



Arbitrary Detention in Afghanistan

A Call For Action



Volume I

OVERVIEW AND RECOMMENDATIONS

UNAMA, Human Rights
Kabul



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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.

Executive Summary

Throughout Afghanistan, Afghans are arbitrarily detained by police, prosecutors, judges, and detention center officials with alarming regularity. It is systemic and occurs in a variety of forms. 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 all Afghans to liberty and to due process of law and erodes their dignity. Another consequence of arbitrary detention is overcrowding in Afghanistan's detention centers. Also, arbitrary detention often places detainees' families under unnecessary socio-economic hardship because income and social standing is lost. Widespread arbitrary detention erodes public confidence in the judicial system and in the government as well.

To reverse this pattern, the Government of Afghanistan (GoA) committed to develop and implement corrective measures both in the Afghanistan Compact and the Afghanistan National Development Strategy (ANDS), as well as in the National Justice Programme.

In order to assist the GoA in its efforts, the United Nations Assistance Mission in Afghanistan (UNAMA), with the cooperation of the Afghanistan Independent Human Rights Commission (AIHRC), monitored detainees in Ministry of Interior (MoI) [police] and Ministry of Justice (MoJ) detention facilities throughout Afghanistan from November 2006-July 2008. This report draws upon this field monitoring to discuss the patterns and causes of arbitrary detention and to make recommendations on measures to effectively combat it. This report does not cover conflict-related detentions, including those by the National Directorate for Security (NDS) or international military forces (IMF).

First, 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.

Second, there are **indications that Afghans have been detained in order to deny them fundamental rights**, particularly that of freedom of expression and many of the fundamental rights of women.

Third, Afghans are **detained without enjoying essential procedural protections, rendering many 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 of prolonged duration. Other procedural protections that do exist, such as the right not to testify against oneself or to defense counsel, are not respected. The denial or lack of defense counsel is particularly problematic as access to, and presence of, defense counsel provides a vital oversight mechanism that prevents many arbitrary detentions and mitigates other abuses. Significantly, time limits for pre-trial detention, which help guarantee the right to trial without delay or to be released, are regularly breached, thus turning a significant portion of detentions arbitrary.

Generally, UNAMA found that these patterns could mainly be attributed to five key factors—though others, such as resources and professional qualifications, also play a role.

First, there are **competing concepts of justice** in Afghanistan—the formal justice system, the informal justice system, and cultural and religious traditions. These competing concepts lead to a presumption of guilt that permeates the criminal justice system which results in a different understanding of the function of detention and procedural protections and which predisposes authorities to detain. These competing concepts also feed a general hostility towards defense counsel and results in a different standard of justice being applied to women.

Second, Afghanistan’s **legal and regulatory frameworks are inadequate** and do not include critical rights or guidance to authorities. Third, Afghanistan’s **formal justice system is still developing institutions, knowledge, capacity and tools, creating** systematic weaknesses that allow arbitrary detentions. Fourth, impunity, corruption and weak oversight mechanisms enable arbitrary detention practices to continue uncorrected. Fifth, **training and capacity-building programmes are insufficient** to tackle the conceptual gaps between most Afghans’ understanding of justice and the standards required in the formal justice system.

These findings and analysis along with consultations with a broad range of stakeholders form the basis of a series of recommendations on how to address arbitrary detention. These recommendations are outlined in the next section.

Recommendations

The following recommendations provide more specific recommendations for combating arbitrary detentions. In light of the release of the ANDS' National Justice Sector Strategy (NJSS) and the National Justice Programme (NJP), especially relevant components of them are highlighted.

RECOMMENDATION 1

Immediately revise the legal framework in order to ensure full legal protection of rights

It is recommended that the MoJ, MoI, Supreme Court and the Parliament, with the support of their international partners, immediately begin to revise the legal framework—including both the Penal Code and Interim Criminal Procedure Code—to ensure that gaps identified in this report are corrected as part of the efforts required to achieve Goal 2 of the National Justice Sector Strategy. In particular, the drafting committee for the revision of the Criminal Procedure Code co-chaired by UNODC and JSSP, the MoJ's Taqin and the Parliament should prioritize the following revisions:

Determination of legality of pre-trial detention: Procedural

- Shift detention-related decisions from the prosecutor to the judiciary;
- Ensure legality of criminal-related detention is reviewed by the Court within 3 days of arrest;
- Enshrine the right of the detainee to challenge detention in Court and receive a decision without delay. As part of this, the draft Criminal Procedure Code should require detainees to be promptly informed of the charges against them and of the content of any indictments filed against them;
- Require periodic review of the legality of detention by the Court during the pre-trial period (ex: once per month);
- Grant the Court explicit authority to release detainees at any stage of the pre-trial process if it deems detention no longer lawful, necessary or reasonable;
- Adjust pre-trial time limits to better ensure trials are held within a reasonable time and balance operational realities with detainees' right to be in detention for shortest time possible.

Addressing these gaps will generally require revisions to be included in the draft Criminal Procedure Code, and to the Law on Prisons and Detention Centers, Law on Organization and Structure of the Courts and the Police Law.

Determination of legality of pre-trial detention: Substantive

- Clearly enumerate a nonexclusive list of the reasons for which suspects and accused may be detained pre-trial ensuring that it is in line with the Constitutional guarantee of presumption of innocence, liberty, and applicable international standards. In particular, ensure the revision of

Article 4, ICPC, which appears to permit detention to be used to coerce information.

- Review bail provisions in the new draft of the CPC to ensure compliance with presumption of innocence and Article 9(3), ICCPR and bolster alternatives to financial bail and implement other recommendations suggested by UNODC's Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation.
- Reinforce requirements for Courts to consider financial bail and other alternatives to detention in pre-trial phase (see also UNODC report recommendations).

Other revisions to prevent arbitrary and illegal detention

- Include a provision in the draft Criminal Procedure Code on the right not to testify against one's self to augment the right to remain silent;
- Add provisions in the draft Criminal Procedure Code, Police Law, and other relevant laws to explicitly prohibit detention designed to coercively extract information.
- Strengthen provisions in the draft Criminal Procedure Code on the right to have a defense counsel present during interrogation, hearings and other investigations including the obligation of police, prosecutors, and judges to inform the detainee at the commencement of any proceeding/interrogation.

Identifying and remedying arbitrary and illegal detention (pre-trial and post-sentencing)

- Review and strengthen provisions for alternatives to imprisonment in line with the recommendations of UNODC's Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation.
- Integrate into the law clearer, stronger and more specific provisions on detainees' right to be released if (a) evidence no longer supports grounds for detention, (b) detention-related procedures, including time limes, have been breached. Specifically,
 - o amend the Police Law so as to include a provision explicitly authorizing the police to release those they arrest on their own initiative if evidence is not found to support suspicion;
 - o include provisions in the draft Criminal Procedure Code to clarify that detainees should be released immediately when these conditions occur; and
 - o clarify Article 20(4) of the Law on Prisons and Detention Centers so that MoJ must release when any pre-trial time limit is breached, after due notification to Courts, AGO and defense counsel.
- Clearly establish in the law which institution, and by which procedure, arbitrary detentions should be addressed, including how to address court ordered releases which are routinely ignored.
- Require each institution (MoI, MoJ, AGO, Courts) to establish an internal oversight mechanism that has the authority to take necessary action to prevent and remedy arbitrary detentions, including provide information to initiate a criminal investigation. An annual public report of the internal oversight mechanisms should be submitted to the Parliament.
- Add provisions to relevant laws to protect those who identify arbitrary detentions and release

arbitrary detainees legally from reprimand or unfounded disciplinary actions.

Provisions on criminal acts

- Define arbitrary detention as a criminal act;
- Define in the Penal Code and/or other relevant laws the crime of rape and trafficking of human beings as a crime of the perpetrator and not of the victim;

RECOMMENDATION 2

Clarify and strengthen oversight and accountability

Inter-institutional oversight mechanisms

- The Cabinet and Supreme Court are urged to establish an inter-institutional oversight mechanism to address cases of prolonged arbitrary detention that were not resolved at the district or provincial levels.

Before doing so, it is recommended that:

- o the Cabinet, in consultation with the Supreme Court, clarify the mandate, scope and authority of the Supreme Council on Prisons and of district and provincial level committees overseeing the administration of MoJ detention centers, all of which were created in the Law on Detention Centers and Prisons. Specifically, it should be clarified whether these mechanisms can identify and/or release arbitrary detainees.
- o the MoJ, Mol and AGO clarify the authority and process for resolving arbitrary detentions in Mol facilities of cases in which detainees should have been transferred to MoJ facilities.
- Until the above is clarified and a more permanent inter-agency oversight mechanism established,
 - o The MoJ, AGO, and Mol are strongly encouraged to immediately and jointly request all detention centers, prosecutors and police in each province to compile a consolidated status report on all detainees and prisoners in Mol and MoJ facilities in the province within a month, and, when possible, take appropriate remedial action.
 - In these reports, all potential arbitrary detentions should be flagged and any follow-up action or obstacles to resolution indicated.
 - The report should be submitted to the MoJ's Head of Prisons, Mol's Head of Human Rights and Deputy Attorney General for monitoring and appropriate referrals for action should be made.
 - The consolidated status report should be submitted on a quarterly basis until another mechanism is established.
 - o The Supreme Court is strongly encouraged to request district and provincial Courts to identify any cases pending longer than legal time limits within 1 month, and that subsequent reports be submitted quarterly. It also is strongly encouraged that the Supreme Court request that the relevant court, including the Supreme Court, prioritize in its docket

these cases and those identified in the provincial consolidated status reports. It is also recommended that the Supreme Court conduct an inventory of its case load and prioritize cases accordingly.

Strengthen internal oversight mechanisms

- It is strongly recommended that each institution (Mol, MoJ, AGO, Supreme Court) assess internal oversight mechanisms that are established and assess their effectiveness at identifying, resolving and preventing arbitrary detention by May 2009 and, based on these assessments, by July 2009, develop a plan to strengthen these mechanisms. In particular, it is recommended that the effectiveness of the Mol's Human Rights Officers and the AGO's monitoring prosecutors should be examined as well as the Supreme Court's oversight capacity.
- Mol, MoJ, and AGO are strongly urged to task their respective internal mechanisms monitoring detention (Human Rights Officers, detention center heads, and monitoring prosecutors, respectively) to increase frequency of monitoring and reporting at least every 2 weeks given the tight legal time limits.
- As called for in the NJSS, it is recommended that codes of ethics and professional standards be developed and enforced in Mol, MoJ, AGO and the judiciary.

