration of the procedural rights of suspect and accused, coordination amongst the detective, investigative and prosecutorial institutions and enhancement of professionalism in the drug-related cases are all positive points that have come to existence as a result of establishment of this task force and cannot be ignored in any case. Despite the existence of such great achievements and positive points, there are a number of shortcomings in the task force that indicate the drawbacks within this system.

The over-reliance of the prosecutors on the work of the detective institutions, the lack or scarcity of dismissals in the investigation and prosecution level, lack of consideration of the cooperation of suspect and accused as a mitigating factor that is enshrined in the law and inclination of the prosecutors towards requesting the maximum of punishment for the accused are all the patterns of drawbacks in the work process of the investigative and prosecutorial institutions. A joint consideration of these two sides of the functionality of the investigative and prosecutorial institutions would reveal that the positive points are great achievements that arguably do not exist in the other parts of the criminal justice system of Afghanistan; however, they are not sufficient enough to cover the drawbacks that exists in the system. Consideration of all the procedural rights of the suspect and accused in the system is quite admirable which shows existence of a fair trial in this mechanism. This could be a good pattern to be followed in the other sectors of the criminal justice system of the country. However, violation of the substantive justice for the suspect and accused which comes from the result of the work of these institutions can never be hidden behind

the observance of the procedural rights. This would in turn leave the institution with lack of credibility in the eyes of the public.

In order to reform the system and revive the trust of the public, the following steps should be taken by the taskforce:

1. Reduction of reliance of the prosecutors on the work of the detective institutions:

It is very common that the investigative and prosecutorial institutions almost always built their case on the work of the detective institutions. Nonetheless, there should be a certain degree of assessment exercised by the investigative institutions for knowing the authenticity of the work of the detective institutions. The law has made this an obligation of the prosecutor to assess the work of the detective institutions and do not rely on the parts that are not serving justice, even if it is against the suspect and accused and eases the job of the prosecutor. The law further stipulates that the prosecutor should make efforts to find the evidence for and against the suspect or accused and should not suffice to finding the evidence that is only against the suspect or accused. Unlike what the law stipulates, the prosecutors in the Criminal Justice Task Force often rely on the work of the detective institutions in a manner that proves the work of the said institutions uncontested. This has created this belief that the prosecutors are just tasked to confirm what is done by the detective institutions without relying on their legal right which is questioning the authenticity of it and rejecting what is not in conformity with rules. In order to end this belief and revive the credibility of the system, the prosecutors should reduce their reliance on the work of detective institutions to the extent that justice is ensured and not beyond that.

2. Increase the number of dismissals in the cases where the case is not of that status to be proven beyond reasonable doubt:

In any jurisdiction, the prosecutors often try their best to file charges against the suspects that are brought before them. However, it does not mean that there are no dismissals in the process of investigation and prosecution in the other jurisdictions. The prosecutors in discharge of their legal duties are bound to dismiss the case when the grounds for proving it beyond reasonable doubt is not feasible. In the Criminal Justice Task Force, based on the assertions of the prosecutors in their interviews, there are either no or very limited number of dismissals in the investigation and prosecution phase with some prosecutors even not having a single case of dismissal. This type of

confession by the prosecutors certifies the assertions by the defense lawyers who claim that the task force, in practice, is only acting as a convicting mechanism without being concerned about their duty to ensure justice. The assertions that the detection process is furthered in a quite technical way that does not leave any room for mistake, is quite superficial as any technical system may engage with mistakes that need to be corrected. In the criminal justice system, the fact that the prosecutors are granted this authority to assess the authenticity and legality of the work of detective institutions is for the sake of distinction of the right and wrong actions of the said institutions with an ultimate goal of ensuring justice. In order to regain the trust of the public on the work of these institutions, there is a dire need that the prosecutors fill this gap by recourse to dismissals in the cases that eligible for dismissal.

