



# Arbitrary Detention in Afghanistan

A Call For Action



## Volume II

A PRACTICAL GUIDE  
TO  
UNDERSTANDING AND COMBATING ARBITRARY DETENTION PRACTICES  
IN AFGHANISTAN

UNAMA, Human Rights  
Kabul





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**January 2009**



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## Dedication

This report is dedicated to the memory of our former colleague, Kamala Janakiram. Kamala was killed during her travels in Colombia after leaving mission. Her commitment to helping Afghans live a better life was widely known and appreciated and fondly remembered.

## Acknowledgements

UNAMA wishes to acknowledge the hard work of its Human Rights Team which has labored on this project since September 2006. The Arbitrary Detention Verification Campaign (ADVC) would not have been a success without their dedication, commitment and professionalism.

In particular, the work of Kirstie Farmer, Sajida Batool Hussaini, and Dara Katz was integral to the success of this project. Kirstie designed the first monitoring phase, and pulled together support from various government and non-government partners. Sajida was the backbone of the second monitoring phase and the drafting phase's institutional memory. Dara steered the project to completion and drafted this report.

The Afghanistan Independent Human Rights Commission (AIHRC) and its support, advice and participation in ADVC were essential to producing this report. The firm support and cooperation from the Ministry of Interior (MoI), Ministry of Justice (MoJ), and the Supreme Court was another critical factor in enabling this report to be produced. Assistance from partners, including the International Development and Law Organization (IDLO), the US Department of State Justice Sector Support Program (JSSP), as well as colleagues in the Office of the High Commissioner for Human Rights (OHCHR) strengthened the ADVC project. In addition, the continuing support and advice from UNAMA's Rule of Law Unit was invaluable.

## Glossary

<b>AGO</b>	Attorney General's Office
<b>AIHRC</b>	Afghanistan Independent Human Rights Commission
<b>ANDS</b>	Afghanistan National Development Strategy
<b>ANP</b>	Afghanistan National Police
<b>CSSP</b>	US Department of State Corrections Sector Support Program
<b>GoA</b>	Government of Afghanistan
<b>HRC (UN)</b>	UN Human Rights Commission
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICPC</b>	Interim Criminal Procedure Code
<b>ICRC</b>	International Committee of the Red Cross
<b>IMF</b>	International Military Forces
<b>JSSP</b>	US Department of State Justice Sector Support Program
<b>LSOP</b>	UNAMA Legal System Observation Project
<b>MoI</b>	Ministry of Interior
<b>MoJ</b>	Ministry of Justice
<b>MoWA</b>	Ministry of Women's Affairs
<b>NDS</b>	National Directorate of Security
<b>NJP</b>	National Justice Programme
<b>NJSS</b>	National Justice Sector Strategy
<b>OHCHR (UN)</b>	UN Office of the High Commissioner of Human Rights
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNAMA</b>	United Nations Assistance Mission in Afghanistan
<b>UNICEF</b>	United Nations Children's Fund
<b>UNODC</b>	United Nations Office of Drugs and Crime

## Introduction

This practical guide on combating arbitrary detention is Volume II of the United Nations Assistance Mission in Afghanistan's (UNAMA) series *Arbitrary Detention in Afghanistan: A Call to Action*.

This practical guide is designed to complement Volume I and is targeted primarily at practitioners, as well as policy-makers and legislators. Its aim is to provide practitioners and others with the practical tools needed to identify and address arbitrary detention when and where it occurs. In contrast to Volume I, which is designed for policy discussions, Volume II provides detailed guidance as to specific human rights standards, the function of key rights, and, based on field observations, explores possible, practical solutions to improve rights protection. The practical guide can be used at the district-level as a guide to detaining officials, a training aid, and as an aid to those formulating laws, policies, regulations and standard operating procedures.

## Background to the Practical Guide

This practical guide has been developed because throughout Afghanistan, Afghans are arbitrarily detained by police, prosecutors, judges, and detention center officials with alarming regularity. Arbitrary detention is systemic and occurs in a variety of forms throughout the country.

Arbitrary detention violates the Constitution of Afghanistan, and the international human rights standards to which Afghanistan has committed. In particular, it violates the right of every Afghan to liberty and to due process of law and it erodes Afghans' dignity.

Arbitrary detention also creates overcrowding in Afghanistan's detention centers. Arbitrary detention, moreover, often places detainees' families under unnecessary socio-economic hardship because income and social standing is lost. Widespread arbitrary detention erodes confidence in the government as well.

The Government of Afghanistan (GoA) committed to develop and implement corrective measures to combat arbitrary detention both in the Afghanistan Compact and the Afghanistan National Development Strategy (ANDS), as well as in the National Justice Programme.

In order to better understand arbitrary detention practices and help the Government of Afghanistan and its judiciary combat it, UNAMA's Human Rights Team, with the cooperation of the Afghanistan Independent Human Rights Commission (AIHRC) conducted monitoring and research of detention in MoI and MoJ facilities undertaken between November 2006 and July 2008. All safely accessible districts and provinces were covered.<sup>1</sup> The monitoring and research was initiated after consultation

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<sup>1</sup> Research was not undertaken to track the frequency of arbitrary or unlawful detention.

and agreement with the MoI, MoJ, Attorney General's Office (AGO), and the Supreme Court and was conducted in three phases. This monitoring did not examine detentions by the National Directorate of Security (NDS) or those linked with international military forces (IMF).

In the first phase, November 2006-March 2007, UNAMA and AIHRC jointly undertook a structured monitoring program during which 1,089 interviews of detainees and prisoners were conducted at district and provincial MoI and MoJ detention facilities.<sup>2</sup> When possible, the information gathered at the detention center was cross-checked through interviews with prosecutors and examination of court files.<sup>3</sup> The program was constructed with the advice and assistance of partners such as Office of the High Commissioner for Human Rights (OHCHR), the International Development and Law Organization (IDLO), the Justice Sector Support Project (JSSP), and other experts.

During the second phase, March-September 2007, information was collected and analysis was undertaken on 943 additional cases monitored by the regional and provincial offices of both UNAMA and AIHRC during routine monitoring of detention facilities and normal case intake and interviews with relevant authorities. Observations from UNAMA's Legal System Observation Program (LSOP), conducted in Western, Northeastern, Central, Eastern and Northern regions between March and June 2007, also have been integrated into this report. Furthermore, the progress of cases identified in the first monitoring phase were tracked and were included in the second phase.

The third phase, September 2007-July 2008, relied on cases observed by UNAMA's regional and provincial offices across Afghanistan during routine monitoring.

This monitoring and research forms the basis of the findings and analysis contained in this practical guide. The guide does not examine detentions by the National Directorate of Security (NDS) or those linked with international military forces (IMF).

As was discussed in Volume I and are discussed in more detail below, monitoring found that **Afghans are often detained without a legal basis, including for so-called 'moral crimes'**, breaches of contractual obligations, for family disputes, or to pressure a relative or associate into confession. There also are **indications that Afghans have been detained in order to deny them fundamental rights**, particularly to freedom of expression and of women to many of their rights.

Strikingly, Afghans are **detained without enjoying essential procedural protections, rendering most, if not all, detentions arbitrary**. One of the most critical procedural protections—a prompt and periodic review of the legality of detention by a Court—does not exist under Afghan law, nor does a detainees' right to challenge the legality of detention. Consequently, arbitrary detentions that could be prevented are allowed to occur and are often prolonged. Other procedural protections that do exist, such as the right to not testify against oneself or to defense counsel, are not respected. The denial of access to defense counsel is particularly problematic as access and presence of defense counsel provides a vital oversight mechanism that prevents many arbitrary detentions and mitigates other abuses.

<sup>2</sup> The first phase covered 30 of 34 provinces, with the exception of Nuristan, Uruzgan, Zabul and Paktika because of security concerns.

<sup>3</sup> All involved staff received training on domestic legal standards and procedures and on relevant international standards, as well as the questionnaire used to capture monitoring information.

Significantly, time limits for pre-trial detention, which help guarantee the right to a trial without delay or to be released, are regularly breached turning a significant portion of detentions arbitrary.

Generally, UNAMA found that these patterns could mainly be attributed to five key factors—though other factors such as resources and professional qualifications also play a role. These five key factors will be discussed in relation to specific issues below, but in order to aid effective use of the practical guide are outlined below.

There are **competing concepts of justice** in Afghanistan—those underlying the formal justice system and those embedded in the informal justice system and cultural and religious traditions. These competing concepts lead to a *presumption of guilt throughout the criminal justice system and a different understanding about the function of detention and procedural protections* which predispose authorities to detain. These competing concepts also play out in a general hostility towards defense counsel and women enjoying a different level of justice.

Afghanistan's **legal and regulatory frameworks are inadequate** and do not include critical rights or guidance to authorities.

Afghanistan's **formal justice system is still developing institutions, knowledge, capacity and tools** and creates systematic weaknesses that allow arbitrary detentions.

**Impunity, corruption and weak oversight mechanisms** enable arbitrary detention practices to continue uncorrected.

**Training and capacity-building programmes are insufficient** to tackle the conceptual gaps between most Afghans' understanding of justice and the concepts contained in the formal justice system. This practical guide moves from this general overview of findings and roots causes. It systematically catalogues patterns of arbitrary detention from a substantive and procedural perspective and explores the causes and possible solutions for each pattern identified.

## Structure of Practical Guide

The practical guide is divided into two main chapters:

- Arbitrary detention as a result of an absence of legal basis or grounds; and
- Arbitrary detention as a result of the failure or absence of procedural protections.

Each section will:

- a. explain the problem through practical examples gleaned from monitoring,
- b. review the legal framework and its adequacy,
- c. explore factors contributing to such arbitrary detentions, and
- d. suggest possible solutions.

# Chapter I: The Afghan Context and Legal Framework

Understanding the Afghan context is vital to any analysis and development of effective solutions to combat arbitrary detention.

Afghanistan is a country struggling to overcome decades of conflict. Simultaneously, parts of the country are directly affected by a resurgence of armed conflict. After a brief respite from almost 3 decades of conflict, conflict has re-engulfed much of the South and East of the country, and threatens to infiltrate other areas. The security situation hampers the implementation of the 2004 Constitution, creating obstacles to the firm establishment of the institutions established under it—legislative, executive, and judicial—and to the delivery of services, justice, and security. Persistent impunity for past and current crimes, as well as abuses and rampant corruption throw up more obstacles.

Afghans are working together and with international partners to tackle these problems. The recent launch of the ANDS, the NJP, and other initiatives designed to improve the lives of Afghans and to promote Afghanistan's development illustrate the desire of many Afghans to move out of conflict and into prosperity as well as their desire to move away from the 'rule of the gun' towards the rule of law.

This chapter explores the Afghan context specifically in relation to detention practices by first discussing the governing legal framework and standards and then turning to concepts and systems of justice in Afghanistan.

## I. Understanding the legal framework and standards in Afghanistan

Part of understanding the Afghan context is understanding the basic legal framework and standards under which Afghan authorities should operate.

Afghanistan's Constitution draws upon Shari'a and other legal traditions and standards that unambiguously prohibit arbitrary and unlawful detention. It reinforces this prohibition by laying down two general principles:

- a. Liberty (freedom) can be restricted in certain circumstances established by law;<sup>4</sup> and,
- b. All those accused should be presumed innocent until proven guilty after adjudication by a court.<sup>5</sup>

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4 Article 24(1), Afghanistan Constitution.

5 Article 25, Afghanistan Constitution.

Liberty, the Afghanistan Constitution explains, “is the natural right of human beings” which the State must “respect and protect”.<sup>6</sup> In addition, the Constitution states that “innocence is the original state” and that any accused must be presumed innocent.<sup>7</sup> Read together, for those accused, liberty should be restricted only when necessary

In light of these principles, the Constitution stipulates that a person’s liberty can be restricted only if his/her liberty is “affecting others’ freedoms as well as the public interest”<sup>8</sup> and only when “regulated by law”.<sup>9</sup> No one, the Constitution continues, can be detained “without due process of law.”<sup>10</sup> Due process, the Constitution outlines, includes basic procedural protections to ensure that detention is not used to erode liberty and human dignity, such as appearance before a court,<sup>11</sup> the right to defense counsel<sup>12</sup> and to not be tortured or have a confession coerced.<sup>13</sup>

### Afghanistan Constitution: Definition of legal detention

Thus, under Afghanistan’s Constitution, State-mandated detention should be allowed only when:

- a. based on the law;<sup>14</sup>
- b. reasonable;
- c. necessary (needed to protect others’ rights or the public interest), and
- d. certain procedural protections are functioning.

If any of these conditions are not met, then the detention cannot be considered as lawful under Afghan law.

### Afghanistan Constitution: The status of international human rights standards and definition of legal detention

Article 7 of the Afghanistan Constitution reinforces the explicit prohibition against arbitrary detention and strengthens the protections against it. This article obliges Afghanistan’s authorities to observe the Universal Declaration of Human Rights (UDHR)<sup>15</sup>, and to respect the International Covenant on Civil and Political Rights (ICCPR) and other treaties which Afghanistan has signed and ratified.<sup>16</sup> The Constitution in effect reaffirms the State’s commitment to complying with the treaty commitments it has made.

6 Article 24(1) and (3), Afghanistan Constitution

7 Article 25(1), Afghanistan Constitution.

8 Article 24(1), Afghanistan Constitution.

9 Ibid.

10 Article 27(2), Afghanistan Constitution.

11 Article 31, Afghanistan Constitution.

12 Article 31, Afghanistan Constitution.

13 Article 29-30, Afghanistan Constitution.

14 Article 94, Afghanistan Constitution, defines law as that which is approved by both houses of the National Assembly and endorsed by the President.

15 UN General Assembly Resolution 217A(III), 10 December 1948.

16 Article 7, Afghanistan Constitution. It also should be noted that under Article 27 of the Vienna Convention on Treaties, a State cannot invoke provisions of domestic law as a justification for a failure to comply with obligations in a treaty.

Many of these treaties contain explicit prohibition of arbitrary detention, guarantees of procedural protections and limitations on detention, as does the UDHR.<sup>17</sup> Put in another way, criteria for legal detention articulated under the ICCPR add detail to those explicit in the Afghanistan Constitution. Under the ICCPR, detention must be permitted only when:

- a. lawful (grounds/basis and procedure for the detention must be clearly established in domestic legislation and observed<sup>18</sup>);
- b. reasonable in the circumstances;
- c. necessary in the circumstances. (For pre-trial detention, necessary is defined generally as only when preventing flight, interferences with evidence or the reoccurrence of the crime); and
- d. all due process protections are functioning.<sup>19</sup>

Failure to meet any of these criteria renders the detention arbitrary under international law, and therefore arbitrary under Afghan law.

## Defining arbitrary detention

Given the criteria laid out above, arbitrary detentions are not simply detentions that are 'against the law'. Rather, as the UN Human Rights Committee explains, arbitrary detentions are detentions that are carried out by the State (in this case, the GoA) and "include elements of *inappropriateness, injustice, lack of predictability and due process of law...*"<sup>20</sup>

The UN Working Group on Arbitrary Detention has broadly defined arbitrary detentions as detentions that:

- a. have no valid legal basis;
- b. are intended to deny the detainee the exercise of the fundamental rights guaranteed by either domestic (Afghan) or international law; or
- c. occur in such a manner that essential procedural guarantees are not observed so that the arrest and detention gains an arbitrary character, even if it was legal originally.<sup>21</sup>

## Category A

A detention is arbitrary when, for example, the police detain someone simply for being from a certain tribe. There is no provision of law that makes being part of a tribe a crime.

17 UDHR: prohibition of arbitrary detention, Article 9, procedural protections, Articles 7, 11, 14-16; ICCPR, prohibition of arbitrary detention, Article 9, procedural protections Article 9 and 14; Convention on the Rights of the Child (CRC), Article 37[2]; as well as non-discrimination clauses in the Convention on the Elimination of Discrimination Against Women (CEDAW), Article 15[1]; and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5. It is vital to note that the International Court of Justice (ICJ) held in the Hostages in Tehran case that wrongful deprivation of freedom is incompatible with the principles of the UN Charter and the UDHR, Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), ICJ Reports 1980, p. 42, para 91.

18 Grounds: Communication No. 702/1996, C. McLaurance v. Jamaica (Views adopted on 18 July 1997), in UN Doc. GAOR, A/52/40 (vol. II), pp. 230-231, para. 5.5.; Procedure: Communication No. 770/1997, D. L. Grindin v. Russian Federation (Views adopted on 18 July 2000), UN Doc. CCPR/C/69/D/770/1997.

19 Communication No. 458/1991, A. W. Mukong v. Cameroon (Views adopted on 21 July 1994), in UN doc. GOAR, A/49/40 (vol II), p. 181, para. 9.8.

20 Communication No. 458/1991, A. W. Mukong v. Cameroon (Views adopted on 21 July 1994), in UN doc. GOAR, A/49/40 (vol II), p. 181, para. 9.8, emphasis added.

21 See OHCHR Fact Sheet No. 26: The Working Group on Arbitrary Detention, available from <http://www.unhcr.ch/html/menu6/2/fs26.htm>

## Category B

For instance, when prosecutors order the police to arrest someone merely for expressing an opinion they do not like, that is arbitrary detention. This constitutes an attempt to deny the detainee his/her right to freedom of expression. It is neither reasonable nor necessary (and is, most of the time, unlawful) to do so if the person is exercising his/her freedom of expression within the limitations established by the law.

## Category C

When a detainee is unable to challenge the legality of his/her detention, then the detention becomes arbitrary. While the initial arrest may be justified, the inability of the detainee to challenge the lawfulness of detention renders it arbitrary.

These definitions generally reflect the criteria laid out above and are largely based upon Article 9 of the International Covenant on Civil and Political Rights (ICCPR), to which Afghanistan is a party. Article 9 guarantees individuals the right to liberty and security of person and prohibits arbitrary arrest and detention. It states that no one can be deprived of their liberty (or detained) unless it is executed in accordance with procedures and is based on grounds that are established in law. Coupled with Article 7 and 14 of the ICCPR, Article 9 outlines other essential procedural protections that are required for a detention not to be arbitrary (to be discussed further in Part III, Section 2).<sup>22</sup> Other treaties to which Afghanistan is a State party also prohibit arbitrary detention, and generally support the UN Working Group's definition.<sup>23</sup>

Aligned with the principles laid out in the Afghanistan Constitution, these criteria will be used in this report to guide evaluation of law and practice in Afghanistan.<sup>24</sup> Arbitrary detentions generally falling into

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22 Article 9, ICCPR states:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

23 ICCPR, prohibition of arbitrary detention, Article 9, procedural protections Article 7, 9 and 14; Convention on the Rights of the Child (CRC), Article 37(2); as well as non-discrimination clauses in the Convention on the Elimination of Discrimination Against Women (CEDAW), Article 15(1); and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5. It is vital to note that the International Court of Justice (ICJ) held in the Hostages in Tehran case that wrongful deprivation of freedom is incompatible with the principles of the UN Charter and the UDHR, Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), ICJ Reports 1980, p. 42, para. 91.

24 The UN Working Group on Arbitrary Detention The UN Working Group on Arbitrary Detention has established that detention is arbitrary when:

it is clearly impossible to invoke any legal basis to justify the deprivation of liberty (i.e. not provided by law);

it results from the exercise of the rights or freedoms guaranteed by the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR); or

it derives from a total or partial non-observance of international norms relating to the right to a fair trial, as defined in the UDHR, ICCPR and other international instruments, that is of such gravity as to give the deprivation of liberty an arbitrary character.

From: Human Rights Council, "Opinions Adopted by the Working Group on Arbitrary Detention", A/HRC/7/4/Add.1, 16 January 2008, [http://ap.ohchr.org/documents/E/HRC/report/A\\_HRC\\_7\\_4\\_Add\\_1.pdf](http://ap.ohchr.org/documents/E/HRC/report/A_HRC_7_4_Add_1.pdf)

Category A will be examined in Chapter II while those generally falling into Category C will be discussed in Chapter III. Arbitrary detentions falling into Category B will not be discussed because the monitoring was not designed for this Category.<sup>25</sup>

### Other relevant Afghan laws

Beyond these constitutional requirements, Afghanistan's legislation seeks to translate the guarantees and standards outlined into practice. The relevant laws include:<sup>26</sup>

- Interim Criminal Procedure Code (ICPC) (general procedural framework, under revision);<sup>27</sup>
- Police Law (detailing standards for police practice);<sup>28</sup>
- Penal Code 1976<sup>29</sup>
- Criminal Procedure Law 1965, amended 1974;<sup>30</sup>
- Law on Organization and Structure of Courts;<sup>31</sup>
- Law on Detention Centers and Prisons (which reinforces the ICPC and details the procedure to monitor legality and conditions of detention);<sup>32</sup> and
- Law on Advocates (it expands upon the right to defense counsel).<sup>33</sup>

## II. Understanding the concepts and systems of justice in Afghanistan

One cannot understand why the law is or is not applied correctly without understanding the context in which it operates. It must be acknowledged that Afghanistan's Constitution and legislation protecting against arbitrary detention have been promulgated only within the past 5 years.

### Informal, customary justice systems

The formal legal system co-exists and often competes with a well-developed network of informal legal systems throughout the country. Afghans still regularly resort to these informal systems more than the formal justice system, although women appear to be increasingly seeking justice from formal institutions. These informal systems regulated society and were used to resolve disputes when weak or non-existent central governments could not.

<sup>25</sup> See "Arbitrary Detention in Afghanistan: A Call to Action", Volume I, Chapter III, Section B for further discussion of this category.

<sup>26</sup> Throughout this report, these laws will be discussed and analyzed along with the guarantees provided in the Afghanistan Constitution. Other laws, however, do regulate detention but due to the scope of the report are not discussed. These include the Law on International Cooperation in Criminal Matters, Law on Counter-Narcotics, Law on Forensics.

<sup>27</sup> Official Gazette No. 820, 2003.

<sup>28</sup> Official Gazette No. 862, 2005.

<sup>29</sup> Official Gazette No. 347, 1976.

<sup>30</sup> Official Gazette No. 26, 1965.

<sup>31</sup> Official Gazette No. 851, 2005.

<sup>32</sup> Official Gazette No. 852, 2005.

<sup>33</sup> Official Gazette No. 934, 2007.

While the 1964 Constitution, along with subsidiary legislation such as the Criminal Procedure Law of 1964, established Afghanistan's formal legal system with many—though not all—the protections and guarantees of today's system,<sup>34</sup> informal legal systems, such as the *pashtunwali*, continued to dominate many parts of the country.<sup>35</sup> Today, they still do in many areas. The coexistence of both the informal and formal legal systems presents a unique dynamic in which the firm establishment of the formal legal system and its related legal concepts are yet to occur.

