

# 2.2: The Afghanistan Military Court System

---

## Summary

This chapter examines the structure of the Afghanistan Military Court System.

## Introduction

The Afghanistan National Army (ANA) is subject to an Afghan military court system separate and distinct from the formal court system discussed in Chapter 2.1. The structure of the military courts includes military primary trial courts and a Court of Military Appeals. Appeals from the Court of Military Appeals are heard by the Afghanistan Supreme Court. This chapter provides an overview of the structure of the Afghan military court system as well as the ANA General Staff Legal Department.

## Afghan Military Courts

Article 134 of the Afghanistan Constitution provides that a “[s]pecial law shall regulate discovery and investigation of crimes of duty by the armed forces, police and officials of national security.”<sup>1</sup> Pursuant to this Article, as well as Articles 122 and 64, the Law on Organization and Jurisdiction of Military Courts was enacted.<sup>2</sup> Military courts have exclusive jurisdiction over military crimes committed by members of the ANA, and have concurrent jurisdiction with civilian courts over offenses that are both military crimes and civilian crimes.<sup>3</sup>

Military crimes are defined in the Uniform Code of Military Justice and the procedures for prosecution are set forth in the Criminal Procedure Code for Military Courts.<sup>4</sup> The Uniform Code of Military Justice “includes a series of prohibitions and punishments for everything from desertion to treason. In all, the code covers 34 different violations, all but a handful of which incur a minimum punishment of at least one year imprisonment. The codes are enforced and cases reviewed by primary military courts in each of the regional commands. Appeals are

---

<sup>1</sup> 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission) (hereinafter Constitution), Art. 134: [http://supremecourt.gov.af/Content/Media/Documents/constitution2004\\_english3012201016726844.pdf](http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf). See also Articles 122 and 64.

<sup>2</sup> Law on Organization and Jurisdiction of Military Courts, Official Gazette No. 1034 (07 August 2010)(hereinafter Law on Military Courts), Art. 1: Unofficial English translation provided by the Department of State Bureau of International Narcotics and Law Enforcement Affairs (INL), Justice Sector Support Program (JSSP).

<sup>3</sup> *Ibid*, Art. 15.

<sup>4</sup> Uniform Code of Military Justice, Official Gazette No. 944 (29 April 2008). Military Criminal Procedure Code, Official Gazette No. 1020 (10 May 2010;20/2/1389). English copies provided by NATO Training Mission – Afghanistan (NTM-A) ANA Legal Development Team.

handled by a secondary military court of appeals consisting of [six] judges, located in Kabul.”<sup>5</sup> A sixth judge was added to allow the court to have two full panels to hear cases.<sup>6</sup> The current Chief Judge is a Brigadier General.<sup>7</sup> The military courts apply military law and abide by the privileges and immunities provided for in the Constitution and “other enforced laws of Afghanistan.”<sup>8</sup>

## Military Primary Courts

The Law on the Organization & Jurisdiction of the Courts of the Islamic Republic of Afghanistan (Law on Courts), and the Law of Military Courts authorize the establishment of military primary trial courts “to try duty-related crimes [by the] staff of [the] Ministry of Interior, National Directorate of Security, Border Forces, branches of ministries and institutions having military structure.”<sup>9</sup> The Law on Courts provides that the following military primary courts shall be established:<sup>10</sup>

1. Primary Court of Ministry of Interior;
2. Primary Court of National Directorate of Security;
3. Primary Court of Border Forces;
4. Primary Court of ministries and institutions with military structure; and
5. Provincial Primary Military Courts.

“In provinces where primary military courts are not available, the closest Military Primary Court of the neighboring province shall try military cases.”<sup>11</sup> Military primary courts have jurisdiction over the following crimes:<sup>12</sup>

1. Crimes committed during or as a result of performing duty by military staff.

---

<sup>5</sup> International Crisis Group, *A Force in Fragments: Reconstituting the Afghan National Army*, Asia Report N° 190 – 12 May 2010 (hereinafter *A Force in Fragments*), p. 14: <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/190%20A%20Force%20in%20Fragments%20-%20Reconstituting%20the%20Afghan%20National%20Army.ashx>.

<sup>6</sup> Information provided by Combined Security Transition Command-Afghanistan (CSTC-A), Ministry of Defense Ministerial Advisory Group, February 2014.

<sup>7</sup> *A Force in Fragments*, *supra* note 5, p. 14.

<sup>8</sup> Law on Military Courts, *supra* note 2, Articles 3 and 8.