RECOMMENDATION 3

Work to improve coordination across institutions at the district, provincial and national level

- It is strongly recommended that the Supreme Court, Mol, MoJ Head of Prisons and Detention Centers, and AGO agree upon a Standard Operating Procedure (SoP) for coordination related to detention issues at the district, provincial and national levels as soon as possible. The procedure should include protocols on transfer of files between institutions, actions to be taken when files are incomplete or missing, and the procedure to follow when time lines are about to be breached.
- It is encouraged that projects included in the NJP which are intended to improve information management systems and to enable better coordination between institutions at the district, provincial and national level are implemented without delay by the relevant Afghan institutions, and strongly supported by the donor community and the UN. This includes exploring the viability of the case management system currently being piloted by the US Department of State's Justice Sector Support Program (JSSP) and Corrections Sector Support Program (CSSP).
- Mol and MoJ, with international donor and advisory support, are strongly urged to begin work to develop inter-jurisdictional tracking mechanisms.

RECOMMENDATION 4

Adjust training and capacity-building initiatives to account for differing concepts of justice and need to develop better tools

It is strongly recommended that police, prosecutorial and judicial training and capacity-building programs

run by the international implementing partners, such as JSSP, CSSP, UNODC, EUPOL, and Afghan organizations like AIHRC or the government institutions themselves, be augmented and more targeted so that authorities gain a better understanding of, amongst other issues:

- the concepts of justice underlying the formal justice system, and their compatibility with those in the informal justice,
- the role and function of detention and the rights they are responsible to respect and protect;
- the role and function of defense counsel;
- women's right to equal protection of the law and authorities' obligation to protect this right and the role of Mol Family Response Units and MoWA at the local level;
- the function and content of procedural rights in relation to detention;
- alternative investigation and interrogation techniques to detention;
- definition of arbitrary detention, and the remedies available;
- SOPs on coordination and implementation of the law; and
- internal oversight mechanisms.

These practical human rights components need to be more prominent in standard and advanced training of the police, prosecutors, judges, and staff of detention facilities.

Law faculties are strongly encouraged to integrate these subjects into legal education. Law faculties also are urged to integrate education and training of detention and detainees rights.

Legislative support programs are urged to work with justice sector support programs to develop training for legislators and their staff who sit on relevant committees in both the Meshrano jirga and the Wolesi jirga. The training programme should cover these subjects but be modified to include legislative requirements and the Parliament's oversight responsibilities.

RECOMMENDATION 5

Launch a nation-wide awareness raising campaign for the general public and detainee and prisoners on detention-related rights

It is strongly recommended that the national public awareness campaign called for in the NJSS include a campaign on detention-related rights targeted both at both current detainees and prisoners and the general public. The MoJ, Mol, AGO, and the Supreme Court in cooperation with AIHRC and other partners, such as UNDP and JSSP, are urged to support such a campaign.

Awareness-raising tools such as MoJ's pamphlet for female detainees on their rights, which is supported by UNODC and UNIFEM are urged to be strongly supported and developed. Police stations, detention centers and prosecutor offices should seek to have information materials such as this on hand and on display.

RECOMMENDATION 6

Promote and support the education and training of defense counsel, a national legal aid scheme and the creation and deployment of paralegals into districts and provinces in need

It is strongly recommended that the MoJ's Legal Aid Unit continue to develop a national legal aid system as called for under the NJSS and NJP.

- Paralegals. The paralegal system in Afghanistan should be a priority for the MoJ Legal Aid Unit, the Independent Bar Association and justice sector donors. The following is strongly encouraged:
 - o New regulations creating paralegals within the Afghan legal system should be supported both politically and financially by the GoA and donors.
 - o The MoJ in cooperation with the Independent Bar Association, with the support of donors, should develop a program to expedite training and to deploy paralegals into each province, and, when possible, into district centers. The paralegals should be mandated to provide advice to detainees and their families on their rights and the criminal procedure. (Under the Advocate's Law only a registered defense counsel or relative can represent a detainee). Areas not served by legal aid organizations should be prioritized.
- Increasing numbers of defense counsel and legal assistance. Efforts to increase numbers of defense counsels need to be prioritized.
 - o The Independent Bar Association should strictly implement its requirement that lawyers registered handle at least 2 legal aid cases each year.
 - o The MoJ's Legal Aid Unit should design incentives for those who choose to become defense counsel, particularly in remote areas. Donors should support such actions.

RECOMMENDATION 7

Allocate the necessary budgetary and other resources to implement initiatives

Donors are strongly urged to make the funding promised under the NJSS and NJP for detention-related initiatives available as soon as possible. The Parliament and Ministry of Finance also is urged to ensure that once funding is received it is allocated and dispersed promptly.

For the GoA and judiciary to successfully begin to combat arbitrary detention and reduce detention center overcrowding, the following areas require funding:

- salaries and benefits to retain a sufficient number of qualified judges, prosecutors, police, detention center officials and court administrators;
- training and capacity-building of these officials;
- national public awareness campaign;
- to operate the necessary oversight mechanisms.

RECOMMENDATION 8

Discipline and prosecute violators

The Mol, MoJ, AGO and Supreme Court are urged to discipline swiftly appropriately officials at all levels and any other person who fail to respect detainees' rights, legal time limits, and other regulatory and legal standards. Such discipline includes prosecution when criminal provisions are violated. A confidential mechanism also should be put in place which enables prosecutors, judges, defense counsel, relatives of detainees or other individuals to report cases of possible arbitrary detentions with confidence that the allegations will be appropriately investigated.

I. Overview

A. Introduction

- ▶ *The police suspected Mohamed's son of murdering a village elder. They arrested Mohamed because they cannot find his son.*
- ▶ *In 2000, a man was convicted of murder and sentenced to 3 years in prison. No one can find his case file so he is still in prison 5 years after his sentence expired.*
- ▶ *A girl was accused of having sex with a male cousin outside of marriage. She was arrested 2 months ago but the prosecutor has still not issued the indictment. The prosecutor's deadline to file the indictment passed 1 month ago. The girl is still in detention.*
- ▶ *A man disagreed with the Provincial Governor. The Provincial Governor ordered the Provincial Chief of Police to throw the man in the police lock-up to 'teach him a lesson'.*

These are examples of Afghans being detained arbitrarily. These arrests and detentions either:

- a. have no valid legal basis;
- b. are intended to deny the detainee the exercise of the fundamental rights guaranteed by either Afghanistan's constitution or international law; or
- c. occur in such a manner that essential procedural guarantees are not observed so that the arrest and detention becomes arbitrary, even if it was legal originally.¹

The Afghanistan Constitution prohibits such abuses of power.² It authorizes detention only when detention is in line with the law, is necessary and is reasonable and when all due process standards are followed.

These basic rules and standards are required because detaining an individual is one of the most coercive and potentially harmful powers that the Afghan State possesses.

Any detention by the State places a detainee's life effectively 'on hold', and creates hardship for the detainee's family. Detaining someone denies a person the full enjoyment of a number of rights, such as the rights to family life, and to earn a livelihood (on which family members may be dependent). In many instances, detention also risks exposing detainees, and eventually their families, to disease and other health problems.³

Necessity to prevent arbitrary detention

When the State arbitrarily detains people it is of grave concern. Arbitrary detentions deprive detainees of their dignity and access to justice. Arbitrary detentions in many instances lead to violations of other rights, such as the prohibition against inhuman or degrading treatment or torture, and enforced disappearances (when someone effectively 'disappears' while in Government custody). Arbitrary detentions, moreover, can infringe rights of a detainee's family by creating avoidable economic or social hardships for them.

Arbitrary detentions persist in Afghanistan

Unfortunately, in Afghanistan arbitrary detentions continue to occur with disturbing regularity at the district, provincial and central levels. Cases in which police, prosecutors, Courts and detention centers arbitrarily detain individuals have been identified with

disturbing frequency. In Afghanistan, arbitrary detention is not isolated to one geographical area or type of criminal charge, nor does it occur only in relation to criminal issues.

Most arbitrary detentions in Afghanistan can be attributed in part to weaknesses in the legal and regulatory framework and in institutional direction and oversight. Some are the result of ignorance of the law or a presumption of guilt. Some arbitrary detentions result from the absence of procedural protections, while others result from blatant abuse of power. Still others are caused by the detaining authorities' misperceptions and misunderstandings of law, practices and procedures that go uncorrected.

Efforts to combat arbitrary detentions have been generally ineffective to date

Yet, arbitrary detentions persist despite ongoing efforts to combat them, including education, regulation, police reform, and anti-corruption campaigns.

The inability to effectively combat arbitrary detention erodes Afghans' confidence in their Government and undermines efforts to instill the rule of law, promote good governance and protect human rights. It also exacerbates overcrowding in Afghanistan's detention system and strains already limited resources, which further places in jeopardy the dignity and access to justice of all detainees.

More robust measures therefore are needed to combat arbitrary detentions.

Commitments to develop effective measures to combat arbitrary detention

The Government of Afghanistan (GoA) recognizes the need to combat arbitrary detentions. In both the Afghanistan National Development Strategy

(ANDS) and the Afghanistan Compact, the GoA calls for real progress in combating arbitrary detention.⁴ In the Afghanistan Compact, the GoA committed by 2010 to "adopt corrective measures" designed to prevent arbitrary detention.⁵ The National Justice Sector Strategy (NJSS) of the ANDS and the National Justice Programme (NJP) laid out a multi-faceted strategy to improve access to quality justice services and to reduce arbitrary detention by 2012. The UN has the responsibility to help the GoA develop these measures⁶ and to track their effectiveness.⁷

B. Purpose of the report

In consideration of the GoA's commitments to address the problem of arbitrary detention, UNAMA's Human Rights Unit prepared this report as a tool to help the GoA, the judiciary and their partners develop and enhance policies, laws, regulations and operational procedures that will help prevent and reverse practices that lead to arbitrary detentions. It assumes that the GoA, the judiciary and their partners recognize that arbitrary detention requires urgent and concerted action.

C. Structure and scope of the report

The report draws upon more than 2,000 detention cases that were monitored by UNAMA's Human Rights Team and the Afghanistan Independent Human Rights Commission (AIHRC) between November 2006 and July 2008. It:

1. describes the main types of arbitrary detention occurring in Afghanistan;
2. explores why arbitrary detention persists (root causes); and, based on this analysis,
3. proposes recommendations on

how to improve efforts to combat arbitrary detention.

It focuses on arbitrary detentions during both the pre-trial and post-sentencing phases⁸ that occur within district- and provincial-level Ministry of Interior (Mol) and Ministry of Justice (MoJ) facilities (police lock-ups and detention centers, respectively). This focus was chosen in part because detentions in Mol and MoJ facilities constitute the vast majority of detentions in Afghanistan. For example, as of December 2008, approximately 12,500 people were held in MoJ facilities throughout the country.