The formal justice system often is the system of last resort. This is particularly true in civil cases, where a party reverts to the formal system when s/he feels a *jirga* or *shura* (council of elders) will not result in a satisfactory outcome.<sup>36</sup> This dynamic has different effects, particularly when combined with systemic weaknesses such as corruption and impunity. For instance, in the East where customary dispute mechanisms dominate, police have used their official authority as leverage to participate in *jirgas* for their own benefit.<sup>37</sup> Local government officials many times also are members of *jirgas* or *shuras*, which can amplify their power and create further ambiguity.<sup>38</sup>

To design effective corrective measures to combat arbitrary detention, it must be taken into account that Afghanistan's informal legal systems significantly influence attitudes, practices and interpretation of the formal justice system's legal standards and procedures. It is upon informal justice and customary practice that Afghans generally base their concepts of justice. This influence, while at times constructive, also may not be fully compatible with the principles and protections on which the formal justice system is built.

Some of the practices of informal/traditional legal systems directly conflict with the principles of the formal justice system. For instance, in Pashtun areas, some legal practices are not fully compatible with principles of proportionality, of equality of arms, and of protecting human dignity, which are principles that form part of the foundation of both Afghanistan's formal criminal justice system and the protections against arbitrary detention. While there is a right to appeal and to present evidence in the informal system, standards related to admission of evidence, equality before the *jirga*, particularly of women, and the type of sentences mandated are not similar.<sup>39</sup>

34 The 1964 Constitution and Penal Code of 1965 were promulgated prior to Afghanistan's accession to the ICCPR and other international human rights treaties and thus did not and were not required to contain the protections and guarantees contained therein.

35 International Commission on Jurists, "Afghanistan's Legal System and its Compatibility with International Human Rights Standards", <http://www.icj.org/IMG/pdf/doc-51.pdf>.

36 Based on discussions with Norwegian Refugee Council (NRC) staff and field-based observations.

37 UNAMA found this to be a consistent pattern in the Eastern region (particularly between 2004-2006) where police at the district level would interfere in civil matters, such as marriage, land, or debt disputes being addressed through customary dispute mechanisms. The usual pattern was that the police would arrest one or both sides and the police would negotiate involvement in a *jirga* or a bribe in exchange for the detainee's release.

38 See UNODC, "Afghanistan: Female prisoners and their social reintegration". March 2007, <http://www.unodc.org/documents/justice-and-prison-reform/Afghan-women-prison.pdf>, Chapter 4 for more in-depth discussion, particularly in relation to women.

39 For example, in Pashtun areas, women are excluded from *jirgas*, and are given as part of restitution to the aggrieved party of a murdered married women. See discussion in International Legal Foundation (ILF), "The Customary Laws of Afghanistan: A Report by the International Legal Foundation", September 2004 for details on this and other Pashtun practices. Similar practices are found in Tajik and Uzbek communities in Northern areas.

## Religious institutions and Shari'a

Another challenge for Afghanistan is to resolve the tension between the formal justice system and religious institutions, particularly the Ulema Shuras at the local and national level. These religious councils garner considerable authority amongst Afghan communities of most ethnicities and tribes. Consequently, their opinions are influential and have been considered within the formal justice system.

While Afghanistan is an Islamic state and its laws must not be contrary to the principles of Islam,<sup>40</sup> the opinions of these religious institutions do not necessarily have legal weight in criminal proceedings.

At the same time, the informal justice system and its rules and Afghanistan's religious institutions and Shari'a (Islamic law) overlap to the point that the line between the two is blurred.

To become the system of first resort, Afghanistan's formal justice system must figure out how to build the confidence of religious institutions, community leaders, and the general public that it will fairly and fully apply Shari'a within the parameters of the Constitution.

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40 Articles 1 and 3, Afghanistan Constitution.

## Chapter II: Arbitrary detention due to an absence of legal basis or grounds

### I. Introduction

In order to legally detain someone in Afghanistan, the detaining authority must ensure that there is a legal basis for doing so. The legal basis generally should comply with the principle:

- Detention, particularly while awaiting trial, should not be the rule and should be for the shortest time possible.<sup>41</sup>

#### Explaining the principle

The rationale behind the principle that detention should not be the rule and should be for the shortest time possible is the following:

Detention restricts an individual's freedoms and enjoyment of rights, such as freedom of movement and the right to a family life. Detention is one of the most coercive powers of the State. The State's primary responsibility is to respect and protect the rights of its citizens. Thus, the State should seek to place someone in detention only when there is strong, objective evidence to justify doing so and only when it is necessary (i.e. including in the public interest or to protect others' rights).

Counterbalanced with this principle is the State's authority to determine when detention would be in the 'public interest' or to prevent the limitation of others' freedoms.

*For pre-trial detention:* Consideration of this principle means that the presumption of innocence should be taken into account when assessing whether or not to detain. This presumption is enshrined in Afghan and international law.<sup>42</sup> Respecting it requires that, for the State to restrict or deny one's rights and freedoms, the State must have established a reasonable suspicion of the person's guilt and that there is a need to restrict liberty (e.g. risk of flight, of reoccurrence, tampering with evidence, severity of the crime, etc). Until guilt is proven, restrictions or denials of rights and freedoms should be limited to that which is absolutely necessary and objectively justifiable. Detention is one of the most restrictive options and thus should be minimized in favor of 'non-custodial' alternatives, i.e. options that do not require a person to be in residence in a restrictive State-run facility such as house arrest or release on guarantee, etc.

41 Laid out in Article 24, Afghanistan Constitution and Article 4, ICPC. See also HRC, "General Comment No. 8: Right to Liberty and security of persons [Art. 9]", 30 June 1982, [http://www.unhcr.ch/tbs/doc.nsf/\[Symbol\]/f4253f9572cd4700c12563ed048bec?Open](http://www.unhcr.ch/tbs/doc.nsf/[Symbol]/f4253f9572cd4700c12563ed048bec?Open), para. 3 and Rule 6.1, UN Standard Minimum Principles for Non-Custodial Measures ("The Tokyo Rules"), UN General Assembly Resolution 45/110, 14 December 1990.

42 Article 24 and 25, Afghanistan Constitution read together as well as Article 4, ICPC.

*For post-sentencing detention:* Compliance with this principle implies that any sentence of imprisonment must be aligned with the severity of the crime, reasonable (i.e. 10 years in prison for stealing a loaf of bread would be unreasonable), and necessary. Alternatives to imprisonment should be considered wherever possible.<sup>43</sup> Sentencing must take into account the right of the victim to be provided an effective remedy. To be effective, a remedy should be punitive, but also should help prevent reoccurrence of the violation.<sup>44</sup> It, therefore, could be argued that the State, as part of its responsibility to protect its citizens and provide an effective remedy, should seek to rehabilitate, thus supporting alternatives to imprisonment when possible.<sup>45</sup>

## Putting the principle into action

To translate this principle into reality, the Afghanistan Constitution, supported by international law, requires that each detention should be:

- Provided for in the law [lawful];
- Reasonable in the circumstances; and
- Necessary.<sup>46</sup>

*Provided for in the law [lawful].* To be detained for a crime, the deed eliciting detention must be established as a crime in the law before the deed was committed.<sup>47</sup> The law also must establish the crime as one for which detention is permitted.<sup>48</sup> For instance, the detention of a man in Kitti district of Daikundi province in 2007 because of a dispute over inheritance of property was arbitrary. Being involved in such a dispute is not a crime under Afghan law.<sup>49</sup> For detention designed to protect the detainee from harm [protective detention]<sup>50</sup> or others from harm [preventative detention],<sup>51</sup> the circumstances when detention is permitted must be articulated in the law before it is ordered.

*Reasonable in the circumstances.* Detention must not just be lawful but also must be reasonable. The UN Human Rights Committee (HRC) found that in the case of *van Alpen* that it was not reasonable to continue to detain a suspect without any other justification other than to try to elicit information when the suspect is unwilling to provide it. The HRC found that when this happens, detention is being used

43 For a detailed discussion on alternatives to imprisonment, please see UNODC, "Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation", 2008, [http://www.unodc.org/documents/justice-and-prison-reform/Afghanistan\\_Implementing\\_Alternatives\\_Imprisonment.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Afghanistan_Implementing_Alternatives_Imprisonment.pdf).

44 Human Rights Committee, "General Comment 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant", 29 March 2004, paragraph 17.

45 Rule 8.1 and 9.1, Tokyo Rules.

46 See discussion above in Section V[a].

47 Article 27, Afghanistan Constitution, says "No deed shall be considered a crime unless ruled by a law promulgated prior to the commitment of the offense. No one shall be... detained without due process of law."

48 Article 24(1), Afghanistan Constitution, states that liberty can only be limited by the law.

49 Such an offense is not included in the applicable Penal Code. Article 32, Afghanistan Constitution excludes debt as a ground for imprisonment. Article 11, ICCPR excludes inability to fulfill contractual obligations as sufficient grounds for detention.

50 Article 53, Law on Prison and Detention Centers.

51 Article 15, Police Law.

coercively, which is not reasonable. Thus, the HRC found that the suspect was arbitrarily detained.<sup>52</sup>

In fact, even though the law allows detention, it does not mean it is always reasonable to do so. To be legal, the Afghan authority detaining the person must be able to objectively justify each case of detention as reasonable, using facts and the law. For pre-trial detention, reasonableness is linked to the notion of the presence of a reasonable suspicion. For instance, the law may allow detention of an alleged burglar but the Afghan authority detaining the suspect must prove that there is enough evidence to 'reasonably' conclude that the detainee may be the burglar.<sup>53</sup>

*Necessary.* Closely linked to the notion of reasonableness is that of necessity. In all circumstances, detention must be necessary. Afghanistan's Constitution deems detention necessary only when it is to protect others' freedoms and the public interest.<sup>54</sup> What the public interest is and when others' freedoms require protection is left to the State to define. International law, however, provides some guidance to the State. The Human Rights Committee has determined that detention may be necessary to prevent flight, interferences with evidence or the reoccurrence of the crime.<sup>55</sup> It also has held that to comply with the ICCPR on detention, the justification for that detention must be substantiated, not merely based on suspicions or conjecture.<sup>56</sup> There must be objectively verifiable facts pointing to a risk of flight, interference with evidence, reoccurrence of the crime or a threat to the public interest or others' freedoms which cannot be mitigated by non-custodial alternatives, such as financial bail or other guarantees. Without such substantiation, Afghan authorities have not established detention is necessary. The detention would instead be arbitrary. Post-conviction detention also must be only that which is strictly necessary to remedy the violation and prevent its reoccurrence. Determining if detention is necessary can include consideration of non-custodial alternatives both initially and periodically.<sup>57</sup>

In Afghanistan, police, prosecutors and judges are to detain people only when all three tests are met.

52 Communication No. 305/1988, *Hugo van Alpen v. The Netherlands* [Views adopted 15 August 1990], U.N. Doc. CCPR/C/39/D/305/1988, para. 5.8.

53 Communication No. 458/1991, *A. W. Mukong v Cameroon* [Views adopted on 21 July 1994], in UN doc. GOAR, A/49/40 (vol II), p. 181, para. 9.8 and van Alpen, para. 5.8.

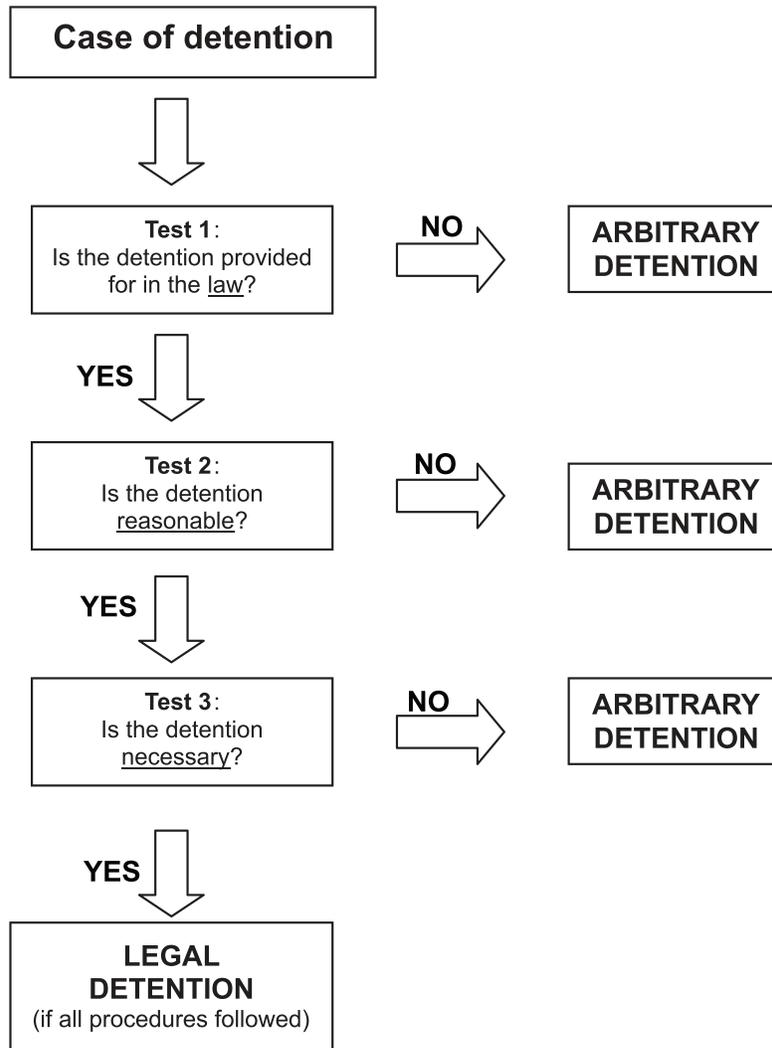
54 Article 24(1), Afghanistan Constitution. While Article 4, ICPC states restricting human rights, which includes liberty, must be "strictly confined to the need of collecting evidence and establishing the truth", the Constitution is more specific when deprivation of liberty is allowed and must be read in conjunction with Article 4, ICPC. Based on Article 24 of the Constitution, deprivation of liberty to collect evidence and establish the truth must be strictly in the public interest for the duration of the detention and balanced with the State's responsibility to respect and protect the accused's liberty.

55 Article 9(3), ICCPR. van Alpen, supra n. 49, para. 5.8. Domestic legislation in Afghanistan does not explicitly provide such criteria

56 Communication No. 526/1993, *M. and B. Hill v. Spain* [Views adopted on 2 April 1997], UN doc. GOAR, A/52/50 (vol II), p. 17, para. 12.3.

57 Chapter 13, ICPC outlines when 'conditional release', or early release, is permitted.

Figure 1: Determining if a detention is arbitrary because of substantive violations



### Putting the principle to the test

Monitoring found that often these three tests are not met. Men, women and children are frequently detained:

- For deeds not established as crimes in the law or for which the law does not permit detention;
- Without establishing reasonableness or necessity;

The following sections will discuss these patterns of arbitrary detentions and their causes in more detail.

## II. Arbitrary detention as a result of deeds not established as crimes in the law or for which the law does not permit detention

Throughout Afghanistan, individuals are still being detained for deeds that are not established as crimes in the law or for deeds for which the law does not permit detention. Such detentions do not meet the first Constitutional test of lawfulness and thus are arbitrary.

Monitoring found that these types of arbitrary detentions fell under four main categories:

1. Breaches of civil law/contractual obligations;
2. Detention to pressure a relative or associate;
3. Breaches of Shari'a and customary or social practices;
4. Misapplying the criminal code to criminalize an individual

This section explains the findings, discusses why such detentions are arbitrary, and explores causes as well as possible solutions.

### Breaches of civil law/contractual obligations

#### a. Establishing Arbitrariness (Failing the 'Lawful' test)

Breaches of civil law or contractual obligations are not lawful grounds for detention in Afghanistan. Under the Afghanistan Constitution, no one can be imprisoned for debt<sup>58</sup> or for failures to comply with contractual obligations.<sup>59</sup> Detentions for breaches of civil law or contractual obligations therefore are not 'provided for in the law' and thus are arbitrary.

#### b. Explaining the findings

Though less frequent than a few years ago, when such arbitrary detentions do occur, monitoring shows that they generally involve:

- housing, land and property disputes,
- arguments over debt, normally with the detaining authority supporting the lender in securing payment of the debt; and
- family disputes, including over marriage (these also generally fall under the third category—breaches of Shari'a and customary or social practices) .

58 Article 32, Afghanistan Constitution.

59 Article 11, ICCPR prohibits imprisonment "merely on the ground of an inability to fulfill a contractual obligation".

For example, in Sher-i-bezurg district of Badakhshan province, police detained 3 men over a land dispute from 7 to 12 September 2007. On 17 April 2007, the police in Kunar province detained a 19-year-old man for allegedly splashing water on a girl, and held the man for more than 5 days without charge. In 2007, police in Rodat district of Nangarhar province detained three men involved in a land dispute for 3 days without charge and allegedly beat them.

Monitoring found a systematic pattern in Bamyan and Daikundi provinces of such detentions by both the police and prosecutors. In the Eastern Region, until recently, another phenomenon had been observed in which police or other authorities detained one or all the parties in a civil matter in order to elicit a bribe or to secure a place in the jirga on the matter. Police appear to initiate these types of detentions more frequently.

### c. Identifying Root Causes

Based on observations, detentions for breaches of civil law or contractual obligations appear to be caused by:

- A lack of understanding and awareness of the law, and what constitutes a crime: Police, prosecutors, and sometimes judges do not understand the law or the difference between a breach of civil law and of criminal law.
- Misunderstanding of function of detention. Authorities also do not necessarily fully comprehend the function of detention—particularly that it is not meant to be a coercive tool. Detentions for breaches of civil law or contractual obligations are frequently meant to pressure the party to release the property or money in question.
- Confusion over role and mandate of responsible authorities, particularly the police: Many authorities are confused about their role and mandate and that of other authorities. The general public also is not clear about the roles and functions of various authorities. This confusion is closely related to the insufficient understanding and awareness of the law discussed above. For instance, police have a responsibility to maintain security but generally should not serve as arbitrators of disputes. They also should not normally involve themselves in civil matters. Prosecutors, moreover, are responsible for criminal cases not civil cases.<sup>60</sup>
- Absence of clear and defined relationship between the informal and formal justice systems: Exacerbating the above is the blurred relationship between the customary and formal justice systems. That the same informal bodies handle both civil and criminal disputes likely also generates confusion when trying to navigate the formal justice system. At the same time, this blurred relationship also creates opportunities for corruption by authorities, like the phenomenon in the Eastern Region discussed above in ‘Explaining the findings’.
- Corruption by detaining authorities: Corruption and willful defiance of the law leads to such detentions. Police may detain someone so as to get a bribe. Prosecutors may be convinced to move forward with an indictment through a financial bribe or a promise of a better position.

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While some criminal cases have civil components, prosecutors should treat these as separate matters.

Another type of corruption is when detaining authorities use detention to help ensure a relative, friend, or favored person gains land, wins a civil dispute, or, for women, are forced to marry.

- [Pressure from local power-brokers or other detaining authorities](#): Pressure from local power-brokers on detaining authorities is, in many areas, substantial. In light of the social and political structures of communities and the weakness of government institutions, local power-brokers, whether they be elders, wealthy businessmen, commanders, or are politically connected, are able to exert tremendous pressure on detaining authorities to use detention for their own purposes.
- [Discrimination based on personal affiliations](#). Tribal, ethnic, and political affiliations often influence such detentions. Arbitrary detentions can be used as a weapon in low-level ethnic conflicts. A police chief who is of one ethnicity may sanction the baseless detention of a man of another ethnicity in order to demonstrate the first ethnic group's control of an area.

In addition, the absence of consistent oversight and accountability mechanisms and weak procedural protections (discussed below) contribute to the continuation of detentions.

### d. Proposing solutions

Given these causes, solutions to further reduce arbitrary detentions for civil offenses include:

- [Targeted training and awareness-raising campaigns](#) to educate police, prosecutors, and judges about the difference between a breach of civil and criminal law, the function of State-mandated detention; and the distinction between informal and formal systems.
- [Improved oversight and accountability](#). Increased random and regular monitoring of MoI/police lock-ups both by ANP Human Rights Officers and external actors such as the AIHRC would help mitigate such detentions by the police. Similar oversight of prosecutors and judges needs to be developed. Mechanisms must also be established to ensure appropriate action is taken in response to problems and violations identified through monitoring. As part of these mechanisms, disciplinary action or other consequences for those who are found responsible for such detentions also need to be taken, including prosecution when appropriate.
- [Strengthening procedural protections](#). Discussed at length below, inadequate judicial control of detention and the absence of genuine access to defense counsel create the conditions for such arbitrary detentions.

## Detention of a suspect's or accused's relative or associate

### a. Establishing Arbitrariness (Failing the 'Lawful' test)

Detentions of relatives or associates of suspects or persons accused of crimes directly violates Article 26 of the Afghanistan Constitution which states

1. Crime is a personal act.

2. Investigation, arrest and detention of an accused as well as penalty execution shall not incriminate another person.

It is not lawful to arrest or detain a relative or associate of an accused or convicted criminal. Only the person who has committed the crime or is alleged to have done so can be detained.<sup>61</sup> Detentions of relatives or associates of the accused are arbitrary.

Detaining a suspect's or accused's relative or associate to pressure him/her to surrender or confess also is arbitrary.<sup>62</sup> Such a detention fails all three tests. First, the detention is not 'lawful' as already established. Second, the purpose of the detention is not 'reasonable'. Such a detention punishes someone else for the actions of another. Third, such detentions also fail to meet the criteria of being necessary. There is no risk of flight, interference with evidence, or reoccurrence of the crime. Nor does it meet the Constitutional requirement that detention only be ordered to protect others' rights—it instead interferes with others' rights.

### **b. Explaining the findings**

Police are detaining relatives or associates of suspects in lieu of the suspect or accused or in order to pressure the suspect or accused to surrender. These detentions are undertaken on the police's initiative or at the request of the prosecutor. In rare cases, the courts have convicted relatives in place of the accused. While such detentions normally are of close relatives, there is no discernable pattern for what criminal offense these detentions occur.

For instance, in Nahrin district of Baghlan province, two men were detained in 2007 because their sons were suspected of committing a crime but had allegedly fled the jurisdiction. Four men were detained in the MoJ Sholgara district detention in Balkh province because their relatives were accused of burning a harvest on 26 June 2005.<sup>63</sup> In Jalalabad, the police detained the wife and the mother of a robbery suspect on 6 October 2007 after the police failed to locate the suspect. UNAMA intervention secured the release of both detainees.

Such arbitrary detentions can be prolonged. For example, an 18-year-old man was detained for more than 7 months in the MoJ detention center of Sher-i-berzurg district, Badakhshan province, because his friend was accused of committing murder and could not be located.<sup>64</sup>

Guarantors also have been imprisoned when the accused has failed to meet his/her obligations. Such a case occurred in 2007 in Kohistan I district of Kapisa after the accused failed to repay 3 million Afghanis embezzled from a bank and fled the jurisdiction.

61 Articles 27, 28, 38-48, Penal Code of 1976, which remains in force, reaffirms that only the person committing the crime can be held responsible and arrested, detained and punished. This principle is further supported by the presumption of innocence which requires that even if a person is associated with a suspect or accused, then they must be presumed innocent of the crime.