<sup>9</sup> Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, Official Gazette No. 1109, 19 June 2013 (1392/4/9), Art. 77 (translation provided by UNAMA)(hereinafter *Law on Courts*); *see also* Law on Military Courts, *supra* note 2, Art. 13(A)(1).

<sup>10</sup> *Law on Courts*, *ibid*, Art. 77.

<sup>11</sup> *Ibid*. As of May 2012, seven military primary courts are located in each of the regional commands located in Gardez, Helmand, Herat, Jalalabad, Kabul, Kandahar, and Mazar-e-Sharif. Information provided by NTM-A Legal Development Team, The Afghan National Army, General Staff (GS) Legal, BG Khawari, Chief ANA GS Legal (ANA TJAG), May 2012, slide 7; *see also* *A Force in Fragments*, *supra* note 5, p. 14.

<sup>12</sup> *Law on Courts*, *supra* note 9, Art. 78.

2. Crimes committed by civil personnel of a military facility during or as a result of performing duty in military unit, squad or educational institutions.
3. Crime by a non-military person working in armed civil military unit.
4. Crimes related to losing, buying and selling, stealing, embezzlement and illegal acquisition of weapon, ammunition, explosive material, technique or other military equipment.

If an issue of jurisdiction arises between a military primary court and a civil court, the court that is authorized to review the severest crime has jurisdiction.<sup>13</sup> If the punishments are equal, the military primary court shall have jurisdiction over the case.<sup>14</sup> “Victims rights’ claims related to crimes that are tried by military courts, shall also be the authority of military courts based on provisions of the Criminal Procedure Code.”<sup>15</sup>

Military primary courts shall be established at the level of each corps as follows:<sup>16</sup>

- 1- The qualified judge stated in this law having the rank of Colonel or higher as the presiding judge;
- 2- Two other judges having the rank of Lieutenant Colonel or above as members;
- 3- Correspondence manager having the rank of Major;
- 4- Two officers who assist correspondence manager and the judges in administrative affairs and work as judicial clerks shall have the rank of Captain and First Lieutenant and a Non Commissioned Officer (NCO) with the rank of Sergeant First Class.
- 5- Two custodians and one third degree contract driver.

## **The Court of Military Appeals**

The Court of Military Appeals was created to hear appeals from the decisions issued by the military primary courts.<sup>17</sup> The Court of Military Appeals is located in Kabul and has two divisions:<sup>18</sup>

1. Division for Crime by Graduated Commissioned and Noncommissioned Officers
2. Division for Crime by Soldiers

---

<sup>13</sup> Ibid, Art. 79

<sup>14</sup> Ibid.

<sup>15</sup> Ibid, Art. 80.

<sup>16</sup> Law on Military Courts, *supra* note 2, Art 16(B).

<sup>17</sup> Ibid, Art. 13(A)(2); Art. 17(C)(1); *see also* Law on Courts, *supra* note 9, Art. 60

<sup>18</sup> Law on Courts, *supra* note 9, Art. 60.

In cases involving “shared crimes” by officers, non-commissioned officers, and soldiers, the Division for Crime by Graduated Commissioned and Noncommissioned Officers retains jurisdiction.<sup>19</sup> The Head of the Division for Crime by Soldiers also serves as the Deputy Head of the Military Appellate Court.<sup>20</sup> The Chief Judge of the Court of Military Appeals reports to the Supreme Court.<sup>21</sup> The Law on Military Courts provides that the Court of Military Appeals comprises five judges and six administrative support staff as follows:<sup>22</sup>

- 1- The qualified judge contained in this law holding the Brigadier General Rank as the presiding judge;
- 2- The qualified judge contained in this law holding Colonel Rank as the Deputy Presiding Judge;
- 3- Three judges as members, two of them holding Colonel Rank and the other one holding Lieutenant Colonel Rank or above;
- 4- Correspondence manager holding Lieutenant Colonel Rank;
- 5- Two officers who assist correspondence manager and the judges in administrative affairs and work as judicial clerks shall have the rank of Captain and First Lieutenant and a Non Commissioned Officer (NCO) with the rank of Sergeant First Class.
- 6- Three persons as custodians and driver holding third degree contract employee or higher (or equivalent according to the civil servants law).