3. Valuing the cooperation of suspect and accused as a factor for requesting the minimum punishment enshrined in the law

Although the law has articulated the cooperation of suspect and accused as a mitigating factor that authorizes the prosecutors to request the minimum punishment from the court, the prosecutors, considering this as their discretionary powers, often refrain from such a request, as claimed by the defense lawyers. As in the field of organized crimes, which drug trafficking is one of them, cooperation of the suspect is of a great value for the law enforcement authorities, the laws often consider such cooperation generally as a mitigating factor. In Afghanistan, despite the fact that the degree of reduction of punishment is not considered enough and is proposed to be further reduced by the law, the prosecutors even do not recourse to that unsatisfying reduction and avoid that privilege for the sake of the safeguarding the system which in reality is against the system. The legislator who has articulated such a provision in the law has been well aware of the value of such cooperation in regard to drug trafficking as an organized crime. Non-consideration of such a legal provision by the prosecution would certainly be a derogation from the purpose of the law which is protection of the society against the dangers of the organized crimes. In order to achieve the purpose of law, the prosecutors should recourse to such provisions in the process of their work for better encouragement of suspect and accused to further cooperate with the law enforcement authorities.

4. The prosecutors should avoid requesting the maximum punishments for the suspect and accused in all the cases before them:

In the Criminal Justice Task Force, the prosecutors tend to request the maximum of punishment enshrined in the law for almost all the cases that they investigate and prosecute. This is quite understandable that in general the prosecutors often request the maximum punishment in any system in the world as they consider that s requirement of their job to defend the interest of the public by punishing the offenders. However, in the situation of Afghanistan when the prosecutors themselves know that almost all the cases that they deal with are related to the ordinary traffickers and transporters who do it for furthering their daily life, requesting the maximum of punishment would not be in the interest of justice which is the ultimate goal of imposing a punishment on an offender. The best possible solution for this is that the prosecutors really consider the circumstances and surroundings of the cases that they deal with and request either the minimum or the maximum of the punishment from the court for ensuring justice in a better way.

To summarize these concluding remarks, it can be asserted that the Criminal Justice Task Force has many positive points that are admirable. However, a lot more is needed to be done in order to make this system as a credible institution in the eyes of the public. The above-mentioned reform proposals are just put forward for betterment of the system and ultimately gaining the public trust on this task force. It is worth mentioning here that, unlike the reform proposals for the criminalization chapter, none of these proposals would require amendment of the laws as they all would take place by adoption of guidelines and procedures that the taskforce itself has the authority of. A set of all-inclusive guidelines and procedures that are adopted after a realistic assessment of the functionality of the system would really serve this purpose.

Turning to the second point which was the role of investigation and prosecution in the overall campaign against drugs in Afghanistan would require assessing this issue in two layers:

The first one is the role of shortcomings in the system itself that may have caused the lack of impact of the system in this campaign. The Second one is the role of other external factors that has left the system not effective in the campaign against drugs.

As stated earlier, the system of investigation and prosecution certainly had its shortcomings and flaws, reducing the effectiveness of the system in its turn. However, the said shortcomings in the system were of a minimal impact on reducing the impact of the investigation and prosecution in the overall campaign. One of the shortcomings, arguably impactful on the reduction of role of the system is the focus of the system on investigation and prosecution of the low-level and mid-level

traffickers with no considerable number of high-level traffickers prosecuted in the system. Although it can be accepted as one of the main shortcomings of the system, it cannot be considered as the failure of the investigative and prosecutorial institutions *per se*. It, with no doubts, is the failure of the entire system of the task force with a more weight on the side of the detective institutions as the institution who have failed to detect such offences and bring to justice the high-level traffickers involved in them. It really supports the claim of the prosecutors that in the absence of detection of crimes by the detective institutions, they can never be able to exercise their investigative and prosecutorial power on an issue. Similar to this is the role of the other shortcomings such as inclination towards harsh punishments, over reliance of the prosecutors on the work of detective institutions and lack of dismissals in the investigation and prosecution phase, that cannot establish the direct linkage between their existence and the boom of the drug trafficking business in the country, despite the fact that their role in reduction of trust of people on the system cannot be ignored. The most relevant shortcoming of the investigation and prosecution process, arguably, is the de-valuing of cooperation of the suspect and accused by the prosecutors which can be of a considerable impact in the arena of organized crimes. Any potential cooperation of the suspect and accused could be that vital that will end up in detection and hence investigation and prosecution of high-level traffickers who are enjoying full impunity. Having said this, it can be summarized that the said flaws in the work of investigative and prosecutorial institutions can have an impact on the reduction of role of the system in the overall campaign against drugs, it cannot be as much impactful as the other external factors that exist outside of the investigative and prosecutorial system that undoubtedly are more impactful on the growth of drug trafficking in Afghanistan.