62 See also Communication No. 16/1977, D. Monguya Mbege et al. v. Zaire (Views adopted on 25 March 1983) in UN doc GAOR, A/38/40, p. 140, para. 20-21/

63 The four were detained on the prosecutor's order of 30 November 2006, and were interviewed in detention by UNAMA on 17 January 2007.

64 According to reports received, the man was not suspected to be a conspirator or involved in the murder.

Though admittedly rare, there have been cases in which the court has convicted individuals for the alleged crimes of their relatives. One recent case in which UNAMA intervened was of a man from Metherlam district in Laghman whose son was accused of kidnapping an 18-year-old woman. The court convicted and sentenced the father to 6 years imprisonment for his son's alleged actions. On 1 October 2007, the Appeals Court corrected the error of the primary court and overturned its decision and released the father.

### c. Identifying Root Causes

Based on observations, these types of detentions appear to be caused by:

- [Confusion about individual criminal responsibility](#). UNAMA found that authorities do not appear to have a full understanding that responsibility for a crime rests solely with the individual committing the crime (including those assisting in the commitment of the crime). Some of this confusion may come from traditions within some customary legal systems that involve family members or associates in the delivery of justice for crimes. For instance, in Pashtun customary legal systems the concept of seeking forgiveness, or *nanawati*, often involves family members participation or sacrifice, such as giving a daughter in marriage to the victim's family.
- [Misunderstanding of function of detention](#). As discussed above, authorities do not fully grasp the function of detention and assume that it is a coercive tool at their disposal.
- [Inadequate investigation and interrogation techniques](#). Using detention to pressure the alleged perpetrator indicates that police and prosecutors are unable to apprehend suspects or obtain necessary information with the techniques that they have at their disposal.
- [Insufficient inter-jurisdictional coordination and summons mechanisms](#). Another problem identified was weak inter-jurisdictional coordination to apprehend or track suspects and accused beyond the original jurisdiction. The problem is worse between provinces than within provinces. The lack of a fully functioning system to track, apprehend, and handover suspects or accused across jurisdictions enables suspects and accused to in effect 'disappear', leaving their relatives or associates vulnerable.
- [Demand for justice by victims](#). The demand for justice by victims may create pressure on the authorities to hold someone to account. Relatives of identified suspects or those indicted are the easiest targets.
- [Insufficient procedural protections](#). Absence of procedural protections, such as a review of the legality of detention by a Court, provides the space for such detentions to occur. The oversight on the executive (in this case the prosecutor) that a review by the judiciary provides is critical.
- [Corruption of and discrimination by detaining authorities](#). As is often the case, such detentions can be linked to corruption. Such detentions may be caused by the police or prosecutor either receiving a bribe or pressure from a local power-broker or third party, or by personal enmity based on ethnicity, family or tribal membership or political affiliation.

The consequences of confusion about the law, the function of detention and problematic procedural protections at the district level were illustrated by the Laghman case discussed above; that a conviction of a relative occurred is deeply troubling. At the same time it is reassuring that the Appeals Court overturned the conviction. Nonetheless the case highlights the urgent need to address the root causes so as to ensure people's lives are not unnecessarily 'put on hold' and that justice is delivered.

#### d. Proposing solutions

Taking into account the overlapping nature of the root causes discussed above, a combination of the following is necessary to reduce arbitrary detentions of relatives or associates of suspects or accused:

- [Targeted training and awareness-raising campaigns.](#) Training and awareness-raising campaigns are needed to educate police, prosecutors, and judges about the function of State-mandated detention and the distinction between customary/traditional and formal systems by Mol, AGO and MoJ.
- [Continue substantive training and capacity-building on investigation and interrogation techniques at district and provincial level.](#) Police and prosecutors need a wider menu of techniques to conduct investigations and interrogation. Police mentors as well as programs supporting the AGO should work to strengthen and continue training and capacity-building on such techniques.
- [Awareness raising for victims on role of detention and concepts of the formal justice system.](#) Concerned ministries, the Supreme Court and other partners, such as the AIHRC, should work together to design and implement awareness raising for victims on the investigation and adjudication process and what they can expect. Initiatives such as that being developed by JSSP to support victims through the legal process should be encouraged.
- [Develop stronger inter-jurisdictional coordination mechanisms.](#) Mol and MoJ, in particular, should work to strengthen coordination between jurisdictions on tracking, apprehending and turning over suspects or indicted individuals.
- [Strengthening procedural protections early in the process.](#) Discussed at length below, the inability to have detention reviewed by a court and the absence of genuine access to defense counsel create space for arbitrary detention.

### Breaches of Shari'a and customary or social practices

Afghan authorities at times detain people for breaches of Shari'a and customary or social practices that are not classified as crimes in the Penal Code of 1976.

Shari'a and customary or social practices are closely linked. Customary or social practices that conform to the principles of Islam are normally considered to be supplementary sources of Shari'a,<sup>65</sup> while those that do not are considered contrary to Islam. At the same time, there is no consensus about which

65 The main sources of Shari'a are the Koran (Ayat) and the sunnah.

customary or social practices are compliant with Islamic principles. Given this, this report will consider detentions due to breaches of Shari'a and customary or social practices together.

### a. Establishing Arbitrariness (Failing the 'Lawful' test)

Without prejudicing interpretation by the Supreme Court, detention for breaches of Shari'a or customary or social practices not found in criminal law appears not to comply with the 'lawful' test. In Article 27(1), the Afghanistan Constitution requires that a deed must be considered a crime "by a law promulgated prior to commitment of the offense."<sup>66</sup> It defines law in Article 94 as that which is approved by both houses of the National Assembly and endorsed by the President, unless stated otherwise by the Constitution.<sup>67</sup> Reading Article 94 and Article 27(1) together, the Constitution requires that a deed must be codified in a law that is approved by the National Assembly and endorsed by the President for it to be considered a crime and detention to be lawful. Neither Shari'a nor customary or social practices, therefore, would meet this standard for criminal offenses.

*Customary and social practices.* While customary and social practices may be upheld and protected within customary legal systems, not all breaches of such practices are defined as crimes in Afghan law. Customary legal systems' practice and written documentation do not meet the standards of being law as defined by the Constitution. They are not approved by both houses of the legislature nor endorsed by the President. In addition, since Article 3 of the Afghanistan Constitution requires law to conform to the principles of Islam, customary and social practices that do not would be unlawful. Thus, detaining an individual for a breach of customary or social practices not defined as a crime is arbitrary under Afghan law.

*Shari'a.* Under this interpretation, detention for breaches of Shari'a not defined as crimes in codified Afghan law also does not meet the 'lawful' test. Many prosecutors, judges and lawyers disagree. They have argued to monitors and in indictments and court decisions that the Penal Code of 1976 does not fully reflect Shari'a and that the gap must be filled by Shari'a or that Shari'a is law under the Afghanistan Constitution and thus can be applied in criminal cases. They argue that Article 130 of Afghanistan's Constitution allows for this.

Article 130 permits the application of Hanafi jurisprudence (a school of Shari'a) if there is a gap in the law so as to "attain[] justice in the best manner."<sup>68</sup> It could be argued that the Afghanistan Constitution allows Hanafi jurisprudence to be considered as 'law' for the purposes of detention and defining a crime and punishment. Article 27(1), however, appears to prohibit this.<sup>69</sup> Hanafi jurisprudence is not 'promulgated' law or *qanoon*. The obligations laid out in Article 7 of the Afghanistan Constitution to comply with international standards also would appear to prevent the application of Article 130 for detention purposes.<sup>70</sup> For example, according to international law, a deed must be defined as a crime in domestic legislation prior to the commitment of the deed.<sup>71</sup>

66 Article 27(1), Afghanistan Constitution.

67 Article 94(1), Afghanistan Constitution.

68 Article 131, Afghanistan Constitution, provides that for those who follow the Shi'a sect, Shi'a jurisprudence should be applied.

69 Arguments that the breaches for which Shari'a is used are targeted at women could open an argument that allowing application of Article 130 is discriminatory towards women and thus prohibited by Article 22, Afghanistan Constitution.

70 Shari'a itself also includes these principles of non-retroactivity and predictability. The lack of clarity about the applicability of Article 130 would seem to indicate that, so as to also respect the presumption of innocence, Article 130 should not be used for criminal matters.

71 Communication No. 702/1996, C. McLaurance v. Jamaica (Views adopted on 18 July 1997), in UN doc GAOR, A/52/40, (vol. II), pp/ 230-231,

## b. Explaining the findings

*On 26 May 2007, police in Rustaq district of Takhar province detained an 18-year-old woman and her 22-year-old male cousin for running away. The district Chief of Police detained them after they approached the district court to marry them. The couple had decided to marry after the woman had been forcibly engaged to another cousin.<sup>72</sup>*

Such a case is not atypical. Men, women, boys and girls accused of running away from home are frequently detained, and sometimes indicted and convicted despite 'running away' not being a crime.<sup>73</sup> Normally, these cases are linked with a girl or woman escaping a forced marriage or domestic violence, or with a couple attempting to elope after permission of the families has been denied or cannot be obtained.<sup>74</sup> Most of these detentions are of women and girls, though both parties may be detained.

Many such detentions were identified in Parwan and Kapisa during monitoring. Three (3) more cases were found in Herat, while others were found in Kunduz, Baghlan, Jawzjan, and Balkh as well as most other provinces monitored.<sup>75</sup> In Nangarhar a substantial number of cases were identified. In Herat province, UNAMA identified a case on 15 July 2008 in which a woman was forcibly married to her brother-in-law after her husband died. After she complained to the Police, and obtained a divorce, she was charged and convicted of 'running away' and sentenced by the Appeals Court to 7 months imprisonment. Often the prosecution of a case is dependent upon the political, ethnic, tribal affiliations and inclinations of prosecutors rather than the evidence available.

These findings confirm those of other organizations, such as UNIFEM, the Ministry of Women's Affairs (MoWA), and UNODC.

When women and girls are detained for running away with a man or boy they are then often subjected to virginity tests without their consent (which further violate the rights of the detainee<sup>76</sup>). While these tests are scientifically unreliable, they are used to determine whether or not intercourse occurred. If the female fails the test, then she (not necessarily the male) is charged with having sex outside marriage (zina), under the Penal Code.<sup>77</sup> (The implications of this pattern will be further discussed below in Chapter III, Section VII).

Women also have been detained, indicted and convicted for being in the company of a man without proper accompaniment, or *Khelwat-e-sahiha*. While considered a crime in Hanafi jurisprudence, it is

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para. 5.5. See also Articles 9(1) and 15(1), ICCPR.

72 In detention, the couple confessed to having sexual relations outside of marriage (zina), a crime under the Penal Code. They were subsequently convicted and sentenced to 10 years in prison by the Rustaq court. They have appealed the verdict. The couple had to be transferred from the Rustaq district detention because after they were arrested, a group tried to stone the woman to death.

73 See UNODC, *Afghanistan: Female Prisoners and their Social Reintegration*, March 2007, p. 22.

74 Based on observation and casework in regional offices. See also Ministry of Women's Affairs, *Violence Against Women Primary Database*, pp. 22-23, which integrates results from arbitrary detention and regular monitoring.

75 In Shirbirgan, for example, a 19-year-old woman was detained for running away on 26 April 2007 and only released after AIHRC's intervention.

76 One could argue that such tests constitute inhumane or degrading treatment and thus violate the Constitution.

77 Articles 426-8. In comments to UNAMA, the MoJ noted that it did not agree with this argument.

not within the Penal Code.<sup>78</sup> In Pul-i-kumri in Baghlan province, a pregnant widow was convicted of this on 2 April 2007 after being in a room with a male family friend after her husband's death.

### c. Identifying Root Causes

Based on observations, these types of detentions appear to be caused by:

- [Lack of clarity in the law](#). Confusion as to the applicability of Article 130 for detention and criminal matters gives space for such detentions to occur.
- [Prevalence of customary legal system and religious institutions](#). The prevalence of the informal legal system and religious institutions over the formal justice system helps create these practices. Many judges are *mullahs* and not formally trained in law. Police and prosecutors also often believe it their responsibility to uphold customary and religious practices and do so rather than upholding codified law.
- [Pressure from local leaders](#). There also is often tremendous pressure on police, prosecutors and judges from community, religious and political leaders to respond to breaches of *Shari'a* and customary and social practices.
- [Ignorance of and ignoring the law, particularly by the ANP](#). Many judges and prosecutors are not adequately knowledgeable about Afghan law. If they are trained in *Shari'a*, then they depend primarily on it. Police are not necessarily familiar with the criminal law either and work from their own understanding of what a crime is which is based on community practices. At other times, detaining authorities knowingly ignore the law and decide to use their authority to enforce customary and social practices or *Shari'a*.
- [Status of women](#). Women are more frequently the subjects of these types of arbitrary detentions. This is linked to the low-status of women in Afghanistan. As has been repeatedly documented, women are not fully afforded their rights and not viewed as equal to men. Many law enforcement and judicial officials in the criminal justice and detention systems hold this view.<sup>79</sup>
- [Weak accountability mechanisms](#). Insufficient oversight mechanisms provide the space for such detentions to occur. They are institutionally weak. Frequently those in charge of them are unwilling to hold authorities accountable for such violation because they do not view the actions of the offending official as problematic.

### d. Proposing solutions

- [Work with religious and legal scholars to reinforce to the authorities, religious scholars and community leaders that Afghan law reflects \*Shari'a\* principles](#). It is not widely understood that Afghan law is based upon *Shari'a*. Explaining this at the district and provincial level to community and religious leaders as well as authorities could mitigate some of the pressure on authorities to detain for breaches of customary practices. It also could reduce the tendency of authorities

78 UNODC, p. 22.

79 For further discussion please see Ministry of Women's Affairs, Violence Against Women Primary Database and UNODC, Afghanistan: Female Prisoners and their Social Reintegration, March 2007 for a further discussion on the status of women in Afghanistan.

to detain on such grounds.

- [Clarifying the applicability of Article 130](#). The Supreme Court is urged to clarify whether Article 130 can be applied in criminal matters and in relation to detention and then disseminate the determination widely.
- [Improved oversight and accountability](#). Increased random and regular monitoring of Mol/police lock-ups both by ANP Human Rights Officers and external actors such as the AIHRC would help mitigate such detentions by the police. Similar oversight of prosecutors and judges needs to be developed, including of prosecutors by the judges. Mechanisms also must be established to ensure appropriate action is taken in response to problems and violations identified through monitoring. As part of these mechanisms, disciplinary action or other consequences for those who are found responsible for such detentions also need to be taken.
- [Strengthen the capacity of ANP Family Response Units \(FRUs\)](#). FRUs are relatively new and are designed to provide female victims of violence, forced marriages, or other crimes with support and assistance as well as to raise awareness about violence against women. Police mentors have been put in place to support many of FRUs. Yet, monitoring has found that a number of FRUs send women and girls back into the abusive environment or generally fail to provide protection to female victims but duplicate the re-victimization patterns. FRUs also often are marginalized by the Chiefs of Police. Stronger support at the policy-level and from mentors, as well as stronger monitoring and accountability of these units is necessary.
- [Training on law](#). Police, prosecutors and judges, especially at the district level, need to receive more information and training on the law and the difference between the formal law and customary and religious law.

## Resulting from misapplication of criminal law to criminalize an individual

### a. Establishing Arbitrariness (Failing the 'Lawful' test)

Afghan authorities have misapplied criminal law to detain people who have not committed a criminal offense. The character of the deed committed must fit the definition of the crime in order for the detention to be 'lawful'. In these instances, authorities are trying to make the deed fit the crime and thus these detentions are arbitrary.

### b. Explaining the findings

When authorities detain individuals by misapplying criminal law, it tends to be those:

- who commit deeds that are not socially, religiously or culturally accepted;
- who are victims of a crime themselves (usually women);or
- who are subject to personal or political manipulation.

Often people are detained for breaches of *Shari'a* and customary or social practices seemingly legally by using provisions of the Penal Code. For instance, a 16-year-old girl and a 22-year-old woman were

detained in Nangarhar on 7 February 2007 after seeking shelter at a nearby home when they heard gunshots while walking. They were charged and convicted of adultery, despite an investigation finding that adultery had not taken place.<sup>80</sup>

Victims of rape (female and male), domestic violence, trafficking, forced marriages or other violence against women are often detained on criminal charges, thus criminalizing the victim. Charging female rape victims with adultery or *zina* (sex outside of marriage) appears to be standard practice.<sup>81</sup> Cases were found in almost every province over the monitoring period. For instance, in January 2007, a 20-year-old rape victim from Surkroad district, Nangarhar, was charged with adultery after she approached the prosecutor with her complaint of rape. A 15-year-old girl in Samangan province was detained, charged, and convicted of *zina* after she complained to police that she was raped by her uncle, and as a result became pregnant.<sup>82</sup>

Trafficking cases are more infrequent than rape cases, but follow a similar pattern. In Achin district, Nangarhar, a 22-year-old woman was charged with adultery after she was apparently kidnapped, forcibly married to another man and her child killed. In Qala-e-zal district of Kunduz, a 17-year-old girl who was trafficked from Kabul and forcibly married to a 25-year-old man on 26 August 2007 was charged and convicted with running away (despite there being no provision in the Penal Code) and misrepresenting herself to the authorities as a victim rather than being a participant in a trafficking ring.

Criminal provisions also are misused to coercively detain individuals in pursuit of personal gain (such as resolving a land dispute in someone's favor<sup>83</sup>), to stifle journalists<sup>84</sup>, and other political ends.

### c. Identifying Root Causes

- Pressure from local leaders and security. There is often tremendous pressure on police, prosecutors and judges from community, religious and political leaders to respond to breaches of *Shari'a* and customary and social practices. In this vein, not bowing to such pressure may lead to security problems for prosecutors and courts.
- Status of women. Women are more frequently the subjects of such arbitrary detentions. This is linked to the low-status of women in Afghanistan. For rape and trafficking cases, there is a presumption that the female victim is at fault and has dishonored her family, rather than viewing her as a victim of a crime. When allegations of rape are made, prosecutors do not consistently investigate or indict, nor do judges convict when adequate evidence is available.

80 A Presidential Decree released the 22-year-old woman, who was freed on 20 October 2007. The 16-year-old girl's sentence was reduced to seven months.

81 In addition to monitoring, see UNODC, pp. 21-22.

82 She was convicted on 2 June 2007. She gave birth while in detention. She was given a sentence of 2 years. Her uncle was charged and convicted, sentenced to pay a cash fine of 12,00 Afghanis or 2 years of imprisonment. In another case, a 15-year-old girl from Kama district was charged with adultery and detained in Nangarhar MoJ detention center on 15 April 2007. The Kama district ANP received reports on 10 April 2007 that she had been kidnapped by two men and raped. After referring the case to the Kama primary court, the alleged rapists were arrested. On 16 May 2007, the alleged rapists were released on bail and the charges subsequently withdrawn. The girl remained in custody until 16 September 2007.

83 In Obeh district of Herat province, a 65-year-old man was detained on charges of blasphemy, when the issue was actually a land dispute between the mullah accusing him and the detainee.

84 A journalist was detained by the police in Rodat district of Nangarhar while he was covering demonstrations linked to poppy cultivation.

- [Gaps in the law](#). Rape is not clearly defined as a crime in the Penal Code. It is not established as a crime itself. It can be established as a crime from the provisions on *zina* (adultery), pederasty and violation of honor (Articles 427-429).<sup>85</sup> Reading the crime of rape into this chapter, however, creates problems for the victims because the charge of *zina* (adultery) is usually applied to both parties (male and female). As UNODC points out, these provisions do discuss aggravating conditions which make non-consensual sex a crime.<sup>86</sup> Still, they do not define non-consensual sex as a crime exclusively of the perpetrator.<sup>87</sup>
- [Insufficient legal knowledge](#). Prosecutors and judges may not have sufficient knowledge of the law and instead read into the law customary practices on justice.
- [Lack of oversight and accountability](#). Weak oversight and accountability creates space for abuse and unknowing misapplication of the law. The ANP Human Rights Officers who monitor detention in police lock-ups do not necessarily have the knowledge to identify these types of arbitrary detention, or the leverage to challenge them. Prosecutors who are either ignorant of or misusing the law also do not provide an adequate check on police. At the same time, absence of internal oversight of prosecutors allows these detentions to occur. While courts often do perform their oversight role on the executive authorities and end such detentions at either the primary court or appeals court level, convictions also happen.
- [Corruption by detaining authorities](#). Corrupt practices also lead to such misapplication of criminal law, as does corruption for political gain.

#### d. Proposing solutions

- [Work with community and religious leaders to discuss the role of law](#). Rather than tell religious and community leaders that they 'should follow and respect the law', give them an option to participate in the law. Develop initiatives that help community and religious leaders understand from where Afghan criminal law originates and how they can discuss changes to the law with lawmakers.
- [Promote discussion with religious and community leaders about rape and trafficking](#). Decriminalizing rape and trafficking victims requires backing of community and religious leaders. Opening discussion about these crimes and their victims, as well as a discussion about what Islam explains, could be helpful.
- [Give victims a voice](#). Victims also need the space to tell their stories and help men and women understand the devastating effect of rape, trafficking and domestic violence. Initiatives such as radio programs in which female victims share their experiences have proven helpful in the past. Initiatives like that being developed by JSSP to support victims through the legal process also should be encouraged so that victims have a voice during the judicial process.
- [Define the crime of rape and trafficking in the Penal Code](#). So as to prevent victimization of rape victims, rape should be defined clearly as a crime of the perpetrator only in criminal law.

85 UNODC, page 21.

86 Ibid.

87 In comments to UNAMA, the MoJ noted that it did not agree with this argument.

Trafficking in human beings also should be defined as a crime for the same reason.

- [Educate detaining authorities on the law and its limits.](#) Legal experts should work with trainers and policy-makers to develop training and educational materials on the function of the law and how law can and should be used, including the role of the police as law enforcers, and prosecutors and judges and protectors of the law, versus legislators as law makers.
- [Institute regular reviews of case-loads, and use oversight to design corrective initiatives.](#) Mechanisms overseeing police, prosecutors and judges, as well as non-government monitors such as the AIHRC, should conduct regular reviews of case-loads of police, prosecutors and the courts to identify and track detentions based on misapplication of the criminal law. Based on this, disciplinary action should be taken and information gathered to develop corrective initiatives. Corrective initiatives could be guidance circulars, district-level workshops discussing the scope of certain provisions of criminal law, or more basic training.

### III. Arbitrary detention due to absence of reasonableness or necessity

While the vast majority of detentions in MoI and MoJ facilities are for crimes for which the law permits detention, UNAMA found that many of these detentions fail the ‘necessary’ and ‘reasonable’ tests.

#### a. Establishing Arbitrariness

As discussed above, under the Afghanistan Constitution, failure to meet either the reasonableness and necessity test renders detention arbitrary.

