

**IDENTIFYING AND UNDERSTANDING MUTUAL LEGAL  
ASSISTANCE OBLIGATIONS UNDER INTERNATIONAL LAW:  
THE CASE OF AFGHANISTAN**

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*ABSTRACT*

*The rise of transnational crime has been a growing threat to international security and global governance over the last three decades. Transnational crime poses a greater threat to developing countries and conflict-affected states such as Afghanistan. One of the main challenges to any state’s effort to combat transnational crime is its transnational character,*

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*often involving activities that cross multiple state boundaries. As a result, a single state acting alone may find it nearly impossible to suppress such crimes without legal assistance from other countries. Further, under international law, states cannot enforce their criminal jurisdiction beyond their national boundaries. These barriers combined with the rise in transnational crime have pushed states to find new ways to encourage and facilitate legal assistance among themselves. Most notably, the UN adopted four major conventions, known as UN Suppression Conventions, including the 2003 UN Convention against Transnational Organized Crime and the 2005 UN Convention against Corruption. To effectively combat transnational crime and facilitate flow of evidence and information, these UN conventions impose a wide range of mutual legal assistance obligations on states parties including Afghanistan.*

*The purpose of this Article is to identify and analyze Afghanistan's mutual legal assistance obligations under international law. The Article examines the relevant provisions of the UN Suppression Conventions and delineates at least 17 mutual legal assistance obligations and eight non-mandatory measures for Afghanistan. Additionally, the Article explores and assesses the impacts of Afghanistan's obligations under the SAARCC Convention on Mutual Legal Assistance in Criminal Matters. Finally, it briefly examines 40 Recommendations from the Financial Action Task Force and analyzes the impacts of mutual legal assistance provisions of the recommendations to states parties and non-states parties. The Article's analysis may help not only Afghanistan understand, incorporate, and implement its obligations, but will also provide a useful analytical framework for other states parties (particularly developing countries) to understand the UN Suppression Conventions to compare and assess the extent of their compliance with the conventions.*

## I. INTRODUCTION

Combating transnational crimes requires states to pursue crimes beyond their national boundaries. However, investigation and prosecution of crimes outside a state's territory raises the question of whether a state can extend its jurisdiction beyond its sovereign borders. Under traditional international law, although states may be able to establish their prescriptive and adjudicative jurisdiction over transnational crimes, they are not allowed to enforce their criminal jurisdiction beyond their national borders. Although states have attempted to extend their jurisdiction unilaterally or multilaterally, the scope of extension remains quite limited. The challenge of jurisdictional gaps is formidable, chiefly because of the longstanding principle, with narrow exceptions, that states generally cannot enforce their jurisdiction extraterritorially. Therefore, states seek to employ other remedies such as mutual legal assistance (also known as international judicial cooperation,<sup>1</sup> or

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1. John A. E. Vervaele, *Mutual Legal Assistance in Criminal Matters to Control (Transnational) Criminality*, in ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 121 (Neil Boister & Robert J. Currie eds., 2015)

judicial assistance).<sup>2</sup> Since these developments are quite recent in international law, no globally accepted uniform terminology exists to describe states' cross-border legal cooperation activities.

There is an important distinction between traditional attempts to extend jurisdiction and modern innovations (mutual legal assistance). The first efforts sought to *directly* extend the jurisdiction of a sovereign state. When State A seeks to directly enforce its laws within the territory of State B, however, this inevitably threatens the long-standing Westphalian principle of non-interference in the domestic affairs of another sovereign (State B). Friction is unavoidable. More recent efforts therefore proceed in a different manner by enlisting the State B to *voluntarily* exercise its own domestic jurisdiction in cooperation with, and in service of, enforcement officials in State A. In the last three decades, this has been accomplished through a growing network of bilateral and multilateral treaties.<sup>3</sup>

Against this backdrop, this Article examines Afghanistan's international law obligations with respect to mutual legal assistance. These obligations arise from the international conventions to which Afghanistan has become a party. This Article examines several UN Suppression Conventions, regional conventions, and inter-governmental organizations' frameworks and identifies the mutual legal assistance obligations they carry for states parties including Afghanistan. In order to analyze and identify Afghanistan's obligation under international law, the Article focuses primarily on four UN conventions: the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; the 1999 UN International Convention for the Suppression of the Financing of Terrorism; the 2003 UN Convention against Transnational Organized Crime; and the 2005 UN Convention against Corruption. These conventions are globally influential—widely ratified by almost all states across the globe, including Afghanistan—and they embody many mandatory and non-mandatory mutual legal assistance requirements for member states. Collectively, these four conventions are referred to here as the UN Suppression Conventions.<sup>4</sup> This Article identifies and explains at least 17 mutual legal assistance obligations and eight non-mandatory measures for Afghanistan under the four UN Suppression Conventions.

The Article proceeds with the following order. Part II lays out an overview of mutual legal assistance, explains its various types and tools such as formal and informal methods, and contextualizes the scope of the study.

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2. *Mutual Legal Assistance Manual*, COUNCIL OF EUROPE 9 (Mar. 2013), <https://rm.coe.int/mutual-legal-assistance-manual-eng/1680782927> [hereinafter THE COUNCIL OF EUROPE'S MANUAL].

3. An older, and considerably less efficient, means of formal cooperation has existed for centuries in the form of 'letters rogatory'. These are discussed briefly below, *see infra* section II (a).

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

Part III provides a comprehensive comparative analysis of Afghanistan's mutual legal assistance obligations under four major UN Suppression Conventions. It also identifies and explains many non-mandatory mutual legal assistance measures strongly recommended by the Conventions. Furthermore, it explores the impacts of regional mutual legal assistance conventions and the universally influential recommendations set out by international organizations, particularly the Financial Action Task Force. Finally, Part IV concludes this Article.

## II. MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS: AN OVERVIEW

Scholars and practitioners categorize mutual legal assistance or international legal/judicial cooperation slightly differently. Some scholars, such as Neil Boister, discuss international legal cooperation under two categories, treating international law enforcement cooperation<sup>5</sup> separately from legal assistance.<sup>6</sup> Other scholars, such as Richardson<sup>7</sup> and Prost,<sup>8</sup> include all these efforts under the general rubric of mutual legal assistance but distinguish between formal and informal mutual legal assistance methods. In this classification, law enforcement cooperation falls under the informal mutual legal assistance method.<sup>9</sup> Practitioners such as the drafters of the Council of Europe's Mutual Legal Assistance Manual differentiate mutual legal assistance (judicial assistance), which requires formal request and compulsory measures in the form of warrants or court orders,<sup>10</sup> with administrative assistance (informal assistance), such as exchanging information or evidence through police-to-police or prosecutor-to-prosecutor cooperation.<sup>11</sup>

Given that all scholars and practitioners describe the same patterns of state actions, the differing terminology does not necessarily indicate a different approach to the underlying substance; it can, however, lead to confusion and disagreement.<sup>12</sup> Moreover, none of the classifications are

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5. *See id.* at 280-310.

6. *See id.* at 311-32.

7. L. Song Richardson, *Due Process for the Global Crime Age: A Proposal*, 41 CORNELL INT'L L.J. 2, 350-51 (2008).

8. *See* Kimberly Prost, *Breaking Down the Barriers: Inter-national Cooperation in Combatting Transnational Crime*, OAS (1998), [https://web.oas.org/mla/en/G\\_Countries\\_MLA/can\\_mla\\_desc2\\_en.pdf](https://web.oas.org/mla/en/G_Countries_MLA/can_mla_desc2_en.pdf).

9. *See, e.g. id.*; Richardson, *supra* note 7, at 351; Dato' Umar Saifuddin bin Jaafar, *Informal Measures in Mutual Legal Assistance—Success Stories; Public-Private Partnership to Prevent and Detect Corruption* 1, [https://www.unafei.or.jp/publications/pdf/GG9/19\\_GG9\\_IP\\_Malaysia2.pdf](https://www.unafei.or.jp/publications/pdf/GG9/19_GG9_IP_Malaysia2.pdf) (last visited Oct. 2, 2022).

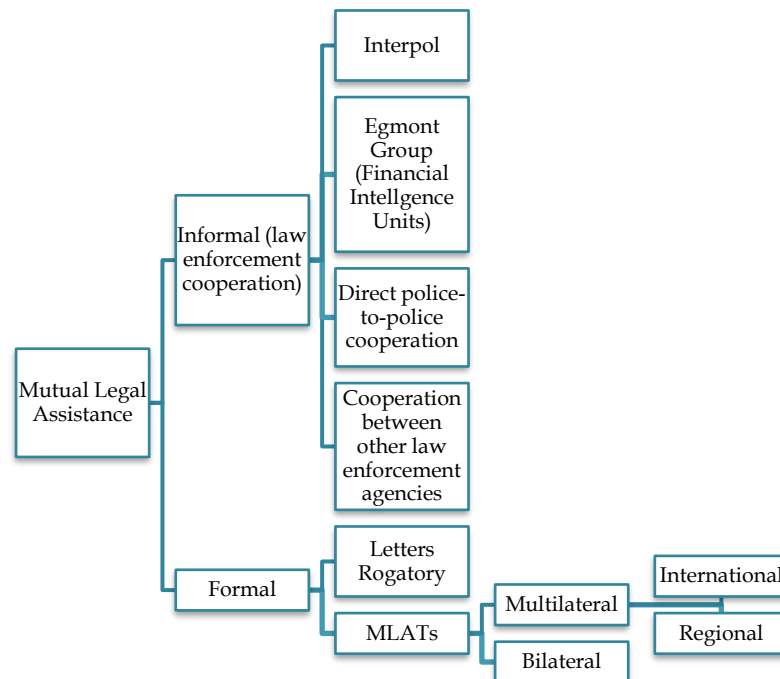
10. THE COUNCIL OF EUROPE'S MANUAL, *supra* note 2, at 9.

11. *Id.*

12. Even in a single language, such as English, the terminology is not consistent. The problem is further complicated because the legal terminology in common law heritage states (usually operating in English) is different than the legal terminology of civil law heritage states (operating in multiple languages). Additionally, in many local languages, terms for newly introduced legal concepts such as mutual legal assistance may not exist. This invites further

particularly clear-cut. The two categories overlap to some extent, and it can be difficult to draw precise lines between them. Nonetheless from the above discussion, as a matter of consistency and clarity, this Article follows Richardson and Prost’s description and differentiation of mutual legal assistance into formal and informal methods. Generally, mutual legal assistance will therefore be defined as “a process by which states seek and provide assistance in gathering evidence for use in criminal cases.”<sup>13</sup> The two methods of mutual legal assistance<sup>14</sup>—informal and formal—have various forms (see Figure 1.). It should be noted that the various methods and forms of mutual legal assistance are complementary to each other rather than conflicting. They will be elucidated in greater detail below.

**Figure 1.** Forms of mutual legal assistance as practiced globally



confusion. For instance, based on University of Washington Law Emeritus Professor Jon Eddy’s observation as a Resident Legal Advisor to the Indonesian Ministry of Law and Human Rights in 2003, Indonesia had no existing term for mutual legal assistance. FATF demanded that Indonesia amend its legislation to provide for mutual legal assistance. Indonesia kept putting forward draft legislation using the phrase “kerja sama” (literally, ‘working together’). When FAFT officials translated this, it was translated as “cooperation.” FATF understood ‘cooperation’ to refer only to discretionary informal assistance, and not to the more robust and formal mandatory forms of mutual legal assistance. Although substantive issues did divide the parties, to a large extent the controversy continued due to a linguistic misunderstanding. When the linguistic issue was identified, the Indonesians simply created a new term—“bantuan hukum balik” (roughly, reciprocal legal aid) and the issue was then resolved in short order.

13. STEPHEN DAVID BROWN, *COMBATING INTERNATIONAL CRIME: THE LONGER ARM OF THE LAW* (2008).

14. Prost, *supra* note 8.

A. *Informal Mutual Legal Assistance (Law Enforcement Cooperation)*

The territorial nature of enforcement jurisdiction and the practical challenges noted earlier make law enforcement cooperation critical to combating transnational crimes. States initially resort to the informal method or law enforcement cooperation. Informal mutual legal assistance refers to the cooperation of law enforcement agencies in one country with their counterparts in another country by exchanging information and obtaining cross-border evidence “below the radar of high-level government officials”<sup>15</sup> in an informal and often relatively unstructured setting.<sup>16</sup> This occurs primarily through police-to-police contact, often with increasing involvement of other law enforcement agencies such as tax authorities, security agencies, financial intelligence units, and similar entities over time.<sup>17</sup> States aim to assist each other through law enforcement cooperation with the purpose of detecting and investigating transnational crimes.<sup>18</sup> Law enforcement cooperation can take place in different forms, including storing and sharing information, supporting intelligence or undercover operations, or conducting joint investigations.<sup>19</sup> As Boister observes, many recent transnational crime conventions encourage law enforcement cooperation among states parties.<sup>20</sup>

Informal mutual legal assistance is extremely important in obtaining information and gathering evidence. Essentially, the informal method is “the first step in any evidential request of complexity in any event, even where it is always the intention to issue a formal letter of request.”<sup>21</sup> The informal method also plays a critical role in establishing networks and good relationships between states’ law enforcement agencies;<sup>22</sup> it serves as a rapport-building step before initiating a formal mutual legal assistance request. Except in certain circumstances where a rule/law might be breached in the process, information or evidence produced through informal mutual legal assistance methods not only opens the door for further investigation and potentially a formal mutual legal assistance request but may itself have evidentiary value.<sup>23</sup> The Council of Europe’s Manual on Mutual Legal Assistance indicates that information or documents that are obtained through informal methods are admissible in the courts.<sup>24</sup> According to the Manual, “[t]he word ‘informal’ is not being used in the present context in relation to the product itself, simply in relation to the way in which the request is made and the route by which it is communicated.”<sup>25</sup>

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15. See Richardson, *supra* note 7, at 351.

16. See BOISTER, *supra* note 5, at 283.

17. See *id.*

18. See *id.* at 280.

19. See *id.* at 284-96.

20. See *id.* at 283.

21. THE COUNCIL OF EUROPE’S MANUAL, *supra* note 2, at 9.

22. *Id.*

23. *Id.*

24. *Id.* at 11.