The report does not examine detentions by the National Directorate of Security (NDS) or those linked with international military forces (IMF). While these detentions are of concern, NDS and IMF-linked detentions have been extensively reported on publicly, unlike Mol and MoJ detentions.⁹ In addition, systematic data on NDS and IMF-linked detentions is not available for the monitoring period because neither NDS nor IMF allowed UNAMA or its partners unconditional access to their detention facilities.

D. Methodology

This report is based on monitoring and research of detention in Mol and MoJ facilities undertaken between November 2006 and July 2008 by UNAMA's Human Rights Team, with the cooperation of the AIHRC. All safely accessible districts and provinces were covered.¹⁰ The monitoring and research was initiated after consultation and agreement with the Mol, MoJ, Attorney General's Office (AGO), and the Supreme

Court and was conducted in three phases.

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 Mol and MoJ detention facilities.¹¹ When possible, the information gathered at the detention center was cross-checked through interviews with prosecutors and examination of court files.¹² 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.

II. Defining Arbitrary Detention in Afghanistan

A. International Human Rights Law

According to the UN Human Rights Committee, arbitrary detentions are not simply detentions that are 'against the law'. Rather, arbitrary detentions are detentions that are carried out by the State (in this case, the GoA) and "include[s] **elements of inappropriateness, injustice, lack of predictability and due process of law....**"¹³

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.¹⁴

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.

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 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).¹⁵ Other treaties to which Afghanistan is a State party also prohibit arbitrary detention, and generally support the UN Working Group's definition.¹⁶

B. Afghan law

Afghanistan's Constitution unambiguously prohibits arbitrary and unlawful detention. It

broadly endorses the UN Working Group's definition and largely reflects the general principles laid out in Article 9(1) of the ICCPR that to deprive an individual of liberty, the grounds must be provided in the law and in accordance with legally established procedures.

Liberty, the Afghanistan Constitution explains, "is the natural right of human beings" which the State must "respect and protect".¹⁷ The Constitution stipulates that a person's liberty can be restricted if his/her liberty is "affecting others' freedoms as well as the public interest"¹⁸ and only when "regulated by law".¹⁹ No one, the Constitution continues, can be detained "without due process of law."²⁰

Other laws of Afghanistan reflect these Constitutional guarantees and define the grounds and procedures for legal detention. These laws include:²¹

- Grounds:
 - o Penal Code 1976²²
- Procedures:

- o Interim Criminal Procedure Code (ICPC)(generalproceduralframework, under revision);²³
- o Police Law (detailing standards for police practice);²⁴
- o Criminal Procedure Law 1965, amended 1974;²⁵
- o Law on Organization and Structure of Courts;²⁶
- o Law on Detention Centers and Prisons (which reinforces the ICPC and details the procedure to monitor legality and conditions of detention);²⁷ and
- o Law on Advocates (expands upon the right to defense counsel).²⁸

C. Using the definition

Afghan law is generally in accordance with the definition of arbitrary detention established by the UN Working Group on Arbitrary Detention. Accordingly, the UN Working Group's definition (Categories A, B and C) will be used to structure analysis contained in this report of the types of arbitrary detention occurring in Afghanistan.

III. Types of Arbitrary Detention in Afghanistan

A. Lack of legal basis for detention (Category A)

Afghans are still being arbitrarily detained without legal basis or grounds. The following details the general patterns in relation to these types of arbitrary detentions which were identified during monitoring.

1. For civil law related disputes for which the law does not authorize detention

Monitoring found that, while less frequent than a few years ago, Afghans still may be detained for breaches of civil law or contractual obligations for which detention is not permitted under applicable law.²⁹ Monitoring shows that these types of arbitrary detentions generally involve:

- ▶ housing, land and property disputes,
- ▶ arguments over debt, normally with the detaining authority supporting the lender in securing payment of the debt;³⁰ and
- ▶ family disputes, including over marriage (these also generally fall under breaches of Shari'a and customary or social practices).

For example, in Sher-i-bezurg district of Badakhshan province, police detained 3 men over a land dispute from 7 to 12 September 2007. In 2007, in Rodat district of Nangarhar province, police 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 East, 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.

2. For deeds not established as crimes in the law³¹

Individuals may be arbitrarily detained under the criminal procedure for deeds that do not constitute crimes under Afghan law. These types of arbitrary detentions include detentions:

- ▶ for breaches of customary law or Shari'a;³²
- ▶ resulting from misapplication of the law to criminalize an individual.

a. For breaches of customary law or Shari'a

This type of arbitrary detention disproportionately affects women and girls. Monitoring generally confirmed the findings of UNIFEM, UNODC³³ and the Ministry of Women's Affairs (MoWA) that a significant number of detainees, particularly female detainees, are detained for having allegedly committed a breach of customary law or Shari'a or 'moral crimes' (UNODC found this was the case for approximately 50% of women in detention.³⁴)

- **Running away.** In particular, 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 in the Penal Code.³⁵ Many such detentions were identified in Parwan and Kapisa, as well as in Herat, Kunduz, Baghlan, Jawzjan,

and Balkh and most other provinces monitored.³⁶ 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.

- **Improper accompaniment.** 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 not within the Penal Code.³⁷ In Puli-kumri in Baghlan province, a pregnant widow was convicted on 2 April 2007 after being in a room with a male family friend subsequent to her husband's death.

b. Resulting from misapplication of the law to criminalize an individual

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. Thus, these detentions are arbitrary. Some of these arbitrary detentions may fall under Category B (detention to limit a right or freedom guaranteed domestically or internationally) of the UN Working Group on Arbitrary Detention's definition.

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.³⁸

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.³⁹ 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.⁴⁰

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 favor⁴¹), to stifle journalists⁴², and other political ends.

3. As a relative or associate of an accused or suspect⁴³

Another type of arbitrary detention identified during monitoring was detaining relatives or associates of suspects in lieu of the suspect or accused or in order to pressure the suspect or accused to surrender to the authorities.⁴⁴ While such detentions normally are of close relatives, there is no discernible pattern for what criminal offense these detentions occur.

When these detentions occur, they tend to be undertaken on the police's initiative or at the request of the prosecutor. 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 2005.⁴⁵ 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.⁴⁶

In rare cases, the Courts have convicted relatives in place of the accused. 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.

B. It is unclear whether Afghans are detained to deny the exercise of fundamental rights guaranteed in Afghanistan's law, though there are indications this may be occurring, particularly in relation to freedom of expression and women's rights (Category B)

The monitoring conducted was not designed to identify or track detentions that are intended to deny the exercise of fundamental rights. There are indications, however, that some arbitrary detentions in Afghanistan may fall into this category, particularly in relation to freedom of expression and the rights of women.

Since late 2007, there has been increasing concern about arbitrary limitations on freedom of expression, particularly of journalists. Detention appears to have been a tool to deny the exercise of freedom of expression in cases in Baghlan, Mazar-i-sharif, Herat, and Kabul.⁴⁷

Detentions of women for ‘running away’ and ‘Khelwat-e-sahiha’ could also be interpreted as detentions intended to deny these women their rights to association, marriage and to be free from cruel, inhuman and degrading treatment [linked with domestic violence].

However, it is difficult to disentangle intent to deny exercise of fundamental rights from political motivations and religious and social practices in most of the possible cases of such arbitrary detentions. It is, therefore, hard to state with confidence that these cases fall under Category B. Still, it should be recognized that the possibilities for such arbitrary detentions exist and are increasingly possible in relation to those attempting to exercise their rights of freedom of expression or association during the upcoming election cycles.

C. Afghans are detained without enjoying essential procedural protections, rendering most, if not all, detentions arbitrary (Category C)

Monitoring found that most, if not all, detentions in Afghanistan could be classified as ‘Category C’ because many essential procedural protections against arbitrary detentions are either not present in the law or, if provided for in the law, not functioning effectively.

Essential procedural protections

The ICCPR outlines procedural protections essential to prevent arbitrary detentions in Articles 9 and 14(3). They include:

- Detainees are to be promptly informed of the reasons for detention and/or arrest and any charges against them;⁴⁸

- If criminal, detainees are to be promptly brought before a judge or other judicial officer;⁴⁹
- All detainees are able to challenge the legality of arrest and detention before a court and to receive a decision on their legality without delay;⁵⁰
- Detainees are to be informed promptly of their rights and effectively able to realize them, including:
 - o 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;⁵¹
 - o Right to defense counsel or to carry out one’s own defense and the time and facilities to present a defense;⁵²
- Detainees have a fair trial in relation to the charges against them within a reasonable time and without delay, failing which they should be released;⁵³
- Prisoners must be released at the end of a court-ordered sentence.⁵⁴

All these procedural guarantees, moreover, 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.⁵⁵

Monitoring, however, shows that not all procedural protections are established in the law nor are most of those provided in the law operating properly.

1. Right to be brought promptly before a judge or to be able to challenge detention before a Court:

Afghan law does not grant Afghans the rights:

- to be brought promptly before a judge⁵⁶ for an initial and then periodic review of the lawfulness of pre-trial detention,⁵⁷ or
- to challenge the lawfulness of his/her detention and have a decision on this made by a court without delay.

Nor does it ensure these rights are effectively available. To be effectively available, reviewing the lawfulness of detention and its effects must be “real and not merely formal.”⁵⁸ 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 the legality of the detention. Second, to be effectively available, detainees must be able to access the Courts to challenge his/her detention. Holding a person incommunicado,⁵⁹ meaning detaining a person without permitting access to legal representation,⁶⁰ or not permitting detainees to challenge their detention before the Courts,⁶¹ or breaching statutory time limits means these protections are not effectively available and generally renders the detention arbitrary.

Afghan law:

- Places control of detention under the prosecutor not the Court.* Afghan law generally vests the prosecutor with the authority to determine the lawfulness of detention and to release detainees.⁶² International law, however, strongly suggests that the authority reviewing the legality must be independent, impartial and objective in relation to the issues. The UN Human Rights Committee has stated its opinion that

only the Court meets these criteria.⁶³ The prosecutor, normally the party requesting pre-trial detention, and the Ministry of Justice for protective detentions do not have the institutional objectivity and impartiality necessary to act as the legitimate decision-making organ.⁶⁴ 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. Judicial authority in Afghanistan is vested solely with the judiciary.