Afghan domestic legislation, however, does not provide clear criteria or procedures upon which to assess reasonableness or necessity. Even when an authority does assess if a detention is reasonable or necessary, it generally fails to substantiate but instead merely asserts its decision. This is insufficient under Afghan law<sup>88</sup>

#### b. Explaining the findings

A significant number of detentions appear to not be justifiable as reasonable or necessary, particularly in the pre-trial phase. Monitoring showed that regular assessments of reasonableness or necessity or consideration of non-custodial alternatives are infrequent. Rather than examining the circumstances of the case, authorities appeared instead to detain individuals merely because they were suspected or accused of such a crime that permitted pre-trial detention or were convicted of a crime eliciting a sentence of imprisonment. (Under Afghan law, a suspect or accused can be detained pre-trial only if the crime in question is punishable by more than 1-year imprisonment.<sup>89</sup> Detention is not permitted for crimes that garner a lesser punishment.)

#### c. Identifying Root Causes

##### Inadequate guidance in Afghan law for pre-trial detention

The absence of explicit guidance or procedures in Afghan law on assessing necessity and reasonableness results in detentions that are both unnecessary and unreasonable. Sporadic use of bail provisions that are also overly restrictive multiplies constitutionally unnecessary and unreasonable detentions.

Current Afghan law generally only provides prosecutors and judges with basic guidance as to what constitutes reasonable and necessary detentions in the Afghan context.

- Article 24 of the Constitution states that depriving someone of their liberty can be done only to protect the rights of others or to protect the public interest.

<sup>88</sup> See discussion on Necessity and Reasonableness in Section VI(a) above.

<sup>89</sup> Article 35 read with Articles 24 and 101(2), Penal Code 1976.

- The ICPC further directs detaining authorities to respect the presumption of innocence and “strictly confine” detentions or limitation of rights to that necessary for “collecting evidence and establishing the truth.”<sup>90</sup>
- The ICPC also grants the primary prosecutor the power to release a suspect (prior to indictment) “whenever he deems no more necessary the deprivation of liberty.”<sup>91</sup>
- The 1965 Criminal Procedure Code, as amended in 1974, includes provisions on bail and alternative guarantees but also does not allow them to be applied to a broad list of petty and serious crimes.

The ICCPR and its case-law provides Afghan authorities additional guidance on what would be deemed reasonable and necessary detentions. These principles include substantiated reasonable suspicion and risks of flight, interference, reoccurrence of the crime.

Reliance on such general principles in framework laws, however, is not sufficient legally or practically to protect against arbitrary detentions at the district and provincial level. Legally, the HRC has stated that the grounds for detention must be “established in domestic legislation.”<sup>92</sup> Currently, what constitutes “necessary” or “reasonable” is not clearly defined. Practically, the absence of clearer guidance for prosecutors and judges has led to detention being the rule, not the exception. Overuse of pre-trial detention, in particular, has led not only to arbitrary detentions but also to detention center overcrowding.

### *ICPC inadequate in pre-trial phase*

While the police have clear guidance as to when they can detain on their own initiative,<sup>93</sup> the prosecutors and courts do not have clear guidance for preventative (pre-indictment) and pre-trial detention in particular. During the investigation and pre-trial stage, Article 4 of the ICPC, for instance, allows rights, including liberty, to be limited in order to establish the truth and collect evidence.

Such a standard opens the door to arbitrary detentions. It allows police and prosecutors to use detention as a coercive tool to obtain confessions, witness information and other types of evidence.

Detention for these purposes violates the Constitution. It fails the necessary and reasonable tests as discussed above.

In the absence of provisions defining the limits of Article 4, the ICPC helps authorities justify arbitrary detentions that are clearly prohibited by the Afghanistan Constitution. Article 4 reinforces tendencies to detain rather than conditionally release suspects or accused. The result is many detentions that are unnecessary and unreasonable.

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90 Article 4, ICPC.

91 Article 34(2), ICPC.

92 Communication No. 702/1996, C. McLaurance v. Jamaica (Views adopted on 18 July 1997), in UN doc GAOR, A/52/40, (vol. II), pp/ 230-231, para. 5.5.

93 See Article 15, Police Law and Article 30 and 13, ICPC.

*Bail provisions problematic*

Even when judges do actively assess necessity and reasonableness, Afghan subsidiary law is overly restrictive. The bail provisions included in the 1964 Criminal Procedure Code, which remain applicable,<sup>94</sup> do not allow bail or non-custodial alternatives to be applied for those accused of a broad list of petty and serious crimes. The list includes recidivist pick-pocketing, looting, false accusation, arson, and forgery.<sup>95</sup> Such restrictions do not comply with the Afghanistan Constitution because they violate Article 9(3) of the ICCPR, which says:

It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

*Legal gaps lead to overcrowding*

Taken together, these legal gaps create overcrowding in detention centers. The absence of clear guidance as to when it is appropriate to detain coupled with the propensity of the judiciary to detain results in detentions being ordered as standard practice rather than as an exception. Doing this creates an unnecessary burden on the Government and its taxpayers to feed, clothe, and care for these detainees. It also produces unnecessary financial, emotional and social hardship on families of pre-trial detainees.

Yet, the presence of detainees unnecessarily and unreasonably in detention is not simply due to a problematic domestic legislative framework. Even though the Police Law provides the police with clear legal guidance,<sup>96</sup> they do continue to detain people unnecessarily and unreasonably. Other factors contributing to such arbitrary detentions are:

- [Misunderstanding of function of detention](#). The law's bias towards detention is exacerbated by the fact that detaining authorities do not fully grasp the function of pre-trial detention and assume that it is a coercive tool at their disposal. Authorities also appear to rely on detention rather than explore non-custodial alternatives, such as guarantees.
- [Inadequate investigation and interrogation techniques](#). Necessity of detention in the eyes of the detaining authorities is greater because police and prosecutors do not have a full menu of investigative and interrogation techniques and thus rely on detention as an interrogation tool.
- [Presumption of guilt](#). A belief that those suspected or accused are guilty predisposes authorities to assume all detentions are necessary and reasonable. UNAMA has been present when statements were made, prior to hearing or conviction, that the suspect or accused did not 'deserve' to be released or to enjoy defense counsel (see Section VI(b)(8) on Right to a Defense Counsel below).

<sup>94</sup> Article 98(3), ICPC only nullifies laws or parts of law which are contrary to the ICPC. As there are no bail provisions in the ICPC, the 1964 provisions are not contradicted and apply.

<sup>95</sup> Annex Table Relating to Article 97 of Chapter Eight of the Criminal Procedure Code, Criminal Procedure Code, 1964 as amended in 1974.

<sup>96</sup> Article 15, Police Law.

#### d. Proposing solutions

- [Substantial revisions to criminal law to correct gaps and bias.](#) Changes to correct the gaps and bias identified above should be made in the draft Criminal Procedure Code currently under consideration and the Penal Code. Specifically:
  - The law should severely limit circumstances in which detention can be deemed necessary and reasonable. It should enumerate these circumstances as far as possible, while giving the Court adequate space to protect the public interests and others' rights. Doing so also will require revision of bail provisions to comply with Article 9(3) of the ICCPR.
  - Prosecutors should be required to substantiate with evidence why both pre-trial and post-conviction detention is necessary and reasonable and judges should be required to refer to such evidence in their decision to detain pre-trial and in sentencing decisions.
  - Clear guidance should be developed to assist judges in determining when suspects should be released on pending trial either on payment of bail or on other conditions without payment of bail.
  - Given the economic situation of Afghans, alternatives to pre-trial detention other than financial bail should be permitted in the law.
  - Sentencing provisions in both the substantive and procedural law should be revised to enable judges to consider non-custodial alternatives when appropriate.
- [Training and capacity-building on the function of detention and of the presumption of innocence.](#) Judges and prosecutors, in particular, should be trained and capacity-built on the purpose of detention as well as why the Constitution requires the presumption of innocence and how minimizing pre-trial detention is needed in order to respect this principle. Mentors and trainers for district and provincial police also should reinforce these concepts.
- [Continue substantive training and capacity-building on investigation and interrogation techniques at district and provincial level.](#) Police and prosecutors need a wider menu of techniques so as to conduct investigations and interrogation. Police mentors as well as programs supporting the AGO should work to strengthen and continue training and capacity-building on such techniques.

## IV. Arbitrary detention due to expiration of legal time limits or court-ordered sentences

Throughout Afghanistan, a substantial number of detainees and prisoners are held in custody beyond legal time limits or court-ordered sentences. Such detentions do not comply with the 'lawfulness' test and are thus arbitrary under Afghan law.

### a. Establishing Arbitrariness (Failing the 'Lawful' test)

Under Afghan law, when any of the time-frames or sentences expire, the detaining authority has no authority under the law to keep the suspect, accused or prisoner in custody.<sup>97</sup>

- *Police*: Article 25 of the Police Law authorizes the police to hold someone in custody for a *maximum* of 72-hours after initial arrest.
- *Prosecutors*: The ICPC only authorizes prosecutors on their own initiative to detain someone without charge for 15-days before requiring a Court-approved 15-day extension.<sup>98</sup>
- *Courts*: Courts can approve an extension of pre-indictment detention for additional 15-days, resulting in a total of 30 days pre-indictment detention.<sup>99</sup> Each level of the Court has limited periods for which they can authorize detention: the primary court can authorize detention for 2 months from the time of indictment, the appeals court can do so for 2 months from the time the primary court's verdict is issued once an appeal is lodged, and, when there is an appeal, the Supreme Court can do so 5 months from the issuance of the appeals verdict, for a total of 10 months.<sup>100</sup> Courts can issue sentences of imprisonment for convictions based on the provisions of the Penal Code or applicable law.

In addition, MoJ detention officials are required to release detainees if the pre-trial time frame has expired. They also are required to release prisoners upon completion of their sentences.<sup>101</sup>

*Acquittal or decision not to indict*. If a person is found to be innocent of the charge against him/her or not indicted, then there is no legal basis on which to detain that person and the person must be released. There is no longer any possible need to detain the person to establish the truth or collect information, as is the criteria under Afghan law.<sup>102</sup>

97 Article 6(3), ICPC, Article 25, Police Law, Articles 20(4) and 49 and 50, Law on Prisons and Detention Centers. The HRC also confirmed that it is a violation of Article 9(1), ICCPR if prisoners are not released at the end of their sentence. Communication R.2/B, A.M. Garcia Lanza de Netto on behalf of B. Weismann Lanza and A.Lanza Perdomo (Views adopted 3 April 1980), in UN doc. GOAR, A/35/40, p. 118, para 16.

98 Article 36, ICPC.

99 Article 36, ICPC.

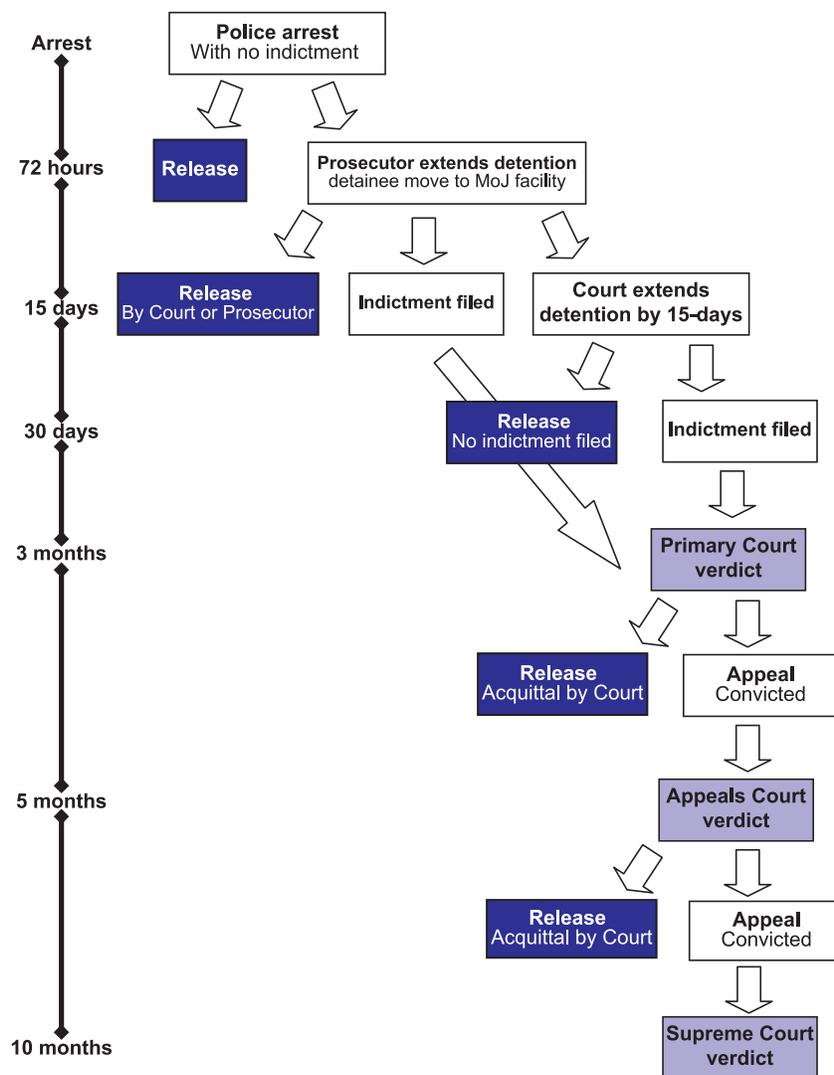
100 Article 6(2), ICPC.

101 See Articles 20(4), 49 and 50, Law on Prisons and Detention Centers.

102 Article 4, ICPC.

*Guarantors or financial guarantees.* Release when timelines or sentences have expired is not to be conditioned unless provided by law. For pre-trial detainees, under the law, they are presumed innocent<sup>103</sup> and thus must be released without condition when time limits have expired. For prisoners (after appeals are exhausted), Afghan law is ambiguous. The Supreme Court High Council has stated that a court may require a guarantor for release but that it must be specified in the Court’s sentencing decision.<sup>104</sup> Earlier in 2008, however, a joint commission of International Committee of the Red Cross (ICRC), the Corrections Sector Support Program (CSSP), Ministry of Defense (MoD) and MoJ released a number of prisoners who were being held only because they did not have a guarantor.

Figure 2: Legal pre-trial timelines and arbitrary detention



103 Article 25, Afghanistan Constitution and Article 4, ICPC.

104 See Supreme Court High Council Memo No. 720, 17 July 2006 and Supreme Court High Council Memo No. 990, 9 September 2006.

## b. Explaining the findings

All the types of cases discussed below fail to meet the test of being lawful and are arbitrary in Afghanistan. Monitoring found that:

- [Release on acquittal, expiration of sentence or expiration of legal pre-trial timeframe.](#) MoJ detention officials are not releasing either pre-trial detainees and prisoners at the end of the legal timeframe or at the order of the prosecutor or court. Detention center officials often refused to release those acquitted or those who had completed their sentence without a financial or other guarantee, even when not required by their sentence.

*Pre-trial detainees beyond the legal timeframe.* Monitoring found that both police and officials of MoJ detention centers and prosecutors had failed to release detainees once pre-trial timeframes had passed. This was done despite the authorities having no authority to keep the detainees in custody.<sup>105</sup> As will be discussed at length below, UNAMA and AIHRC consistently found pre-trial detainees who remained in detention despite one or more time frame lapses by the police, prosecutor, or courts.

Rather than being released, a significant number of detainees were awaiting court verdicts in detention well-beyond legal timeframes laid out in the ICPC. The most egregious cases tended to be those awaiting Supreme Court decisions beyond the 5-month timeframe.<sup>106</sup> These waits all too often stretched into years.<sup>107</sup> Delays in the courts sometimes meant that detainees' time in detention was greater than the sentence given or legally allowed for the offense.

Many of pre-indictment detainees also should have been released. In some cases, police failed to inform the prosecutor of the detention within 24 hours of arrest thereby prolonging detention.<sup>108</sup> A number of these cases were linked with civil disputes or national security issues. In most cases in which these detainees should have been released, the prosecutor failed to comply either with the 48-hour deadline to interview the suspect, or respect the indictment timelines.<sup>109</sup> Monitoring also identified some detainees who remained in detention without an indictment beyond the 30-day deadline.<sup>110</sup>

105 See Article 20(4) and 49, Law on Prisons and Detention Centers.

106 Article 6(2), ICPC.

107 UNAMA and AIHRC documents show that more than 200 cases were awaiting Supreme Court verdicts beyond the 5-month time frame in Balkh, Saripul, Jawzjan and Faryab provinces while, as of 13 March 2007, 338 cases were beyond the time limits in Kabul, Parwan, Logar, Kapisa, Panjshir and Wardak.

108 In remote districts, this failure was many times linked with the physical absence of district prosecutors. At the same time, the Supreme Court has identified as a problem the failure of prosecutors to comply with indictment timelines or to release if timelines are breached. In fact, the Supreme Court High Council claimed that prosecutors were requesting the Courts to extend pre-indictment detention beyond the 30 day maximum of the ICPC. The Supreme Court High Council instructed both the Courts and MoJ to strictly observe the law and release detainees if timelines had expired. See Supreme Court High Council Memo No. 720, 17 July 2006.

109 In the first monitoring phase, prosecutors failed to comply with the interview deadline in 1038 cases of the 1069 cases for which dates were available (97%). For only 28 of 941 men interviewed were timeframes followed, while they were complied with only for 3 of 97 women interviewed. The pattern did not change significantly in subsequent stages of monitoring.

110 In one case, a detainee was arrested in Kunduz, held for 13 days, and then transferred to the police in Taloqan in Takhar province where he was detained for 4 months and 15 days before indictment and transfer to the MoJ detention center.

*Failure to release unconditionally on acquittal or no indictment.* Another disturbing finding was that a number of detainees had been exonerated or acquitted of the charges against them but remained in detention. Reasons given included the courts' or prosecutors' failure to transmit the acquittal decision and release order, possession of a decision but no explicit order to release, or the absence of a guarantor to which to release the detainee (despite no such requirement in the Court's decision). For example, UNAMA found that MoJ detention center officials in Herat refused to release 5 women who had been cleared of accusations upon investigation (i.e. not indicted) because they did not have a guarantor.

*Failure to release unconditionally on completion of sentence.* Throughout Afghanistan, MoJ detention center authorities did not necessarily release prisoners who had completed their legally mandated sentence<sup>111</sup> or who were granted an early release by Presidential Decree. MoJ detention center officials and prisoners explained to monitors that many prisoners were not being released despite the end of their sentence because they could not produce a guarantor or financial guarantor.<sup>112</sup> The Supreme Court High Council has flatly rejected such explanations as a violation of Article 27 of the Constitution.<sup>113</sup>

Others are not released because of failure to pay fines applied as part of their sentence.<sup>114</sup> Under current law, a prisoner's term of imprisonment can be extended up to 90-days if s/he cannot pay the fines applied as part of her/his sentence. Imprisonment can be extended by 90-days if the prisoner cannot pay court fees. The term of imprisonment, therefore, can be lawfully extended up to 6 additional months if the appropriate procedures are followed and orders issued. Procedures and orders are not always followed; nor are the time limits necessarily respected.

- Monitoring of detention periods. Prosecutors were not consistently monitoring the detention periods of pre-trial detainees and prisoners to ensure legality as the law requires.<sup>115</sup> ANP Human Rights Officers, whose responsibility it is to monitor detention in police lock-ups,<sup>116</sup> do not do so consistently either, nor are they vested with the necessary authority or support to take action on violations.

Discussions with detention center officials and prosecutors throughout the monitoring period showed that, while some prosecutors did check periods of detention, such oversight was not

111 For example, in Khost, monitors found 2 men convicted of corruption remained in detention more than 4 months after the expiration of their sentence. They have since been released.

112 UNAMA presented a list of 19 such prisoners in Kabul to the Supreme Court in July 2007 for their action. No action was taken by the Supreme Court. After riots in Pul-Charki in April/ May 2008, a committee composed of ICRC, CSSP, MoD and MoJ released those who were still detained only because they could not produce a guarantor because there was not legal basis on which to detain them. A similar pattern was found in Parwan.

113 Supreme Court High Council Memo No. 990, 29 February 2006.

114 Such was the case with a 26-year-old man convicted of theft in Takhar. He was not released despite a Supreme Court decision stating his sentence was served, because he refused to pay the monetary part of his sentence. A similar case occurred in Kunduz in which a 58-year-old man was held beyond his sentence despite a release document, at the request of the prosecutor because he was not able to pay the cash fine applied to him as part of the Courts sentencing. (It should be noted that Article 108(a)(2) and 109 of the Penal Code of 1974 state that the court should not apply a fine which would create significant financial hardship on the convict while 1987 amendments to Article 447 state that if the person does not have the financial ability to pay the whole amount to the Government then the Court can order that the fine be paid in installments.)

115 Article 51, Law on Prisons and Detention Centers.

116 Article 1 and 4(a) and (b), MoI Order No. 020, on the Protection of Human Rights in Police Performance, tasks and authorities of the Human Rights Officers of the Provincial Police Headquarters, dated 30 November 2005.

regular or consistent throughout the country. ANP Human Rights Officers were found to still be familiarizing themselves and their colleagues with their mandates, but were monitoring to some extent. It, however, was unclear if Chiefs of Police responded to their findings appropriately or were held to account when they did not respond to concerns appropriately.

The Courts also are responsible to monitor detention period, though as discussed in Chapter III, Section IV and IX, the law does not sufficiently instruct the Courts to do so.

### c. Identifying Root Causes

While the law does have provision for release if the State is unable to comply with deadlines or sentencing has expired, the law is both confusing and routinely not applied. Linked back to a presumption of guilt, a lack of understanding of obligations to release even without Court or prosecutorial sanction, weak record keeping, monitoring and responsiveness by the Prosecutor's office as well as, in some cases, the absence of initiative of the detention center staff also contribute to this pattern.

- [Presumption of guilt of pre-trial detainees](#). Authorities' pervasive presumption of guilt results in these types of arbitrary detentions. This is supported by the fact that pre-trial detainees are not released when timelines expired, that these timelines are regularly breached, and that guarantees are required even when pre-trial detainees are exonerated.
- [Societal view of convicts](#). Many seem to view convicts who have completed their sentences as untrustworthy, not as people who have completed their punishment and should be allowed to reintegrate into society.<sup>117</sup>
- [Confusion in the law](#). Even when authorities are willing to follow the law, it is ambiguous at points.
  - **Pre-trial detainees.**
    - *Ambiguity*. The law's ambiguity in relation to pre-trial detention means that a person can be detained without indictment or trial for 10 months. The law is ambiguous as to when the MoJ detention center authorities no longer have the authority to detain pre-trial detainees. The ICPC establishes that if any pre-trial timeframe is breached, then "the arrested person shall be released,"<sup>118</sup> while the Law on Prisons and Detention Centers, which post-dates the ICPC, only directs detention center officials to release a detainee at the end of the permissible pre-trial period (10 months).<sup>119</sup> The ICPC appears to be more in line with the Constitution.
    - *Weak judicial oversight*. The weak provisions in the law for judicial review and oversight of pre-trial detention also lead to prolonged pre-trial detention.
  - **Post-sentencing prisoners**. The Law on Prisons and Detention Centers establishes

117 Rule 58, UN Standard Minimum Rules for the Treatment of Prisoners, 1955.

118 Article 6(3) and 36, ICPC.

119 Article 20(4) and Article 49. Also note that Article 20(4) states that the legal pre-trial timeframe established in the ICPC is 9 months, but from time of arrest to final verdict of Supreme Court, according to the ICPC, is 10 months.

that the detention center has no right to hold the prisoner longer than the term of the sentence, but also requires a release document to initiate the release.<sup>120</sup> The practical result is that detention center officials refuse to release without the release document, which is frequently not timely.