25. *Id.*

Despite a recent increase in developing and using formal methods, such as mutual legal assistance treaties (MLATs), among States, informal methods continue to play a critical role and are considered irreplaceable.<sup>26</sup> In addition to direct agency-to-agency cooperation such as police-to-police contact, there are many international and regional organizations that facilitate information-sharing and law enforcement cooperation among member states.<sup>27</sup> The International Criminal Police Organization (ICPO or INTERPOL) and the Egmont Group are two of the most influential international bodies that facilitate and enhance information-sharing and shape national policies in relevant areas. Afghanistan is a member of both organizations. Below is a brief description of those organizations and their initiatives.

## 1. INTERPOL

INTERPOL is an inter-governmental organization established in 1923.<sup>28</sup> It is the largest police organization in the world with 195 member countries.<sup>29</sup> Afghanistan has been a member of INTERPOL since October 21, 2002.<sup>30</sup> The goal of INTERPOL is “to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries”<sup>31</sup> and “establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.”<sup>32</sup>

Every INTERPOL member should establish a focal point department within its national police.<sup>33</sup> According to Article 31 and 32 of the INTERPOL Constitution, in order to ensure “constant and active co-operation among member countries,<sup>34</sup> every member “shall appoint a body which will serve as the National Central Bureau.”<sup>35</sup> INTERPOL describes National Center Bureaus (NCBs) as the heart of its operations.<sup>36</sup> NCBs serve as a bridge between different police units inside a country and connect the national police of member countries to each other and with INTERPOL’s General Secretariat<sup>37</sup> through a “secure global police communications network called

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26. Prost, *supra* note 8.

27. See BOISTER, *supra* note 5, at 309-10.

28. *Our History*, INTERPOL, <https://www.interpol.int/en/Who-we-are/Our-history> (last visited Oct. 2, 2022).

29. *Member Countries*, INTERPOL, <https://www.interpol.int/en/Who-we-are/Member-countries> (last visited Oct. 2, 2022).

30. *Afghanistan*, INTERPOL, <https://www.interpol.int/en/Who-we-are/Member-countries/Asia-South-Pacific/AFGHANISTAN> (last visited Oct. 2, 2022).

31. THE CONSTITUTION OF THE ICPO-INTERPOL (adopted by the General Assembly at its 25th session (Vienna - 1956)), art. 2 (1) [hereinafter INTERPOL CONSTITUTION].

32. *Id.* art. 2 (2).

33. *National Center Bureaus (NCBs)*, INTERPOL, <https://www.interpol.int/en/Who-we-are/Member-countries/National-Central-Bureaus-NCBs> (last visited Oct. 2, 2022) [hereinafter NBCs].

34. INTERPOL CONSTITUTION, *supra* note 31, art. 31.

35. *Id.* art. 32.

36. NBCs, *supra* note 33.

37. INTERPOL CONSTITUTION, *supra* note 31, art. 32.

I-24/7.”<sup>38</sup> NBCs carry out their duties in two important ways. First, they share national criminal data with INTERPOL global databases.<sup>39</sup> INTERPOL has developed 17 databases covering individuals; forensics; travel and official documents; stolen property; firearms trafficking; and organized crime networks.<sup>40</sup> These databases enable national police “to identify a trend, prevent a crime, or arrest a criminal.”<sup>41</sup> Second, NBCs “cooperate on cross-border investigations, operations and arrests.”<sup>42</sup> NBCs are able to seek or provide cooperation to each other for any crime that crosses national boundaries.<sup>43</sup>

Finally, one of the most important tools that INTERPOL uses to facilitate cooperation is “Notices.” Notices “are international requests for cooperation or alerts allowing police in member countries to share critical crime-related information.”<sup>44</sup> The General Secretariat of INTERPOL has the authority to issue Notices at the request of NBCs.<sup>45</sup> There are eight types of Notices for different purposes,<sup>46</sup> including Red (for wanted persons), Yellow (for missing persons), Blue (for additional information), and Black (for unidentified bodies).<sup>47</sup> The General Secretariat only issues a Notice if it meets the requirements set by the INTERPOL Constitution and Rules on the Processing of Data.<sup>48</sup> INTERPOL issued 13,377 Red Notices in 2019 alone.<sup>49</sup>

Despite developing comprehensive mechanisms for cooperation and relatively effective communication channels, INTERPOL has been criticized for being informal and for being used by authoritarian states to suppress their political opponents abroad.<sup>50</sup> Additionally, INTERPOL has been criticized for not giving individuals the right to a hearing before the Commission for the Control of INTERPOL’s Files (CCF)<sup>51</sup> to dispute INTERPOL Red Notices.<sup>52</sup> Although a Red Notice is not obligatory,<sup>53</sup> it is the most famous

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38. NBCs, *supra* note 33.

39. *Id.*

40. *Our 17 Databases*, INTERPOL, <https://www.interpol.int/en/How-we-work/Databases/Our-17-databases> (last visited Oct. 2, 2022).

41. NBCs, *supra* note 33.

42. *Id.*

43. *Id.*

44. *About Notices*, INTERPOL, <https://www.interpol.int/en/How-we-work/Notices/About-Notices> (last visited Oct. 2, 2022).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Red Notices*, INTERPOL, <https://www.interpol.int/en/How-we-work/Notices/Red-Notices> (last visited Oct. 2, 2022).

50. See EDWARD LEMON, *Weaponizing Interpol* 30 J. DEMOCRACY 15, 15-17 (2019).

51. The CCF is an independent oversight body that reviews INTERPOL notices. See BOISTER, *supra* note 5, at 309.

52. BOISTER, *supra* note 5, at 309.

53. *Id.* at 308.

among INTERPOL's notices<sup>54</sup> and is used extensively.<sup>55</sup> Despite the fact that the majority of countries prefer to act only on arrest requests processed through diplomatic channels,<sup>56</sup> about 33% of members make arrests based on INTERPOL Red Notices.<sup>57</sup>

## 2. The Egmont Group of Financial Intelligence Units

The Egmont Group was founded in 1995 as an informal forum.<sup>58</sup> It is “a united body of 167 Financial Intelligence Units (FIUs)”<sup>59</sup> from around the globe. The Financial Transactions and Reports Analysis Center of Afghanistan (FinTRACA) joined the Egmont Group in 2010.<sup>60</sup> However, the Egmont Group suspended FinTRACA's membership on 15 August 2021, the day the Taliban took control of Kabul.<sup>61</sup> One of the main goals of the Egmont Group is to facilitate the exchange of financial intelligence information in money laundering and terrorist financing cases.<sup>62</sup> According to the Egmont Group's Charter, “all members foster the widest possible cooperation and exchange of information with other Egmont Group FIUs on the basis of reciprocity or mutual agreement.”<sup>63</sup> The Egmont Group has created the Egmont Secure Web (ESW) which is “an electronic communication system that allows encrypted sharing among members of emails and financial intelligence.”<sup>64</sup> The ESW system establishes a “secure and reliable channel of communication for the members of the Egmont Group.”<sup>65</sup>

Some Egmont Group documents, including the Charter and its principles, are binding on member countries.<sup>66</sup> For instance, the document that institutes the Egmont Group's principles for information exchange

54. *Interpol: How to Challenge an International Arrest Warrant (Red Notices and Diffusions)?*, KAARLS, <http://kaarls-strafrechtadvocaten.nl/english/interpol-red-notice-and-diffusion-removal-request/> (last visited Oct. 2, 2022).

55. See BOISTER, *supra* note 5, at 308.

56. *Id.* at 309.

57. *Id.*

58. See Egmont Group of Financial Intelligence Units Charter, preamble para. 8, [hereinafter EGMONT'S GROUP CHARTER] (approved by the Egmont Group Heads of Financial Intelligence Units on July 2013 and revised on September 2018); *The Egmont Group of Financial Intelligence Units*, U.S. TREASURY, <https://www.fincen.gov/resources/international/egmont-group-financial-intelligence-units> (last visited Oct. 2, 2022).

59. *About, Egmont Group*, EGMONT GRP. [hereinafter EGMONT'S WEBSITE] <https://egmontgroup.org/about/> (last visited Oct. 2, 2022).

60. Valentina Pasquali, *FinTRACA, Afghanistan's Financial Intelligence Unit, Faces Bleak Future*, ASS'N. OF CERTIFIED ANTI-MONEY LAUNDERING SPECIALISTS [ACAMS] (Sept. 13, 2021), <https://www.moneylaundering.com/news/fintraca-afghanistans-financial-intelligence-unit-faces-bleak-future/>.

61. *Statement on FinTRACA, FIU Afghanistan*, EGMONT GROUP, <https://egmontgroup.org/news/statement-on-fintraca-fiu-afghanistan/> (last visited Oct. 2, 2022).

62. EGMONT'S WEBSITE, *supra* note 59.

63. EGMONT'S GROUP CHARTER, *supra* note 58, para. 3.1 (A).

64. *Id.* para. 3.3.

65. *Id.* para. 3.3(a).

66. *Id.* para. 1.4.

explicitly indicates that the principles are obligatory and thus “cases of significant and relevant-non-compliance will be subject to the *Egmont Group Support and Compliance Process*.”<sup>67</sup> On the other hand, other documents, such as the Operational Guidance for FIU Activities and the Exchange of Information, are merely instructive.<sup>68</sup> According to the 2017/2018 Annual Report of the Egmont Group, 22,532 exchanges of information occurred among FIUs of the Egmont Group.<sup>69</sup>

Although informal mutual legal assistance methods are crucial and useful in gathering information and evidence, enforcing criminal jurisdiction, and disrupting certain types of transnational crime,<sup>70</sup> their scope is limited and they do not provide a vehicle through which states can exchange all of the necessary forms of assistance or evidence.<sup>71</sup> In particular, if a legal assistance request triggers a domestic legal or judicial procedure in the receiving state, or the legal assistance request initiates compulsory measures in the receiving state, informal methods or police-to-police cooperation would not be helpful to produce the required evidence or information.<sup>72</sup> For instance, obtaining bank records, search and seizure, interviewing a suspect, or obtaining internet records would not be possible through informal mutual legal assistance requests.<sup>73</sup> To obtain such evidence, states must resort to formal mutual legal assistance methods.<sup>74</sup>

### B. Formal Mutual Legal Assistance

Due to the limited scope and efficiency of informal methods, states have worked to enforce criminal jurisdiction through formal mutual legal assistance methods. These methods are the tools by which law enforcement and judicial authorities of different jurisdictions can formally seek and obtain legal assistance and help each other with criminal jurisdiction and effective prosecution and deterrence of serious crimes.<sup>75</sup> As noted above, these methods extend the *practical reach* of criminal enforcement by State A (the requesting state) by enlisting the assistance of State B (the requested state), which then exercises its domestic jurisdiction in furtherance of State A’s request. Some scholars, such as Boister and Prost, identify the general

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67. *Principles for Information Exchange between Financial Intelligence Units*, EGMONT GRP. FIN. INTEL. UNITS at 3 (Oct. 28, 2013), <https://egmontgroup.org/wp-content/uploads/2021/09/Egmont-Group-of-Financial-Intelligence-Units-Principles-for-Information-Exchange-Between-Financial-Intelligence-Units.pdf>.

68. See EGMONT’S GROUP CHARTER, *supra* note 58, para. 1.4.

69. *Annual Report 2017/2018*, EGMONT GRP. 9 (2018), [https://egmontgroup.org/wp-content/uploads/2021/09/Egmont\\_Group\\_Annual\\_Report\\_2017-2018.pdf](https://egmontgroup.org/wp-content/uploads/2021/09/Egmont_Group_Annual_Report_2017-2018.pdf).

70. See, e.g., Prost, *supra* note 8; BOISTER, *supra* note 5, at 311.

71. See, e.g., Prost, *supra* note 8; BOISTER, *supra* note 5, at 311.

72. See, e.g., Prost, *supra* note 8; BOISTER, *supra* note 5, at 311.

73. THE COUNCIL OF EUROPE’S MANUAL, *supra* note 2, at 10-11.

74. See Prost, *supra* note 8; see also THE COUNCIL OF EUROPE’S MANUAL, *supra* note 2, at 10.

75. See Marie Chêne, *Mutual Legal Assistance Treaties and Money Laundering*, TRANSPARENCY INT’L 2 (2008).

domain of mutual legal assistance as covering a wide variety of investigative matters such as taking testimony; interrogating criminals witnesses, experts, and victims; providing evidence and information; executing court decisions; and requests for arrest, detention, search, and seizure.<sup>76</sup> There are two methods for formal mutual legal assistance: letters rogatory and MLATs.<sup>77</sup>

### 1. Letters Rogatory

Letters rogatory is the traditional, long-standing formal method of pursuing mutual legal assistance among states.<sup>78</sup> While letters rogatory were the primary formal mutual legal assistance tool before the advent of MLATs, they are still used by countries in the absence of an MLAT.<sup>79</sup> Letters rogatory is defined as “a formal request from one responsible authority to another responsible authority in the foreign country where evidence or the service of documents is sought.”<sup>80</sup> Commonly, there is judicial oversight over letters rogatory and a judge’s signature is required.<sup>81</sup> Although letters rogatory are customarily sent through diplomatic channels,<sup>82</sup> some countries may transmit them via INTERPOL<sup>83</sup> or directly from court to court.<sup>84</sup> Letters rogatory do not convey an obligation to respond to a requested State because the letters rely entirely “on principles of comity, or respect for foreign sovereignty, rather than on an assertion that the jurisdiction seeking the evidence has a legal right to the evidence.”<sup>85</sup> Both prosecutors and defendants can use letters rogatory to request evidence.<sup>86</sup>

Using letters rogatory can be challenging. First, it is an extremely time-consuming, slow process.<sup>87</sup> According to information available on the U.S. Department of Justice’s website, the process of letters rogatory typically takes at least one year.<sup>88</sup> Second, letters rogatory cannot be used before the

76. See BOISTER, *supra* note 5, at 316-317; see also Prost, *supra* note 8.

77. T. MARKUS FUNK, MUTUAL LEGAL ASSISTANCE TREATIES AND LETTERS ROGATORY: A GUIDE FOR JUDGES, FED. JUDICIAL CTR. 1 (2014); see, e.g., Richardson, *supra* note 7, at 350-53.

78. U.S. Dep’t of Just., Crim. Res. Manual § 275 (2018), <https://www.justice.gov/jm/criminal-resource-manual-275-letters-rogatory> (last visited Oct. 2, 2022).

79. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* 13 (2012) [hereinafter OECD TYPOLOGY].