The Court of Military Appeals currently consists of six judges, one Brigadier General and five Colonels.<sup>23</sup> The Minister of Defense must approve the organization, structure, and staffing of the Court of Military Appeals.<sup>24</sup> The Court of Military Appeals is given the same right to review that the civilian criminal appeals courts apply allowing it to review both the factual and legal findings of a case.<sup>25</sup> Appeals from the any decision of the Court of Military Appeals are heard by the Supreme Court of Afghanistan.<sup>26</sup>

---

<sup>19</sup> Ibid, Art. 79.

<sup>20</sup> Ibid, Art. 60.

<sup>21</sup> Ibid.

<sup>22</sup> Law on Military Courts, *supra* note 2, Articles 17(B) and 18(B). Although the Court of Military Appeals is to maintain its principal office in Kabul, it can hold court in any city or province “to proceed with complicated cases.”

<sup>23</sup> Information provided by CSTC-A Ministry of Defense Ministerial Advisory Group, February 2014.

<sup>24</sup> Law on Military Courts, *supra* note 2, Art. 17C).

<sup>25</sup> Ibid, Art. 17(C)(2); *see also* Law on Courts, *supra* note 9, Art. 10(2) & 54.

<sup>26</sup> Law on Military Courts, *supra* note 2, Art. 20.

## Military Court Judges

Military court judges must have the following qualifications:<sup>27</sup>

1. Having the citizenship of Islamic Republic of Afghanistan for at least ten years.
2. Having good qualities and reputation and shouldn't have been convicted to felony or intentional misdemeanor by absolute decision of a competent court.
3. Having Bachelor degree or higher in Law or *Shari'a* from Afghanistan or other countries.
4. Not having an illness or disability which hinders a judge from performing his duties.
5. Judges of Primary courts should have completed the age of 25.
6. Judges should have completed the judicial *stage* successfully or have worked in judicial and justice organizations for at least five years.

In addition, military primary court judges are required to have eight years of professional experience and military appellate court judges must have at least 10 years of professional experience.<sup>28</sup> Military judges are appointed based on the recommendation of the Minister of Defense, confirmation by the Supreme Court, and approval of the President.<sup>29</sup>

## ANA General Staff Legal Department

As of February 2014, the *tashkil* for the ANA General Staff (GS) Legal (*Huquq*) Department is 883 personnel; however, not all of the positions are filled.<sup>30</sup> The GS Legal Administration reports the following personnel:<sup>31</sup>

GS Staff Legal Personnel	Number of Employees	Authorized <i>Tashkil</i>
Officers	340	388
Non-Commissioned Officers	205	310
Soldiers	118	173
Civilians	11	12
<b>TOTAL</b>	<b>674</b>	<b>883</b>

Originally, the GS Legal Department did not include all of the legal personnel within the ANA. Several Independent Command legal billets and all of the Brigade legal billets were not part of

---

<sup>27</sup> Ibid, Art. 21.

<sup>28</sup> Ibid, Art. 22.

<sup>29</sup> Ibid, Art. 14(A)(2).

<sup>30</sup> Information provided by CSTC-A Ministry of Defense Ministerial Advisory Group, February 2014.

<sup>31</sup> Ibid as reported by GS Legal Department Chief Deputy, Legal Administration COL Zarak.

GS Legal Department.<sup>32</sup> The departments have since been restructured and currently all legal personnel within any unit are under the GS Legal Department.<sup>33</sup> In late 2012, the Corps detention facilities were also restructured and placed under the GS Legal Department.<sup>34</sup> The *tashkil* for the Corps detention facilities added an additional 371 soldiers to the GS Legal Department (53 soldiers for each of the seven facilities), which do not appear to be reflected in the above personnel chart provided by the GS Legal Department.<sup>35</sup>

The Head of the GS Legal Department is responsible for certifying prosecutors and defense attorneys that may be appointed to a military case.<sup>36</sup> The Head of the GS Legal Department also has the authority to disqualify a prosecutor or defense attorney.<sup>37</sup> Prosecutors must be officers of the ANA.<sup>38</sup> Defense attorneys may be officers of the ANA or qualified civilians registered under the Advocates' Law.<sup>39</sup>

The GS Legal Department faces similar challenges facing the formal civilian court system including enhancing the capacity of the department, preventing corruption and patronage, and filling professional billets with lawyers. Since 2008, the GS Legal Department has been recruiting only law school trained officers for its professional billets including judges, prosecutors, defense attorneys, and investigators.<sup>40</sup> In May 2012, 68% of the professional billets were filled by individuals with a law degree.<sup>41</sup>

## International Support

Training of the Afghan National Security Forces falls under the NATO Training Mission-Afghanistan (NTM-A)/Combined Security Transition Command-Afghanistan (CSTC-A).<sup>42</sup> NTM-A's/CSTC-A's training includes support to the Ministry of Defense Legal Department. NTM-A/CSTC-A provides a basic legal officer course, a paralegal course, as well as criminal investigative training.<sup>43</sup> In 2012, NTM-A/CSTC-A reported that a school for legal instruction

---

<sup>32</sup> See NTM-A Legal Development Team, *The Afghan National Army, General Staff (GS) Legal*, BG Khawari, Chief ANA GS Legal (ANA TJAG), May 2012, slide 5.