- [Ignorance of the law](#). Despite efforts to train and educate police, prosecutors and judges, many are not fully aware of the legal timeframes and their purpose.
- [Ineffective administration](#). Inefficient court administration, in particular, causes delays. Untimely relaying of case files between the district and provincial level caused delays,<sup>121</sup> as it did between the courts and detention centers in relation to acquittals and sentencing.
- [Insufficient investigations](#). Prosecutors either delay or fail to fully investigate cases in a timely fashion.<sup>122</sup>
- [Corruption and political interference](#). Corruption of police, prosecutors and judges also contributes to this problem. Police may detain and not inform prosecutors in order to elicit bribes, or prosecutors or judges sit on a case because of requests from politically influential people request to do so. Investigations and hearings also are delayed by political interference by power-brokers and commanders.
- [Security concerns](#). In both conflict and non-conflict areas, prosecutors and judges, in particular, encounter security concerns which can stall the investigative and hearing process.<sup>123</sup>

#### d. Proposing solutions

- [Targeted training and capacity-building on the function of detention, of the presumption of innocence, and oversight](#). Judges and prosecutors, in particular, should be trained and capacity-built on the purpose of detention and why the Constitution requires the presumption of innocence as well as the function of internal monitoring and independent judicial oversight. Training and capacity-building aimed at minimizing pre-trial detention also is needed in order to ensure the presumption of innocence is respected. Mentors and trainers for district and provincial police also should reinforce these concepts.
- [Clarifying the law](#). Adjustments should be made to the law so as to minimize confusion.
  - *Time for release clarified*. The law needs to clarify the timeframe permitted for pre-trial detention.
  - *Right to be released*. Clearer, stronger and more specific provisions should be integrated into the law to establish the detainees' right to be released if procedures and timelines are not followed and the detaining authorities' responsibility to do so.

120 Article 50, Law on Prisons and Detention Centers.

121 Documented in Takhar, Kunduz, Baghlan and Badakhshan and other provinces during the first and second monitoring phases.

122 Widely reported by field offices across Afghanistan.

123 Reports were received in Farah that deteriorating security conditions prevented prosecutors from conducting investigations. On 31 May 2007, three hand grenades were thrown into the residential compound of the Chief Provincial Prosecutor of Baghlan. The attack came after he announced an anti-corruption campaign.

- *Strengthen judicial oversight.* Judicial oversight of detention, particularly of pre-trial detention needs to be strengthened. (See Chapter III, Section IV)
- *Criminalize time limit breaches.* Another way to reinforce clarity of the law, as well as to strengthen accountability, is establishing arbitrary detention, including that due to breaches of time limits as criminal acts in the Penal Code.
- Improved oversight mechanisms. Compliance of authorities with the legal timeframes needs to be more closely monitored and, when non-compliance found, remedied promptly. In particular, there should be a national level oversight committee that regularly reviews status of detainees and prisoners. ANP human rights officers, prosecutors and detention center officials in particular should be encouraged to take up their oversight roles more aggressively, but alternative mechanisms should be considered. Given the amount of gross breaches of time frames for cases awaiting consideration by the Supreme Court, the Supreme Court is urged to strengthen case management and oversight of detention periods for appeals it is considering and to take remedial action promptly.

## V. Other arbitrary detention without legal basis

Aside from the types of cases discussed above which are unlawful, there are other types of detentions that are arbitrary because they have no legal basis.

### a. Establishing Arbitrariness (Failing the ‘Lawful’ test)

Individuals detained without documented legal justification, such as an arrest warrant, court order or final court decision, are not lawfully detained.<sup>124</sup> The only exception is the first 72-hours of a detention by the police because an individual is caught committing or having just committed a crime for which the minimum sentence is 1 year imprisonment or is alleged to have committed a felony and there is a risk of flight.<sup>125</sup>

Detentions of children with their mothers are of concern in this context when children’s rights, including to education, to food, to health care, to freedom of movement, etc, are unnecessarily limited because they are in detention. While such a detention may be in the ‘best interest of the child’, as established by international and domestic law,<sup>126</sup> in many instances this is not the case. The child may not be given appropriate nutrition, health care, sanitation or education opportunities. Generally, determination of what is in the ‘best interests of the child’ should be made on a case-by-case basis.<sup>127</sup>

### b. Explaining the findings

Monitoring found cases, albeit infrequent, in which there were no files for the detainees or prisoners. One case, in which the Supreme Court and AGO were involved, is of two men in the Baghlan MoJ provincial detention center for whom no file could be located since at least 2006. Securing their release in 2007 required several interventions by AIHRC.

Other detentions of concern are those of individuals without indictments for extended periods, discussed above, and of dependent children who routinely accompany their mothers.<sup>128</sup>

### c. Identifying Root Causes

Generally, root causes of these arbitrary detentions are linked with a presumption of guilt, ignorance of the law, lack of resources and accountability, and sometimes corruption. Children held in detention with their mothers is closely linked with cultural practices.

124 Article 2, Law on Prisons and Detentions Centers; Article 24, Afghanistan Constitution.

125 Article 30, ICPC.

126 Articles 3, 9 and 37, UN Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990.

127 UNICEF and UNODC have both raised this issue. UNICEF is working with the Government of Afghanistan to develop policies that protect children in detention with their mothers.

128 See UNODC, supra n. Error! Bookmark not defined. and UNICEF, supra n. Error! Bookmark not defined..

#### **d. Proposing solutions**

Possible corrective measures include those enumerated above on:

- [Countering presumption of guilt;](#)
- [Raising awareness amongst officials about the law;](#)
- [Reallocating resources so as to ensure prompt investigations;](#)
- [Strengthened oversight mechanisms.](#)

## Chapter III: Arbitrary detention due to failure or absence of procedural protections

### I. Introduction

The Afghanistan Constitution prohibits arrests or detentions without “due process of law”.<sup>129</sup> This means that for a detention to be legal, not only must the grounds of the detention meet the three tests discussed in the previous chapter, but also the appropriate procedures established in the law must be followed.<sup>130</sup> The appropriate procedures should also seek to comply with, and support, the principle discussed above that *‘detention is the exception rather than the rule and should be for the shortest time possible.’*<sup>131</sup>

### Defining Due Process of Law

Afghan law does not define what constitutes “due process of law”. The international standards to which Afghanistan has committed, though, do. Due process of law includes the following procedural guarantees:<sup>132</sup>

- Arrest and detention can only be undertaken by an authority authorized by law to do so and with an appropriate order;<sup>133</sup>
- Detainees are promptly informed of the reasons for detention and/or arrest and any charges against them;<sup>134</sup>
- Each detention is registered;<sup>135</sup>
- Detainees are promptly brought before a judge or other judicial officer<sup>136</sup> and able to challenge arrest and detention before a court to receive a decision on their legality without delay;<sup>137</sup>
- Detainees are promptly informed of their rights and effectively able to realize them:
  - Right to inform family of detention and communicate with them;<sup>138</sup>

129 Article 27(2), Afghanistan Constitution.

130 Article 9(1), ICCPR states “No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

131 Laid out in Article 24, Afghanistan Constitution and Article 4, ICPC. See also HRC, “General Comment No. 8: Right to Liberty and security of persons (Art. 9)”, 30 June 1982, [http://www.unhcr.ch/tbs/doc.nsf/\[Symbol\]/f4253f9572cd4700c12563ed048bec?Open](http://www.unhcr.ch/tbs/doc.nsf/[Symbol]/f4253f9572cd4700c12563ed048bec?Open), para. 3. See discussion in Chapter II, Section I. In addition non-binding international documents provide further guidance, including Rule 6.1, UN Standard Minimum Principles for Non-Custodial Measures (“The Tokyo Rules”), UN General Assembly Resolution 45/110, 14 December 1990.

132 Mostly enumerated in Article 9 and 14, ICCPR.

133 Article 9(1), ICCPR and Article 24, Afghanistan Constitution.

134 Article 9(2) and 14(3)(a), ICCPR.

135 Rule 7(1), UN Standard Minimum Rules for the Treatment of Prisoners, 1955. Article 2, ICPC and Article 29, Law on Prisons and Detention Centers.

136 Article 9(3), ICCPR.

137 Article 9(4), ICCPR.

138 Articles 7, 10(1), and 17, ICCPR. In addition non-binding international documents provide further guidance, including Rules 37, 38(1) and (2), and 92,

- Right to not be compelled to testify against oneself or to confess guilt, including the rights to remain silent and to be free from ill-treatment or torture;<sup>139</sup>
- Right to defense counsel or to carry out one's own defense and the time and facilities to present a defense;<sup>140</sup>
- Detainees have a fair trial in relation to the charges against them within a reasonable time and without delay or be released;<sup>141</sup>
- Prisoners must be released unconditionally at the end of a court-ordered sentence.<sup>142</sup>

These procedural guarantees or protections are designed in part to safeguard against arbitrary detention. They generally flow from the presumption of innocence.<sup>143</sup> As such, they also are designed to minimize detentions and time in detention.<sup>144</sup> They also prevent other violations such as incommunicado detentions and enforced disappearances, torture and ill-treatment, as well as discriminatory practices.

For the Constitutional standard of due process to be met and detention to be legal, all these procedural guarantees must be 'effectively available', which means (a) provided by law and (b) functioning as they are intended. They, moreover, must be available for every detainee without discrimination.<sup>145</sup>

For example, the law must establish that all detainees possess the right to communicate with their families about their detention. Police also must inform detainees of this right upon arrest and then allow them to contact their family, such as providing them with a phone. They must do this for men and women, boys and girls, regardless of tribal, ethnic or political affiliation or other status.

Yet, monitoring shows that this is not done for this and other procedural guarantees.

## Scant due process of law in Afghanistan

Afghan criminal law has integrated some but not all of the required procedural guarantees. The right to a prompt review of the legality of detention by a judge or other judicial officer, for instance, is not provided in the law. At the same time, when guarantees are provided in the law, monitoring has demonstrated that police, prosecutors or judges do not consistently respect them. The right to not testify against oneself, for example, is regularly ignored by both police and prosecutors.

UN Standard Minimum Rules for Treatment of Prisoners, 1955, Principles 15 and 16(1), 16(4) and 19, Body of Principles for the Protection of All Persons under Any Form of Detention, 1988.

139 Articles 7, 10(1), 14(3)(g), ICCPR as well as the Convention Against Torture.

140 Article 10, UDHR; Articles 9(3) and (4) and 14(3)(b) and (d), ICCPR. In addition non-binding international documents provide further guidance, including Principle 11(1), Body of Principles for the Protection of All Persons under Any Form of Detention, 1988.

141 Article 9(3) and 14(3)(c), ICCPR.

142 Articles 24 and 27(3), Afghanistan Constitution and Article 9 and 14, ICCPR.

143 Article 4, ICPC and Article 14(2), ICCPR.

144 See HRC, "General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial", 23 August 2007, para.30: "The presumption of innocence requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial. Defendants should normally not be shackled or kept in cages during trial... The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree..."

145 Article 22, Afghanistan Constitution and Article 14(1) and 26, ICCPR; Article 5(a), CERD and Communication No. 694/1996, *Waldman v. Canada* (views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), pp. 97098, para. 10.

### Law bias toward detention

In fact, it could be argued that Afghan law and the practice of the criminal justice system is prejudiced towards detention as a rule. For pre-trial detainees, the absence of procedural guarantees in the law, such as no periodic review of the legality of detention, and the limited alternatives to detaining an individual suspected, accused or convicted of a crime creates a bias in the law towards detention. These omissions undermine respect for principles of the presumption of innocence and that detention should be exceptional. They encourage police, prosecutors and judges to detain.

### Disrespect of procedural guarantees, particularly of defense counsel

At the same time, monitoring showed that police, prosecutors and judges persistently and consistently do not respect procedural guarantees, even when provided in the law. For instance, as will be discussed below, Afghan authorities are often hostile to the right to defense counsel. They also do not appear to consistently respect the right to not testify against oneself and routinely permit expiration of legal time limits without consequence. In addition, police, prosecutors, and, to some extent, judges fail to inform detainees of their rights. In fact, some prosecutors told monitors that they intentionally do not inform detainees of their rights because they believe these rights hamper investigations.<sup>146</sup>

Such disregard for the law, and ultimately of detainees' rights, not only undermines the rule of law and the presumption of innocence, but it also ensures that detention is overused and is frequently arbitrary. The disrespect of defense counsel is particularly problematic as access and presence of defense counsel provides a vital oversight mechanism that mitigates many abuses. At the same time, it must be acknowledged that insufficient human and physical resources, such as judges, prosecutors, defense counsel, court venues, and court administrators hamper authorities from fulfilling their obligations.

### Confusion about authority to release arbitrary detainees

Arbitrary detainees may languish in detention because the law is not clear as to which institution has the authority to release them. For MoJ detentions, for example, the MoJ, prosecutor, court and various committees and councils appear to have the authority to release detainees during different phases of detention but how these officials interact and how to operationalize them is not expressed clearly in the law.<sup>147</sup> [see chart in Annex II]

### Grave consequences

Monitoring also has exposed the consequences of this legal bias and disrespect of the guarantees in the law:

<sup>146</sup> According to 7 November 2007 joint AIHRC-UNAMA response to a Request for Information by the Northern region.

<sup>147</sup> When examined together, the ICPC and Law on Prisons and Detention Centers appear to vest primary oversight authority for detentions in MoJ facilities in the AGO. The MoJ detention center officials are required to release detainees and prisoners once the legal time limits laid out in the ICPC or final sentence of the Court expire [Articles 20(4) and Article 49 of the Law on Prisons for pre-trial/acquittals; Article 50 of the Law on Prisons for prisoners.] On the other hand, under current Afghan law, the AGO (in particular the primary prosecutor and monitoring prosecutor) has responsibility to monitor legality of detention and order release when arbitrary/illegal as well as to comply with timelines as well as to execute the final decisions of the Court [Articles 6(3), 8(4), 34(2), 36, 84, ICPC and Articles 22 and 51, Law on Prisons and Detention Centers]. Under current law, the Court may order a release but there are no explicit provisions for the Court to ensure its execution, though this authority can be presumed. Given the realities in the Afghan criminal justice system, however, this authority needs to be explicit.

1. Detention is the rule rather than the exception;
2. Arbitrary detention is unacceptably frequent; and has led to
3. Unnecessary overcrowding and population pressure in detention centers; as well as
4. Unwarranted economic, social and emotional hardship on families and detainees.

The knock-on effects of these consequences include:

- Disillusionment with the State for its failure to protect families and individuals from hardship, abuse and corruption;
- Needless removal of productive members of the workforce and a drag on economic development;
- Increased tensions amongst detention center populations, leading to hunger strikes and other protests, which further undermine the criminal justice system's legitimacy.

## Examining procedural guarantees

In order to better understand these dynamics, this section of the report will examine the status of each procedural guarantee, explaining its purpose, the findings about the functioning of the guarantee, and the law that is applicable. It then explores root causes and possible solutions.

## II. Arrest and detention ordered and carried out by authorized authority

### a. Explaining the function

One of the most basic procedural guarantees against arbitrary detention is that only a legally authorized authority orders and carries out arrest and detention. This protects against abuse of power for personal or political purposes and helps ensure the law regulates detention. It also minimizes the possibility of enforced disappearances.

### b. Establishing the law

Article 24 of the Afghanistan Constitution requires any deprivation or limitation of liberty to be regulated by law. This means that the order must be lawful, i.e. based on the law and issued by an authority legally authorized to do so. It also means that the authority carrying out the arrest must be legally authorized to do so. In addition, Article 27(2) states that no one shall be arrested without due process of law, reinforcing the standard established in Article 24.

Under Afghan law, for most criminal offenses, generally only the police and the primary (district) prosecutor [*saranwal*] can initiate or order arrest.

- *Police*: The police can only order an arrest under certain conditions: if caught during or immediately after the commission of a crime<sup>148</sup> or, if suspected of a felony, if there is a risk of flight.<sup>149</sup> The prosecutor must sanction the arrest within 48 hours.<sup>150</sup> The police also can order protective detention in a Mol police lock-up.<sup>151</sup>
- *Prosecutor*: The prosecutor on his/her own initiative can order an arrest of a person suspected of committing a misdemeanor for which punishment is at least medium term imprisonment (1 year) or for committing a felony.<sup>152</sup>
- *Other*: Heads of detention centers also can order protective detention after approval by the Attorney General's Office and the Ministry of Justice.<sup>153</sup> Other laws authorize authorities to detain for specific crimes, such as the Counter-Narcotics Law. Provincial and district governors do not have the authority to order an arrest.

148 The crime for which they are arresting must be a misdemeanor for which punishment is medium term imprisonment (1 year) or a felony.

149 Article 30, ICPC and Article 15, Police Law. The Police Law also discusses detention for protection, identification purposes, and suicide threats.

150 Article 33-34, ICPC.

151 Article 15(1), Police Law.

152 Article 35, ICPC.

153 Article 53, Law on Prisons and Detentions Centers.

### c. Discussing the findings

Monitoring found that generally arrests and detentions are authorized and undertaken by the appropriate authority (police or prosecutor) but that unauthorized officials and non-government actors still do arrest and detain people.<sup>154</sup> Normally, these types of arbitrary arrests and detentions are linked with civil disputes, such as land disputes and family or marriage disagreements and ordered by provincial or district governors.

The district governor of Panjab in Bamyan province ordered the arrest of two men on 19 May 2007, one for lying and another to 'prevent' fighting over a land dispute. The district governor claimed that he ordered the arrest because the Chief of Police was not around to order the detention. The Prosecutor was available at the time the arrest was ordered. On 16 July 2007, a Provincial Governor in the North East of the country ordered the detention of a woman who was fleeing domestic violence. The Governor claimed that the detention was 'protective', though it appeared to be intended to coerce the woman to return to her husband, who was a relation of the Governor. The Governor has no authority to detain someone 'protectively' or otherwise.

The provincial NDS prosecutors also have overstepped their jurisdiction and ordered detention under the jurisdiction of the Attorney General's Office. In Nangarhar, the NDS prosecutor ordered the arrest of minors on allegations of extra-marital sex (*zina*) in two incidents during August 2007.<sup>155</sup> Many of these detentions were linked with freedom of expression issues. On 4 July 2007, the NDS in Kabul detained a journalist for breaches of the media law. Under the Media Law, the Media Commission is the only authority authorized to handle such accusations unless it refers the case to the AGO.<sup>156</sup> On 6 October 2007, NDS in Kabul detained a journalist for broadcasting pictures of an ANP and NDS clash after a suicide attack. The journalist reported that he was threatened by the NDS and then released.

### d. Exploring root causes

- [Corruption and abuse of power by officials](#). Abuse of power causes many of these detentions. NDS, district and provincial governors, and other authorities use their positions to detain for personal or political ends.
- [Misunderstanding of the law](#). Authorities many times are not clear on the law. District and provincial governors, for instance, may believe that they have the authority to order arrests. Citizens also are not aware of the law and may believe that governors and other authorities can order arrests and thus do not protest.
- [Weak accountability and oversight mechanisms](#). Many of the authorities mentioned operate with relative impunity. This impunity permits such arrests and detentions.
- [Insufficient judicial oversight](#). As will be discussed in Section IX, the absence of prompt judicial

<sup>154</sup> Please note that this report is not discussing detentions by non-State actors party to the ongoing conflict, such as the Taliban.

<sup>155</sup> In the first case, the NDS prosecutors arrested a 14-year-old girl on suspicion of having extra-marital sex (*zina*) on 1 August 2007. She initially approached the authorities with a claim of rape. The arrest was based on a 'confession' given without the presence of a guardian or lawyer. In the second instance, the NDS prosecutor ordered the arrest of a 14-year-old girl and her cousin on 29 August 2007 for allegedly have extra-marital sex (*zina*).

<sup>156</sup> Law on Media, Official Gazette 828, 2004.

oversight of arrests and detentions enables these practices to continue. This key check on executive power by the judiciary needs to be strengthened.

- [Inadequate access to defense counsel](#). The significant problems in accessing defense counsel during pre-trial detention discussed further in Section VIII facilitate these types of arrests and detentions. The absence of defense counsel is the absence of another check on executive authority.

#### **e. Proposing solutions**

- [Stronger accountability and oversight mechanisms](#). Regular and randomized audits of arrests and detention orders by the AGO and Mol would make it more difficult for unauthorized authorities to order arrests and detentions. Another measure would be stronger and more public complaints mechanisms.
- [Strengthen judicial oversight](#). Provisions in the law that institute prompt judicial oversight of arrest and detentions need to be added. See Section IV for more in-depth discussion.
- [Better and concerted awareness-raising on the law](#). Initiatives need to be designed which educate authorities and Afghans in general as to who has the authority to arrest and detain.
- [Improve access to defense counsel and advocates](#). See discussion in Section VIII.

### III. Promptly informed of the reasons for detention and/or arrest and any charges

#### a. Explaining the function

At the time of arrest or detention, an individual must be informed promptly of the reasons s/he is being arrested and detained and promptly of charges against him/her. Without this information, detainees are not able to challenge the lawfulness of their detention before a competent judicial authority.<sup>157</sup>

As will be discussed below, obtaining a decision on the detention's lawfulness is a critical procedural guarantee against arbitrary detentions as well as enforced disappearances. It also is vital to ensuring compliance with the principle that detention should be exceptional and as short as possible. Thus, ensuring that a detainee understands the reasons for arrest and detention and is made promptly aware of any charges against him or her is an essential procedural guarantee.

#### b. Establishing the law

Afghan law explicitly provides this procedural guarantee in the Constitution.<sup>158</sup> In subsidiary legislation, only the police are directed to inform detainees upon arrest of the reason for arrest and detention.<sup>159</sup> The prosecutors are not directed to inform the detainee of charges against them (i.e. indictments), but the Court is required to provide this information to the accused detainees 5 days before trial, which is to take place within 3 month of arrest.<sup>160</sup>

Looking at international standards, Afghan authorities also are required to inform detainees of the reasons for their detention or any charges against them under Articles 9(2) and 14(3)(a) of the ICCPR:

- **Promptly.** At the time of arrest, detainees must be informed of the reasons for their arrest. Once criminal charges are brought, the detainee must be informed within 3 days from indictment in detail of the nature and the charges against him/her.<sup>161</sup>
- **Sufficient detail.** Detainees must be informed in sufficient detail so as to request a decision on the lawfulness of detention from a competent judicial authority.<sup>162</sup> At the time of detention, the detainee must be informed of the reasons for his arrest and detention. The level of detail

157 Communication No. 248/1987, G.Campbell v. Jamaica [Views adopted on 30 March 1992], p. 246, para. 6.3.

158 Article 31, Afghanistan Constitution.

159 Article 31, ICPC states that the police must inform the detainee of the reasons for arrest within 24 hours while Article 15, Police Law, which post-dates the ICPC, directs the police to inform the detainee of the "reason and case immediately upon detention". The latter is more inline with the Constitution and should be considered valid.