The role of the factors other than the flaws of investigation and prosecution have been that immense that a unanimous consensus amongst the national and international actors has come into existence about it. The fact that Afghanistan is still a battle field and lack of security is still a huge challenge for it, is one of the main factors in the boom of drug business. Lack of security has been playing both cause and effect role in regard to the drug crimes in Afghanistan. The drug traffickers, simultaneous to enjoying the lack of security in the country for furthering their business, are creating security challenges either by directly being involved in insurgency activities or indirectly allocating shares to the insurgents for removing any potential hinders that might be created towards their business. It is clearly evidenced that the business of drugs can enjoy full freedom in the

absence of security as it has grown enormously in the insecure areas where the control is permanently in the hand of insurgents or time to time is being exchanged between the Afghan government and the insurgents. There are also sufficient evidence at hand that the war machine in Afghanistan is considerably fueled by the drug money in different layers starting from cultivation until the trafficking.

The economic dimension, parallel to the security challenge, is another main factor that provides further ground for the growth of the drug business in Afghanistan. In the phase of cultivation, this factor can play a major role in two distinct ways. First that the farmers themselves are attracted to cultivation of this crop by its lucrativeness as it generates six times more benefit compared to any competing crop and willfully recourse to the cultivation of poppies. Second that the farmers are obliged to cultivate poppy due to the agreement of *Salam*, in which the traffickers pay the money for the next harvest before the cultivation season. In this type of agreement, since the farmer has already received the money, they cannot refrain from cultivation of the poppy even if it is against their will. Since the only source of income for the farmers is the product of their lands, they cannot pay back the money that are paid and often are pressured by the drug-traffickers to cultivate poppy in their lands. This situation can be more critical and severe in the localities where the drug traffickers are of sole control and the defenseless and vulnerable farmers do not enjoy any protection from the state or any local mechanism that stands against cultivation of drugs. Moreover, lack of employment opportunities in the rural areas have also made an extensive amount of cheap labor available in the localities to be utilized in the harvest season by the farmers. The amount of almost 5\$ per day is sufficient enough to incentivize the available local labor force to get involved in the business. This can be of the same impact in the processing and trafficking level too. In both these layers, the ordinary laborers are getting the least benefit and the high risk of being punished by the criminal justice system. According to the assertion of the interviewees, almost majority of the cases that are being adjudicated are related to the people who are involved in this business for securing a low income with which they can maintain their own or their family lives.

To summarize these concluding remarks, we can put forward that these lack of security and economic factors are that impactful on the boom of this business that failures of the investigation and prosecution system will be quite tangential in comparison to them.

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Fieldwork plan, Questions for the Defense Lawyers (September 2016)

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Interview: Defense Lawyer No. 1 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (January 2017, face to face)

Interview: Defense Lawyer No. 2 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (January 2017, face to face)

Interview: Defense Lawyer No. 3 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (January 2017, face to face)

Interview: Defense Lawyer No. 4 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (January 2017, face to face)

Interview: Defense Lawyer No. 5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (January 2017, face to face)

Interview: Judge No.1 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face)

Interview: Judge No. 2 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face)

Interview: Judge No. 3 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face)

Interview: Judge No. 4 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face)

Interview: Judge No. 5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face)

Interview: Judge No. 6 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (November 2016, face to face)

Interview: Prosecutor No.1 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face)

Interview: Prosecutor No.2 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face)

Interview: Prosecutor No.3 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face)

Interview: Prosecutor No.4 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face)

Interview: Prosecutor No.5 of the Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face)

Interview: The Head of Criminal Justice Task Force of Islamic Republic of Afghanistan (October 2016, face to face)