- Does not provide for a prompt or periodic review of the legality of detention by a Court:* The primary prosecutor is responsible for confirming the actions of the police in an arrest within 72 hours (3 days). While the prosecutor’s review of detention falls within the meaning of prompt,⁶⁵ it is not compliant with international standard because legality is not assessed by a Court. Afghan law does not require the lawfulness of arrest and detention be assessed by the court until the first hearing is convened, up to 3 months after arrest (Article 6 and 53(2)(b), ICPC).⁶⁶

A periodic review of detention by a court during the pre-trial period also is not required by Afghan law. The UN Human Rights Committee, however, has stated that only one review of the legality of detention at the beginning of detention is insufficient. Over time, the character of detention may change from lawful to arbitrary. The Court, therefore, should review detention at reasonable, regular intervals, until judgment is rendered or the detainee released.⁶⁷

- Does not clearly 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 provide procedurally for it.⁶⁸

- d. *Does not require that the detainee is present during detention related proceedings.* Article 9, ICCPR, stipulates that the detainee must be present when the Court assesses the lawfulness of his/her detention.⁶⁹ This is to enable the detainee to address the arguments of the prosecutor or detaining authority.⁷⁰ Yet, in Afghanistan, the detainee or his/her representative is not present or permitted to challenge the decision either when the prosecutor confirms the legality of detention at 72 hours or when the Court determines whether to extend the time for indictment at 15 days after arrest.⁷¹
- e. *Does not provide sufficient guidance to ensure a review of the legality of detention is effectively available within* the meaning of both the Constitution and international law.

To be legal, a detention must not simply have a legal basis; it also must be necessary and reasonable (and substantiated as such⁷²). Such an assessment should generally follow the principle that pre-trial detention not be the general rule, which is supported in the Afghanistan Constitution⁷³ and stipulated in the ICCPR.⁷⁴

Though the Afghanistan Constitution has defined detention as being reasonable and necessary when it is to protect others freedoms and the public interest,⁷⁵ the law does not provide clear procedures or criteria upon which to assess when these criteria are met but only provides basic guidance.⁷⁶ It also generally does not promote the principle of minimizing pre-trial detentions where possible.

- There is no instruction, for instance, that detention on suspicion of a criminal offense must be based on a reasonable suspicion that the detainee committed the offence.⁷⁷
- Some guidance present in the law also undermines protection of other rights. For example, the instruction that pre-trial detention is to strictly confine pre-trial detention to that necessary for “collecting evidence and establishing the truth”⁷⁸ opens the door to use of detention to coerce information, including forced confessions, which would violate a detainee’s rights and possibly render the detention arbitrary.
- Alternatives in the form of bail and other guarantees are insufficient and, when provided, can be applied in limited circumstances.⁷⁹

Monitoring showed, moreover, that regular assessments of reasonableness or necessity or consideration of non-custodial alternatives by the Court or prosecutor 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. These findings indicate that more explicit guidance is needed in the law.

Given these gaps in legal protection, many arrests and detentions in Afghanistan that may have been initially lawful may gain an arbitrary character, such as pre-indictment detentions that have continued well-beyond the time limit laid out in the ICPC. Many detentions that are arbitrary initially, such as those discussed above, are allowed to persist. The practical result is that detention

is the general rule and detention centers are overcrowded with a significant number of persons whose detentions do not appear to be justifiable as lawful, reasonable or necessary, particularly in the pre-trial phase.

Yet, it should be noted that even if these opportunities were available in the law, they would not be effectively available as other factors would hamper their use. These factors include: (a) detainees being unaware of their rights to challenge the legality of detention, to defense counsel or to conduct their own defense; (b) insufficient access to effective defense counsel and to the information necessary to challenge detention; as well as (c) the court's frequent reticence towards active defense counsels. Another indicator that these rights would not be effectively available even if they were guaranteed is the frequent failure of police⁸⁰ and prosecutors⁸¹ to respect existing time limits and procedures to control the legality of detention.

2. Right to a trial within reasonable time or be released and to be released at end of sentence: generally not respected

The protections in place to ensure that detainees enjoy their right to a fair trial without delay and within a reasonable time or be released are regularly breached, as is the right to be released at the end of a Court-ordered sentence, or other Court-ordered releases. These frequent breaches render arbitrary a significant portion of all detentions, if not a majority of pre-trial detentions.

Pre-trial detention: consistent breaches of timelines

Monitoring vividly illustrated that at least one pre-trial detention time limit laid out in the ICPC

was breached for the vast majority of detainees interviewed, rendering most of the detentions monitored arbitrary as they no longer had a basis in law. The time lines being breached represent Afghanistan's interpretation of what constitutes 'without delay' and 'within a reasonable time' for the trial process of a detainee and are required by Afghanistan's Constitution.⁸²

A significant number of detainees were in detention 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 the 5-month timeframe.⁸³ These delays all too often stretched into years. For instance, in Kabul in late 2007, detainees were found to have waited more than 6 years for a verdict from the Supreme Court. Monitoring also pointed to longer and more consistent delays in the Appeals Courts rendering a verdict, (which has 2 months from the announcement of the original verdict),⁸⁴ than those in Primary Courts (which has 2 months from the filing of the indictment to issue a verdict). Still, the delays at the Primary Court level were consistent. For example, the 2-month timeframe was breached for every relevant case monitored during the first monitoring phase from Kabul, Kapisa, Parwan, Logar, Panjshir, and Wardak provinces.⁸⁵ Delays in the Courts sometimes meant that detainees' time in detention was greater than the sentence given or legally allowed for the offense.

Another disturbing finding was that a number of detainees had been exonerated or acquitted of the charges against them but nevertheless 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 five women who had been cleared of accusations upon investigation (i.e. not indicted) because they did not have a guarantor. In Kabul, in July 2007, 19 prisoners were not released because they could not provide a guarantor or pay a financial guarantee.

Post-sentencing detention: failure to release upon completion of sentence.

Throughout Afghanistan, MoJ detention center authorities did not necessarily release prisoners who had completed their legally mandated sentence⁸⁶ or those who were granted an early release by Presidential Decree.⁸⁷ MoJ detention center officials and prisoners explained to monitors that many prisoners were not being released despite their sentences expiring because they could not produce a guarantor or financial guarantor.⁸⁸ The Supreme Court High Council has rejected such conditionality for release as a violation of Article 27 of the Constitution.⁸⁹

3. Other procedural guarantees: generally disrespected—particularly of defense counsel

Monitoring showed that police, prosecutors and judges persistently and consistently do not respect, or at times are not aware of, procedural rights, even when explicitly provided for in Afghan law.⁹⁰

Right to defense counsel or put on own defense

Afghans generally are not informed of their right to a defense counsel or to present their own defense, nor do they generally enjoy access to defense counsel or the ability to present their own defense.⁹¹

The vast majority of detainees did not enjoy access to defense counsel. In none of the cases monitored had a detainee enjoyed defense counsel from the time of arrest through trial.⁹² During the first phase of monitoring, it was found that of 931 interviewees, 82.5% 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.⁹³ Monitoring also found that once defense counsel are engaged, they may be intimidated into dropping cases by high ranking officials and government entities such as NDS.

Right to not testify against oneself, including right to remain silent

Police, prosecutors and judges also do not appear to consistently respect the right to not testify against oneself. Consequently, pre-trial detention is sometimes used as an interrogation tool rather than as a protective or preventative mechanism. Forced 'confessions' were regularly reported during monitoring—approximately 165 interviewees (15%) in the first monitoring phase with cases reported throughout the monitoring period.⁹⁴ 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.⁹⁵ Additionally, it appears that the Courts also are not consistently upholding these rights nor have they disqualified evidence obtained by coercion, thereby casting doubt on the veracity of a charge or conviction.

Right to be informed of the reasons for detention at the time of arrest and to be promptly informed of any charges

A notable exception to the patterns identified

is the right to be informed of the reasons for detention at the time of arrest and to be informed promptly of any charges. Generally, detainees knew the reasons they were detained and the charges, if any, against them. 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.

Still, monitoring clearly found that police, prosecutors, and, to some extent, judges did not consistently inform detainees of their rights. Some prosecutors told monitors that they intentionally do not do so because they believe these rights hamper investigations.⁹⁶

Overall, monitoring found that the absence of adequate procedural protection renders the legality of most detentions questionable. 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 mechanism that prevents many arbitrary detentions and mitigates other 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.

4. Root causes of patterns identified

ROOT CAUSE 1:

Competing concepts of justice

There are competing concepts of justice being applied in Afghanistan's formal justice system: those underlying the formal justice system and those embedded in Afghanistan's informal justice systems, and customary and religious practices. This is not unexpected, as Afghanistan's formal criminal justice system, and the international standards that help define how it functions, are relatively new compared to Afghanistan's informal justice system, and customary and religious practices. Consequently, a large number of Afghans, including those comprising the formal criminal justice system, do not necessarily know or understand the formal justice system and its standards.

The problem is that while some concepts of justice derived from the informal justice system and customary and religious practices reinforce those in the formal justice system, there are some that do not comply with those laid out in Afghanistan's Constitution or international law. The application of these problematic concepts within the formal justice system many times imperils Afghan's dignity and access to justice and results in arbitrary detentions and other rights violations. In the process, it undermines the integrity of the formal justice system and the rule of law.

In order to develop effective corrective measures, the difference between these concepts of justice needs to be recognized and addressed through adjustments to policy, law, procedures, training and awareness-raising.

The rest of this section highlights some of the key areas of difference between the concepts of justice underlying the formal justice system and those embedded in Afghanistan's informal justice systems, and customary and religious practices

Presumption of guilt

Of most concern is the pervasive presumption of guilt by detaining authorities (police, prosecutor, judges)⁹⁷ throughout Afghanistan's which was identified during monitoring.⁹⁸ The presumption of guilt creates the conceptual foundation for many arbitrary detentions in Afghanistan. Presuming guilt prejudices the criminal justice system towards detaining the accused pre-trial, corrodes respect for the detainees' rights, and renders ineffective many procedural protections. It is compounded by a general attitude that those guilty of crimes, even after having completed their sentence, are not entitled to dignity and justice.

Taken together, these factors result in judges being hostile towards detainees' right to defense counsel and to present a defense, helps justify coerced confessions, and leads to failures to release at the expiration of time limits or acquittal. It also diminishes the likelihood that alternatives to detention or alternative sentencing will be considered and may help account for failures to release prisoners at the end of their sentences without guarantees.