160 Articles 39-42, ICPC.

161 The Human Rights Committee has stated that detainees should be informed of the charge as soon as it is formally made (General Comment 32, para. 31), and has held separately that 7 days in detention was too long to wait for a detainee to be informed of the reasons for detention (Communication no. 597/1994, P. Grant v. Jamaica [Views adopted on 22 March 1996], in UN doc. GAOR, A/51/40 [vol. II], p. 212, para 8.1). When read with the requirements on reviewing the lawfulness of detention, the authorities must inform the detainee within 3 days of the charges being brought (see A. Berry v. Jamaica [Views adopted on 7 April 1994], UN doc., GAOR, A/49/40 [vol. II], pp. 26-27, para. 11.1; L. Stephens v. Jamaica [Views adopted on 18 October 1995], UN doc. GAOR, A/51/40 [vol II], p. 9, para. 9.6.)

162 Cambell v. Jamaica, supra, fn. 154

necessary is greater when a detainee becomes an official suspect and a preliminary investigation commences.<sup>163</sup> Once an indictment is submitted, the detainee must be provided detailed information on both the law and the alleged facts on which the charges are based.<sup>164</sup>

- [In a language that the detainee understands](#).<sup>165</sup> The detainees must be informed of the reasons for arrest and detention in a language that s/he understands. An interpreter must be provided if authorities cannot communicate in this language.

It is important to highlight that these standards apply equally to those arrested and detained on suspicion of connection with subversive or terrorist activities, especially those who are being detained on the basis of expressing an opinion.<sup>166</sup> These detainees must be provided information as to “the scope and meaning of ‘subversive activities’, which constitute a criminal offense under the relevant legislation.”<sup>167</sup>

### c. Discussing the findings

Generally, detainees knew the reasons they were detained and the charges, if any, against them. Language also did not appear to be a problem. In the first phase of monitoring, approximately 86% of those interviewed (976 interviewees) knew the charges against them and the reason for detention. Only 58% (658) of those who knew the reasons for detention had been informed at the time of their arrest. Subsequent monitoring did not illustrate any change.

It should be noted that whether the information was provided in sufficient detail was not systematically monitored. Based on findings in relation to the ability of detainees to prepare their defense which are discussed in Section VIII below, however, it can be inferred that detainees are not consistently informed in sufficient detail to challenge the lawfulness of their detention.

### d. Exploring root causes

- [Insufficient protection in the law](#). Current Afghan law does not require any authority but the police to inform detainees of the reasons for their detention and charges against them within the timeframe established by international standards. Without the national legal framework to provide direction, this procedural protection is not and has not been respected.
- [Poor understanding of the function of this procedural guarantee by both authorities and detainees](#). Generally, authorities do not recognize why detainees need to know in sufficient detail the reasons for their detention or the charges against them. While linked to misunderstanding of the function of other protections, such as access to defense counsel, this ignorance also emanates from a presumption of guilt by authorities and a lack of knowledge by detainees of their rights to challenge or question their detention.

163 General Comment 32, para. 31.

164 Ibid.

165 Article 14(3)(a), ICCPR; Principle 14, Body of Principles for the Protection of Persons under Any Form of Detention.

166 Communication No. R.8/33, L.B. Carballal v. Uruguay (views adopted on 27 March 1981), in UN. Doc. GAOR, A/36/40, pp. 128-129, paras. 12-13.

167 Ibid.

- [Insufficient investigations and indictments](#). The general absence of thorough investigations by the police and prosecutors means that even if detainees requested more detail about the reasons for detention, these details might not be available. Indictments submitted by prosecutors also do not always provide adequate detail on evidence and legal grounds for charges either. The end result is that the detainee may not have adequate grounds upon which to challenge the legality of his/her detention.
- [Absence of accountability](#). While not the primary root cause, the lack of accountability for police and prosecutors who do not comply with this procedural protection exacerbates existing problems and, if not addressed with other causes, could undermine such initiatives.

### e. Proposing solutions

- [Fill gaps in the law](#). A critical step to ensuring this procedural protection, and others, are put into practice is enshrining it fully into the law. Specifically, Afghan law should:
  - Continue to require the police to immediately inform detainees of the reasons for their detention;
  - Require authorities to promptly (3 days) inform detainees of any charges to be laid against them and any indictments filed;
  - Provide guidance to authorities as to the level of detail and type of information necessary to comply with the standard that detainees have sufficiently detailed information to challenge the lawfulness of their detention.
- [Reinforce and recast training for police and prosecutors](#). Without an understanding of why this procedural protection exists, police and prosecutors will be less likely to put it into practice. Training for the police and prosecutors on this procedural protection should be evaluated and redesigned to meet this objective. Another initiative would be to ensure that detention center staff, many detainees primary contacts, are aware of this procedural protection.
- [Develop and enforce internal standard operating procedures to ensure detainees are informed](#). MoI, MoJ, and the Supreme Court should develop guidance and standard operating procedures to ensure that this procedural protection is part of normal procedures. Accountability procedures, such as monitoring and oversight, should be integrated into these procedures.
- [Raise awareness amongst detainees and the public of the right and its function](#). Equally important to authorities putting this procedural protection into practice is detainees and the public at large to be aware that this protection exists, why it exists and what to do if it is not respected. To do this, the following should be considered:
  - *Informing detainees at time of detention*. Not only should the police or detaining authority inform detainees of this procedural protection, but other parties, such as detainee advocates and defense counsel, should be aware of this right and inform detainees of this right.
  - *Integrate into access to justice or related public information campaigns*. Public information campaigns at the provincial and district level should inform the general public of this procedural protection and its function.

- *Raise awareness of defense counsel and other parties working with detainees.* As discussed above, other parties who speak with detainees should also be aware of this procedural protection. Information on it should be included in public information campaigns, training, and other programming targeting defense counsel, legal aid centers, DoWA legal units, and families of detainees.

## IV. Prompt (and periodic) review of legality of detention

### a. Explaining the function

A Court's prompt review of the legality of detention is a cornerstone check on executive power.

Arbitrary detention, incommunicado detentions, and enforced disappearances tend to occur when police and prosecutors lack oversight by a sufficiently independent and impartial authority—the Court—and the detainee has no ability to challenge the legality of his/her detention.

When oversight is insufficient or the detainees' ability to challenge detention does not function, the detaining authority gains the ability to act with impunity and to use detention coercively. The detainee, accordingly, loses a voice in the process and instead is beholden to the detaining authorities.

This imbalance violates what is called the 'principle of equality of arms'. This principle means that both the detaining authority (the Government) and the detainee must have equal access and rights before the law, i.e. both parties should be afforded the same procedural rights.<sup>168</sup> It is linked with the presumption of innocence. It also is founded upon the understanding that role of the State is to protect rather than to limit rights.

To preserve equality of arms and respect the presumption of innocence, two complementary procedural protections exist:

- detaining authorities must promptly bring the detainee before a judicial officer with sufficient authority to review the lawfulness of detention and to order release if not lawful; and,
- detainees must be able to exercise the right to take proceedings before a court which will decide without delay the lawfulness of detention and order release if not lawful.

These protections help ensure that:

- detention is brought under independent oversight;
- detention is lawful, necessary and reasonable;
- alternatives to detention are considered promptly; and
- the detention system and detainee families are not overburdened.

They also help ensure that an effective remedy exists to the violation of the right to be free from arbitrary detention, which is a related but independent obligation of the government.<sup>169</sup>

<sup>168</sup> The Human Rights Committee explained in General Comment 32, paragraph 13, that the only time distinctions in procedural rights can be made is if they are "based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant." The HRC also explained the principle of equality of arms as the balance that must exist "between the prosecution and defense", Communication No. 307/1988, *J. Campbell v. Jamaica* (Views adopted on 24 March 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 44, para. 6.4. See also Communication No. 1347/2005, *Dudko v. Australia* (Views adopted 223 July 2007), CCPR/C/90/D/1347/2005, 29 August 2007, para. 7.4.

<sup>169</sup> Article 2(3), ICCPR obligates States to provide an effective remedy to any violation of a person's rights. Articles 9(4) and 9(5), ICCPR lays out what the modality of an effective remedy to arbitrary detention is.

## b. Establishing the law

Afghan law does not provide for either detaining authorities to promptly bring the detainee before a judge or judicial officer or the detainee's ability to challenge the lawfulness of his/her detention. Instead, Afghan law requires that the police bring the detention to the attention of the prosecutor for his/her approval within 72 hours.<sup>170</sup> This procedure does not comply with the Afghanistan Constitution when it establishes that no one can be detained without due process of law,<sup>171</sup> which would be defined in part by Articles 9(3) and 9(4) of the ICCPR.

International standards require that bringing detention under judicial control be:

- **Prompt.** Within 3 days, detaining authorities must bring a detainee before an appropriate judicial authority. Four days was deemed too long without a reasonable justification;<sup>172</sup>
- **Without delay.** The Court must decide about the legality of detention as “expeditiously as possible”.<sup>173</sup>
- **By an independent, impartial and objective authority.** The authority reviewing the legality must be independent, impartial and objective to the issues.<sup>174</sup> The Human Rights Committee has held the Courts are the only authority that can “ensure a higher degree of objectivity and independence in such control.”<sup>175</sup> It found that prosecutors do not have the institutional objectivity and impartiality necessary to act as the legitimate decision-making organ<sup>176</sup> nor does another executive authority, such as the Ministry of Interior.<sup>177</sup> Articles 9(3) and 9(4) of the ICCPR, moreover, specifies that such decisions can be taken only either by a judge or by an officer authorized to exercise judicial power.
- **With the detainee present.** Article 9(3) stipulates that the detainee must be present when the Court assesses the lawfulness of his/her detention. Linked to the equality of arms, the detainee must be able to respond to the arguments of the prosecutor or detaining authority.<sup>178</sup>
- **Effectively available.** Reviewing the lawfulness of detention and its effects must be “real and not merely formal.”<sup>179</sup> This means, first, that the Court must not just look at self-evident facts, but at the full situation of detention—lawfulness, necessity, and reasonableness—and assess

170 Articles 15 and 25, Police Law; Articles 31-33, ICPC. The ICPC gives the police only 24 hours, and Police Law 72 hours. The Police Law supercedes the ICPC, because it is more specific (*lex specialis*) and newer.

171 Article 27(2), Afghanistan Constitution.

172 Communication No. 625/1995, *M. Freemantle v. Jamaica* (Views adopted on 24 March 2000), in UN doc. GAOR, A/55/40 (vol. II), pg. 19, para. 7.4 and Communication No. 373/1989, *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc., GAOR, A/51/40 (vol. II), p. 9, para. 9.6, amongst others.

173 Communication No. 291/1988, *M. Torres v. Finland* (Views adopted on 2 April 1990), in UN doc., GAOR, A/45/40 (vol. II), pp. 109-100, para. 7.3.

174 Communication No. 521/1992, *Kulomin v. Hungary* (Views adopted on 22 Marc 1996), in UN doc. GOAR, A/51/40 (vol. II), p. 81, para. 11.3.

175 *Torres v. Finland*, supra n. 170, para. 7.2.

176 *Ibid* and Communication No. 959/2000, *Saimijon and Bazarov v. Uzbekistan* (Views adopted 14 July 2006), in UN doc. CCPR/C/87/D/959/2000 (2006), para. 8.2.

177 *Torres v. Finland*, supra n.170, p. 100.

178 See, for instance, *Dudko v. Australia*, supra n. 165, para. 7.4, Communication No. 84/1981, *H. G. Dermit on behalf of G. I. And H.H. Dermit Barbato* (Views adopted on 21 October 1982), in UN doc. GAOR, A/38/40, pg. 133, para. 10(b) and Communication No. R.7/28, *L. Weisenberger v. Uruguay* (Views adopted on 29 October 1980), in UN doc. GAOR, A/36/40, p. 119, para.16.

179 *Torres v. Finland*, supra n.170, p. 100, Communication No. 373/1989, *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc. GAOR, A/51/40 (vol. II), p. 9, para. 9.7, amongst others.

the legality of detention. Second, to be effectively available, detainees must be able to access the Courts and its proceedings to challenge his/her detention. Holding someone in detention incommunicado,<sup>180</sup> without access to legal representation<sup>181</sup> and not permitting persons in detention to challenge their detention<sup>182</sup> means these protections are not effectively available.

- [Periodic review](#). One review of the legality of detention at the beginning of detention is insufficient. As discussed above, the lawfulness, necessity and reasonableness of detention may change with time. The Court, therefore, must review detention at reasonable, regular intervals until judgment is rendered or the detainee released.<sup>183</sup>

### c. Discussing the findings

Monitoring found that neither procedural guarantee is provided for in Afghan law or is effectively available. Detainees are neither brought before a judge or other appropriate judicial officer nor able to challenge their detention before a court and receive a decision without delay. Legislation does not provide adequate protections, and even if these protections could be read into the law, they are not available.

#### *Legal gaps*

The ICPC grossly breaches the legal standards laid out above because it:

- [Uses the prosecutor as the initial reviewing authority](#). The prosecutor, rather than the Court, is directed to review of the lawfulness of detention within 72 hours (3 days).<sup>184</sup> Yet, in Afghanistan, judicial authority is vested solely with the judiciary.
- [Does not bring detention under judicial control until 3 months into detention \(first hearing\)](#). The Court is not notified of detention until 15 days into detention when it either receives the indictment or determines whether to extend the time to prepare the indictment.<sup>185</sup> At the time it receives the indictment, however, the Court is not directed to assess the legality of detention,<sup>186</sup> nor is it directed to do so when determining whether to extend time to prepare an indictment and detention.<sup>187</sup> The ICPC only directs the Court to assess the lawfulness of detention at the first hearing<sup>188</sup> which is to be set not later than 3 months from the time of arrest.<sup>189</sup>

180 Communication No. 84/1981, H. G. Dermit on behalf of G. I. And H.H. Dermit Barbato (Views adopted on 21 October 1982), in UN doc. GAOR, A/38/40, pg. 133, para. 10.

181 L. Stephens v. Jamaica, supra n. 176.

182 See Communication R.2/9, E.D. Santullo Valcado v. Uruguay (Views adopted 26 October 1979), in UN doc. GAOR, A/35/50, p. 110, para. 12, and Communication No. R.1/4, W. T. Ramirez v. Uruguay (Views adopted on 23 July 1980), p. 126, para. 18, amongst others. Also, it should be noted that when a detainee or legal representative fails to take advantage of the opportunity to challenge detention, the Human Rights Committee has not be able to conclude if the detainee had been denied this right. See Stephens v. Jamaica, supra 176, para. 9.7.

183 Torres v. Finland, supra n.170, para. 7.4.

184 Article 33(1), ICPC. While the Prosecutor does have the authority to release the detainee, s/he is not sufficiently independent, objective or impartial.

185 Article 36, ICPC.

186 Article 42, ICPC only directs the Court to order the notification of the accused of the indictment and to fix the date for the first hearing upon receipt of the indictment.

187 Article 36, ICPC does not direct the Court to assess the legality of detention.

188 Article 53(3)(b), ICPC instructs the Court to assess the legality of arrest and detention after reading out the indictment.

189 Article 6(2) allows the primary court to extend detention for two more months beyond the 1 month allowed from arrest until indictment.

*Note: While it can be argued that the Court should assess the legality of arrest and detention at the 15 day point whether it is instructed to in the law or not, monitoring clearly indicates that this does not occur.*

- Does not require the detainee's presence when reviewing detention. Neither when the prosecutor reviews the legality of detention at 72 hours or when the Court determines whether to extend the time for indictment is the detainee or his/her representative present or permitted to challenge the decision.<sup>190</sup>
- Does not grant detainees the right to challenge the lawfulness of the detention: Afghan law, including the Constitution, contains no explicit provision that affords a detainee, whether pre-trial or protective, the right to challenge the lawfulness of detention and have a decision without delay by a court. It also does not appear to provide procedurally for it.<sup>191</sup>
- Fails to provide for periodic review. There is no provision to review the legality of pre-trial detention, nor is the Court instructed to review the legality of detention at appeals hearings.<sup>192</sup>

Monitoring also found that even when legality is assessed at the first or other hearings, the assessment is normally a mere formality and, thus, does not comply with the requirements laid out above of being effectively available.

#### *Practical problems: timelines breached frequently*

Exacerbating these legal gaps and prosecutor practice is the failure of police to comply with the 72-hour time limit to refer the case to the prosecutor.<sup>193</sup> Normally these breaches were a few days to 2 weeks. Such non-compliance was often linked to the absence or delay of district prosecutors, rather than police negligence. In fact, of all detaining authorities, the police most consistently respected the legal time limits and, in some areas, police reform has improved the situation. Still, breaches did occur.

On 14 July 2008, UNAMA found that of 52 suspects held in the Herat provincial police lock-up, 40 had been detained over the legal limit of 72-hours, some up to 40 days. In Mazar-i-Sharif, the police breached the 72-hour timeline by 6 and 4 days respectively in early March 2007 in the case of a man suspected of kidnapping a child and a man accused of adultery. In Kitti and Miramoor districts of Daikundi province, police held suspects beyond 72-hours when prosecutors, who are not located in the district, failed to interview the detainees in time.<sup>194</sup> In other cases, the police kept detainees for

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192 Articles 67 and 69 (Appeals hearing) and Articles 74-75 (Supreme Court hearing) of the ICPC do not instruct the Court to review the legality of detention.

193 Article 15(4) and 25, Police Law.

194 Two men were arrested for assault on 4 September 2007 and not interviewed for more than 8 days. No district prosecutor is present in these districts. As directed by Article 97, ICPC, all detentions are referred to the district court in the provincial capital.

extended periods of time without informing the prosecutor of the detention as they are required.<sup>195</sup> In Waras district, the police did not inform the prosecutor of the detention of a man suspected of murder for 10 months, and then only after AIHRC intervened.<sup>196</sup> In another case, a detainee was arrested in Kunduz, held for 13 days without seeing the prosecutor, and then was transferred to the police in Taloqan in Takhar province where he was detained for 4 months and 15 days before indictment and transfer to the MoJ detention center.

A number of prolonged police detentions were linked with civil disputes. Such cases were identified in Laghman, Badakhshan, and Ghor. Cases of prolonged detention also were linked with national security cases, such as suspected involvement with anti-government or terrorist groups, such as a case in Gardez in Paktia province in which a man suspected of anti-government activities was held for 9 days and then released without charge. In more remote areas, the absence of district prosecutors creates prolonged detentions in police lock-ups.

The result of these procedural protections not being in place or functioning is that most of the detainees in Afghanistan are being arbitrarily detained. The vast majority are being detained unlawfully, and a significant portion unnecessarily or unreasonably. The consequence is that the detention system is needlessly overcrowded, and families and communities senselessly strained.

#### d. Exploring root causes

While the law is the main reason that these procedural protections or rights are not respected and realized, other root causes exist, including:

- [Presumption of guilt](#). The general presumption of guilt throughout the system means that there is a presumption that detention is lawful, necessary and reasonable, and, consequently, there is no need to review the legality of detention.
- [Misunderstanding function of detention, of the oversight role of the judiciary, and principle of equality of arms](#). Prosecutors and judges do not necessarily see detention as exceptional, reasonable and necessary only in limited circumstances. At the same time, with guilt presumed, they also do not understand the need for the detainee and the State to have equality of arms, or the equal ability to prove guilt or innocence. Thus, the ability to challenge detention is not seen as necessary. The necessity of review by the Court also is not clearly understood. In an ideal system, the judiciary is to be independent of the police and prosecutors, as well as impartial and objective. As such, a review of the legality by the judiciary serves as a critical check on the power of executive power.
- [Lack of alternatives to detention](#). The absence of alternatives to detention, such as a more developed system of bail or other types of guarantees, reinforces resistance to releasing detainees. This resistance can render reviews mere formalities, or not effectively available.

<sup>195</sup> Article 21(1), ICPC requires the police to inform the prosecutor of any detentions undertaken on their own initiative (i.e. without a written warrant) within 24 hours of arrest.

<sup>196</sup> The man was arrested on 15 July 2006 and referred to the prosecutor on 29 May 2007.

- [Inadequate training and oversight](#). That judges do not tend to review legality when they consider whether to extend the time allowed to indict, and that prosecutors do not release when detentions are unnecessary or unreasonable is linked with inadequate training and oversight.
- [Problematic logistics and insufficient resources](#). A number of remote districts do not have either prosecutors, judges or defense counsel present.

### e. Proposing solutions

- [Revise Afghan law to ensure procedural protections and alternatives to detention exist](#). The revision of the Criminal Procedural Code, which is in process, must contain both general and specific provisions that ensure legality of detention is reviewed as required by the Afghanistan Constitution, including provisions that require:
  - the detainee be brought before a judge within 3 days of arrest;
  - the detainee be informed of his/her right to challenge his/her arrest and detention before a court;
  - the court promptly and without delay decide on the legality of detention;
  - periodic reviews of the legality of pre-trial detention by the Court.
- Draft and implement standard operating procedures and judicial instructions to operationalize procedural protections and alternatives, including oversight mechanisms. Codifying these protections in the law does not mean these procedural protections are effectively available. The law must be put into operation. To do so, the AGO and Supreme Court need to draft and implement appropriate standard operating procedures and judicial instructions, distribute and train on them without delay. These efforts must be targeted primarily to the district-level. The material and human resources necessary to make these protections operate also need to be deployed at the district-level without delay.
- Train prosecutors, judges and court administrators. Authorities need to be trained on the procedures and instructions, as well as the law. More importantly, authorities need to be trained on the function and benefits of ensuring these protections operate effectively.
- Train defense counsel and other advocates. Representatives and potential representatives need to be trained on these protections, procedures and instructions as well so that they can effectively represent and advise detainees.
- Raise awareness of detainees and the general public of these protections. Unless detainees are aware of their rights/procedural protections, it is difficult for them to use them. Initiatives by the AIHRC, the government and other institutions to raise awareness of their rights need to be developed.

## V. Each detention registered in a logbook available for inspection

### a. Explaining the function

The procedural protection that each detention must be registered in a logbook available for inspection by interested parties is designed to ensure that each detention is officially acknowledged and subject to regulation, oversight and challenge. The transparency that this registration provides is an additional safeguard against enforced disappearances and ill-treatment and torture. It also facilitates tracking and management of the investigation, trial and sentencing process. It additionally ensures that persons are detained in places lawfully recognized as places of detention.

### b. Establishing the law

Afghan law does require both facilities run by police (Mol) and Ministry of Justice (MoJ) to register detentions, though not necessarily in consolidated logbooks.<sup>197</sup> A number of international instruments, which are not binding, call for logbooks.<sup>198</sup>

### c. Discussing the findings

Logbooks present and accessible. Generally, throughout monitoring it was found that MoJ facilities maintained logbooks, while Mol facilities were not as consistent and did not always have a logbook. For example, during the first phase of monitoring, not all Mol facilities in Bamyan or Daikundi maintained logbooks. During the second and third phases of monitoring, the situation improved. Similarly, the absence of logbooks during the first phase of monitoring in Sholgara and Zari district Mol detention facilities in Balkh were remedied. Monitors were sporadically denied access to logbooks.