80. *Id.*

81. U.S. Dep’t of Just., *supra* note 78.

82. *Id.*

83. *Id.*

84. Funk, *supra* note 77, at 17.

85. Peter Swire & Justin D. Hemmings, *Mutual Legal Assistance in an Era of Globalized Communications: The Analogy to the Visa Waiver Program*, 71 N.Y.U. ANN. SURV. AM. L. 687, 692 (2016).

86. Funk, *supra* note 77, at 2.

87. Daniel Halvarsson, *The Suspect and Mutual Legal Assistance: A Legal Analysis of the Rights of the Individual in the Suppression of Transnational Organized Crime* 29 (2015) (Master’s Thesis, Uppsala University).

88. See U.S. Dep’t of Just., *supra* note 78.

initiation of judicial proceedings. Therefore, it is not available to prosecutors who may need particular evidence to initiate a judicial proceeding.<sup>89</sup> Third, letters rogatory do not create a binding obligation on a requested state. States may respond to letters rogatory and provide legal assistance as a matter of courtesy, but they have no obligation to do so.<sup>90</sup> One commentator observes, “parties utilizing letters rogatory must simply cross their fingers and hope that the foreign nation will provide the evidence in a timely fashion and in an admissible form.”<sup>91</sup> Fourth, letters rogatory does not have a central authority where decisions are made by expert staff. This can create misunderstanding and confusion as to what information is being requested or not requested, and the letters could be directed to the wrong authority in the receiving state.<sup>92</sup> Given the limited efficiency of letters rogatory due to the above shortcomings and the increase in transnational crime, states have endeavored to develop a more effective and reliable method.<sup>93</sup> These efforts have resulted in the advent of MLATs.<sup>94</sup>

## 2. MLATs

An MLAT is “a treaty which creates a binding obligation on the treaty partners to render assistance to each other in criminal investigations and proceedings.”<sup>95</sup> MLATs are mandatory and have “the force of law.”<sup>96</sup> According to some scholars, MLATs have addressed many flaws of the letters rogatory system and created a mechanism that is a “mandatory, reliable, and efficient means to obtain foreign evidence in a timely fashion and in an admissible form.”<sup>97</sup> The main goal of MLATs is “to introduce administrative efficiency into the investigation of criminal cases with transnational aspects, by way of treaty obligations.”<sup>98</sup> Unlike letters rogatory, the use of MLATs to obtain cross-border evidence is only available for governments or prosecutors, not for defendants.<sup>99</sup>

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89. L. Song Richardson, *Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem*, 26 BERKELEY J. INT’L L. 62, 89 (2008).

90. *Id.*

91. Richardson, *supra* note 7, at 352.

92. *See* Halvarsson, *supra* note 87, at 29.

93. Richardson, *supra* note 7, at 352.

94. *Id.*

95. James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE W. RESV. J. INT’L L. 405 (1988).

96. U.S. Dep’t of Just., *Crim. Resource Manual*, CRM 276, <https://www.justice.gov/jm/criminal-resource-manual-276-treaty-requests> (last visited Oct. 5, 2019).

97. Richardson, *supra* note 7, at 353.

98. ROBERT J CURRIE & JOSEPH RIKHOF, *INTERNATIONAL & TRANSNATIONAL CRIMINAL LAW* 515 (2d ed. 2013)

99. *See id.* at 354-355. The exclusion of defendants from the MLAT compulsory process for obtaining evidence has been subjected to much criticism. Opponents assert that the exclusionary rule establishes an “unconstitutional compulsion disparity” between prosecution and defendant. (*See* L. Song Richardson, *Convicting the Innocent in Transnational Criminal*

MLATs may be bilateral or multilateral.<sup>100</sup> Bilateral MLATs are negotiated and signed between two states. One of the main benefits of bilateral MLATs is that two parties can devise a clear enforcement mechanism which reconciles differences in their legal systems and cultures in the treaty.<sup>101</sup> Bilateral MLATs address a variety of differences such as “the fact that nations criminalize different acts, have different legal traditions (civil versus common law), use different evidence-gathering mechanisms, and understand appropriate law enforcement behavior differently.”<sup>102</sup> The U.S. Department of State asserts that every bilateral MLAT may be quite unique.<sup>103</sup> In recent years, use of bilateral MLATs by states has grown rapidly because they are more effective than letters rogatory, elevate certainty in cooperation,<sup>104</sup> and are binding on signatory states.<sup>105</sup> For example, while the U.S. has historically, been disinclined to provide legal assistance in criminal matters to foreign jurisdictions,<sup>106</sup> the country has entered into MLATs with over 70 countries.<sup>107</sup>

Multilateral MLATs are negotiated and signed by more than two countries. Although states do not have an obligation under customary international law to provide legal assistance,<sup>108</sup> MLAT provisions have been incorporated into many international and regional crime conventions to promote reciprocity.<sup>109</sup> Multilateral MLATs have two important benefits. First, they are particularly efficient because many countries can join and use them together.<sup>110</sup> In the absence of bilateral MLATs, they provide a strong legal basis for member states to use mutual legal assistance tools and engage in cross-border cooperation to fight transnational crime.<sup>111</sup> Second, multilateral MLATs set the legal basis and standards for party states to develop and sign more detailed bilateral MLATs based on the general framework and obligations they accepted in the multilateral MLATs.<sup>112</sup>

There are two types of multilateral MLATs. The first type of multilateral MLAT contains the provisions of mutual legal assistance obligations in the

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*Cases: A Comparative Institutional Analysis Approach to the Problem*, 26 BERKELEY J. INT’L L. 62, 92 (2008)). The disparity in turn undermines the fairness of the process and individual rights. (*Id.* at 93.) These criticisms have been raised in the context of the U.S., but they can be relatively applicable to other countries.

100. OECD TYPOLOGY, *supra* note 79, at 13-14.

101. See Richardson, *supra* note 7, at 354.

102. *Id.*

103. U.S. Dep’t of Just., *supra* note 96.

104. See generally OECD TYPOLOGY, *supra* note 79, at 14; see also Funk, *supra* note 77, at 3.

105. See, e.g., Halvarsson, *supra* note 87, at 29; Richardson, *supra* note 7, at 84.

106. See Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT’L LAW. 1, 191, 194 (1985).

107. CHARLES DOYLE, CONG. RSCH. SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 23 (2016), <https://fas.org/sgp/crs/misc/94-166.pdf>.

108. See, e.g., BOISTER, *supra* note 5, at 311; Vervaele, *supra* note 1, at 122.

109. See BOISTER, *supra* note 5, at 311.

110. OECD TYPOLOGY, *supra* note 79, at 15.

111. See Halvarsson, *supra* note 87, at 30.

112. See Halvarsson, *supra* note 87, at 30; see also BOISTER, *supra* note 5, at 315.

UN Suppression Conventions.<sup>113</sup> Some of these “obligations are commonly known as treaties within the treaty, or mini-MLATs.”<sup>114</sup> This means that the conventions are not exclusively about mutual legal assistance, but they contain “a set of detailed obligations for the provision of legal assistance.”<sup>115</sup> As the UN became increasingly involved in suppressing transnational crimes such as drug trafficking, it started to incorporate mutual legal assistance obligations in many relevant conventions.<sup>116</sup> Some of the UN Suppression Conventions that embody MLAT obligations (mini-MLATs) include the UN Single Convention on Narcotic Drugs of 1961<sup>117</sup> as amended by the 1972 Protocol (UNSCND);<sup>118</sup> the UN Convention on Psychotropic Substances of 1971 (UNCPS);<sup>119</sup> the Vienna Convention;<sup>120</sup> the Financing Convention;<sup>121</sup> UNCTOC;<sup>122</sup> and UNCAC.<sup>123</sup>

Most of these conventions set general mutual legal assistance obligations and oblige states parties to “afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings”<sup>124</sup> of relevant crimes. For instance, the UNCTOC defines the scope of mutual legal assistance; explains general conditions for providing or refusing mutual legal assistance; requires states parties to designate a central authority;<sup>125</sup> and describes the contents of mutual legal assistance requests.<sup>126</sup> Although the conventions impose a series of detailed obligations on states parties, the ultimate application of these duties largely depends upon further mutual agreement between states and how they develop and implement clear enforcement mechanisms between themselves to comply with the obligations and facilitate mutual legal assistance requests.

The second type of multilateral MLATs are those that focus solely on mutual legal assistance in criminal matters. These multilateral MLATs are

113. Halvarsson, *supra* note 87, at 30; *See, e.g.*, BOISTER, *supra* note 5, at 314.

114. Halvarsson, *supra* note 87, at 30.

115. BOISTER, *supra* note 5, at 314.

116. *See id.* at 123.

117. *See* Vervaele, *supra* note 1, at 122-123; *see also* U.N. Single Convention on Narcotic Drugs, Aug. 8, 1975, as amended by the 1972, art. 35 (d), (e) 976 U.N.T.S. 105 [hereinafter UNSCND].

118. *See* UNSCND, *supra* note 117.

119. *See* Convention on Psychotropic Substances, Aug. 16, 1976, 1019 U.N.T.S. 175 [hereinafter UNCPS].

120. *See* U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Nov. 11, 1990, art. 7, 1582 U.N.T.S. 95 [hereinafter Vienna Convention].

121. *See* U.N. International Convention for the Suppression of the Financing of Terrorism arts. 12-17, Apr. 10, 2002, 2178 U.N.T.S. 197 [hereinafter Financing Convention].

122. *See* United Nations Convention Against Transnational Organized Crime and the Protocols Thereto arts. 7 & 18, Sep. 29, 2003, 2225 U.N.T.S. 209 [hereinafter UNCTOC].

123. *See* United Nations Convention Against Corruption arts. 14(b) & 46, Dec. 14, 2005, 2349 U.N.T.S. 41 [hereinafter UNCAC].

124. *See, e.g.*, UNCTOC, *supra* note 122, art. 18, ¶ 1.

125. Central authority is the heart of MLAT. One of the significant benefits of central authority is that it establishes and provides law enforcement expertise, and its decisions are made by expert staff.

126. UNCTOC, *supra* note 122, art. 18, ¶¶ 3-30.

generally comprised of regional conventions. It has been argued that the European Convention on Mutual Legal Assistance in Criminal Matters (1959) is the oldest MLAT in criminal matters.<sup>127</sup> This Convention has been used as a model for various subsequent treaties and conventions.<sup>128</sup> Other regional MLAT conventions include the 1992 Inter-American Convention on Mutual Legal Assistance in Criminal Matters,<sup>129</sup> the 2000 EU Convention on Mutual Legal Assistance in Criminal Matters,<sup>130</sup> the 2004 ASEAN Treaty on Mutual Legal Assistance in Criminal Matters,<sup>131</sup> and the SAARCC Convention on Mutual Legal Assistance in Criminal Matters.<sup>132</sup> All of these Conventions require states parties to afford legal assistance to one another and facilitate flow of cross-border evidence. There is no overarching international convention (such as a UN convention) that exclusively addresses mutual legal assistance in criminal matters. However, in 1998 the UN adopted a non-mandatory model treaty on mutual legal assistance in criminal matters which can be used as a template by states parties when developing their own mechanisms.<sup>133</sup>

In addition to the “hard law” or MLAT treaties which impose legal obligations upon the states parties, many intergovernmental organizations have developed and promoted mutual legal assistance standards among their member states. They track the enforcement and implementation of multilateral MLATs; provide capacity building trainings and tools to the relevant institutions of member countries (particularly developing countries); bring member states together and convene regular coordination meetings; and report on the progress of member states in complying with the obligations. Since the decisions they make and the standards and recommendations they promote are non-binding, they are known as “soft law.”<sup>134</sup> Some of these organizations include the Financial Action Task Force (FATF), the United Nations Office on Drugs and Crime (UNODC), the Organization for Economic Co-operation and Development (OECD), and the World Bank.

127. See BOISTER, *supra* note 5, at 311.

128. See, e.g., BOISTER, *supra* note 5, at 313; see also Halvarsson, *supra* note 87, at 30.

129. See Organization of American States, *Inter-American Convention on Mutual Legal Assistance in Criminal Matters* (Apr. 14, 1996).

130. See Council of Europe, *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, art. 1 E.T.S. No. 030, Strasbourg 20.IV.1959 (1959). According to Article 1, one of the purposes of the Convention “is to supplement the provisions and facilitate the application between the Member States of the European Union, of: (a) the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.” This means that the Convention does not override the provisions of the previous conventions.

131. See Treaty on Mutual Legal Assistance, Nov. 29, 2004, ASEAN.

132. SAARC Convention on Mutual Assistance in Criminal Matters, Aug 3, 2008 (signed by all parties on August 3, 2008) [hereinafter SAARCC].

133. Model Treaty on Mutual Legal Assistance in Criminal Matters, 1998 (adopted by General Assembly resolution 45/117, subsequently amended by General Assembly resolution 53/112), G.A. res. 45/117, [https://www.unodc.org/pdf/model\\_treaty\\_mutual\\_assistance\\_criminal\\_matters.pdf](https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf).

134. See, e.g., Michael Pucci, *FATF Recommendations: Becoming Soft Law*, 37 MICH. J. INT’L L., <http://mjiolonline.org/fatf-recommendations-becoming-soft-law-2/> (last visited Oct. 2, 2022).

### III. AFGHANISTAN'S MUTUAL LEGAL ASSISTANCE OBLIGATIONS UNDER INTERNATIONAL LAW

Afghanistan has ratified or acceded to all six UN Suppression Conventions that require or encourage mutual legal assistance, either formal, informal, or both. Accordingly, Afghanistan bears many mutual legal assistance obligations under those Conventions, which in addition to imposing many legal obligations also encourage states parties to take additional measures to supplement their mutual legal assistance mechanisms. These non-mandatory measures are extremely important in the creation of a comprehensive and effective mutual legal assistance regime within a state.

In addition to the UN Suppression Conventions, Afghanistan is a party to the 2008 SAARC regional convention and has undertaken several mutual legal assistance obligations. Although the SAARCC is not yet enforceable among states parties because it has not yet been ratified by Pakistan, it was adopted by the then Afghan Parliament and signed by the then President of Afghanistan. As it will be explained toward the end of this article,<sup>135</sup> as a practical matter the SAARCC is unusable for Afghanistan until it enters into force following ratification by all states parties in accordance with the terms of the Convention.