Different understanding of function and purpose of detention and related procedural protections

Many police, prosecutors and judges have a different understanding of the function of detention and related procedural protections

than that used in the formal justice system's legal framework. Under the formal justice system and international standards, pre-trial detention generally is a mechanism to prevent further harm to others' rights or evidence, flight of the suspect or accused, or reoccurrence of the crime and is to be minimized in light of the presumption of innocence. Currently in Afghanistan where guilt is presumed, however, pre-trial detention is largely used as an interrogation tool and as a way to punish the accused. For those convicted, detention is seen purely as punishment, and not rehabilitative so as to prevent further criminal activity upon release. (see Art 10(3) ICCPR)

Procedural protections generally are not functional because they are frequently viewed as unnecessary, or hindrances to investigations and convictions, rather than as protections against injustices, such as prolonged detention of innocent people. UNAMA has found that police, prosecutors, and judges who are aware of detainees' rights on many occasions willfully choose to ignore the detainees' rights in pursuit of a confession, indictment, or conviction. As explanation they assert that 'human rights hinder their work'.

Lack of tradition of and hostility to defense counsel

Engaging a defense counsel is a relatively new concept in Afghanistan. Monitoring also exposed that engaging defense counsel is seen as a sign of guilt, rather than a critical protection against abuse of power and arbitrary detention. Many detainees, for example, expressed to monitors the view that they did not need to engage defense counsel because they were not guilty of anything. Coupled with the presumption of guilt, this lack of familiarity with the function and purpose of defense counsels appears to create hostility toward the right to defense counsel by the police, prosecutors and Courts, as demonstrated by the

consistent failure to inform detainees of their rights to defense counsel and limitations placed on defense attorney's access to investigation, proceedings, and documents. The Justices of the Supreme Court, while officially reaffirming the right of defense counsel to be present during judicial sessions,⁹⁹ also have indicated during discussions that those suspected or accused of certain categories of crimes (mainly those linked with subversive or anti-government activities) should not have access to defense counsel.

Consequently, defense counsel are not able to function effectively or to address arbitrary detentions. Many arbitrary detentions that might have been prevented or stopped continue. This is compounded by the lack of availability of defense counsels in many provinces of the country.

Complex concept of women's rights and access to justice

The competition between concepts of justice in the formal justice system and those in the informal justice system, and customary and religious practices is most intense and problematic in relation to women and girls. Women and girls are frequently detained for 'moral crimes' which are not crimes in the formal justice. They also are detained after being criminalized for being victims of rape or sexual assault. These practices generally reflect the customary and religious practices and concepts of justice related to women and girls.

The low-status of women in Afghanistan within the informal, customary and religious systems is also found in the formal justice system. Women are not fully afforded their rights and are not viewed as equal to men. Many law enforcement and judicial officials operating in the criminal justice system hold this view and this is reflected in their application of the law.¹⁰⁰ As a result, women do not enjoy adequate protection of the law and are arbitrarily detained.

Frequently judges and prosecutors justify these arbitrary detentions by stating that 'moral crimes', such as running away, are crimes, pointing to Article 130 of the Afghanistan Constitution which permits application of Hanafi jurisprudence (i.e. Shari'a) when a gap in the law exists. Alternatively, as discussed above, some authorities interpret provisions in the law to enable them to apply customary and religious precepts of what constitutes a crime (and justice) within the formal criminal justice system. Police often do the same. Family Response Units, designed to help respond to and advocate on behalf of women and girls who are victims of sexual and gender-based violence, have at times returned these victims into the hands of the perpetrators, often the family, on the basis that the victim had dishonored her family by approaching them or from a failure to recognize these acts as constituting a crime.

Patterns found in relation to rape and trafficking cases also are illustrative of this dynamic. There is a general attitude 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.¹⁰¹

Finding solutions

The widespread practice of arbitrary detention cannot be resolved until these conceptual differences are addressed successfully. Of particular importance is changing the presumption of guilt to one of innocence, as is enshrined in Afghanistan's Constitution¹ and laws¹ and in international standards.¹ There also needs to be a change in attitude towards those found guilty. Training, capacity-building and awareness-raising programs to explain these new concepts and their rationale is necessarily along with reinforcement of these concepts through by adjusting law, policy and procedures and by holding those who do not respect these concepts to account.

To change the dynamics related to women, community and religious leaders' backing is necessary as is a clarification about whether **Shari'a** can be applied to criminalize deeds not socially, culturally, or religiously acceptable to some elements of society. More concerted efforts are needed to promote the status of women and their equal rights to dignity and justice. Opening discussion about rape, trafficking and sexual and gender-based violence and their victims, as well as a discussion about what Islam states could be helpful. 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.

ROOT CAUSE 2:

Inadequate legal framework

Arbitrary detentions persist in part because the current legal framework has significant gaps and inconsistencies, with critical areas of ambiguity of which many are mentioned above. These include:

- The lack of clarity about whether certain deeds are crimes, particularly when related to interpretation of Shari'a and customary and religious practices;
- The absence of procedural protections, in particular the right to be brought promptly before a judge for criminal detentions and to challenge the legality of detention before a court for all detentions;
- Insufficient alternatives to detention and imprisonment in the law.¹⁰²

In addition, 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.¹⁰³

The law does not necessarily provide enough direction in light of the current level of legal knowledge and understanding. An illustrative example is that police do not necessarily know that, if they have not notified the prosecutor, they have the authority to release arrested persons on their own initiative within the first 48 hours if they cannot find evidence to support the reason for detention. This gap in knowledge is likely because this authority to release is implied and not written

in the Police Law.¹⁰⁴

Admittedly, the law is not consistently applied. Still, law serves as the foundation on which protections against arbitrary detention are built and it is problematic. Its bias towards detention rather than non-custodial alternatives further reinforces the presumption of guilt present in the system. The law's gaps amplify the system's weaknesses and are deleterious to protecting detainees' rights.

Finding solutions

It is essential to correct and clarify the law to comply with Afghanistan's Constitution, including the ICPC, Penal Code, Law on Prisons and Detention Centers.

ROOT CAUSE 3:

Formal system still developing institutions, knowledge, capacity, and tools

Arbitrary detentions occur in part because the formal justice system is still developing the knowledge, capacity, tools, as well as institutions necessary to protect against arbitrary detention.¹⁰⁵ While its capacity, reach, and legitimacy is growing, the formal justice system struggles to fulfill its obligations, particularly in rural areas. Some remote districts remain without functioning primary Courts or prosecutors. Security issues also create impediments to the administration of justice. Absenteeism of prosecutors and judges, and sometimes police, adds to the problem.

Police, prosecutors and judges have limited, though increasing, technical and legal knowledge. Many prosecutors and judges, as well as defense counsels, do not possess the required legal qualifications. As such, the law on many occasions

is not accurately or fully implemented as it was intended and arbitrary detentions occur.

Afghan police and prosecutors possess limited investigation and interrogation techniques and tools. Consequently, detention is relied upon as a tool to coerce information. Arbitrary and prolonged detentions of accused, suspects, and relatives and associates result.

Afghanistan does not yet have a functioning inter-jurisdiction tracking mechanism, even between districts, or an effective financial bail system or an alternative guarantee system. As a result, judges generally feel compelled to detain even after acquittal so as to prevent flight. While risk of flight is a strong justification for pre-trial detention, mechanisms that help mitigate should be put into place so as to ensure respect of the presumption of innocence and to prevent pre-trial detention from being the general rule. Without such mechanisms, not only do detention centers become overcrowded but detention threatens to become arbitrary.

Inadequate administrative capacity and case management prevents timely handling of investigations and cases, thereby prolonging detention and rendering many detentions arbitrary. At the same time, the absence of consistently functioning cooperation and coordination between and amongst police, prosecutors, Courts and detention centers makes possible arbitrary detention due to administrative oversight.

The absence of effective internal oversight mechanisms in these institutions also perpetuates arbitrary detention. During the monitoring period, prosecutors were not consistently monitoring the detention periods of pre-trial detainees and prisoners to ensure compliance with the law.¹⁰⁶

ANP Human Rights Officers, whose responsibility it is to monitor detention in police lock-ups,¹⁰⁷ do not do so consistently either, nor are they vested with the necessary authority or support to take action on violations.¹⁰⁸ The result is not just continuation of arbitrary detention but an environment that enables abuse of power and corruption that in turn lead to arbitrary detention.

Another factor is that MoJ detention center officials and others who release detainees when time frames expire or have experienced riots in their detention centers because of frustration with breaches of time limits are reprimanded, sometimes by being placed in detention themselves. Detaining authorities therefore are reluctant to release detainees or prisoners who are arbitrarily detained without firm backing from the prosecutors or senior officials, leaving those arbitrarily detained in detention.

These institutional weaknesses must be addressed if a significant proportion of arbitrary detentions are to be prevented.

Finding solutions

Training and capacity building programs need to be adjusted to improve the knowledge and capacity of detaining authorities, including on investigation and interrogation skills. Standard operating procedures (SoPs), regulations and inter-institutional agreements need to be concluded and put into operation at the district, provincial and national level so that coordination is improved and the law is applied appropriately. Other tools, such as a stronger bail/guarantee system and inter-jurisdictional tracking mechanisms, need to be developed. Finally, the culture within institutions must shift so that those authorities which comply with the law are rewarded rather than reprimanded.

ROOT CAUSE 4:**Impunity, corruption and weak accountability**

Fixing the legal framework or strengthening institutions, knowledge and capacity will have limited effect if rampant impunity and corruption are not addressed. The continued ability of power-brokers both inside and outside government institutions to manipulate the criminal justice system for their own ends—including to avoid prosecution themselves—results in and encourages arbitrary detention. Corruption, whether in the form of money, positions, or influence, has infiltrated the criminal justice system. The inability to hold officials or leaders to account for such practices currently and in the past also perpetuates arbitrary detention.

The result is that justice in Afghanistan is not available for all Afghans equally. Many of those who remain in detention, whether arbitrary or legal, are the poor since they lack the financial resources or influence to gain their freedom.

Weak oversight within, and of, the formal criminal justice system and insufficient coordination amongst the key institutions also enable impunity and corruption to persist, as does the tendency to punish or remove those who are diligent in their jobs rather than promote or reward them.

Finding solutions

Until the rule of law is firmly entrenched, extra diligence in the form of strong oversight and accountability mechanisms with an effective enforcement component will be required to prevent arbitrary detention. Firm and unyielding political support from both national leaders and the international community also is a pre-requisite to combating impunity and corruption and improving accountability.

ROOT CAUSE 5:**Incomplete training, capacity-building and awareness-raising programs**

Tremendous efforts have gone into training and capacity-building of police, prosecutors, judges and detention center officials on the formal justice system and the laws comprising it. Yet, as discussed above, authorities frequently do not understand many key concepts, including the function of detention or of procedural protections. This indicates that training and capacity-building initiatives need to be reassessed, as they are not effectively communicating and reinforcing these concepts or the responsibilities of different actors in delivering justice.