<sup>33</sup> Information provided by CSTC-A Ministry of Defense Ministerial Advisory Group, February 2014.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Law on Military Courts, *supra* note 2, Art. 14(A)(1 & 3).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, Art. 14(A)(1).

<sup>39</sup> *Ibid.*, Art. 14(A)(3); see Chapters 2.1: Afghanistan's Formal Justice Institutions, and 3.5: The Afghan Advocate for more information on the Advocates' Law.

<sup>40</sup> NTM-A Legal Development Team, *The Afghan National Army, General Staff (GS) Legal*, BG Khawari, Chief ANA GS Legal (ANA TJAG), May 2012, slide 14.

<sup>41</sup> *Ibid.*, slide 13.

<sup>42</sup> See Chapter 1.4 The International Community and Rule of Law Implementers in Afghanistan; see also NTM-A website for more information: <http://ntm-a.com/wordpress2/>; and Commander's Vision for 2011-Accelerating Progress, February 2011: <http://ntm-a.com/wordpress2/wp-content/uploads/2011/04/Commanders-Vision-for-2011-Accelerating-Progress.pdf>.

<sup>43</sup> See *A Patchwork Strategy of Consensus: Establishing Rule of Law in Afghanistan*

had been established and plans for a law faculty in the new National Defense University were being made.<sup>44</sup> The NATO ISAF Joint Command (IJC) is responsible for partnering with ANA units at the corps level and below.<sup>45</sup> More detailed information on the military court structure and training for military legal personnel should be directed through your chain of command to NTM-A and/or IJC.

---

By Mark R. Hagerott, Thomas J. Umberg, and Joseph A. Jackson, Joint Forces Quarterly  
Issue 59, 4<sup>th</sup> Quarter (October 2010), note 3: <http://www.ndu.edu/press/patchwork-strategy-of-consensus.html>

<sup>44</sup> Ibid.

<sup>45</sup> Ibid. As of October 2010, NTM-A/CSTC-A continued working at this level because IJC did not have enough judge advocates.

## Resources

- 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission), Art. 134:  
[http://supremecourt.gov.af/Content/Media/Documents/constitution2004\\_english3012201016726844.pdf](http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf)
- Law on Organization and Jurisdiction of Military Courts, Official Gazette No. 1034 (07 August 2010)(unofficial English translation provided by the Department of State Bureau of International Narcotics and Law Enforcement Affairs (INL) Justice Sector Support Program (JSSP).
- Uniform Code of Military Justice, Official Gazette No. 944 (29 April 2008).
- Criminal Procedure Code for Military Courts, Official Gazette No. 1020 (10 May 2012; 20/2/1389).
- Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, Official Gazette No. 1109, 19 June 2013 (1392/4/9)(translation provided by UNAMA).
- International Crisis Group, *A Force in Fragments: Reconstituting the Afghan National Army*, Asia Report N° 190 – 12 May 2010:  
<http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/190%20A%20Force%20in%20Fragments%20-%20Reconstituting%20the%20Afghan%20National%20Army.ashx>
- *A Patchwork Strategy of Consensus: Establishing Rule of Law in Afghanistan*, by Mark R. Hagerott, Thomas J. Umberg, and Joseph A. Jackson, Joint Forces Quarterly, Issue 59, 4th Quarter (October 2010), p. 143: <http://www.ndu.edu/press/patchwork-strategy-of-consensus.html>
- NTM-A Legal Development Team, *The Afghan National Army, General Staff (GS) Legal*, BG Khawari, Chief ANA GS Legal (ANA TJAG), May 2012.
- NTM-A Legal Development Team, *Military Justice & the ANA*, 8 May 2012.

## Web Resources

- Afghanistan Ministry of Defense: <http://www.mod.gov.af>
- Afghanistan International Security Forces (ISAF)/NATO: <http://www.isaf.nato.int/>
- NATO Training Mission – Afghanistan (NTM-A): <http://www.ntm-a.com/>