This section first identifies and analyzes Afghanistan's mutual legal assistance obligations under the UN Suppression Conventions and subsequently discusses the non-mandatory measures recommended by Afghanistan. Then, it briefly examines Afghanistan's obligations under regional conventions, particularly under SAARCC. Finally, it explores the FATF 40 Recommendations, how they are aggressively implemented by the FATF, and thus how they affect implementation of mutual legal assistance mechanisms in Afghanistan.

#### A. *Impact of the UN Suppression Conventions*

As noted above, Afghanistan has ratified or acceded to at least six UN conventions: UNSCND,<sup>136</sup> UNCPS,<sup>137</sup> the Vienna Convention,<sup>138</sup> the Financing Convention,<sup>139</sup> UNCTOC,<sup>140</sup> and UNCAC.<sup>141</sup> These Conventions contain various provisions pertaining to mutual legal assistance, mini-MLATs, or law enforcement cooperation. The relevant provisions embody

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135. See *infra* section III (b).

136. See UNSCND, *supra* note 117 (Ratified by Afghanistan on February 19, 2015).

137. See UNCPS, *supra* note 119 (Afghanistan acceded to the UNCPS on May 21, 1985).

138. See Vienna Convention, *supra* note 120 (Afghanistan signed Vienna Convention on Dec. 20, 1988, and ratified it on Feb. 14, 1992).

139. See Financing Convention, *supra* note 121 (Afghanistan acceded to the Financing Convention on Sep. 24, 2003).

140. See UNCTOC, *supra* note 122 (Afghanistan signed UNCTOC on Dec. 14, 2000, and ratified it on Sep. 24, 2003).

141. See UNCAC, *supra* note 123 (Afghanistan signed UNCAC on Feb. 20, 2004, and ratified it on Aug. 25, 2008).

two sets of distinctive concepts: first, they impose a wide array of “obligations” with which Afghanistan, as a state party, is required to comply; second, the provisions recommend several additional measures that are not obligatory to states parties, but which are crucial and complementary to the obligations. Accordingly, this article discusses the obligations and non-mandatory measures separately.

### 1. Mutual Legal Assistance Obligations

Prior to identifying and examining each of Afghanistan’s obligations under the UN Suppression Conventions, it is worth clarifying some important points relating to the conventions and the obligations they impose.

First, each convention addresses one specific category of transnational crime. The UNCAC, for instance, addresses corruption and the Vienna Convention addresses drug trafficking. The specific mutual legal assistance obligations imposed by each treaty thus concern the specific categories of crime addressed by each convention.<sup>142</sup> The only partial exception to this specificity is the UNCTOC, which covers a wide variety of transnational crimes.<sup>143</sup> The UNCTOC also provides that the Convention not only applies to the established transnational organized crimes specified in the Convention, but also to any “serious crime” “where the offence is transnational in nature and involves an organized criminal group.”<sup>144</sup> The Convention defines “serious crime” as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”<sup>145</sup> Given this broad definition, most transnational crimes fall under the auspice of this Convention and thus are subject to the Convention’s provisions regarding mutual legal assistance.

Second, among the six UN Suppression Conventions, the UNSCND and the UNCPS provide the fewest details on MLAT obligations.<sup>146</sup> They do not even use the term “mutual legal assistance.” They each contain only one very general provision about an obligation to transmit legal papers through a

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142. See, e.g., UNCTOC, *supra* note 122, art. 3, ¶ 1 & art. 18, ¶ 1; UNCAC, *supra* note 123, art. 3, ¶ 1 & art. 46, ¶ 1; Vienna Convention, *supra* note 120, art. 7, ¶ 1.

143. See UNCTOC, *supra* note 122, arts. 5, 6, 8, & 23.

144. *Id.*, art. 3(b). According to the UNCTOC, “an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.” (UNCTOC, *supra* note 122, art. (2).) Also, the UNCTOC defines “Organized Criminal Group” as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” (UNCTOC, *supra* note 122, art. 2(a).)

145. *Id.* art. 2(b).

146. See BOISTER, *supra* note 5, at 314; see also UNSCND, *supra* note 117, art. 35(e); see also UNCPS, *supra* note 119, art. 21(e).

designated body for the purpose of prosecution.<sup>147</sup> The text and details of the relevant provisions of the two Conventions (Article 35 (e) of the UNSCND<sup>148</sup> and Article 21 (e) of the UNCPS)<sup>149</sup> are identical. The lack of details in the two Conventions is not surprising given the fact that they were the earliest UN conventions to include MLAT provisions. These two Conventions will not be further cited or discussed in this article due to their limited provisions relating to mutual legal assistance.

Third, almost all of Afghanistan's obligations are rooted in three conventions: the Vienna Convention, the UNCTOC, and the UNCAC. These three Conventions have nearly identical MLAT provisions that use practically the same language and contain the same rules.<sup>150</sup> Among the three, the UNCTOC and the UNCAC, the two most recent conventions, provide the most comprehensive and detailed provisions on MLAT obligations.<sup>151</sup> (Although the Financing Convention also embodies several mutual legal assistance obligations with respect to crimes related to the financing of terrorism, nearly all of those obligations are also present in the three above mentioned Conventions and the relevant provisions of the Financing Convention are neither as detailed nor as well-articulated as the three other Conventions.)<sup>152</sup> As illustrated in Figure 2, the bulk of Afghanistan's obligations originate from the Vienna Convention, the UNCTOC, and the UNCAC.<sup>153</sup> Afghanistan has thus repeatedly committed to similar or even identical formal mutual legal assistance obligations, albeit in connection with different subject matter or crimes under each convention.

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147. See UNSCND, *supra* note 117, art. 35(e); see also UNCPS, *supra* note 119, art. 21(e) (requiring states parties to “[e]nsure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel.”).

148. UNSCND, *supra* note 117, art. 35(e).

149. UNCPS, *supra* note 119, art. 21(e).

150. See UNCTOC, *supra* note 122, art. 18; see also UNCAC, *supra* note 123, art. 46; Vienna Convention, *supra* note 120, art. 7.

151. See UNCTOC, *supra* note 122, art. 18; see also UNCAC, *supra* note 123, art. 46.

152. This means that any gaps under the Financing Convention are covered under the UNCTOC and the UNCAC.

153. Wherever necessary, this Article will refer to the Financing Convention (and if referring to it in conjunction with the other three conventions, may refer to ‘the four conventions’—which is to say all the UN Conventions but for the two early (and less developed) ones), the UNSCND and the UNCPS.

**Figure 2.** An Overview of Obligations (Formal and Informal) Under the Four UN Suppression Conventions

No.	Obligations	UN Conventions			
		Vienna Convention	Financing Convention	UNCTOC	UNCAC
1	Set the scope of MLATs	YES	YES	YES	YES
2	Provide mutual legal assistance where offenses involve a legal person	NO	NO	YES	YES
3	Determine specific purposes for mutual legal assistance	YES	NO	YES	YES
4	Follow the conventions' procedures in the absence of an actual legal assistance treaty	YES	NO	YES	YES
5	Bar bank secrecy as grounds to refuse mutual legal assistance	YES	NO	YES	YES
6	Designate a central authority	YES	NO	YES	YES
7	Make requests in writing	YES	NO	YES	YES
8	Set requirements for content of mutual legal assistance requests	YES	NO	YES	YES
9	Use information or evidence only for the requested purposes	YES	YES	YES	YES
10	Require speedy execution of requests	NO	NO	YES	YES
11	Mandate confidentiality	YES	NO	YES	YES
12	Requested state must bear the ordinary cost of executing a request	YES	NO	YES	YES
13	Provide copies of publicly available records, documents, or information	NO	NO	YES	YES
14	Provide mutual legal assistance for purposes of confiscation and recovery of assets	YES	NO	YES	YES
15	Determine the scope of law enforcement cooperation	YES	YES	YES	YES
16	Enable national authorities to cooperate and exchange information (particularly in money-laundering cases)	NO	NO	YES	YES
17	Establish special investigative techniques	NO	NO	YES	YES

\*In Figure 2, "YES" indicates the obligation is present under a specific convention and "NO" means the obligation does not exist under a specific convention.\*

Fourth, given the fact that the UNCTOC and the UNCAC cover all obligations that are present under the Vienna Convention and the Financing Convention, this article only refers to the UNCTOC and the UNCAC within the main text of this section when it identifies obligations. However, it may occasionally mention the Vienna Convention or the Financing Convention if there is a difference in the substance of an obligation under those Conventions compared with the UNCTOC and the UNCAC. Nevertheless, this article provides citations to all four Conventions in the footnotes if all four of the Conventions encompass a specific obligation.<sup>154</sup>

154. In many occasions, all four conventions (the Vienna Convention, the Financing Convention, the UNCTOC, and the UNCAC) or three conventions (the Vienna Convention, the UNCTOC, and the UNCAC) entail the same obligations with similar or identical language. In those cases, the relevant provisions of the Vienna Convention or the Financing Convention will

Fifth, none of these four UN Suppression Conventions adhere to the categorization of formal and informal mutual legal assistance methods. The Conventions discuss formal mutual legal assistance, or MLATs, under the title of “mutual legal assistance,” yet they also discuss law enforcement and other forms of international cooperation in other articles. To correspond with the classification discussed earlier and as a matter of clarity, this article explores and explains Afghanistan’s obligations with the two categories of formal and informal mutual legal assistance.

#### **a. Obligations Related to Formal Mutual Legal Assistance**

Afghanistan has accepted a number of obligations with respect to formal mutual legal assistance in criminal matters by ratifying or acceding to UN Suppression Conventions; most of these obligations are very general. All states parties need to pass domestic legislation or enter into bilateral MLAT agreements in order to fulfill their convention obligations. The UN has developed and published two comprehensive legislative guides for the implementation of the UNCTOC and the UNCAC (the UN Legislative Guides) to assist the states’ policymakers and legislators in ratification and implementation of the conventions.<sup>155</sup> Since all the conventions impose similar obligations on states parties, these guides are a very useful tool for understanding not only the UNCTOC and the UNCAC, but also the other named UN Suppression Conventions. The UN Legislative Guides provide a detailed explanation of a states party’s obligations and illustrate what measures must be taken by a state party in order to comply with its obligations under the conventions.<sup>156</sup>

This article discusses the obligations in the sequence established by the UNCTOC and the UNCAC and their corresponding UN Legislative Guides. However, in a few instances, any of the three Conventions or the Financing Convention have added a new obligation/requirement that is not present in others, have omitted an obligation that is present in others, or have reduced an obligation to a non-mandatory measure. This article will point out those instances as it examines each obligation. The following are the obligations that Afghanistan is required to fulfill under the various conventions that it is a state party to.

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be cited in footnotes. This Article will only include language from the Vienna Convention and/or the Financing Convention when it contains different language or obligation.

155. See, e.g., NIKOS PASSAS ET AL., U.N. OFF. ON DRUGS & CRIME DIV. FOR TREATY AFF., LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, U.N. Sales No. E.0000000 (2004) [hereinafter NIKOS PASSAS ET AL.]; NIKOS PASSAS ET AL., LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, U.N. OFF. ON DRUGS & CRIME DIV. FOR TREATY AFF., U.N. Sales No. E.06.IV.16 (2006) [hereinafter PASSAS ET AL. - GUIDE ON UNCAC].

156. See, e.g., NIKOS PASSAS ET AL., *supra* note 155, at 163-170; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 168-175.

i. Setting the Scope of MLATs

One of the main obligations for Afghanistan is to provide the most extensive legal assistance possible to other states parties to combat a variety of crimes (e.g., transnational organized crimes, drug-related crimes, terrorism-related crimes, and corruption-related crimes) covered by the conventions.<sup>157</sup> Other states parties bear the same obligation toward Afghanistan. For instance, the UNCTOC and the UNCAC require states parties “to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences [sic] covered” by the conventions.<sup>158</sup> Afghanistan cannot comply with this obligation unless it incorporates it into domestic law. The UN Legislative Guides assert that “each State party must ensure that its mutual legal assistance treaties and laws provide for assistance with respect to investigations, prosecutions and judicial proceedings.”<sup>159</sup>

Regarding the scope of MLATs, since the UNCTOC is only applicable to “transnational” and “organized”<sup>160</sup> crimes, the Convention puts forward a “lower evidentiary standard” for establishing the “elements of transnationality and organized crime” and assessing the necessity for mutual legal assistance.<sup>161</sup> The Convention provides that states parties shall reciprocally extend the widest mutual legal assistance to one another,<sup>162</sup> as long as there are “reasonable grounds to infer the crime is transnational<sup>163</sup> and committed by organized criminal networks.”<sup>164</sup>

ii. Providing Mutual Legal Assistance Where Offenses Involve a Legal Person

Under the UNCTOC and the UNCAC, Afghanistan has an obligation to provide mutual legal assistance in criminal cases where a legal person is deemed responsible.<sup>165</sup> Both the UNCTOC and the UNCAC require states parties to afford the greatest mutual legal assistance possible to one another in cases where a legal person is accused of wrongdoing.<sup>166</sup> The identical

157. See, e.g., UNCTOC, *supra* note 122, art. 18, ¶ 1; UNCAC, *supra* note 123, art. 46, ¶ 1. The obligation is also included in the Vienna Convention and the Financing Convention. (See Vienna Convention, *supra* note 120, art. 7, ¶ 1; Financing Convention, *supra* note 121, art. 12, ¶ 1.)

158. UNCTOC, *supra* note 122, art. 18, ¶ 1; UNCAC, *supra* note 123, art. 46, ¶ 1.

159. NIKOS PASSAS ET AL., *supra* note 155, at 163; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 168.

160. See UNCTOC, *supra* note 122, art. 3.

161. NIKOS PASSAS ET AL., *supra* note 155, at 221.

162. UNCTOC, *supra* note 122, art. 18, ¶ 1.

163. Article 18, ¶ 1 of the UNCTOC indicates that offenses may be transnational if “victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party.”

164. UNCTOC, *supra* note 122, art. 18, ¶ 1.

165. See UNCTOC, *supra* note 122, art. 18, ¶ 2; see also UNCAC, *supra* note 123, art. 46, ¶ 2. This obligation does not exist in the Vienna Convention and the Financing Convention.