Another factor not yet explicitly discussed is the general lack of awareness of Afghans of their rights in the formal justice system. Without such knowledge, Afghans will not be able to claim or demand their rights. Awareness-raising programs to date are largely limited and not coordinated amongst key stakeholders, like the AIHRC and NGOs.

Finding Solutions

A nation-wide, coordinated awareness-raising campaign would be helpful. Such a campaign could include radio programmes, town-hall meetings, theatre performances, and information materials that account for the high illiteracy rate. Awareness-raising tools such as MoJ's pamphlet for female detainees on their rights (which was supported by UNODC and UNIFEM) should continue.

Annex 1: Recommendations by Stakeholder

To the Government of Afghanistan

Recommendation 1

- The MoJ [Taqnin] with advice from the AGO, Mol and Supreme Court, is urged to begin immediately the task of revising the legal framework, including the Penal Code, and continue to revise the draft Criminal Procedure Code so as to prioritize the revisions outlined under Recommendation 1.

Recommendation 2

- The Cabinet is urged to, with the Supreme Court, establish an inter-institutional oversight mechanisms to address cases of prolonged arbitrary detention not able to be resolved at the district or provincial levels. Before doing so,
 - o the Cabinet, in consultation with the Supreme Court, should clarify the mandate, scope and authority of the Supreme Council on Prisons and of district and provincial level committees overseeing the administration of MoJ detention centers, all of which were created in the Law on Detention Centers and Prisons. Specifically, it should be clarified whether these mechanisms can identify and/or release arbitrary detainees.
 - o the MoJ, Mol and AGO clarify the authority and process for resolving arbitrary detentions in Mol facilities of cases in which detainees should have been transferred to MoJ facilities.

- Until the above is clarified and a more permanent inter-agency oversight mechanism identified,
 - o The MoJ, AGO, and Mol are strongly encouraged to immediately and jointly request all detention centers, prosecutors and police in each province to compile a consolidated status report on all detainees and prisoners in Mol and MoJ facilities in the province within a month, and, when possible, take appropriate remedial action.
 - In these reports, all potential arbitrary detentions should be flagged and any follow-up action or obstacles to resolution indicated.
 - The report should be submitted to the MoJ's Head of Prisons, Mol's Head of Human Rights and Deputy Attorney General for monitoring and appropriate referrals for action should be made.
 - The consolidated status report should be submitted on a quarterly basis until another mechanism is established.
- It is strongly recommended that each institution [Mol, MoJ, AGO] assess the effectiveness of their internal oversight mechanism at identifying, resolving and preventing arbitrary detention by April 2009 and, based on these assessments, by June 2009, develop a plan to strengthen these mechanisms. In particular, it is recommended that the effectiveness of

the Mol's Human Rights Officers and the AGO's monitoring prosecutors should be examined as well as the Supreme Court's oversight capacity.

- Mol, MoJ, and AGO are strongly urged to task their respective internal mechanisms monitoring detention (Human Rights Officers, detention center heads, and monitoring prosecutors, respectively) to increase frequency of monitoring and reporting at least every 2 weeks given the tight legal time limits.
- As called for in the NJSS, it is recommended that codes of ethics and professional standards be developed and enforced in Mol, MoJ, and AGO.

Recommendation 3

- It is strongly recommended that Mol, MoJ Head of Prisons and Detention Centers, and AGO, together with the Supreme Court, agree upon a Standard Operating Procedure (SoP) for coordination related to detention issues at the district, provincial and national levels as soon as possible. The procedure should include protocols on transfer of files between institutions, actions to be taken when files are incomplete or missing, and the procedure to follow when time lines are about to be breached.
- It is encouraged that projects included in the NJP which are intended to improve information management systems and to enable better coordination between institutions at the district, provincial and national level are implemented without delay by the relevant Afghan institutions, and strongly supported by the donor community and the UN. This includes exploring the viability of the case management system currently being

piloted by the US Department of State's Justice Sector Support Program (JSSP) and Corrections Sector Support Program (CSSP).

- Mol and MoJ, with international donor and advisory support, are strongly urged to begin work to develop inter-jurisdictional tracking mechanisms.

Recommendation 5

- The MoJ, Mol, AGO, and the Supreme Court in cooperation with AIHRC and other partners, such as UNDP and JSSP, are urged to support the inclusion of a public awareness campaign on detention-related rights targeted both at current detainees and prisoners and the general public in the national public awareness campaign called for in the NJSS.
- Awareness-raising tools, such as MoJ's pamphlet for female detainees on their rights which was supported by UNODC and UNIFEM, are urged to be strongly supported and developed. Police stations, detention centers and prosecutor offices should seek to have information materials such as this on hand and on display.

Recommendation 6

- It is strongly recommended that the MoJ's Legal Aid Unit continue to develop a national legal aid system as called for under the NJSS and NJP.
 - o **Paralegals.** The paralegal system in Afghanistan should be a priority for the MoJ Legal Aid Unit, the Independent Bar Association and justice sector donors. The following is strongly encouraged:
 - New regulations creating

paralegals within the Afghan legal system should be supported both politically and financially by the GoA and donors.

- The MoJ in cooperation with the Independent Bar Association, with the support of donors, should develop a program to expedite training and to deploy paralegals into each province, and, when possible, into district centers. The paralegals should be mandated to provide advice to detainees and their families on their rights and the criminal procedure. (Under the Advocate's Law only a registered defense counsel or relative can represent a detainee). Areas not served by legal aid organizations should be prioritized.
- **Increasing numbers of defense counsel and legal assistance.** Efforts to increase numbers of defense counsels need to be prioritized.
 - The MoJ's Legal Aid Unit should design incentives for those who choose to become defense counsel, particularly in remote areas. Donors should support such actions.

Recommendation 7

- The Parliament and Ministry of Finance also is urged to ensure that once funding is received it is allocated and dispersed promptly.
- For the GoA and judiciary to successfully begin to combat arbitrary detention and reduce detention center overcrowding,

the following areas require funding:

- salaries and benefits to retain a sufficient number of qualified judges, prosecutors, police, detention center officials and court administrators;
- training and capacity-building of these officials;
- national public awareness campaign;
- to operate the necessary oversight mechanisms.

Recommendation 8

- The MoI, MoJ, AGO are urged to discipline swiftly appropriately officials at all levels and any other person who fail to respect detainees' rights, legal time limits, and other regulatory and legal standards. Such discipline includes prosecution when criminal provisions are violated.
- A confidential mechanism also should be put in place which enables prosecutors, judges, defense counsel, relatives of detainees or other individuals to report cases of possible arbitrary detentions with confidence that the allegations will be appropriately investigated.

To the Judiciary of Afghanistan

Recommendation 1

- The Supreme Court is urged to provide advice to the MoJ (Taqnin) so that it can immediately begin to revise the legal framework, including the Penal Code, and continue to revise draft the Criminal Procedure Code so as to prioritize the revisions outlined under Recommendation 1.

Recommendation 2

- The Supreme Court is urged, with the Cabinet, to establish an inter-institutional oversight mechanisms to address cases of prolonged arbitrary detention not able to be resolved at the district or provincial levels. Before doing so,
 - o the Supreme Court is urged to consult with the Cabinet to clarify the mandate, scope and authority of the Supreme Council on Prisons and of district and provincial level committees overseeing the administration of MoJ detention centers, all of which were created in the Law on Detention Centers and Prisons. Specifically, it should be clarified whether these mechanisms can identify and/or release arbitrary detainees.
- Until the above is clarified and a more permanent inter-agency oversight mechanism identified,
 - o The Supreme Court is strongly encouraged to request district and provincial Courts to identify any cases pending longer than legal time limits within a month, with subsequent reports provided on a quarterly basis. It also is strong encouraged that the Supreme Court request that the relevant court, including the Supreme Court, prioritize in its docket these cases and those identified in the provincial consolidated status reports. It is also recommended that the Supreme Court conduct an inventory of its case load and prioritize cases accordingly.
- It is strongly recommended that the Supreme Court assess the effectiveness of their internal oversight mechanism at identifying, resolving and preventing

arbitrary detention by April 2009 and, based on these assessments, by June 2009, develop a plan to strengthen these mechanisms. In particular, it is recommended that the effectiveness of the Supreme Court's oversight capacity be examined

- As called for in the NJSS, it is recommended that codes of ethics and professional standards be developed and enforced in the judiciary.

Recommendation 3

- It is strongly recommended that the Supreme Court, Mol, MoJ Head of Prisons and Detention Centers, and AGO agree upon a Standard Operating Procedure (SoP) for coordination related to detention issues at the district, provincial and national levels as soon as possible. The procedure should include protocols on transfer of files between institutions, actions to be taken when files are incomplete or missing, and the procedure to follow when time lines are about to be breached.
- It is encouraged that the Supreme Court support projects included in the NJP which are intended to improve information management systems and to enable better coordination between institutions at the district, provincial and national level and help ensure that they are implemented without delay. This includes exploring the viability of the case management system currently being piloted by the US Department of State's Justice Sector Support Program (JSSP) and Corrections Sector Support Program (CSSP).

Recommendation 5

- The MoJ, Mol, AGO, and the Supreme Court in cooperation with AIHRC and other partners, such as UNDP and JSSP, are urged to support the inclusion of a public awareness campaign on detention-related rights targeted both at both current detainees and prisoners and the general public in the national public awareness campaign called for in the NJSS.

Recommendation 8

- The Mol, MoJ, AGO and Supreme Court are urged to discipline swiftly, and appropriately, officials at all levels and any other person who fails to respect detainees' rights, legal time limits, and other regulatory and legal standards. Such discipline includes prosecution when criminal provisions are violated. A confidential mechanism also should be put in place which enables prosecutors, judges, defense counsel, relatives of detainees or other individuals to report cases of possible arbitrary detentions with confidence that the allegations will be appropriately investigated.

To the Parliament of Afghanistan

Recommendation 1

- The Parliament is urged to ensure that it places revisions of the criminal law framework onto its agenda and approves revisions to it as outlined in Recommendation 1.

Recommendation 7

- The Parliament and Ministry of Finance also is urged to ensure that once funding is received it is allocated and dispersed promptly.

For the GoA and judiciary to successfully begin to combat arbitrary detention and reduce detention center overcrowding, the following areas require funding:

- o salaries and benefits to retain a sufficient number of qualified judges, prosecutors, police, detention center officials and court administrators;
- o training and capacity-building of these officials;
- o national public awareness campaign;
- o to operate the necessary oversight mechanisms.