Registration of detentions. During the first phase of monitoring, monitors specifically looked at if detainees and prisoners interviewed were registered in the logbook. They found that approximately 95% of detainees and prisoners were registered in the logbook. This was not monitored systematically in other phases but concerns also did not arise that this pattern had changed.

Timeliness, completeness and accuracy of information. The quality and reliability of the information in the logbooks, though, was not as consistent. Throughout the North East Region, logbooks were found to be missing critical information such as the date a convicted prisoner was to be released. Information in Kabul's Mol detention facility was found to be unreliable. Throughout the provinces of Kabul, Laghman, Parwan, Kapisa, Logar and Wardak reliability of information varied with the facility. Not having accurate and timely information in logbooks can unnecessarily, and arbitrarily, prolong detention.

<sup>197</sup> Article 2(1)(a), ICPC require that the police record all activities while Article 29 of the Law on Prisons and Detention Centers directs that files be created for each detainee and prisoner in which all relevant information is registered.

<sup>198</sup> Rule 7(1), UN Standard Minimum Rules for the Treatment of Prisoners; Principle 12, Body of principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and Article 10, UN Declaration on the Protection of All Persons from Enforced Disappearances.

#### d. Exploring root causes

- [Instructions and resources provided and benefit evident.](#) Logbooks and some guidance on how to use them are provided to MoI and MoJ facilities. At the same time, the function and usefulness of logbooks—to track detainees and prisoners—is self-evident to those managing detention facilities. As a result, logbooks tend to be used more consistently.
- [Inadequate information available due to lack of coordination and communication.](#) Information in logbooks is not reliable in part because police, prosecutors, and the courts are not relaying complete information promptly. Doing so is vital to respecting the principle that detention should be for the shortest time possible, and the presumption of innocence.

#### e. Proposing solutions

- [Conduct a nation-wide survey of logbooks and implement recommendations.](#) MoI and MoJ should survey all their detention facilities to identify where logbooks are (a) not present and (b) not being used properly, and (c) identify where detention facilities are not receiving timely and complete information.
- [Integrate periodic reminders of function of and procedures related to logbooks.](#) So as to maintain consistent use of logbooks, MoI and MoJ should integrate into their annual work plans periodic reminders about the logbook, such as circulars and refresher briefings.
- [Institute regular and random monitoring of logbooks.](#) To ensure logbooks are being maintained and accurately reflect the situation of the facilities' population, regular and random monitoring of district- and provincial-level detention facilities should be undertaken by oversight and inspection units of the respective ministries.

## VI. Right to inform family of detention and to communicate with them

### a. Explaining the function

Upon arrest, detainees have the right to inform their families of their detention and to communicate with them throughout their detention. This procedural protection is present for several reasons.

First, this procedural protection helps to protect against enforced disappearances and incommunicado detentions. Being able to immediately inform someone of his/her detention decreases the possibility that detaining authorities can 'disappear' individuals. By requiring the ability to immediately and continually communicate with family during detention, this protection by definition reduces the potential for incommunicado detentions.

Second, the transparency that communication with family grants also diminishes the possibility of ill-treatment or torture during detention.

Third, this procedural protection protects the detainee's and prisoner's right to privacy, family and correspondence established independently in Afghan and international law.<sup>199</sup>

Fourth, it allows the detainee to seek assistance to challenge the lawfulness of his or her detention.

### b. Establishing the law

Afghan law does not provide for the right to inform detainees' families of their detention and to communicate with them while in detention except through the international obligations directly applicable on Afghan authorities<sup>200</sup> and the Law on Prisons and Detention Centers.<sup>201</sup> There is no domestic legislation providing this right for those detained in MoI detention facilities.

Under the ICCPR, a detainee's right to inform his/her family of the arrest and detention and to communicate and maintain correspondence with them through his/her detention is protected by the prohibition against inhuman treatment and torture<sup>202</sup> and the obligation to treat all persons deprived of their liberty humanely and with respect to their human dignity.<sup>203</sup> In fact, the Human Rights Committee has concluded that denial of this right constitutes inhuman treatment and is "inconsistent with the

199 Articles 37 and 54, Afghanistan Constitution and Article 17, ICCPR. During pre-conviction detention, a detainee is presumed innocent and thus detaining authorities have a little justification to restrict other rights. Once convicted, prisoners rights can only be limited as is necessary and proportionate to detention

200 Articles 7 and 10(1), ICCPR. Other international standards include Rules 37, 38(1) and (2), and 92, UN Standard Minimum Rules for Treatment of Prisoners, 1955, Principles 15 and 16(1), 16(4) and 19, Body of Principles for the Protection of All Persons under Any Form of Detention, 1988.

201 Articles 31 and 35, Law on Prisons and Detention Centers grants detainees and prisoners the rights to communicate with their family in person and through mail as well as to inform them of their entry and transfer from detention centers and prisons. The law also requires detention center and prison authorities to immediately inform family about death or serious illness of detainees or prisoners.

202 Article 7, ICCPR.

203 Article 10(1), ICCPR.

standards of human treatment” required by the ICCPR.<sup>204</sup>

Similar requirements to other rights—that it be provided for in domestic legislation and be effectively available (i.e. that detainees and prisoners can inform and communicate with their families) apply.

### c. Discussing the findings

It was found that while the right to inform their families of their detention and to communicate with them throughout their detention was one of the most respected, it is still regularly denied. During the first phase of monitoring, 54% (607) of those interviewed reported that the police told them of their right to inform their family of their detention and that 58% (662 interviewees) informed their families of their detention. The pattern was similar for both men and women. The disparity in this figure indicates that even when not informed of their right, detainees were able to inform their families of their detention. It should be noted that neither the prosecutors nor courts tended to inform detainees of this right either.

The pattern did not change in subsequent phases of monitoring. For instance, a monitoring exercise in Daikundi and Bamyan provinces in November 2007 found that detainees and prisoners were generally not informed of their right to inform and communicate with family, though Daikundi authorities appeared better than Bamyan authorities at doing so. One man detained in the police lock-up in Yakawland district, Bamyan, for fighting on 15 April 2007 had not been informed of his right to contact his family, nor had a man accused of murder who was detained on 15 July 2006 in Waras district. At the same time, when people are arrested in their homes or in villages, the family usually is informed of the detention.

In Herat, and surrounding provinces, the general finding contrasted with Bamyan and Daikundi. Monitoring found that detainees were informed at the time of their arrest of their right to contact their family and were generally able to do so. Some detainees, though, did indicate that they did so through fellow detainees who were released.

### d. Exploring root causes

- [Misunderstanding of the function of the right](#). Generally, detaining authorities do not understand the function of the right, including the protection to them that transparency provides. Without this understanding, they are not necessarily receptive. At the same time, Afghan culture is oriented around family, which may explain why this right is most consistently respected and exercised.
- [Attitudes towards detainees and prisoners](#). Hostility towards detainees and prisoners linked with the pervasive presumption of guilt translates into a reticence to afford detainees rights, such as contact with their family.
- [Insufficient legal framework and subsidiary instructions](#). As noted above, Afghan law is insufficient to ensure this right/procedural protection is effectively available. In addition, standard operating

204

Communication No/ 577/1994, Espinoza de Polay v. Peru (Views adopted 6 November 1997), in UN doc. CCPR/C/61/D/577/1994, para. 8.6.

procedures are not adequate.

- [Inadequate training and oversight](#). Detaining authorities also do not have adequate training on the procedural protection nor are there mechanisms to monitor compliance with this right and take action to remedy violations.

#### **e. Proposing solutions**

- [Strengthen the legal framework](#). Specific provisions that establish the right to inform family of arrest and detention and to maintain communication and correspondence and the general procedures to put this right into operation must be included in the revision of the Criminal Procedure Code. The Police Law also should be amended to reflect the police's responsibility to inform detainees of this right upon arrest and to facilitate contact.
- [Create standard operating procedures and check lists](#). Once the law is in place, the MoJ and Mol should formulate procedures to ensure that detainees can inform their family of their detention and to continuously contact them, distribute these guidelines and implement without delay. In these procedures, supervising officials both at the district and provincial level and central level should be tasked to monitor compliance. In addition, this right should be included on a check list for police and other detaining authorities of the rights of which they must inform the detainee and procedures they must follow.
- [Redesign training](#). Current training needs to be assessed and redesigned to instill an understanding of the function of this right and of new procedures and laws.
- [Raise awareness amongst detainees and general public of this right](#). AIHRC and other organizations should design initiatives which raise awareness of detainees of their rights, and also raise awareness of the general public so that if they or a family member are detained, they understand their rights and responsibilities. Initiatives could include radio ads, community theatre or community meetings.

## VII. Right to not be compelled to testify against oneself or confess guilt, includes to remain silent

### a. Explaining the function

Another procedural protection against arbitrary detentions, including incommunicado detentions and enforced disappearances, is the right to not be compelled to testify against oneself or to confess guilt (i.e. freedom from forced confession).<sup>205</sup> From this flows the right to remain silent.<sup>206</sup> This procedural protection also grows out of the prohibition against inhumane and degrading treatment and torture<sup>207</sup> and the right to a presumption of innocence.<sup>208</sup>

Preserving the presumption of innocence requires that detainees not be compelled to testify against themselves or to confess guilt. If police, prosecutors or other interrogators were allowed to force confessions or use coercive means to get a detainee to testify against him/herself, then the practical result would be persecution of detainees, widespread and systematic torture and ill-treatment, and, ultimately, a government which could terrorize its citizens with impunity. This would undermine all other procedural protections, subvert the presumption of innocence, ignore the principle of equality of arms, and violate the absolute prohibition against torture and inhumane and degrading treatment.

When this procedural protection functions, detainees are protected from coercive interrogation techniques, such as prolonged solitary confinement, incommunicado detention, physical mistreatment and mental abuse. It also protects detainees if they do not have defense counsel or are awaiting his/her appointment. In addition, it assists detainees to mount a credible defense against the charges they face.

At the same time, it should be acknowledged that remaining silent may be perceived as a confession of guilt. In addition, this right does not prevent information or testimony given freely from being used against oneself to prove guilt.

### b. Establishing the law

Afghan law protects the right to not be compelled to testify against oneself or to confess guilt. The Afghanistan Constitution explicitly states that confession to a crime must be done voluntarily and any statement, confession or testimony that is compelled is not valid.<sup>209</sup> It also prohibits the use of torture to elicit testimony or information during investigation, arrest, detention or imprisonment.<sup>210</sup> The ICPC further disallows physical or mental intimidation<sup>211</sup> and requires that statements be made “in a condition

205 Article 14(3)(g), ICCPR.

206 OHCHR, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Professional Training Series No. 9, 2003, p. 240.

207 Article 7, ICCPR and UN Convention Against Torture (CAT).

208 Article 14(2), ICCPR and Article 11(1), UDHR. See also General Comment 32, paragraph 30.

209 Article 30, Afghanistan Constitution.

210 Article 29(2), Afghanistan Constitution.

211 Article 5(4), ICPC.

of absolute moral freedom.”<sup>212</sup> It also gives detainees the right to remain silent when being questioned or interrogated by police, prosecutors or judges.<sup>213</sup> The ICPC also requires that police, prosecutor and Courts inform the detainee of his/her right to remain silent at arrest and before questioning.<sup>214</sup>

These standards are further strengthened by those contained in the ICCPR and UN Convention Against Torture.<sup>215</sup> The UN Human Rights Committee has stated that domestic legislation should invalidate evidence gathered using any methods of compulsion for use in proving guilt as such methods violate the right to not be compelled to testify against oneself.<sup>216</sup> It explained that freedom from compulsion to testify or confess guilt “must be understood in terms of the absence of any direct or indirect physical or psychological pressure from investigating authorities on the accused with a view to obtaining a confession of guilt.”<sup>217</sup>

### c. Discussing the findings

While clearly established in the law, the right to not be compelled to testify against oneself or confess guilt is generally not respected. Detainees were routinely not informed of this right by the police or prosecutors. Forced confessions also were sometimes elicited through torture or ill-treatment and other coercive methods.

Not informed of right. Of the 199 cases that were monitored in Kunduz, Badakhshan, Takhar and Baghlan provinces, 166 (83%) detainees had not been informed of their right to remain silent. Similar patterns were found across the country. What varied was who failed to inform detainees of this right. For example, in the South East region, while the police normally failed to inform detainees of this right, prosecutors and the Courts did so. In the Northern region, neither police nor prosecutors informed detainees of this right, while in the Western region police, prosecutors and judges did not inform detainees of this right.

Forced ‘confessions’. Forced ‘confessions’ were regularly reported during monitoring—approximately 165 interviewees (15%). The following are a few examples. In the third district of Fayzabad, Badakhshan, a man accused of theft alleged that 2 policemen burned his hands with gun powder to force a confession on 1 February 2007. On 6 September 2007, the police allegedly beat two men accused of theft in Imam Sahib district of Kunduz to coerce confessions. The military prosecutor of Nili, Daikundi district confessed to slapping two detainees who accused him of torture to coerce confessions to allegations of committing murder on 24 June 2007. In Dand district of Kandahar, 3 men arrested on 15 June

212 Article 5(5), ICPC.

213 Articles 5(6) and 53(5), ICPC.

214 Article 5(7), ICPC. The Police Law does not specify that police must inform individuals upon arrest of their rights.

215 Other international instruments which protect these rights but are not binding on Afghanistan include 1979 Code of Conduct for Law Enforcement Officials which requires police to refrain from violating this rights (Article 5); 1990 Guidelines on the Role of Prosecutors, which prohibits prosecutors from using evidence obtained by coercion (Guideline 16); 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which requires judges to protect this right (Principle 6).

216 HRC, General Comment 32, paragraph 41. According to this paragraph, the only time this evidence can be used is as evidence that a violation of Articles 14(4) and 7 (prohibition against torture, cruel, inhumane and degrading treatment), ICCPR, 1 has been violated. See also Communication No. 1208/2003, Kurbonov v. Tajikistan (Views adopted 16 March 2006), CCPR/C/86/D/1208/2003, 19 April 2006, paras. 6.2-6.4 amongst others.

217 Ibid and Communication No. 253/1987, Kelly v. Jamaica (Views adopted 10 April 1991), CCPR/C/41/D/253/1987, para. 5.5

2007 for links with anti-government elements allege that, in order to coerce confessions, they were beaten with rifle butts by police, threatened with handover to US forces, and then beaten by Kandahar city district 3 police before being transferred to the central Mol detention facility on 16 June 2007.

During the LSOP it also was observed that judges did not necessarily investigate allegations of that evidence, including confessions, were elicited through coercion. The consequence was that a number of forced 'confessions' may have been accepted as evidence despite the Constitutional prohibition.

This pattern appears to emanate from a presumption of guilt, and is exacerbated by the systematic lack of access to defense counsel (see Section VIII) and lack of awareness of right to remain silent. In addition, authorities appeared to believe that informing or respecting this right would handicap their investigation.

Virginity tests. As mentioned in Chapter II, Section VI(a)(2), many women and girls are subject to virginity tests when accused of 'running away' or '*zina*'. Most of the time, particularly in cases of 'running away', the woman or girl accused is forced to take a virginity test. Such tests not only are traumatic (and highly inaccurate), but may constitute cruel, inhumane and/or degrading treatment and amount to an attempt to coerce confession. The threat of the test could coerce the woman or girl into incriminating herself (truthfully or otherwise).<sup>218</sup>

### d. Exploring root causes

- Belief that respecting right would handicap investigations; misunderstanding of function. One of the main reasons this right is ignored is that police and prosecutors, in particular, do not see its use. Some have expressed a belief that respecting this right would hamper their investigations. Specifically, that they would not be able to extract the information they desire if the detainee were to remain silent and coercive techniques could not be used.
- Inadequate alternative interrogation techniques. As noted above, police and prosecutors do not have adequate training on non-coercive interview techniques.
- Presumption of guilt. The inclination to use coercive techniques is reinforced by police and prosecutors' general presumption that detainees are guilty, which is linked with the general view that the detainee should be punished. This presumption also may influence judges when determining if allegations of coerced confessions, ill-treatment or torture should be investigation and evidence admitted.
- Lack of defense counsel. The systematic absence of defense counsel (discussed below) also enables violation of this right. Under Afghan law, defense counsel have the right and are to be present during any and all interrogations.<sup>219</sup> Doing so means that interrogators are overseen directly, which helps minimize coercive interrogations.

<sup>218</sup> These tests also may violate other rights under Constitution, and in the ICCPR. These include: respect for human dignity (Article 24(2), Afghanistan Constitution and Article 10(1), ICCPR), prohibition and protection against discrimination on basis of sex (Article 22, Afghanistan Constitution and Articles 2 and 26, ICCPR); amongst other rights.

<sup>219</sup> Articles 5(7), and 38, ICPC.

- [Insufficient awareness of detainees about right](#). Detainees are generally not aware of this right and, as they are generally not informed, cannot claim it or challenge the actions that violate it.

#### e. Proposing solutions

- [Redesign and reinforce training](#). Current training needs to be reoriented to convincing police, prosecutors and judges about the benefits and necessity of protecting the right to not be compelled to testify against oneself or confess guilt. To do so, alternative interrogation techniques need to be integrated into this training.
- [Issue clear operating procedures with a strong internal oversight and complaints mechanism](#). Mol, AGO and the Supreme Court need to issue clear operating procedures that assist district, provincial and regional officials in respecting this right. Included in these procedures should be a checklist in which police, prosecutors and judges are reminded to inform detainees of this right. At the same time, each institution should establish a mechanism to monitor compliance with these procedures and provide a procedure through which detainees who believe their right has been violated to complain and seek remedial action.
- [Create initiatives that provide neutral third party presence during interrogations](#). Realistically, defense counsels will be readily available to be present at interrogations, and, often, interrogations take place prior to a detainee deciding to engage a defense counsel. Given this, an alternative third party presence should be available to detainees in Afghanistan. Other countries such as the United Kingdom and Nigeria have developed such alternatives through the use of paralegals. In light of the situation in Afghanistan, however, even paralegals seem to be overly ambitious. Instead, creative solutions, such as using the limited number of paralegals to provide advice to relatives to serve as a third party, should be developed in coordination with both the Supreme Court and newly established Bar Association. Under the Advocates Law, relatives can function as legal advocates without a license.<sup>220</sup> Paralegals have not been authorized to do so .
- [Launch initiatives to raise detainees' and the general public's awareness of this right and other mechanisms](#). Detainees and the general public's awareness needs to be raised about this right as well as of any complaints or support mechanisms developed.

## VIII. Right to defense counsel or carry out one's own defense, includes time and facilities

### a. Explaining the function

The right to defense counsel or to carry out one's own defense is at the heart not only to guaranteeing due process, but also to preventing arbitrary detentions.

When this right is realised, detainees enjoy equality of arms with the detaining authorities. The detainee, either him/herself or through his/her defense counsel, has the ability to access the court, to inspect all documents relevant to his/her case, to be present at interrogations or other investigative activities, to respond to accusations, and to challenge both the accusations and actions of the police, prosecutor and courts. The realisation of this right, therefore, is critical to realizing of other rights.

Indeed, when this right is impaired (as in Afghanistan), procedural protections more consistently fail and arbitrary detentions multiply. In regard to this, the procedural protection that most commonly fails is the right to challenge arrest and detention (discussed above) and to a fair trial without delay (discussed below). Ill-treatment, torture and coerced confessions also become generally more frequent.

These dynamics occur because this right represents a fundamental check on detaining authorities' use of power. Access to and presence of defense counsel, in particular, provides third party oversight of the detaining authority and an advocate for the detainee. For example, the presence of defense counsel during interrogations makes it difficult for police or prosecutors to coerce information or confessions or mistreat or torture detainees. Being able to have access to the case documents also prevents tampering, and allows detainees to challenge the veracity of evidence and the indictment. When this check is absent, the natural default position is that the detaining authority is correct, or, put another way, guilt is presumed.

### b. Establishing the law

The right to defense counsel or to carry out one's own defense is guaranteed in Afghan law both in the Constitution and subsidiary legislation.<sup>221</sup> With the recent passage of the Advocates Law, the right to defense counsel has been reinforced. Corollary rights, such as to access to files, to communicate confidentially with defense counsel, and to have adequate time to prepare one's defense, also are protected.<sup>222</sup> These provisions are reinforced by those in the ICCPR.<sup>223</sup> Afghan authorities also are further obligated to ensure that the right to access to legal assistance

221 Article 31, Afghanistan Constitution; Article 11, Law on the Organization and Jurisdiction of the Islamic Republic of Afghanistan's Justice System; Articles 5(7), 18-19, 38-41, and 96 (interim provision for defense counsel), ICPC; Article 2, The Advocates Law. Yet, it should be noted that the law is somewhat unclear regarding the right to carry out one's own defense. While guaranteed in principle, procedurally, the ICPC does not provide provisions for detainees to challenge their detention on their own initiative or to access investigative activities until the indictment has been filed.

222 Article 38 (presence during investigation), 43 (access to documents), 53(2) (presence during hearing), 56-57 (adequate time to prepare), ICPC.

223 Articles 9(3), 9(4), 14(3)(b) and (d), ICCPR. Prior to the filing of an indictment, the detainee's right of access to and assistance of defense counsel is contained in Article 9(3) and 9(4), ICCPR. See *Campbell v. Jamaica*, supra n. 154 and *Communication No. 289/1988, D. Wolf v. Panama*, [views adopted on 26 March 1992], in UN doc. GOAR, A/47/40, p. 289, para. 6.2. See also HRC, General Comment 32, paras. 32-40.

is effectively available.<sup>224</sup> This means that detainees must be informed of their right and can appoint and communicate confidentially with the defense counsel of their choosing.<sup>225</sup> It also means that the defendant or his/her defense counsel must be able to access relevant documents, be present at interrogations, etc. In addition, detainees' access to defense counsel also must be prompt and regular.<sup>226</sup> Amongst other reasons, this requirement is designed to prevent incommunicado detention, ill-treatment and torture.

### c. Discussing the findings

Despite being guaranteed in the law, the right to defense counsel or to carry out one's own defense is regularly denied. It can be concluded that this right is not respected, protected or effectively available in Afghanistan.

Informing of right. During the first phase of monitoring, 78% (879 interviewees) reported that they had not been informed of their right to defense counsel, and 54.5% (615 interviewees) reported that they had not been informed of their right to present their own defense. These findings were generally confirmed by subsequent monitoring, though some improvement was noted in the Eastern Region. In the instances when detainees were informed of this right, it appeared to be more frequently by the Court at the first hearing, rather than by the police or prosecutors. (Police, prosecutors and Courts are required to inform detainees of their right to defense counsel.<sup>227</sup>)

Access to defense counsel. The vast majority of detainees did not enjoy access to defense counsel. In no case monitored has a detainee enjoyed defense counsel from arrest through trial. During the first phase of monitoring, it was found that 82.5% (931 interviewees) did not have defense counsel. The explanation for this tended to be that either the detainee was unaware of this right (15.6%), there was no defense counsel available (36.4%), or s/he could not afford a defense counsel (12.8%). This pattern continued throughout the monitoring. Of course, where legal aid organizations operated, such as in Kunduz (International Legal Foundation [ILF]),<sup>228</sup> Mazar (Medica Mondiale and Cooperation Center for Afghanistan [CCA] for women), Herat and Ghazni (Quanoon Gashtoonkey), detainees are more likely to have a lawyer.<sup>229</sup> Still, monitoring found that once defense counsel are engaged, they may be intimidated into dropping cases by high ranking officials and government entities such as NDS.