166. UNCTOC, *supra* note 122, art. 18, ¶ 2; UNCAC, *supra* note 123, art. 46, ¶ 2.

provisions of both Conventions require states parties to provide mutual legal assistance to “the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable”<sup>167</sup> by the requesting state party.<sup>168</sup> One of the main implications of this obligation is that Afghanistan should amend its domestic law to meet this requirement,<sup>169</sup> as it does not currently have the ability or the tools necessary to provide legal assistance vis-a-vis legal persons. The UN Legislative Guides for these two Conventions contend that if “a State party presently lacks any legal authority to provide assistance with respect to investigations, prosecutions and judicial proceedings against legal persons, amending legislation should be considered.”<sup>170</sup>

### iii. Determining Specific Purposes for Mutual Legal Assistance

The UNCTOC and the UNCAC establish many similar purposes for mutual legal assistance requests.<sup>171</sup> However, it could be said that the UNCAC has the most comprehensive provisions in this regard.<sup>172</sup> In addition to covering all the purposes set by the UNCTOC, the UNCAC adds two more purposes for mutual legal assistance: (1) identifying, freezing and tracing proceeds of crime and (2) recovering assets.<sup>173</sup> If Afghanistan complies with the requirements of Article 46 (3) of the UNCAC regarding the purposes of mutual legal assistance, it will be in compliance with all the relevant

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167. UNCTOC, *supra* note 122, art. 18, ¶ 2; UNCAC, *supra* note 123, art. 46, ¶ 2.

168. Article 18, ¶ 2 of the UNCTOC and Article 46, ¶ 2 of the UNCAC refer to their respective substantive provisions that establish the liability of a legal persons. For instance, Article 10 of the UNCTOC provides that “(1) Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with Articles 5, 6, 8 and 23 of this Convention. (2) Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. (3) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. (4) Each State Party shall, in particular, ensure that legal persons held liable in accordance with this Article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.” Article 26 of the UNCAC has very similar provisions to Article 10 of the UNCTOC but with the only difference in types of crime which are corruption-related crimes.

169. See NIKOS PASSAS ET AL., *supra* note 155, at 165; see also PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 169.

170. NIKOS PASSAS ET AL., *supra* note 155, 165; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 169.

171. See e.g., UNCTOC, *supra* note 122, art. 18, ¶ 3; UNCAC, *supra* note 123, art. 46, ¶ 3. This obligation is present in the Vienna Convention. (See Vienna Convention, *supra* note 120, art. 7, ¶ 2.) However, the obligation is not included in the Financing Convention.

172. See generally PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155.

173. UNCAC, *supra* note 123, art. 46, ¶ 3(j), (k).

requirements of the UN Suppression Conventions.<sup>174</sup> The text of Article 46 (3) of the UNCAC reads as follows:

Mutual legal assistance to be afforded in accordance with this Article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
- (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.<sup>175</sup>

States parties should have the ability to provide each type of mutual legal assistance enumerated above.<sup>176</sup> As the above article indicates, the list is not exhaustive and other types of assistance can be added to the list as long as the assistance does not require a violation of the domestic law of a requested state.<sup>177</sup> The UN Legislative Guides claim that “[i]n most cases, domestic law already provides powers to take the measures necessary to deliver the above types of assistance. If not, such powers *must be created*.”<sup>178</sup> (Emphasis added.)

#### iv. Following UNCTOC and UNCAC Procedures in the Absence of a Mutual Legal Assistance Treaty

Article 18 (7) of the UNCTOC and Article 46 (7) of the UNCAC lay out specific requirements and procedures to be followed by Afghanistan if it is not bound by a mutual legal assistance treaty.<sup>179</sup> In both Conventions, the requirements and procedures are set forth in 20 paragraphs (paragraphs 9 to

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174. See generally PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155.

175. UNCAC, *supra* note 123, art. 46, ¶ 3.

176. See NIKOS PASSAS ET AL., *supra* note 155, at 165; see also PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 170.

177. UNCAC, *supra* note 123, art. 46, ¶ 3(i).

178. See NIKOS PASSAS ET AL., *supra* note 155, 165; see also PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 170.

179. See UNCTOC, *supra* note 122, art. 18, ¶ 7; see also UNCAC, *supra* note 123, art. 46, ¶ 7.

29 in both articles).<sup>180</sup> These are the provisions that are generally known as mini-MLATs.<sup>181</sup> These articles require states parties to follow these requirements and procedures in the absence of an applicable mutual legal assistance treaty between requesting and requested states.<sup>182</sup> The articles further explain that if the two states are bound by a treaty, “the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this Article in lieu thereof.”<sup>183</sup> According to the UN Legislative Guides, a state party should incorporate the requirements of paragraphs 9 to 29 into its domestic law if it does not directly apply an international treaty, such as these Conventions.<sup>184</sup> However, “[f]or States parties whose legal systems permit direct application of treaties, no implementing legislation will be needed.”<sup>185</sup> It should be noted that although the Financing Convention has a few requirements similar to the ones established in the UNCTOC and the UNCAC,<sup>186</sup> it does not require states parties to follow those procedures in the absence of a mutual legal assistance treaty.<sup>187</sup>

v. Bank Secrecy Cannot be Used as Grounds to Refuse Mutual Legal Assistance

The UNCTOC and the UNCAC obligate Afghanistan to strictly prohibit the use of bank secrecy as grounds to refuse mutual legal assistance requests.<sup>188</sup> For instance, the UNCTOC provides that “States Parties shall not decline to render mutual legal assistance pursuant to this Article [18] on the ground of bank secrecy.”<sup>189</sup> The UN Legislative Guides emphasize this prohibition and illustrate the reasons why it is not included among the mini-MLATs paragraphs (9 to 29).<sup>190</sup> According to the UN Legislative Guides,

180. UNCTOC, *supra* note 122, art. 18, ¶ 7; UNCAC, *supra* note 123, art. 46, ¶ 7. Article 7, ¶ 7 of the Vienna Convention requires similar procedures (albeit with fewer details, ¶¶ 8 to 19). (See Vienna Convention, *supra* note 120, art. 7, ¶ 7.)

181. See U.S. Dep’t of Just., Manual for Compliance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, at 12 (1992).

182. See UNCTOC, *supra* note 122, art. 18, ¶ 7; see also UNCAC, *supra* note 123, art. 46, ¶ 7.

183. See UNCTOC, *supra* note 122, art. 18, ¶ 7; see also UNCAC, *supra* note 123, art. 46, ¶ 7.

184. See NIKOS PASSAS ET AL., *supra* note 155, at 145, § 300; see also PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 171.

185. NIKOS PASSAS ET AL., *supra* note 155, at 224, § 479.

186. See Financing Convention, *supra* note 121, art. 12, ¶ 3 & art. 16.

187. See *id.*, art. 12, ¶ 5 & art. 15.

188. See UNCTOC, *supra* note 122, art. 18, ¶ 8; see also UNCAC, *supra* note 123, art. 46, ¶ 8. The Vienna Convention has the same requirement. (See Vienna Convention, *supra* note 120, art. 7, ¶ 5.) However, the Financing Convention does not prohibit refusals on the basis of bank secrecy, meaning it effectively permits states to refuse MLA requests on the basis of bank secrecy. (See Financing Convention, *supra* note 121, art. 12, ¶ 2.)

189. UNCTOC, *supra* note 122, art. 18, ¶ 8.

190. See NIKOS PASSAS ET AL., *supra* note 155, at 79-80, § 166; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 75, § 171.

“States parties are obliged to ensure that no such ground for refusal may be invoked under their mutual legal assistance laws or treaties.”<sup>191</sup> As such, this provision has two legal implications for states parties. First, if the domestic laws of a state party allow bank secrecy as grounds for refusal, the laws should be modified in accordance with this obligation.<sup>192</sup> Second, if a state party is a party to a mutual legal assistance treaty which allows such grounds for refusal, “the act of that [State] becoming party” to the conventions “should as a matter of treaty law *automatically invalidate* the contrary provisions of an earlier treaty.”<sup>193</sup> (Emphasis added.)

#### vi. Obligations Within Mini-MLATs

As noted above, the mini-MLAT requirements and procedures established in the UNCTOC (Article 18 paragraphs 9 to 29)<sup>194</sup> and the UNCAC (Article 46 paragraphs 9 to 29)<sup>195</sup> are applied when Afghanistan is not required to follow another mutual legal assistance treaty. Depending upon the implementation approach a state party follows with respect to international conventions, it can directly apply the requirements and procedures *or* incorporate the provisions into its domestic law.<sup>196</sup> The mini-MLATs provisions (paragraphs 9 to 29) impose several mandatory obligations and requirements on states parties, including Afghanistan. Details regarding some of the key mini-MLAT provisions are discussed in sections a-i below.

#### a) Designating a Central Authority

Afghanistan is obligated to designate a central authority for execution or transmission of mutual legal assistance requests.<sup>197</sup> The UNCTOC and the UNCAC both require states parties to assign a central authority with the duty and authority to execute or transmit mutual legal assistance requests.<sup>198</sup> The Conventions contain the same or very similar provisions regarding this obligation. For instance, both the UNCTOC and the UNCAC provide that “[e]ach State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and

191. NIKOS PASSAS ET AL., *supra* note 155, at 203, § 611; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 224, § 481.

192. PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 224, § 482.

193. *Id.*

194. *See* UNCTOC, *supra* note 122, art. 18, ¶¶ 9-29.

195. *See* UNCAC, *supra* note 123, art. 46, ¶¶ 9-29. The mini-MLATs are also established in the Vienna Convention (Article 7 paragraphs 8 to 19). (*See* Vienna Convention, *supra* note 120, art. 7, ¶¶ 8-19.) However, the Financing Convention does not entail mini-MLATs.

196. *See* NIKOS PASSAS ET AL., *supra* note 155, at 6, § 6; *see also* PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 184, § 558.

197. *See* UNCTOC, *supra* note 122, art. 18, ¶ 13; *see also* UNCAC, *supra* note 123, art. 46, ¶ 13. The Vienna Convention contains a similar requirement. (*See* Vienna Convention, *supra* note 120, art. 7, ¶ 8.)

198. *See, e.g.*, UNCTOC, *supra* note 122, art. 18, ¶ 13; UNCAC, *supra* note 123, art. 46, ¶ 13.

either to execute them or to transmit them to the competent authorities for execution.”<sup>199</sup> The central authority must ensure “the speedy and proper execution or transmission” of legal assistance requests, whether it executes the requests itself or has this done by other competent authorities.<sup>200</sup> States parties are required to notify the Secretary-General of the United Nations of their designated central authority when they submit their “instrument of ratification, acceptance or approval of or accession” to the Conventions.<sup>201</sup> Although the Conventions oblige states parties to communicate their mutual legal assistance requests through their central authorities,<sup>202</sup> the requirement does not preclude states parties from exercising their right to transmit the requests through diplomatic channels, or (in urgent cases) through INTERPOL if they wish to do so.<sup>203</sup> It can be construed from the UN Legislative Guides that a state party to the Conventions can designate the same central authority to serve the purposes of all the Conventions.<sup>204</sup>

### b) Making Requests in Writing

States parties must make their mutual assistance requests in writing and in a language that is acceptable to the requested state.<sup>205</sup> The UNCTOC and the UNCAC impose the same requirement on states parties: “[r]equests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity.”<sup>206</sup> The Conventions require states parties to inform the Secretary-General of the United Nations concerning “the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession” to the Conventions.<sup>207</sup> In urgent situations, states parties may initially make requests orally, but any oral requests must immediately be followed by written requests.<sup>208</sup>

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199. UNCTOC, *supra* note 122, art. 18, ¶ 13; UNCAC, *supra* note 123, art. 46, ¶ 13.

200. UNCTOC, *supra* note 122, art. 18, ¶ 13; UNCAC, *supra* note 123, art. 46, ¶ 13.

201. UNCTOC, *supra* note 122, art. 18, ¶ 13; UNCAC, *supra* note 123, art. 46, ¶ 13.

202. UNCTOC, *supra* note 122, art. 18, ¶ 13; UNCAC, *supra* note 123, art. 46, ¶ 13.

203. UNCTOC, *supra* note 122, art. 18, ¶ 13; UNCAC, *supra* note 123, art. 46, ¶ 13.

204. See PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 173.

205. See, e.g., UNCTOC, *supra* note 122, art. 18, ¶ 14; see also UNCAC, *supra* note 123, art. 46, ¶ 14. See also Vienna Convention, *supra* note 120, art. 7, ¶ 9 (The Vienna Convention requires same thing; however, obligation is not present in Financing Convention.).

206. UNCTOC, *supra* note 122, art. 18, ¶ 14; UNCAC, *supra* note 123, art. 46, ¶ 14.

207. UNCTOC, *supra* note 122, art. 18, ¶ 14; UNCAC, *supra* note 123, art. 46, ¶ 14.

208. UNCTOC, *supra* note 122, art. 18, ¶ 14; UNCAC, *supra* note 123, art. 46, ¶ 14.

### c) Requirements Regarding the Content of Mutual Legal Assistance Requests

The two Conventions require states parties to include certain information when they issue a mutual legal assistance request.<sup>209</sup> The UNCTOC and the UNCAC contain the same language concerning the content of a request,<sup>210</sup> laying out “the minimum contents for a request.”<sup>211</sup> Identical language is provided in each Convention, as follows:

A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- (e) Where possible, the identity, location and nationality of any person concerned; and
- (f) The purpose for which the evidence, information or action is sought.<sup>212</sup>

### d) Using Information or Evidence Only for the Requested Purposes

According to the UNCTOC and the UNCAC, states parties cannot use the information or evidence they obtained through a mutual legal assistance request for any purposes other than the ones specified in the request, unless the requested state consents in advance.<sup>213</sup> For instance, the UNCTOC and the UNCAC require that “[t]he requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party.”<sup>214</sup>

209. See, e.g., UNCTOC, *supra* note 122, art. 18, ¶ 15; see also UNCAC, *supra* note 123, art. 46, ¶ 15. See also Vienna Convention, *supra* note 120, art. 7, ¶ 10 (same obligation is included in Vienna Convention).

210. UNCTOC, *supra* note 122, art. 18, ¶ 15; UNCAC, *supra* note 123, art. 46, ¶ 15.

211. DAVID McCLEAN, TRANSNATIONAL ORGANIZED CRIME: A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS 224 (2007).

212. UNCTOC, *supra* note 122, art. 18, ¶ 15; UNCAC, *supra* note 123, art. 46, ¶ 15.

213. See UNCTOC, *supra* note 122, art. 18, ¶ 19; see also UNCAC, *supra* note 123, art. 46, ¶ 19; see also Vienna Convention, *supra* note 120, art. 7, ¶ 13; Financing Convention, *supra* note 121, art. 12, ¶ 3 (showing that obligation is also present in Vienna Convention and Financing Convention).