To the International Community

Recommendation 1

- The international community is urged to support and advocate the revisions of the criminal law framework by the MoJ (Taqrin) and Parliament as outlined in Recommendation 1.

Recommendation 2

- International donors and justice, corrections and police sector support programmes are strongly encouraged to support the establishment of inter-institutional oversight mechanisms addressing arbitrary detentions through

technical advice and financial support as necessary.

- International donors and justice, corrections and police sector support programmes are strongly encouraged to support the strengthening of internal oversight mechanisms that will help address arbitrary detentions.

Recommendation 3

- International donors, along with the UN and justice and corrections support programmes are strongly encouraged to fund and work with GoA to quickly implement projects included in the NJP which are intended to improve information management systems and to enable better coordination between institutions at the district, provincial and national level. This includes exploring the viability of the case management system currently being piloted by the US Department of State's Justice Sector Support Program (JSSP) and Corrections Sector Support Program (CSSP).
- International donor and advisory support is strongly urged in order to begin work to develop inter-jurisdictional tracking mechanisms.

Recommendation 4

- It is strongly recommended that police, prosecutorial and judicial training and capacity-building programs run by the international implementing partners, such as JSSP, CSSP, UNODC, EUPOL, and Afghan organizations like AIHRC or the government institutions themselves, be augmented and more targeted so that authorities gain a better understanding of, amongst other issues:

- o the concepts of justice underlying the formal justice system, their compatibility with those in the informal justice,
- o the role and function of detention and the rights they are responsible to respect and protect;
- o the role and function of defense counsel;
- o the right of women and girls to equal protection of the law and authorities' obligation to protect this right and the role of Mol Family Response Units and MoWA at the local level;
- o the function and content of procedural rights in relation to detention;
- o alternative investigation and interrogation techniques to detention;
- o definition of arbitrary detention, and the remedies available;
- o SOPs on coordination and implementation of the law; and
- o internal oversight mechanisms.

- These practical human rights component needs to be more prominent in standard and advanced training of the police, prosecutors, judges, and staff of detention facilities.

-
- Legislative support programs are urged to work with justice sector support programs to develop training for legislators and their staff who sit on relevant committees in both the Meshrano jirga and the Wolesi jirga. The training programme should cover these subjects but be modified to include legislative requirements and the Parliament's oversight responsibilities.

Recommendation 5

- International donors and partners, such as UNDP and JSSP, are urged to support a detention-related component of the national public awareness campaign called for in the NJSS targeted both at both current detainees and prisoners and the general public. Support is urged to be both financial and advisory.
- Awareness-raising tools, such as MoJ's pamphlet for female detainees on their rights that was supported by UNODC and UNIFEM, are urged to be strongly supported and developed. Police stations, detention centers and prosecutor offices should seek to have information materials such as this on hand and on display.

Recommendation 6

It is strongly recommended that international donors and support programmes support the MoJ's Legal Aid Unit in its development of a national legal aid system as called for under the NJSS and NJP.

- **Paralegals.** Justice sector donors and support programmes are strongly urged to prioritize the development of a paralegal system in Afghanistan. The following is strongly encouraged:
 - o New regulations creating paralegals within the Afghan legal system should be supported both politically and financially by donors, along with GoA.
 - o Donors and justice sector support and legal aid programmes should support the MoJ and the Independent Bar Association develop a program to expedite training and to deploy paralegals into each province, and, when possible, into district centers. The paralegals should be mandated

to provide advice to detainees and their families on their rights and the criminal procedure. (Under the Advocate's Law only a registered defense counsel or relative can represent a detainee). Areas not served by legal aid organizations should be prioritized.

- **Increasing numbers of defense counsel and legal assistance.** Efforts to increase numbers of defense counsels need to be prioritized.
 - o Donors and justice sector support programmes should encourage the Independent Bar Association to strictly implement its requirement that lawyers registered handle at least 2 legal aid cases each year.
 - o Donors are encouraged to encourage and support the design and implementation of incentives for those who choose to become defense counsel, particularly in remote areas, by the MoJ's Legal Aid Unit.

Recommendation 7

- Donors are strongly urged to make the funding promised under the NJSS and NJP for detention-related initiatives available as soon as possible.
- For the GoA and judiciary to successfully begin to combat arbitrary detention and reduce detention center overcrowding, the following areas require funding:
 - o salaries and benefits to retain a sufficient number of qualified judges, prosecutors, police, detention center officials and court administrators;
 - o training and capacity-building of these officials;

- o national public awareness campaign;
- o to operate the necessary oversight mechanisms.

To Afghan partners

Recommendation 4

- Law faculties are strongly encouraged to integrate these subjects into legal education. Law faculties also are urged to integrate education and training of detention and detainees rights.

Recommendation 5

- **Paralegals.** The Independent Bar Association, along with justice sector donors and support programmes, are urged to work with the MoJ Legal Aid Unit to develop a paralegal system in Afghanistan. The following is strongly encouraged:
 - o The Independent Bar Association, with the support of donors, is urged to work with MoJ to develop a program to expedite training and to deploy

paralegals into each province, and, when possible, into district centers. The paralegals should be mandated to provide advice to detainees and their families on their rights and the criminal procedure. (Under the Advocate's Law only a registered defense counsel or relative can represent a detainee). Areas not served by legal aid organizations should be prioritized.

- **Increasing numbers of defense counsel and legal assistance.** Efforts to increase numbers of defense counsels need to be prioritized.
 - o The Independent Bar Association should strictly implement its requirement that lawyers registered handle at least 2 legal aid cases each year.

Recommendation 6

- It is strongly recommended that the AIHRC and other partners, support the inclusion of a campaign on detention-related rights in the national public awareness campaign called for in the NJSS.

Annex 2: Glossary

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

Endnotes

¹ See OHCHR Fact Sheet No. 26: The Working Group on Arbitrary Detention, available from <http://www.unhcr.ch/html/menu6/2/fs26.htm>

² Article 24 and 27(2) and (3), Afghanistan Constitution.

³ See Martin Schönreich, "The Scale and Consequences of Pretrial Detention around the World", Justice Initiatives: Pre-trial Detention, Open Society Justice Initiative, 2008, pgs. 11-43, for a discussion of the socio-economic and public health impacts of detention.

⁴ See "National Justice Sector Strategy", ANDS Justice and Rule of Law 1387-1391(2007/08-2012/13), Volume II, Pillar II, Good Governance, Afghanistan National Development Strategy, 2008, page 21 and Human Rights benchmark, *Afghanistan Compact*, 2006.

⁵ Human Rights benchmark, Annex I: Benchmark and Timelines, *The Afghanistan Compact*, 1 February 2006, page 8.

⁶ UN Security Council Resolution 1662(2006), 1746(2007), 1806(2008).

⁷ *Supra*, n. 5.

⁸ The pre-trial phase is during the investigation, indictment and trial phases throughout which the detainee should be presumed innocent. (Under Afghan law, pre-trial detentions are termed provisional detentions. Article 6, Interim Criminal Procedure Code.) The post-sentencing phases is after the detainee has been found guilty based on a fair trial and s/he is detained, or imprisoned, based on a court-ordered sentence. (Generally, this phase is termed imprisonment rather than detention, and detainees are defined as prisoners).

⁹ For discussion on NDS and IMF detentions, see Amnesty International, "Afghanistan: Detainees transferred to torture: ISAF complicity?", November 2007, <http://www.amnesty.org/en/library/asset/ASA11/011/2007/en/dom-ASA110112007en.pdf>, and on IMF-related detentions in Afghan facilities, see Human Rights First, "Arbitrary Justice: Trials of Bagram and Guantánamo Detainees in Afghanistan", April 2008, <http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf>.

¹⁰ Research was not undertaken to track the frequency of arbitrary or unlawful detention.

¹¹ The first phase covered 30 of 34 provinces, with the exception of Nuristan, Uruzgan, Zabul and Paktika because of security concerns.

¹² 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.

¹³ 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.

¹⁴ See OHCHR Fact Sheet No. 26: The Working Group on Arbitrary Detention, available from <http://www.unhcr.ch/html/menu6/2/fs26.htm>

¹⁵ 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.

¹⁶ 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.

¹⁷ Article 24(1) and (3), Afghanistan Constitution

¹⁸ Article 24(1), Afghanistan Constitution.

¹⁹ Ibid. This is further reinforced by Article 27(1), Afghanistan Constitution, which stipulates that to be considered a crime, the deed must be established as such in the law prior to the offense.

²⁰ Article 27(2), Afghanistan Constitution.

²¹ 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.

²² Official Gazette No. 347, 1976.

²³ Official Gazette No. 820, 2003.

²⁴ Official Gazette No. 862, 2005.

²⁵ Official Gazette No. 26, 1965.

²⁶ Official Gazette No. 851, 2005.

²⁷ Official Gazette No. 852, 2005.

²⁸ Official Gazette No. 934, 2007.

²⁹ Article 32, Afghanistan Constitution excludes debt as a ground for imprisonment, but does not a breach of civil law or a contractual obligation. In international law, the ICCPR does exclude inability to fulfill contractual obligations as grounds for detention.

³⁰ Imprisonment/detention for debt is explicitly prohibited in Article 32, Afghanistan Constitution.

³¹ Article 27(1), Afghanistan Constitution prohibits an action, or 'deed', from being considered a crime unless it was established as such by a law promulgated prior to committing the action. Law is that which falls within the meaning of Article 94, Afghanistan Constitution. Article 9(1), ICCPR reiterates this principle.

³² 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 be a lawful ground for detention. Article 27(1) of the Afghanistan Constitution requires that a deed must be considered a crime “by a law promulgated prior to commitment of the offense.” 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. 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 for detention under criminal procedures to be lawful. Neither Shari’a nor customary or social practices, therefore, would meet this standard for criminal offenses.

Many prosecutors and judges 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. 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.” 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. Hanafi jurisprudence is not ‘promulgated’ law or qanoon.

The application of Article 130 for crime-related detention also does not appear to comply with international standards. For example, according to international law, a deed must be defined as a crime in domestic legislation prior to the commitment of the deed [Communication No. 702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), in UN doc GAOR, A/52/40, (vol. II), pp/ 230-231, para. 5.5. See also Articles 9(1) and 15(1), ICCPR.]

³³ UNODC, Afghanistan: Female prisoners and their social reintegration, March 2007, http://www.unodc.org/pdf/criminal_justice/Afghan_women_prison_web.pdf, page 5.

³⁴ UNODC, “Fact sheet: Alternatives to Imprisonment”, distributed at 1 December 2008 UNAMA press conference.