Since detainees did not normally have defense counsel, there were normally none present during interrogations by police and prosecutors. Even when detainees reported to have defense counsel, they normally were not present because they generally had not been engaged at that time. During the first monitoring phase, only 1.4% (16 interviewees) stated that defense counsel had been present

224 See, amongst others, Weismann *Lanza b. Uruguay*, supra n. 94 and Communication No. R.1/6, *M. A. Millán Sequeira v. Uruguay* (views adopted on 29 July 1980), p. 131, para. 16.

225 Article 14(d), ICCPR and HRC, General Comment 32, paras. 37-38.

226 HRC, General Comment 20, paragraph 11 and General Comment 32, paragraph 34. See also Communication

227 Article 5(7), ICPC.

228 Aside from Kunduz, ILF operates in 11 other provinces across Afghanistan.

229 The results of the Legal System Observation Project (LSOP) bears this out. Where legal aid organizations had capacity and were present, presence of defense counsel was better. Of the 31 cases observed in Nangarhar and Laghman (3 legal aid organizations operate), defense counsel were present in 19. In Herat and Badghis, defense counsel were present in 16 of 37 cases observed.

during police interrogations and 2.7% (31 interviewees) that defense counsel had been present during prosecutor interrogations. No noticeable change occurred subsequently.<sup>230</sup>

At the Court, defense counsel were present infrequently. Regions that participated in the Legal System Observation Project (LSOP) generally found that less than half of the detainees had defense counsel during their trial.<sup>231</sup> Of the 26 cases monitored in Kunduz, Takhar and Baghlan, in only 6 (25%) was defense counsel present. In Herat, Badghis, Laghman and Nangarhar, defense counsel tended to be present around half the time. During the first monitoring phase, however, only 51 interviewees (4.5%) reported that defense counsel was present during trial. Reasons for this include that defense counsel normally are used only to draft a defense statement prior to the hearing, and Courts are hostile to defense counsel. On the latter, the Kunduz court, for instance, refuses to recognize defense counsel not affiliated with a legal aid organization. Legal aid associations complained to the Supreme Court that primary and appeal courts neglected to call defense counsel to judicial sessions and rendered decisions in their absence, contrary to the ICPC.<sup>232</sup> Discussions with the Supreme Court have indicated that judges are of the opinion that certain categories of crimes (mainly those linked with subversive or anti-government activities) should not have access to defense counsel. At the same time, the Supreme Court has reaffirmed the right of defense counsel to be present during judicial sessions.<sup>233</sup>

Ability to carry out own defense. Lack of awareness, illiteracy, hostility by the Court and insufficient access to documents (see below) means that detainees are not normally able to present their own defense. The pattern identified in Kunduz, Baghlan and Takhar of how detainees defend themselves is generally representative of that in the rest of Afghanistan: detainees are provided with a copy of the indictment and told to prepare a defense statement. As noted above, a defense counsel may be engaged to write the defense statement, or another literate person, if the detainee desires and can afford it. Others provide an oral statement. In practice, the defense does not normally get to present witnesses or other evidence. The Northern region also observed that defense statements were frequently used against the detainee.

Access to documents. Detainees and defense counsel report that they do not have reliable or sufficient access to documents. Only 27.7% (310 interviewees) reported that they could access documents during the first monitoring phase. This pattern did not change over the monitoring period.

#### d. Exploring root causes

- Fundamental misunderstanding of the right's function and the function of defense counsel, by all parties. Equality of arms, including the provision of defense counsel and access to documents, is a relatively new concept in Afghanistan. Both detaining authorities and detainees (as well as their families) do not fully understand the function of this right. In particular, they do not

230 In November 2007, it was reported that 10 detainees from Herat and Badghis reported to have been informed of their right to a defense counsel and that of there, 5 had defense counsel present during police interrogation but only 3 had defense counsel present during trial.

231 Please note that in many regions trials monitored during the LSOP were those involving legal aid organizations. Many times legal aid organizations were a reliable source of information as to when hearings were to be held. Given this, the statistics on defense counsel during the LSOP are biased.

232 See Supreme Court Circular letter no 730, 17 April 2007. Reference is made to Articles 5(8) and 38-40, ICPC.

233 Ibid.

understand the value and function of defense counsel.

*Defense counsel.* Engaging defense counsel is at the same time seen as a sign of guilt and as a privilege not to be afforded every accused. Defense counsel is not seen as a critical protection against abuse of power and arbitrary detention, amongst its other functions. Detainees expressed to monitors that they did not need to engage defense counsel because they were not guilty of anything. At the same time, the Supreme Court appears to be of the opinion that persons accused of certain categories of crimes should not enjoy defense counsel.<sup>234</sup> This ingrained resistance to the concept of defense counsel results in defense counsel not being able to function effectively because they are consequently not given access to documents, interrogations, etc.

*Put up one's own defense.* Detainees do not understand fully their right to defend themselves, largely because of lack of awareness. They generally believe that they only have the right to present their testimony and not to call witnesses or other evidence. Detaining authorities, however, usually have a higher level of awareness due to trainings they have received. Yet, given that they generally presume detainees are guilty, they are hostile to the concept of a defense.

- [Catastrophic lack of defense counsel throughout Afghanistan.](#) There is a severe shortage of defense counsel in Afghanistan. There simply are not enough, even when legal aid organizations are present, to meet the need. Most extreme is Bamyan and Daikundi. Daikundi has no defense counsel present, while Bamyan only recently (June/ July 2008) gained the presence of 3 defense counsel, one of which focuses exclusively on children. Even in Kabul, where there are numerous legal aid organizations and private defense counsel operating, the majority of detainees are unable to access defense counsel. The demand for defense counsel is greater than the supply available.
- [Insufficient training, regulation and oversight of police, prosecutors and judges.](#) The training that detaining authorities are receiving on the right to defense counsel and to put on one's own defense does not adequately explain the function of this right. Training is not sufficiently reinforced through follow-up initiatives, internal instructions and regulation or effective oversight and monitoring.
- [Threats, intimidation and impunity of power-brokers.](#) Often, power-brokers times threaten defense counsel in order to intimidate them from representing certain people.

#### e. Proposing solutions

- [Redesign training of police, prosecutors and judges to promote understanding of function of right, and counter presumption of guilt.](#) Current police training should be assessed and reoriented to explain more effectively the function and benefits of this right.

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Based on several conversations with Supreme Court justices by UNAMA staff in 2007.

- [Develop awareness raising activities to explain to public the function of right.](#) Detainees need to be more aware of the right, its function and its content. MoJ, Mol, and the AGO should work with AIHRC and its partners to design radio programs, town hall meetings and other initiatives to do this. These efforts should be built upon existing efforts, such as those by UNDP's Access to Justice at the District Level programme.
- [Design and implement procedures and tools to ensure police, prosecutors and Courts inform detainees of this right, including oversight.](#) Training must be complemented by regulation and oversight. The Mol, AGO and Supreme Court should develop procedures and other tools, such as check-lists, to ensure detainees are informed of their right. Monitoring of interrogations and observation of trials also should increase so as to provide oversight. Finally, remedial and disciplinary action must be taken when authorities fail to inform detainees of their right or fail to respect it.
- [Train relatives to represent detainees.](#) Given the drastic shortage of defense counsel, there must be an interim solution until the number of defense counsel increases. The Advocate's Law allows for relatives to represent detainees. The Bar Association and justice sector donors should support this provision. As it is impossible to anticipate who will be arrested and detained and what relatives need to be trained, the Bar Association and other organizations active in the justice sector should identify community representatives to train on basic legal representation skills, particularly in relation to rights of detainees, or place paralegals in communities to advise relatives. These representatives could be called upon by relatives to train and support them. The law also should be changed so that these community representatives can be registered with the Bar Association and provide services directly to detainees.
- [Increase funding to legal aid, in line with the NJP and NJSS.](#) Funding to expand legal aid to detainees is critical. Funding should focus on providing legal aid during interrogation and investigations.
- [Prosecute intimidation of defense counsel.](#) Until there are consequences for threatening and intimidating defense counsel into not representing detainees, this will continue. The AGO should work with its district and provincial prosecutors to prosecute those who intimidate defense counsel.

## IX. Right to a fair trial without delay and within a reasonable time or be released

### a. Explaining the function

The right to a fair trial without delay, which is complemented by the right to be tried within a reasonable time or released, is designed to minimize deprivation of liberty to that which is strictly necessary and reasonable.<sup>235</sup> It also helps ensure that there are lawful grounds for detention. The right to be released if not tried within a reasonable time ensures that unnecessary delays do not infringe on the detainee's right to liberty. Both flow directly from the presumption of innocence and the principle that detention should not be the general rule and be for the shortest period possible.

### b. Establishing the law

Afghan law does not independently establish the right to a fair trial without delay or to be tried within a reasonable time or be released. It, however, can be constructed from other articulated rights. These include to not be detained without due process of law,<sup>236</sup> to appear before the court within legal time limits,<sup>237</sup> to be presumed innocent,<sup>238</sup> and to liberty.<sup>239</sup> The obligation to observe the ICCPR and UDHR in Afghanistan also helps establish this right.<sup>240</sup> Still, Afghanistan is obligated under its Constitution and ICCPR to establish the right independently in domestic law.<sup>241</sup>

As explained in Chapter II, Section IV, the ICPC lays out the length of detention considered reasonable and to be without delay for each stage of the judicial process from indictment to appeal decisions of the Supreme Court: 1 month from arrest to indictment,<sup>242</sup> 2 months from indictment to primary court decision,<sup>243</sup> 2 months from announcement of primary court decision for appeals court to announce decision,<sup>244</sup> 5 months from the announcement of the appeals court decision for Supreme Court to announce decision.

Both the ICPC and the Law on Prisons and Detention Centers require release when timelines are breached, even if the process is not completed.<sup>245</sup> Yet, as discussed above, these laws do not agree on when release is required. The ICPC requires release when any time limit is breached while the Law on Prisons and Detention Centers only requires release when the overall time limit is breached.

While Afghan law has defined reasonableness/without delay by establishing timelines, international

235 HRC, General Comment 32, para. 35.

236 Article 27(2), Afghanistan Constitution.

237 Article 31, Afghanistan Constitution.

238 Article 25, Afghanistan Constitution.

239 Article 24, Afghanistan Constitution.

240 Article 9(3) and 14(3)(c), ICCPR.

241 Article 7, Afghanistan Constitution and Article 2(2), ICCPR.

242 Article 6(1) and 36, ICPC.

243 Article 6(2), ICPC.

244 Article 6(2), ICPC.

245 Article 6(3), ICPC and Articles 20(4) and 49, Law on Prisons and Detention Centers.

standards do not. Instead, they require that:

- procedures be put in place in order to ensure that the trial, including the issuance of decisions, will proceed without delay at all levels (primary and appeals).<sup>246</sup>

In fact, while international standards require all cases, particularly those involving detention, be dealt with as expeditiously as possible, whether a delay is unreasonable or unjustified must be evaluated on a case-by-case basis taking into account factors including the complexity of the case.<sup>247</sup>

Still, international standards establish that:

- delays be reasonable and justified at all stages of judicial proceedings<sup>248</sup>

For instance, it was found that a 29-month lapse between arrest and trial which could not be explained violated the detainee's right to a fair trial without delay.<sup>249</sup> It is relevant to note that lack of resources is not considered a justification for delays.<sup>250</sup>

### c. Discussing the findings

Monitoring found that, from a detention perspective, the right to a fair trial without delay was not respected throughout Afghanistan. Unreasonable delays regularly occurred, many times well beyond the legally established timeframes.

#### Court timelines

A significant number of detainees were awaiting court verdicts well-beyond legal timeframes laid out in the ICPC. The most egregious cases tended to be those awaiting Supreme Court decisions beyond 5-month timeframe—which all too often stretched into years. Monitoring also pointed to longer and more consistent delays in Appeals Courts rendering a verdict, which has 2 months from the announcement of the original verdict, than those in Primary Courts (which has 2 months from the filing of the indictment to issue a verdict).<sup>251</sup> Delays sometimes meant that detainees' time in detention were greater than the sentence given or legally allowed for the offense.

UNAMA found that more than 200 cases were awaiting Supreme Court verdicts beyond the 5-month time frame in Balkh, Saripul, Jawzjan and Faryab provinces while, as of 13 March 2007, 338 cases

246 Human Rights Committee, General Comment 35, paragraph 35.

247 Torres v. Finland, supra n. 170, para. 7.3 and 7.4; Communication No. 336/1988, A. Fillastre v. Bolivia (Views adopted on 5 November 1991), in UN doc. GAOR, A/47/40, p. 306, para. 6.6.

248 HRC, General Comment 32, para. 35, Torres v. Finland, supra n. 170, para. 7.3, Communication No. 1089/2002, Rouse v Philippines (Views adopted on 25 July 2002) in UN doc. CCPR/C//87/D/1089/2002, para. 7.4.

249 Communication No. 564/1993, J. Leslie v. Jamaica, (Views adopted on 31 July 1998), in UN doc. GOAR, A/53/40 (vol. II), p. 28, para. 9.3, as well as Kelly v. Jamaica, supra n. 214, para. 5.11, amongst others.

250 Communication No. 390/1990, B. Lubuto v. Zambia, (Views adopted 31 October 1995), in UN doc. GOAR, A/44/40, p. 229, para. 13.3.

251 Article 6, ICPC.

were beyond the time limits in Kabul, Parwan, Logar, Kapisa, Panjshir and Wardak.<sup>252</sup> During the first phase of monitoring, 42 detainees in Kunduz, Baghlan, Badakhshan, and Takhar had been waiting more than 5 months for a Supreme Court verdict, with the number jumping to 187 verified cases (62 Kunduz, 15 Baghlan, 23 Badakhshan, 87 Takhar) by September 2007. In Kabul, detainees have waited more than 6 years for a verdict from the Supreme Court, while a man accused of murder who lodged his appeal in late 2006 is still awaiting his verdict. The Supreme Court Inspection Panel went to Ghor province in August 2007 and identified 20 cases that were before the Supreme Court that were significantly delayed. The detainees' cases were considered and they were released. A 30-year old man from Ghazni was not so lucky. He remained in detention 10 months longer than his sentence, awaiting the Supreme Court's verdict.

At the Appeals level, delays were found throughout the country. A man accused of murder waited almost 2 years for a verdict of the Khost Appeals Court. During the first monitoring phase, AIHRC found that 60% of cases monitored had been waiting more than 2 months for their Appeals Court hearing or verdict. The situation was the worst in the Northeast, where 80% (38 of the 47) of the cases identified were over time limits. In fact, in April 2007, the population of the Baghlan's MoJ Detention Center went on a hunger strike partly because of prolonged delays in their appeals. Similar hunger strikes occurred in 2008 in Puli-charki<sup>253</sup> and Kandahar's MoJ Detention Center.

At the Primary Court level, for none of the detainees interviewed during the first monitoring phase who were from Kabul, Kapisa, Parwan, Logar, Panjshir, and Wardak provinces was the 2-month timeframe for the Primary Court respected. Of the 34 cases found pending at the Primary Court level in Kunduz, Baghlan, Badakhshan and Takhar during the first phase of monitoring, the time limit had been passed in 19 cases (or 56%). In the South-east region (Paktia, Pakika, Khost, and Ghazni provinces, a pattern of long delays was identified in the first monitoring phase. Little change was found in subsequent monitoring. For instance, in Parwan, two men accused of murder who were arrested 27 March 2007, and for whom an indictment was filed on time, were waiting more than 7 months for trial.

### Time to indictment

Prosecutors regularly fail to comply with legally established time limits to both interview detainees and file indictments against them.

*Interviews.* Prosecutors are to interview detainees within 48 hours of being notified of their detention<sup>254</sup> but no later than 72-hours after arrest.<sup>255</sup> When dates of both arrest and interviews were accessible, monitoring found that prosecutors did not comply with the time limit, many times not interviewing detainees for a matter of weeks, and in the most egregious cases, months. Normally there is no justification for these delays. During the first phase of monitoring, it was found that time limits were broken in 97% (1038) of cases monitored, and that the frequency was the same for men and women.<sup>256</sup>

252 The 338 cases were presented to the Supreme Court on 13 March 2007. Many of the detainees whose cases were submitted are eligible under Presidential Decrees for release.

253 18-23 March 2008.

254 Article 34(1), ICPC.

255 Article 21(1), ICPC states that the Police must notify the Prosecutor within 24 hours of the arrest.

256 For the first monitoring phase, 1038 cases of the 1069 cases for which dates were available. For only 28 of 941 men interviewed were timeframes

For instance, one egregious case was found in Argu district of Badakhshan province—prosecutors failed to interview a man arrested on 10 February 2007 for suspicion of committing murder for 21 days. In fact, in Kunduz, Baghlan, Badakhshan and Takhar provinces, UNAMA and AIHRC found in the first phase that prosecutors breached timelines for every case for which relevant information was available and that there was little evidence to show a change in the pattern subsequently. A similar pattern was found in the Central (Kabul, Kapisa, Parwan, Logar, Panjshir, Wardak) and Eastern Regions (Nangarhar, Kunar, Laghman, Nuristan provinces). District prosecutors in Saripul and Balkh province appeared to be somewhat better at interviewing detainees within 48 hours, with some compliant cases identified in the first phase of monitoring. In Jawzjan, however, district prosecutors were found to have not interviewed detainees for days, weeks, and sometimes months.

*Indictments.* Prosecutors also breach both the 15-day and 30-day timeframes laid out in the ICPC<sup>257</sup> or failed to file an indictment altogether.<sup>258</sup> When dates of arrest as well as indictments (or lack thereof) were accessible, it was observed that, when indictments were filed, these breaches tend to be a matter of days, though they sometimes do stretch to months or years.<sup>259</sup>

#### d. Exploring root causes

In addition to the root causes discussed in Chapter II, Section IV, the following should also be considered:

- [Absence of prosecutors and judges.](#) Many delays are caused by the absence of prosecutors or judges in districts. This is particularly true in more remote, rural districts. In Farah province, 11 districts have no district courts. The situation is similar for Daikundi. The district prosecutor of Ishkamish, Badakhshan province resides in a neighboring district almost 4 hours away from the Ishkamish district center.
- [Overload of court.](#) Particularly at the Appeals Court and Supreme Court level, the caseload appears to be too great to be processed within the timelines.
- [Poor administration of justice.](#) Some of this overload appears to be caused by poor administration of justice. Prosecutors and courts do not necessarily relay case files in a timely manner to or between courts. In the Kambakhsh case, it took approximately 2 months (the full time allowed for detention between primary and appeals verdict) for only the case file to be transferred from Mazar-i-Sharif to Kabul. The transfer was done only after a Supreme Court order and the defense provided the transportation. At the same time, organization and scheduling of hearings tends to not be timely.

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followed, while they were complied with only for 3 of 97 women interviewed.

257 Article 36, ICPC.

258 Article 36 and 39, ICPC.

259 It should be noted that due to difficulties accessing prosecutors' files across the country, compliance with the 15-day extension was particularly hard to verify. In addition, in the first and subsequent phases, the data being used is based on the information available, not on every case monitored. For instance, in Bamyan and Daikundi provinces, information was not available either through the detention centers logbook or through prosecutors. Yet, that these breaches are a pattern and problematic was stated by the Supreme Court High Council in their Memo 720, 17 July 2006.

- [Timelines unrealistic](#). While negligence by prosecutors and courts contributes to delays, as to case backlogs, the timelines themselves may be unrealistic, or ambitious.
- [Lack of resort to alternatives to detention](#). The reliance on detention during the pre-trial and trial stages rather than using alternatives creates more pressure on the system to comply with the tight timelines. These timelines apply only when suspects or accused are in detention.<sup>260</sup> When a suspect or accused is not in detention, the standards of “without delay” apply but are not further confined by the principle that detention should be for as short a time as possible.
- Insufficient diligence by authorities. While weak oversight mechanisms are problematic, insufficient diligence by police, prosecutors, judges and detention officials also plays a role. For instance, the Supreme Court has expressed concern that prosecutors are approaching the Court for extensions to file indictments beyond the 30-day limit in the ICPC.<sup>261</sup> Courts, including the Supreme Court, also are not self-regulating.

### e. Proposing solutions

The following proposed solutions should be read in conjunction with those proposed in Section A(4):

- [Reallocate judges and prosecutors to districts in need through an incentive system](#). Creating incentives to attract and retain judges and prosecutors in more remote, underserved districts is critically necessary. Incentives could include rotation and promotion programs, along with monetary compensation.
- [Develop better standardized procedures for administration of justice](#). The Ministry of Justice, AGO and Supreme Court should develop protocols on transferring case files, scheduling and organizing hearings, and tracking time limits. Relevant officials at all levels should be trained and implementation monitored periodically.
- [Extend timelines in the revision of the Criminal Procedure Code](#). Taking guidance from Human Rights Committee jurisprudence, timelines can be lengthened as long as (1) detention is periodically reviewed (see Section B4) and (2) the case is being actively handled. The Supreme Court, the AGO, MoJ and AIHRC should conduct a joint assessment and propose adjustment to the timelines that balance the imperative that detention be for as short a time as possible with the realistic expectation of processing times. These recommendations should be used in the revision of the Criminal Procedure Code and other relevant legislation.
- [Develop alternatives to detention, integrate into the law, and work to encourage judges to use](#). Currently, the law only discusses conditional release for persons convicted, not for detainees, and has overly restrictive bail provisions (see Section VI(a)(3)). The law should be amended so that bail and other non-custodial alternative are available and required to be considered by judges at each stage of the process.

<sup>260</sup> Article 6, ICPC.

<sup>261</sup> Supreme Court High Council Memo 720, 17 July 2006

## X. Right to be released at end of legally determined sentence

### a. Explaining the function

Discussed at length in Chapter II, Section IV, this procedural protection prevents arbitrary detention by obliging authorities to release prisoners upon completion of their sentence. Not doing so renders the detention unlawful and thus arbitrary.

### b. Establishing the law

Chapter II, Section IV

### c. Discussing the findings

Chapter II, Section IV

### d. Exploring root causes

Chapter II, Section IV

### e. Proposing solutions

Chapter II, Section IV

1 Research was not undertaken to track the frequency of arbitrary or unlawful detention.

2 The first phase covered 30 of 34 provinces, with the exception of Nuristan, Uruzgan, Zabul and Paktika because of security concerns.

3 All involved staff received training on domestic legal standards and procedures and on relevant international standards, as well as the questionnaire used to capture monitoring information.