214. UNCTOC, *supra* note 122, art. 18, ¶ 19; UNCAC, *supra* note 123, art. 46, ¶ 19.

### e) Speedy Execution of Requests

The UNCTOC and the UNCAC oblige states parties to promptly execute mutual legal assistance requests and to follow the requesting state's deadlines specified in the requests.<sup>215</sup> According to the two Conventions, a "requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request."<sup>216</sup> The Conventions further require a requesting state party to "promptly inform the requested State Party when the assistance sought is no longer required."<sup>217</sup>

### f) Confidentiality Requirement

Pursuant to the UNCTOC and the UNCAC, states parties must respect the demand of a requesting state to not disclose the contents of a mutual legal assistance request.<sup>218</sup> For example, according to the two Conventions, "[t]he requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request."<sup>219</sup> Accordingly, the two Conventions implicitly indicate that the requested state must comply.<sup>220</sup> The Conventions further provide that "[i]f the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party."<sup>221</sup>

### g) The Requested State Must Bear the Ordinary Costs of Executing a Request

According to the UNCTOC and the UNCAC, a requested state carries the burden of paying the ordinary costs of implementing a mutual legal assistance request.<sup>222</sup> For instance, the two Conventions provide that "[t]he ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned."<sup>223</sup> If the

215. See UNCTOC, *supra* note 122, art. 18, ¶ 24; *see also* UNCAC, *supra* note 123, art. 46, ¶ 24.

216. UNCTOC, *supra* note 122, art. 18, ¶ 24; UNCAC, *supra* note 123, art. 46, ¶ 24.

217. UNCTOC, *supra* note 122, art. 18, ¶ 24; UNCAC, *supra* note 123, art. 46, ¶ 24.

218. See UNCTOC, *supra* note 122, art. 18, ¶ 20; *see also* UNCAC, *supra* note 123, art. 46, ¶ 20; *see also* Vienna Convention, *supra* note 120, art. 7, ¶ 14 (embodying same confidentiality requirement in Vienna Convention).

219. UNCTOC, *supra* note 122, art. 18, ¶ 20; UNCAC, *supra* note 123, art. 46, ¶ 20.

220. See UNCTOC, *supra* note 122, art. 18, ¶ 20; *see also* UNCAC, *supra* note 123, art. 46, ¶ 20.

221. UNCTOC, *supra* note 122, art. 18, ¶ 20; UNCAC, *supra* note 123, art. 46, ¶ 20.

222. See UNCTOC, *supra* note 122, art. 18, ¶ 28; *see also* UNCAC, *supra* note 123, art. 46, ¶ 28; *see also* Vienna Convention, *supra* note 120, art. 7, ¶ 19 (showing that same requirement exists in Vienna Convention).

223. UNCTOC, *supra* note 122, art. 18, ¶ 28; UNCAC, *supra* note 123, art. 46, ¶ 28.

execution of a request requires extraordinary costs, the requesting and requested states should discuss the issue and make appropriate arrangements.<sup>224</sup> For instance, the UN Legislative Guides indicate that the cost of transferring a person could be deemed extraordinary in nature.<sup>225</sup> The UN Legislative Guides further explain that “developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements” of the provisions.<sup>226</sup>

#### **h) Providing Copies of Publicly Available Records, Documents, or Information**

The UNCTOC and the UNCAC require states parties to furnish each other with documentary evidence or other information that is publicly available.<sup>227</sup> The Conventions provide that a requested state party “[s]hall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public.”<sup>228</sup>

#### **i) Providing Mutual Legal Assistance for Purposes of Confiscation and Recovery of Assets**

The UNCTOC and UNCAC obligate states parties to furnish mutual legal assistance in confiscation cases.<sup>229</sup> According to the Conventions, if a state party receives a request to confiscate proceeds of crime, assets, or any other means of crime, it must take necessary measures to acquire and enforce a confiscation order from its competent authorities.<sup>230</sup> Similarly, if a court in a requesting state has already issued a confiscation order concerning proceeds of crime, assets, or any other means of crime located in the territory of the requested state, the requested state must direct the order to its competent authorities for enforcement.<sup>231</sup> Furthermore, upon receiving either a request for confiscation or a confiscation order from another state party, the requested state must “take measures to identify, trace and freeze or seize proceeds of

224. See UNCTOC, *supra* note 122, art. 18, ¶ 28; *see also* UNCAC, *supra* note 123, art. 46, ¶ 28.

225. See NIKOS PASSAS ET AL., *supra* note 155, at 225; *see also* PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 205-06.

226. PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 206.

227. See UNCTOC, *supra* note 122, art. 18, ¶ 29(a); *see also* UNCAC, *supra* note 123, art. 46, ¶ 29(a).

228. UNCTOC, *supra* note 122, art. 18, ¶ 29(a); UNCAC, *supra* note 123, art. 46, ¶ 29(a).

229. See UNCTOC, *supra* note 122, art. 13; *see also* UNCAC, *supra* note 123, art. 55; *see also* Vienna Convention, *supra* note 120, art. 5, ¶ 4 (containing same obligation in Vienna Convention).

230. See UNCTOC, *supra* note 122, art. 13, ¶ 1(a); *see also* UNCAC, *supra* note 123, art. 55, ¶ 1(a).

231. See UNCTOC, *supra* note 122, art. 13, ¶ 1(b); *see also* UNCAC, *supra* note 123, art. 55, ¶ 1(b).

crime, property, equipment or other instrumentalities<sup>232</sup> in order to be able to ultimately confiscate the requested objects.<sup>233</sup>

### b. Obligations Related to Informal Mutual Legal Assistance

In addition to their formal mutual legal assistance obligations and requirements, the Conventions contain several obligations related to informal mutual legal assistance. The UNCTOC and UNCAC discuss the informal mutual legal assistance obligations under the title *law enforcement cooperation*<sup>234</sup> and the Vienna Convention under the title *other forms of cooperation*.<sup>235</sup> The Conventions require states parties to take specific measures in the area of law enforcement cooperation in order to provide legal assistance and information to each other effectively and in a timely manner. As a state party to the Conventions, Afghanistan bears significant obligations for law enforcement cooperation.

#### i. Determining the Scope of Law Enforcement Cooperation

The UNCTOC and UNCAC establish the scope of law enforcement cooperation among states parties (e.g., police-to-police cooperation).<sup>236</sup> The two Conventions have identical provisions concerning the extent to which states parties shall provide law enforcement cooperation to one another.<sup>237</sup> For instance, the UNCTOC and UNCAC require states parties to “cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered”<sup>238</sup> by the Conventions. These two Conventions further oblige states parties to take effective and specific measures to enhance law enforcement cooperation.<sup>239</sup>

232. UNCTOC, *supra* note 122, art. 13, ¶ 2; UNCAC, *supra* note 123, art. 55, ¶ 2.

233. See UNCTOC, *supra* note 122, art. 13, ¶ 2; see also UNCAC, *supra* note 123, art. 55, ¶ 2.

234. See UNCTOC, *supra* note 122, art. 27; see also UNCAC, *supra* note 123, art. 48.

235. See Vienna Convention, *supra* note 120, art. 9.

236. See UNCTOC, *supra* note 122, art. 27, ¶ 1; see also UNCAC, *supra* note 123, art. 48, ¶ 1; see also NIKOS PASSAS ET AL., *supra* note 155, at 175; see also PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 181; see also Vienna Convention, *supra* note 120, art. 9, ¶ 1; see also Financing Convention, *supra* note 121, art. 18, ¶ 3 (containing same requirement in Vienna Convention and Financing Convention). The UNCTOC and UNCAC imply that law enforcement cooperation can include various agencies. For instance, Article 48, ¶ 1(a) of the UNCAC indicates that states parties must “establish channels of communication between their *competent authorities, agencies and services* in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered” by the Convention (emphasis added). UNCAC, *supra* note 123, art. 48, ¶ 1(a).

237. UNCTOC, *supra* note 122, art. 27, ¶ 1; UNCAC, *supra* note 123, art. 48, ¶ 1.

238. UNCTOC, *supra* note 122, art. 27, ¶ 1; UNCAC, *supra* note 123, art. 48, ¶ 1.

239. UNCTOC, *supra* note 122, art. 27, ¶ 1; UNCAC, *supra* note 123, art. 48, ¶ 1.

According to the two Conventions, states parties are required to (1) ensure secure and swift exchange of information among their competent authorities through improving their communication channels;<sup>240</sup> (2) collaborate with each other in gathering information on the identity and activities of suspects, circulation of proceeds of crimes, and equipment or properties used in the commission of crimes;<sup>241</sup> (3) “provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes”;<sup>242</sup> (4) “promote the exchange of personnel and other experts” such as the posting of liaison officers;<sup>243</sup> and (5) provide information to one another about the techniques and methods used by criminals when carrying out illegal activities.<sup>244</sup>

ii. Enabling National Authorities to Cooperate and Exchange Information (Particularly in Money Laundering Cases)

Under the UNCTOC and UNCAC, states parties have an obligation to enable their relevant national authorities involved in combating money laundering to cooperate with each other domestically and with their counterparts internationally.<sup>245</sup> The Conventions provide that states parties must “ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law.”<sup>246</sup> The Conventions specifically urge states parties to establish a financial intelligence unit “to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering.”<sup>247</sup> In addition, Article 58

240. UNCTOC, *supra* note 122, art. 27, ¶ 1(a); UNCAC, *supra* note 123, art. 48, ¶ 1(a); *see also* Vienna Convention, *supra* note 120, art. 9, ¶ 1(a); Financing Convention, *supra* note 121, art. 18, ¶ 3(a) (showing that same requirement exists in Vienna Convention and Financing Convention).

241. UNCTOC, *supra* note 122, art. 27, ¶ 1(c); UNCAC, *supra* note 123, art. 48, ¶ 1(c); *see also* Vienna Convention, *supra* note 120, art. 9, ¶ 1(d) (containing same requirement in Vienna Convention).

242. UNCTOC, *supra* note 122, art. 27, ¶ 1(c); UNCAC, *supra* note 123, art. 48, ¶ 1(c); *see also* Vienna Convention, *supra* note 120, art. 9, ¶ 1(d) (containing same requirement in Vienna Convention).

243. UNCTOC, *supra* note 122, art. 27, ¶ 1(d); UNCAC, *supra* note 123, art. 48, ¶ 1(e); *see also* Vienna Convention, *supra* note 120, art. 9, ¶ 1(e) (showing that requirement is present in Vienna Convention as well).

244. UNCTOC, *supra* note 122, art. 27, ¶ 1(e); UNCAC, *supra* note 123, art. 48, ¶ 1(d).

245. *See* UNCTOC, *supra* note 122, art. 7, ¶ 1(b); *see also* UNCAC, *supra* note 123, art. 14, ¶ 1(b).

246. UNCTOC, *supra* note 122, art. 7, ¶ 1(b); UNCAC, *supra* note 123, art. 14, ¶ 1(b).

247. UNCTOC, *supra* note 122, art. 7, ¶ 1(b); UNCAC, *supra* note 123, art. 14, ¶ 1(b). According to the interpretation by the UN Legislative Guides, states parties are encouraged to consider three types of entities, each having specific authorities and responsibilities, in their strategy to combat money laundering: first, regulatory agencies such as banks or insurance entities, “with powers to inspect financial institutions and enforce regulatory requirements

of the UNCAC specifically requires states parties to cooperate with each other through financial intelligence units in order to prevent transfers of and to recover proceeds of crimes.<sup>248</sup>

### iii. Establishing Special Investigative Techniques

To effectively constrain transnational crimes, the UNCTOC and UNCAC obligate states parties to allow their competent authorities to establish and use special investigative techniques (“SITs,” including controlled delivery,<sup>249</sup> undercover operations, and electronic or other forms of surveillance) to the extent such techniques do not conflict with domestic law.<sup>250</sup> According to the UNCAC, the information and evidence obtained through SITs should be admissible in court.<sup>251</sup> According to the UN Legislative Guides, enacting new legislation may be required if a state party does not have laws or regulations granting admissibility of evidence produced by SITs.<sup>252</sup> For instance, the UNCAC provides:

In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.<sup>253</sup>

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through the imposition of regulatory or administrative remedies or sanctions;” second, law enforcement agencies such as police, with powers to investigate cases and arrest alleged criminals; and third, financial intelligence units (FIU) with the authority to acquire “reports of suspicious transactions, analyz[e] them and disseminat[e] information to prosecution agencies.” See NIKOS PASSAS ET AL., *supra* note 155, at 51; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 49. These three types of entities should not be confused with the multiple types of FIUs. Based on states’ practices, there are four types of FIUs around the globe: administrative types (e.g., in Belgium), law enforcement types (e.g., in Germany and the United Kingdom), judicial or prosecutorial types (e.g., in Cyprus and Luxembourg), and hybrid types (e.g., in Denmark and Norway). See LOUIS FORGET, IMF & WBG, FINANCIAL INTELLIGENCE UNITS: AN OVERVIEW 9-17 (Paul Gleason & Glenn Gottselig eds., 2004).

248. UNCAC, *supra* note 123, art. 58.

249. The UNCTOC defines “controlled delivery” as “the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.” UNCTOC, *supra* note 122, art. 2, ¶ 1.

250. UNCTOC, *supra* note 122, art. 20, ¶ 1; UNCAC, *supra* note 123, art. 50, ¶ 1; NIKOS PASSAS ET AL., *supra* note 155, at 182; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 210.

251. UNCAC, *supra* note 123, art. 50, ¶ 1.

252. NIKOS PASSAS ET AL., *supra* note 155, ¶ 67, at 25.

253. UNCAC, *supra* note 123, art. 50, ¶ 1.

In order to implement this provision and allow use of SITs at the international level, the two Conventions encourage states parties to enter into bilateral or multilateral agreements.<sup>254</sup> If an agreement does not exist, states parties may cooperate with each other on a case-by-case basis with respect to SITs.<sup>255</sup>

## 2. Non-Mandatory MLATs Requirements and Measures

In addition to the above mandatory requirements, the four UN Suppression Conventions provide guiding provisions and encourage states parties to take various optional measures that supplement the mandatory requirements.<sup>256</sup> Although these measures do not arise from any obligations under the Conventions, incorporating them in domestic laws will enhance the efficiency of Afghan laws and provide further mutual legal assistance tools for the relevant Afghan authorities. Similar to the analysis of the obligations above, this Article mostly refers to the UNCTOC and UNCAC unless there is a substantial difference in the provisions of the two conventions compared with the Vienna Convention and the Financing Convention. References will be made to the relevant provisions of the latter two Conventions in footnotes.