³⁵ See UNODC, supra n. 33, p. 22. 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 (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.)

³⁶ 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.

³⁷ UNODC, supra n. 33, p. 22.

³⁸ 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.

³⁹ In addition to monitoring, see UNODC, supra n. 33 pp. 21-22.

⁴⁰ 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.

⁴¹ 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.

⁴² A journalist was detained by the police¹⁰ in Rodat district of Nangarhar while he was covering demonstrations linked to poppy cultivation.

⁴³ Afghan law prohibits detention of an accused's or suspect's relative or associate for his/her crime (Article 26, Afghanistan Constitution) or to pressure the accused or suspect to surrender or confess (Articles 26-27, Afghanistan Constitution). On the latter, the Human Rights Committee also has found such detentions to be arbitrary: 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.

⁴⁴ 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.

⁴⁵ The four were detained on the prosecutor's order of 30 November 2006, and were interviewed in detention by UNAMA on 17 January 2007.

⁴⁶ According to reports received, the man was not suspected to be a conspirator or involved in the murder.

⁴⁷ For instance, in July 2008, the National Directorate of Security (NDS) arrested and detained a journalist in Kabul who aired a critical review of the Karzai administration. Eventually, the journalist sought asylum outside Afghanistan for fear that his life was under threat. Also in July 2008, the NDS detained another journalist in Ghazni province for having covered extra-judicial killings of two women, allegedly undertaken by the Taliban. He was released after intervention of local leaders and UNAMA. A journalist in Baghlan was arrested in 2007 and again in 2008 for writing an article critical of the Karzai administration. In the first instance, the journalist was released allegedly after apologizing to a minister named in his article. In the second instance, the Appeals Court reversed the conviction of the Primary Court based on Article 7 of the Law on Internal and External Security. The case of Parweiz Sayed Kambakhsh, a journalism student from Mazar-i-sharif charged with blasphemy, also may be linked with an attempt to deny the exercise of freedom of expression of himself and possibly others. The complexity of the political and religious context of the case makes it difficult to determine if this was the original intent, or even a subsequent one.

⁴⁸ Article 9(2) and 14(3)(a), ICCPR.

⁴⁹ Article 9(3), ICCPR.

⁵⁰ Article 9(4), ICCPR.

⁵¹ Articles 7, 10(1), 14(3)(g), ICCPR as well as the Convention Against Torture.

⁵² 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.

⁵³ Article 9(3) and 14(3)(c), ICCPR.

⁵⁴ Articles 24 and 27(3), Afghanistan Constitution and Article 9 and 14, ICCPR.

⁵⁵ 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.

⁵⁶ Article 9(3), ICCPR.

⁵⁷ Article 9(3), ICCPR; periodic review: 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.

⁵⁸ Communication No. 291/1988, *M. Torres v. Finland* (Views adopted on 2 April 1990), in UN doc., GAOR, A/45/40 (vol. II), para. 7.3., 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.

⁵⁹ 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.

⁶⁰ *L. Stephens v. Jamaica*, supra n 58.

⁶¹ 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 been able to conclude if the detainee had been denied this right. See *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc., GAOR, A/51/40 (vol. II), p. 9, para. 9.7.

⁶² Articles 33-34, ICPC. Subsequently, Afghan law generally gives the primary prosecutor with the responsibility to monitor the lawfulness of detention (including compliance with time frames and execution of final decisions of the court) and order release when arbitrary (Articles 6(3), 8(4), 34(2), 36, 84, ICPC and Articles 22 and 51, Law on Prisons and Detention Centers.)

⁶³ Communication No. 521/1992, *Kulomin v. Hungary* (Views adopted on 22 March 1996), in UN doc. GOAR, A/51/40 (vol. II), p. 81, para. 11.3 and *Torres v. Finland*, supra n. 58, para. 7.2.

⁶⁴ 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.

⁶⁵ 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, *Stephens v. Jamaica*, supra n. 61, para. 9.6, amongst others.

⁶⁶ Criminal detention is not brought under control of a judge until 15 days after arrest. Even then, the Court is not instructed to assess the lawfulness of detention (.Article 36, ICPC.)

⁶⁷ *Torres v. Finland*, supra n.58, para. 7.4.

⁶⁸ Neither Article 33 (on the prosecutor's ratification of the arrest and detention), 36 (on extension of time for indictment) or 38 (on defense counsel presence) of the ICPC instructs or permits the detainee or defense counsel to be present and challenge the prosecutor during these decision-making junctures. In fact, one can argue that the omission of reference to these proceedings in Article 38 effectively bars defense counsel (and, thus, the detainee) from challenging the legality of arrest and detention.

⁶⁹ Both Article 9(3) and 9(4) require the presence of the detainee. Article 9(3) specifically say "brought before a judge...".

⁷⁰ See, for instance, 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, 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.

⁷¹ Neither Article 33 (on the prosecutor's ratification of the arrest and detention), 36 (on extension of time for indictment) or 38 (on defense counsel presence) of the ICPC instructs or permits the detainee or defense counsel to be present during these decision-making junctures. In fact, one can argue that the omission of reference to these proceedings in Article 38 effectively bars defense counsel (and, thus, the detainee).

⁷² 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.

⁷³ Article 24 and 25, Afghanistan Constitution.

⁷⁴ Article 9(3), ICCPR.

⁷⁵ Article 24(1), Afghanistan Constitution.

⁷⁶ See Article 24, Afghanistan Constitution, Articles 4 and 34(2), ICPC and Article 97 and Annex Table Relating to Article 97 of Chapter Eight of the Criminal Procedure Code, Criminal Procedure Code, 1964 as amended in 1974.

⁷⁷ 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.

⁷⁸ Article 4, ICPC.

⁷⁹ For more information, see UNODC, *Implementing Alternatives to Imprisonment*, in line with International Standards and National Legislation, May 2008, http://www.unodc.org/documents/justice-and-prison-reform/Afghanistan_Implementing_Alternatives_Imprisonment.pdf.

⁸⁰ The failure of police to comply with the 72-hour time limit to refer the case to the prosecutor. 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 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. In other cases, the police kept detainees for extended periods of time without informing the prosecutor of the detention as they are required. 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.

⁸¹ Prosecutors regularly fail to comply with legally established time limits to both interview detainees and file indictments against them. Prosecutors are to interview detainees within 48 hours of being notified of their detention (article 34(1), ICPC) but no later than 72-hours after arrest (Article 21(1), ICPC). 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 the prosecutor breached the time limit in 97% (1038) of cases monitored, and that the frequency was the same for men and women. Prosecutors also breach both the 15-day and 30-day timeframes laid out in the ICPC or failed to file an indictment altogether (article 36 and 39, ICPC). That these breaches are a pattern and problematic was stated by the Supreme Court High Council in their Memo 720, 17 July 2006.

⁸² Article 31(2), Afghanistan Constitution grants an accused (whether detained or not) to appear before the Court within the timelines specified by law.

⁸³ Article 6(2), ICPC. For instance, 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 were beyond the time limits in Kabul, Parwan, Logar, Kapisa, Panjshir and Wardak. 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, 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.

⁸⁴ Article 6(2), ICPC. The situation was the worst in the Northeast, where 80% (38 of the 47) of the cases identified were over time limits. 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 Pul-i-charki (18-23 March 2008) and Kandahar's MoJ Detention Center. During the first monitoring phase, 60% of the cases monitored which were awaiting an appeal in the Central Region (Kabul, Panjshir, Parwan, Kapisa, Logar and Wardak) suffered significant breaches of the 2 month deadlines. In a case identified in Khost, a man accused of murder waited almost 2 years for a verdict of the Khost Appeals Court. Cases of timeline breaches were found in every region and phase of monitoring.

⁸⁵ Of the 34 cases found pending at the Primary Court level in Kunduz, Baghlan, Badakshan 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.

⁸⁶ For example, in Khost, monitors found 2 men convicted of corruption remained in detention more than 4 months after the expiration of their sentence.

⁸⁷ Others are not released because of failure to pay fines applied as part of their sentence. 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. 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 issues. Procedures and orders are not always followed; nor are the time limits necessarily respected.

⁸⁸ 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-i-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.

⁸⁹ Supreme Court High Council Memo No. 990, 29 February 2006.

⁹⁰ Articles 29-31, Afghanistan Constitution; Articles 5(5-7), 31, 53(g), ICPC, amongst others.

⁹¹ 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 prepare 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 despite them being required to do so. (Article 5(7). ICPC)

⁹² For example, 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. Normally no defense counsels were present during interrogations by police and prosecutors. For those who did have defense counsel during the

first monitoring phase, only 1.4% (16 interviewees) stated that defense counsel had been present during police interrogations and 2.7% (31 interviewees) that defense counsel had been present during prosecutor interrogations. At the Court, defense counsel were infrequently present. 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. 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. No noticeable change occurred subsequently. (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.)

⁹³ Of course, in provinces where legal aid organizations operated, such as in Kunduz (International Legal Foundation [ILF]), Mazar (Medica Mondiale and Cooperation Center for Afghanistan [CCA] for women), Herat and Ghazni (Quanoon Gashtoonkey), detainees are more likely to have a lawyer. 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.

⁹⁴ The following are a few examples. In the third district of Fayzabad, Badakhashan, 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 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.

⁹⁵ 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.

⁹⁶ According to 7 November 2007 joint AIHRC-UNAMA response to a Request for Information by the Northern region.

⁹⁷ This presumption, while not necessarily present in the informal justice system as such, likely is derived from justice being delivered generally at the community-level, where perpetrators are normally quickly identified with a level of certainty.

⁹⁸ Both statements and practices of police, prosecutors and Courts indicate this presumption exists and is pervasive. Statements such as 'human rights hinder our work' and practices like actively deciding not to inform detainee of their rights or marginalizing or barring defense counsel indicate such a presumption.

⁹⁹ Ibid.

¹⁰⁰ 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.

¹⁰¹ See Part III, Section A(2)(b) for cases.

¹⁰² See UNODC, *Implementing Alternatives to Imprisonment*, in line with International Standards and National Legislation, May 2008, http://www.unodc.org/documents/justice-and-prison-reform/Afghanistan_Implementing_Alternatives_Imprisonment.pdf.

¹⁰³ 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.

¹⁰⁴ Based on discussions held during 30 November 2008 UNAMA-UNODC workshop, "Arbitrary Detention and Impunity".

¹⁰⁵ See the ANDS National Justice Sector Strategy for a discussion of the state of justice institutions.

¹⁰⁶ Article 51, Law on Prisons and Detention Centers.

¹⁰⁷ 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.

¹⁰⁸ 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 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.



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