**Figure 3.** An overview of non-mandatory measures under the four UN Suppression Conventions

No	Non-Mandatory Measures	UN Conventions			
		Vienna Convention	Financing Convention	UNCTOC	UNCAC
1	Communicating information spontaneously	NO	NO	YES	YES
2	Requirements for transfer of a person	NO	YES	YES	YES
3	Conducting hearing through videoconference	NO	NO	YES	YES
4	Grounds for refusal	YES	NO	YES	YES
5	Grounds for postponing mutual legal assistance	YES	NO	YES	YES
6	Entering into new agreements and arrangements	YES	NO	YES	YES

254. UNCTOC, *supra* note 122, art. 20, ¶ 2; UNCAC, *supra* note 123, art. 50, ¶ 2.

255. UNCTOC, *supra* note 122, art. 20, ¶ 3; UNCAC, *supra* note 123, art. 50, ¶ 3.

256. *See generally* NIKOS PASSAS ET AL., *supra* note 155, at xv; *see also* NIKOS PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at iii.

7	Facilitating cooperation via use of modern technology	NO	NO	YES	YES
8	Conducting joint investigations	YES	NO	YES	YES

In Figure 3, “YES” indicates the obligation is present in a specific convention, and “NO” means the obligation does not exist under a convention.

Below is an analysis of each of the above non-mandatory measures that are strongly recommended by the Conventions.

#### a. Communicating Information Spontaneously

The UNCTOC and UNCAC encourage states parties to transmit information without request if the information is deemed useful for the investigation of a crime under the Conventions.<sup>257</sup> According to the Conventions, “the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings”<sup>258</sup> or if the information could help the receiving state issue a formal mutual legal assistance request based on the mandatory provisions of the Conventions.<sup>259</sup> The UN Legislative Guides assert that this provision of the Conventions creates a legal tool for states parties to share information and evidence that could be crucial in fighting transnational crimes,<sup>260</sup> even though the receiving state might not initially be aware of the information or evidence.<sup>261</sup> The UN Legislative Guides further explain that if a state party does not have such provisions in its domestic laws and does not directly apply international conventions,<sup>262</sup> “it is strongly encouraged, but not obliged, to take such steps as may be necessary to establish such a legal basis.”<sup>263</sup>

257. UNCTOC, *supra* note 122, art. 18, ¶ 4; UNCAC, *supra* note 123, art. 46, ¶ 4.

258. UNCTOC, *supra* note 122, art. 18, ¶ 4; UNCAC, *supra* note 123, art. 46, ¶ 4.

259. See UNCTOC, *supra* note 122, art. 18, ¶ 4; see also UNCAC, *supra* note 123, art. 46, ¶ 4.

260. NIKOS PASSAS ET AL., *supra* note 155, ¶ 338, at 152.

261. See generally *id.*

262. See NIKOS PASSAS ET AL., *supra* note 155, at 168; see also PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 174.

263. In addition to the formal recommendation of the UN, informal communication, personal relations, and building mutual trust would play a significant role in spontaneous communication of information. See NIKOS PASSAS ET AL., *supra* note 155, at 168; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 174.

### b. Requirements for Transfer of a Person

Under the UNCTOC and UNCAC, the transfer of a person (“who is being detained or is serving a sentence”) between two states parties for “purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings” is optional.<sup>264</sup> However, a transfer shall not take place without the free and informed consent of the person in question and an agreement between the competent authorities of the two states.<sup>265</sup> According to the Conventions, the receiving state party must have “the authority and obligation to keep the person transferred in custody,”<sup>266</sup> and must promptly “return the person to the custody” of the sending state after completing the required action,<sup>267</sup> and must avoid requiring the sending state to begin an extradition request for return of the person.<sup>268</sup>

### c. Conducting Hearing Through Videoconference

According to UNCTOC and UNCAC, states parties may conduct witness or expert testimony hearing through videoconference.<sup>269</sup> Videoconferencing “refers to the use of interactive telecommunications technologies for witness testimony via simultaneous two-way video and audio transmissions.”<sup>270</sup> If a state party requests to hear the testimony of a witness or expert who resides within the territory of another state, the hearing may take place through videoconference “if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party.”<sup>271</sup> According to the UNCTOC and UNCAC, “States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.”<sup>272</sup> Considering how costly the transfer of a person could be, the UN Legislative Guides stress the importance of conducting hearings through videoconference as that may significantly reduce the costs of obtaining the required evidence.<sup>273</sup> Although it depends on the domestic legal system of each state party, these guides suggest that testimony by videoconference may

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264. UNCTOC, *supra* note 122, art. 18, ¶ 10; UNCAC, *supra* note 123, art. 46, ¶ 10; *see also* Financing Convention, *supra* note 121, art. 16, ¶ 1 (showing that measure is also included in Financing Convention).

265. UNCTOC, *supra* note 122, art. 18, ¶ 10; UNCAC, *supra* note 123, art. 46, ¶ 10.

266. UNCTOC, *supra* note 122, art. 18, ¶ 11; UNCAC, *supra* note 123, art. 46, ¶ 11.

267. UNCTOC, *supra* note 122, art. 18, ¶ 11; UNCAC, *supra* note 123, art. 46, ¶ 11.

268. UNCTOC, *supra* note 122, art. 18, ¶ 11; UNCAC, *supra* note 123, art. 46, ¶ 11.

269. *See* UNCTOC, *supra* note 122, art. 18, ¶ 18; *see also* UNCAC, *supra* note 123, art. 46, ¶ 18.

270. CECILY ROSE ET AL., THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY 472 (2019).

271. UNCTOC, *supra* note 122, art. 18, ¶ 18; UNCAC, *supra* note 123, art. 46, ¶ 18.

272. UNCTOC, *supra* note 122, art. 18, ¶ 18; UNCAC, *supra* note 123, art. 46, ¶ 18.

273. *See* NIKOS PASSAS ET AL., *supra* note 155, ¶ 494, at 227; *see also* PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, ¶ 628, at 207.

require some changes in domestic law such as amending “evidentiary rules to allow for the basic admissibility of evidence provided by videoconferencing and setting technical standards for reliability and verification.”<sup>274</sup>

#### d. Grounds for Refusal

The UNCTOC and UNCAC do provide some grounds upon which states parties may refuse to provide mutual legal assistance.<sup>275</sup> States parties may withhold mutual legal assistance if: (1) the request is not provided in accordance with the relevant provisions of the Conventions;<sup>276</sup> (2) the execution of the request may harm essential interests of the requested state (such as sovereignty, security, or public order);<sup>277</sup> (3) the authorities of the requested state lack the power under domestic law to execute the request;<sup>278</sup> or (4) the execution of the request could violate the mutual legal assistance mechanisms of the requested state.<sup>279</sup> According to the Conventions, when a requested state declines to provide legal assistance, it must explain the reasons for refusal.<sup>280</sup>

#### e. Grounds for Postponing Mutual Legal Assistance

According to the UNCTOC and UNCAC, a requested state can postpone the execution of a mutual legal assistance request if it disrupts the process of an ongoing case.<sup>281</sup> The two Conventions provide that “[m]utual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial

274. NIKOS PASSAS ET AL., *supra* note 155, at 227; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 207.

275. See UNCTOC, *supra* note 122, art. 18, ¶ 21; see also UNCAC, *supra* note 123, art. 46, ¶ 21; see also Vienna Convention, *supra* note 120, art. 7, ¶ 15 (showing that same grounds are provided in Vienna Convention).

276. UNCTOC, *supra* note 122, art. 18, ¶ 21(a); UNCAC, *supra* note 123, art. 46, ¶ 21(a); see also Vienna Convention, *supra* note 120, art. 7, ¶ 15(a) (containing same requirement in Vienna Convention).

277. UNCTOC, *supra* note 122, art. 18, ¶ 21(b); UNCAC, *supra* note 123, art. 46, ¶ 21(b); see also Vienna Convention, *supra* note 120, art. 7, ¶ 15(b) (showing that same requirement exists in Vienna Convention).

278. UNCTOC, *supra* note 122, art. 18, ¶ 21(c); UNCAC, *supra* note 123, art. 46, ¶ 21(c); see also Vienna Convention, *supra* note 120, art. 7, ¶ 15(c) (showing that same requirement is present in Vienna Convention).

279. UNCTOC, *supra* note 122, art. 18, ¶ 21(d); UNCAC, *supra* note 123, art. 46, ¶ 21(d); see also Vienna Convention, *supra* note 120, art. 7, ¶ 15(d) (entailing same provision in Vienna Convention).

280. UNCTOC, *supra* note 122, art. 18, ¶ 23; UNCAC, *supra* note 123, art. 46, ¶ 23; see also Vienna Convention, *supra* note 120, art. 7, ¶ 16 (showing that same provision is present in Vienna Convention).

281. See UNCTOC, *supra* note 122, art. 18, ¶ 25; see also UNCAC, *supra* note 123, art. 46, ¶ 25; see also Vienna Convention, *supra* note 120, art. 7, ¶ 17 (containing same provision in Vienna Convention).

proceeding.”<sup>282</sup> The Conventions require the requested state to discuss the issue with the requesting state prior to suspending the execution of the request.<sup>283</sup> For instance, according to the Conventions, before delaying the execution of a request, “the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary.”<sup>284</sup>

#### f. Entering Into New Agreements and Arrangements

The UNCTOC and UNCAC encourage states parties to conclude new bilateral or multilateral agreements that could boost an effective implementation of the provisions of *formal mutual legal assistance*.<sup>285</sup> For instance, the conventions provide that “States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions”<sup>286</sup> of the relevant Articles of the Conventions.

Second, the UNCTOC and UNCAC advise states parties to institute bilateral or multilateral agreements in order to strengthen direct *law enforcement cooperation* between their relevant agencies.<sup>287</sup> Both Conventions provide that “States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them.”<sup>288</sup> According to the Conventions, in the absence of agreements between parties, the Conventions can function as a legal basis for law enforcement cooperation among the concerned parties.<sup>289</sup> Moreover, the UN Legislative Guides assert that law enforcement cooperation is permitted by the domestic laws of most countries, and that since almost all countries are members of INTERPOL, “a multilateral arrangement by which such cooperation can generally be carried out.”<sup>290</sup>

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282. UNCTOC, *supra* note 122, art. 18, ¶ 25; UNCAC, *supra* note 123, art. 46, ¶ 25; *see also* Vienna Convention, *supra* note 120, art. 7, ¶ 17 (embodying same provision in Vienna Convention).

283. *See* UNCTOC, *supra* note 122, art. 18, ¶ 26; *see also* UNCAC, *supra* note 123, art. 46, ¶ 26; *see also* Vienna Convention, *supra* note 120, art. 7, ¶ 17 (showing that same provision exists in Vienna Convention).

284. UNCTOC, *supra* note 122, art. 18, ¶ 26; UNCAC, *supra* note 123, art. 46, ¶ 26; *see also* Vienna Convention, *supra* note 120, art. 7, ¶ 17 (entailing identical provision in Vienna Convention).

285. *See* UNCTOC, *supra* note 122, art. 18, ¶ 30; *see also* UNCAC, *supra* note 123, art. 46, ¶ 30; *see also* Vienna Convention, *supra* note 120, art. 7, ¶ 20 (showing that same provision exists in Vienna Convention).

286. UNCTOC, *supra* note 122, art. 18, ¶ 30; UNCAC, *supra* note 123, art. 46, ¶ 30.

287. UNCTOC, *supra* note 122, art. 27, ¶ 2; UNCAC, *supra* note 123, art. 48, ¶ 2.

288. UNCTOC, *supra* note 122, art. 27, ¶ 2; UNCAC, *supra* note 123, art. 48, ¶ 2.

289. UNCTOC, *supra* note 122, art. 27, ¶ 2; UNCAC, *supra* note 123, art. 48, ¶ 2.

290. NIKOS PASSAS ET AL., *supra* note 155, at 176; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 184.

### g. Facilitating Cooperation via use of Modern Technology

Law enforcement cooperation through the use of modern technology is strongly encouraged by the UNCTOC and UNCAC.<sup>291</sup> According to the Conventions, “States Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology.”<sup>292</sup> As transnational criminals increasingly exploit modern technology to carry out their illegal acts, the need for law enforcement agencies to utilize these tools including e-mail or databases to counteract and constrain such crimes effectively is exceedingly critical.<sup>293</sup>

### h. Conducting Joint Investigations

The UNCTOC and UNCAC encourage states parties to enter into bilateral or multilateral agreements to enable joint investigations if a crime or matter in question is subject to the jurisdiction of one or more states.<sup>294</sup> The Conventions provide that “States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies.”<sup>295</sup> States parties may agree to conduct joint investigations on a case-by-case basis if they do not have a bilateral or multilateral agreement in place.<sup>296</sup> The UN Legislative Guides indicate that joint investigations are already permitted by most states.<sup>297</sup> However, if the domestic laws of a state party do not allow such investigations, the relevant Articles of the Conventions can be used as a legal basis for conducting and facilitating the investigations.<sup>298</sup>

### B. Obligations Under Regional Conventions

As noted earlier, developing and using MLATs as a tool for exchanging cross-border evidence and information originally involved regional MLAT conventions, starting with the European Convention on Mutual Legal Assistance in Criminal Matters (1959).<sup>299</sup> That Convention inspired other

291. UNCTOC, *supra* note 122, art. 27, ¶ 3; UNCAC, *supra* note 123, art. 48, ¶ 3.

292. UNCTOC, *supra* note 122, art. 27, ¶ 3; UNCAC, *supra* note 123, art. 48, ¶ 3.

293. See NIKOS PASSAS ET AL., *supra* note 155, at 236-37.

294. See UNCTOC, *supra* note 122, art. 19; see also UNCAC, *supra* note 123, art. 49; see also Vienna Convention, *supra* note 120, art. 7, ¶ 20 (entailing similar measure with less details in Vienna Convention).

295. UNCTOC, *supra* note 122, art. 19; UNCAC, *supra* note 123, art. 49.

296. UNCTOC, *supra* note 122, art. 19; UNCAC, *supra* note 123, art. 49.

297. NIKOS PASSAS ET AL., *supra* note 155, at 236; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 217.

298. NIKOS PASSAS ET AL., *supra* note 155, at 236; PASSAS ET AL.-GUIDE ON UNCAC, *supra* note 155, at 217.

299. European Convention on Mutual Legal Assistance in Criminal Matters, Apr. 20, 1959, ETS No. 030 (taking effect on Jun. 12, 1962).

states to incorporate MLAT provisions into the relevant UN conventions and develop other regional conventions. Regional conventions are particularly important for their potential to bring together several states that have similar interests, face similar challenges, and are located in the same geographical region. These regional agreements allow states parties to develop provisions detailing MLAT processes and enforcement mechanisms. States parties to regional conventions typically hold regularly scheduled meetings to assess progress, address challenges, and conduct peer review of their performance in implementing the conventions.<sup>300</sup>

Unfortunately, Afghanistan is a party to only one regional MLAT convention, namely the SAARCC (SAARCC stands for South Asian Association for Regional Cooperation Convention). Afghanistan, along with the other states parties (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka), signed the SAARCC on August 3, 2008.<sup>301</sup> However, according to the latest available information, the SAARCC has not yet entered into force.<sup>302</sup> Apparently, the reason SAARCC is not currently enforceable is that Pakistan has failed to ratify it.<sup>303</sup> Article 24 of the SAARCC indicates that it will not enter into force unless all states parties ratify it.<sup>304</sup>

Although Afghanistan signed the SAARCC in 2008, it took eight years before the then Afghan Parliament adopted it and the then President signed it into law in 2016.<sup>305</sup> The Presidential Decree for the signing of the SAARCC demonstrates that it is directly applicable immediately upon the date of signature, August 21, 2016.<sup>306</sup> The SAARCC was translated into Dari and Pashto and published in the Official Gazette.<sup>307</sup> It is surprising that Afghanistan's Parliament and the President did not condition its applicability

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300. See, e.g., *ASEAN Attorneys-General/Ministers Pledged for Stronger Cooperation in Mutual Legal Assistance in Criminal Matters*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Apr. 25, 2019), <https://asean.org/asean-attorneys-general-ministers-pledged-for-stronger-cooperation-in-mutual-legal-assistance-in-criminal-matters/>.

301. SAARCC, *supra* note 132, art. 24.

302. Dipanjan Roy Chaudhury, *Strong Measures Needed Against States Backing Terror: BIMSTEC*, ECON. TIMES, Oct. 18, 2016, <https://economictimes.indiatimes.com/news/defence/strong-measures-needed-against-states-backing-terror-bimstec/Articleshow/54897171.cms?from=mdr>.

303. Ostensibly, there is not a clear answer on whether Pakistan would ratify the convention in the near future. Because of rivalry and the hostile relationship between Pakistan and India, Pakistan has intentionally disrupted the entire mechanism by not ratifying the convention. See V. Balakista Reddy, *Use and Misuse of International Laws*, TELANGANA TODAY, <https://telanganatoday.com/use-and-misuse-of-international-laws> (last updated Mar. 3, 2019).

304. SAARCC, *supra* note 132, art. 24.

305. See *KANWANSIYON SAARC PERAMON-E KOMAKHAI MUTAQABEL DAR MAWZOAT-E JENAE-E* [SAARC Convention on Mutual Legal Assistance in Criminal Matters], Official Gazette, Mar. 5, 2017, No. 1247 (Afg.).

306. *Id.* at Presidential Decree about the Enforcement of the SAARCC.

307. *Id.*

according to the terms of SAARCC Article 24<sup>308</sup> because its application in Afghanistan is inconsistent if the SAARCC is not enforceable in other states parties. In light of Afghanistan's common practice to legislate domestically rather than apply international conventions directly, it seems peculiar to have made this specific convention directly enforceable.

While the SAARCC is not currently applicable in the region, it will impose several obligations on states parties upon its entry into force. Similar to the UN Suppression Conventions, the SAARCC also encourages states parties to take certain non-mandatory measures with respect to furnishing mutual legal assistance to one another. Most of the obligations and non-mandatory provisions are the same as or similar to obligations under the UN Suppression Conventions (albeit with fewer or more details).<sup>309</sup>

### C. Requirements Under Intergovernmental Organizations: FATF Standards

As noted previously, many intergovernmental organizations monitor and promote mutual legal assistance standards. Perhaps the most influential organization has been the FATF, which recommends universal standards heavily focused on combating money laundering and the financing of terrorism.<sup>310</sup> In addition, it has developed a series of recommendations and

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308. See SAARCC, *supra* note 132, art. 24 (“[SAARCC] is subject to ratification and shall enter into force on the thirtieth day after the date of deposit of the last instrument of ratification in accordance with Article 26.”).

309. In order to avoid unnecessary repetition, this article lists the same/similar requirements in a footnote with reference to the relevant Articles of the SAARCC. Where there are differences in provisions that are mandatory or optional under the UN Conventions but not under the SAARCC, or requirements that are missing or additional in the SAARCC, those will be highlighted. The SAARCC contains several obligations related to formal mutual legal assistance that are the same or similar to the UN conventions. These obligations include: 1) determining scope of MLATs (Article 1); 2) determining specific purposes for mutual legal assistance (Article 1(4)); 3) executing requests promptly (Article 4(1)); 4) not using bank secrecy as grounds to refuse mutual legal assistance (Article 4(3)); 5) providing copies of publicly available records, documents, or information (Article 7(1)); 6) designating a central authority (Article 15); 7) requirements for content of mutual legal assistance requests (Article 16); 8) using information or evidence only for the requested purposes (Article 18); 9) requested state must bear the ordinary costs of executing a request (Article 21(1)); and 10) making requests in writing (Article 16(5)). Furthermore, the SAARCC encompasses some additional obligations that do not exist in the UN Conventions. For instance, the SAARCC extends application of its provisions over offenses that occurred before the date it entered into force (Article 1(5)); it prohibits further authentication of evidence produced in accordance with its provisions (Article 19); and it requires requests to be in English (Article 20). Unlike the UN Conventions, the SAARCC does not include an obligation to provide mutual legal assistance for offenses that involve a legal person. In addition to these listed obligations, the SAARCC encourages states parties to take some non-mandatory measures with respect to mutual legal assistance. These discretionary measures include: 1) grounds to refuse mutual legal assistance requests (Article 5(1)) and 2) provisions for transfer of a person (Article 10(1)). Finally, it should be noted that the SAARCC does not cover informal mutual legal assistance or law enforcement cooperation. See generally SAARCC, *supra* note 132.

310. *Who We Are*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/about/whoware/> (last visited Dec. 9, 2021) [hereinafter FATF Web].

international standards known as the FATF 40 Recommendations.<sup>311</sup> FATF contends that although its recommendations are not mandatory (in contrast with the requirements of the UN Suppression Conventions), “many countries in the world have made a political commitment to combat money laundering by implementing the FATF Recommendations.”<sup>312</sup> FATF aggressively monitors implementation of these recommendations which gives the recommendations considerably more weight than a simple ‘recommendation.’ Indeed, the FATF constantly evaluates compliance progress and imposes sanctions in cases of non-compliance.<sup>313</sup>

In order to ensure compliance, the FATF identifies “high-risk” and “other monitored” jurisdictions.<sup>314</sup> Depending on levels of risk, the FATF issues two types of public warning: a public statement or an ongoing process statement.<sup>315</sup> If the risk level is high and the jurisdiction in question fails to make progress towards reforming its anti-money laundering structures and strategies, the FATF will issue a public statement and ask members and non-members to apply “enhanced due diligence measures,”<sup>316</sup> “counter measures,”<sup>317</sup> or both.<sup>318</sup> However, if the jurisdiction in question has strategic deficiencies in its anti-money laundering regime but is “undergoing review by the FATF according to the agreed milestones and timelines,”<sup>319</sup> the FATF will issue an ongoing process statement to make sure members take into account “the risks arising from the strategic deficiencies.”<sup>320</sup>

Afghanistan is not a member of the FATF, but it is a member of the Asia/Pacific Group on Money Laundering (APG), an FATF-style regional body.<sup>321</sup> In fact, from 2012-2017 Afghanistan was included on the FATF’s

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311. See generally Financial Action Task Force [FATF], *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, at 1-115, (Feb. 2012) [hereinafter FATF Recommendations].

312. *FATF 40 Recommendations*, FIN. ACTION TASK FORCE, at 1-14 (Oct. 2004), <https://www.fatfgafi.org/publications/fatfrecommendations/documents/the40recommendationspublishedoctober2004.html> (last visited Oct. 2, 2022).

313. See *id.*

314. *High-Risk and Other Monitored Jurisdictions*, FIN. ACTION TASK FORCE, <https://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html> (last visited Oct. 2, 2022).

315. *Id.*

316. “Enhanced due diligence measures include obtaining additional information on the customer, obtaining information on the source of funds and source of wealth of the customer, and enhanced monitoring of the business relationship.” *Id.*

317. “Counter-measures range from specific elements of enhanced due diligence and systematic reporting of transactions involving the jurisdiction, to a limitation or prohibition of financial transactions with the jurisdiction.” *Id.*

318. See *id.*

319. *Id.*

320. *Id.*

321. *Members and Observers*, ASIA/PAC. GRP. ON MONEY LAUNDERING, <http://www.apgml.org/members-and-observers/members/default.aspx> (last visited Oct. 2, 2022). FATF-style regional bodies (FSRBs) are inter-governmental organizations which are established “for the purpose of disseminating the international standards on combating money laundering, financing of terrorism & proliferation (FATF Recommendations) throughout the world.” *FATF-Style Regional Bodies*, EURASIAN GRP., <https://eurasiangroup.org/en/fatf-style->

ongoing process list of countries with strategic deficiencies.<sup>322</sup> After making the recommended changes in its anti-money laundering regime, Afghanistan was finally removed from the list on June 23, 2017.<sup>323</sup> After the Taliban takeover on 15 August 2021, the FATF announced that they are closely monitoring the situation in the country.<sup>324</sup> However, it has not yet taken any action such as adding the country back on the grey list.

Two of the FATF Recommendations (37 and 38) focus on mutual legal assistance,<sup>325</sup> however they do not provide many details and primarily mirror those in the UN Suppression Conventions. Moreover, the FATF Recommendations recognize the UN Suppression Conventions as instruments for international cooperation and urge countries to “take immediate steps to become party to and implement fully” the Vienna Convention, UNCTOC, UNCAC, and Financing Convention.<sup>326</sup> FATF Recommendations 37 and 38 contain nearly identical requirements, including the scope of mutual legal assistance;<sup>327</sup> speedy and efficient execution of requests;<sup>328</sup> ensuring a legal basis (such as law, treaties, or agreements) for providing mutual legal assistance;<sup>329</sup> prohibiting bank secrecy as grounds for refusal;<sup>330</sup> and using a central authority.<sup>331</sup> In addition to these similar provisions, the FATF recommends that countries have a case management system for tracking mutual legal assistance requests,<sup>332</sup> equip their Central

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regional-bodies (last visited Oct. 2, 2022). There are nine such bodies, each with a focus on a specific region. See *FATF-Style Regional Bodies (FSRBs)*, ASIA/PAC. GRP., <http://www.apgml.org/fatf-and-frsb/page.aspx> (last visited Oct. 2, 2022). APG is the largest FATF-style regional body with 41 active members. See *Overview of APG Members*, ASIA/PAC. GRP., <http://www.apgml.org/members-and-observers/page.aspx> (last visited Oct. 2, 2022). The main goal of the APG “is to ensure the adoption, implementation and enforcement of internationally accepted anti-money laundering and counter-terrorist financing standards as set out in the FATF Forty Recommendations and FATF Eight Special Recommendations.” See *Asia/Pacific Group on Money Laundering (APG)*, FATF, <http://www.fatf-gafi.org/countries/#APG> (last visited Oct. 2, 2022). According to this APG website, it also assists “countries and territories of the region in enacting laws to deal with the proceeds of crime, mutual legal assistance, confiscation, forfeiture and extradition; providing guidance in setting up systems for reporting and investigating suspicious transactions and helping in the establishment of financial intelligence units.” See *id.*

322. See *Improving Global AML/CFT Compliance: On-Going Process*, FATF (Feb. 24, 2017), <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatf-compliance-february-2017.html>.

323. *Improving Global AML/CFT Compliance: On-Going Process*, FATF (June 23, 2017), <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/fatf-compliance-june-2017.html>.

324. *FATF Public Statement on the Situation in Afghanistan*, FATF (2021), <https://www.fatf-gafi.org/countries/a-c/afghanistan/documents/afghanistan-2021.html>.

325. FATF Recommendations, *supra* note 312, at 27-28.

326. *Id.* at 27.

327. See *id.* at 27-28.

328. See *id.* at 27.

329. See *id.*

330. See *id.*

331. See *id.* at 27-28.

332. *Id.* at 28.

Authorities with “adequate financial, human and technical resources,”<sup>333</sup> and provide swift response to “requests by foreign countries to identify, freeze, seize, and confiscate” proceeds of crime.<sup>334</sup> Since their inception in 1990, the FATF Recommendations have been revised and updated several times.<sup>335</sup>

#### IV. CONCLUSION

Mutual legal assistance is the main tool for states to provide evidence and information to one another in combating transnational crime. Although mutual legal assistance has different forms and practices, MLATs are increasingly being used by states as they presently provide the most efficient, reliable, and compulsory process for exchanging legal assistance. States have incorporated many MLAT requirements into several international and regional conventions and also into other forms of international frameworks, such as the FATF Recommendations. The UN Suppression Conventions impose or recommend many obligatory or non-obligatory measures on states parties. As a party to the UN Suppression Conventions, Afghanistan has undertaken many obligations and non-mandatory measures imposed by those conventions. These obligations and non-mandatory measures are intended to harmonize domestic laws, provide obligatory mechanism for legal assistance, and enhance international cooperation in the fight against transnational crime among states parties. This Article has identified at least 17 obligations and eight non-mandatory measures for Afghanistan under the UN Suppression Conventions. These obligations and non-mandatory measures will not have any tangible effects unless states parties like Afghanistan incorporate these mechanisms into domestic law and implement them. The extent of Afghanistan’s statutory compliance with its mutual legal assistance obligations under the UN Suppression Conventions, however, requires a comprehensive analysis in a separate article.

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333. *Id.*

334. *Id.*

335. *See* FATF 40 Recommendations, *supra* note 313, at 2.