

# 6.1: National Security Cases in Afghanistan

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## Summary

This chapter identifies the laws governing national security cases and provides an overview of the National Directorate of Security as well as the process of a national security case in Afghanistan.

## Introduction

Afghanistan's Constitution provides: "The state shall prevent all kinds of terrorist activities."<sup>1</sup> The National Directorate of Security (NDS) is responsible for investigating offenses including national treason, espionage, terrorism, sabotage, propaganda against the Government, war propaganda, assisting enemy forces, and organized activity against internal and external security.<sup>2</sup> The Directorate of Prosecution of Crimes against Internal and External Security (PIES), an independent directorate of the Attorney General's Office (AGO) and often referred to as the NDS Prosecution Department, is responsible for prosecuting national security cases.<sup>3</sup>

## The National Directorate of Security

"The National Directorate of Security (NDS) is Afghanistan's principal internal and external intelligence-gathering organ and plays a key operational role, arresting and interrogating persons suspected of security-related offenses."<sup>4</sup> NDS derives its mandate from the National Security Law.<sup>5</sup> The National Security Law, however, is an unpublished Presidential Decree and is considered by the Government of Afghanistan to be "confidential."<sup>6</sup> Accordingly, information and details about the law are limited. This chapter relies on the October 2011 report entitled

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<sup>1</sup> 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission), Art. 7, para. 2:

[http://supremecourt.gov.af/Content/Media/Documents/constitution2004\\_english3012201016726844.pdf](http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf).

<sup>2</sup> Law on Crimes against Internal and External Security of the Democratic Republic of Afghanistan, Decree No. 153, Oct. 1987, Articles 1-8, 23 and 9, Cheechi Translation Unit/Fayeq/Ashraf/Sharif, June 23, 2005 (hereinafter Law on Crimes against Internal and External Security).

<sup>3</sup> See The Law on Structure and Authority of the Attorney General's Office. Official Gazette, Issue No. 1117, 7 October 2013, Articles 7 and 12(5).

<sup>4</sup> *Treatment of Conflict-Related Detainees in Afghan Custody*, United Nations Assistance Mission in Afghanistan (UNAMA) and the UN Office of the High Commissioner for Human Rights, October 2011, p. 14 (hereinafter October 2011 Conflict Detainee Report):

[http://unama.unmissions.org/Portals/UNAMA/Documents/October10\\_%202011\\_UNAMA\\_Detention\\_Full-Report\\_ENG.pdf](http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf).

<sup>5</sup> Ibid citing the National Security Law, Presidential Decree No. 89, 4 November 2001 (13/12/1380), Art. 6.

<sup>6</sup> Ibid; several requests were made for a copy of the law, but were denied because the law is considered "confidential."

*Treatment of Conflict-Related Detainees in Afghan Custody* by the United Nations Assistance Mission in Afghanistan (UNAMA) and the UN Office of the High Commissioner for Human Rights, which recites some articles of the National Security Law.<sup>7</sup> The report states:<sup>8</sup>

[T]he *National Security Law* govern[s] [NDS'] functions, conduct and activities which include “ensuring national security” and “fighting against terrorism.” Headed by the National Security Director, who reports directly to the President of Afghanistan, NDS is responsible for all intelligence and information gathering including foreign intelligence, counter espionage, terrorism and all other issues relating to national security and foreign affairs. While collecting and analyzing intelligence, however, agency officials have a duty to maintain a balance between “obtaining essential information and protecting the freedom of individuals.” They are under an obligation to consider the provisions in the Constitution and other enforced laws and decrees. NDS operates without judicial oversight and limited review by Parliament.

The Law on Crimes against the Internal and External Security list the categories of crimes for which NDS is responsible including national treason, espionage, terrorism, sabotage, propaganda against the Government, war propaganda, assisting enemy forces, and organized activity against internal and external security.<sup>9</sup> Other relevant laws include the Law on Combat against Terrorist Offenses,<sup>10</sup> The Law on Fire Weapons, Ammunitions and Explosive Materials (FWAEM),<sup>11</sup> the Penal Code,<sup>12</sup> and the Criminal Procedure Code.<sup>13</sup>

The number of NDS employees is considered confidential, but is estimated to be between 15,000 and 30,000.<sup>14</sup> “NDS employees are subject to disciplinary action under the Military Code of Discipline for violations of the laws of NDS.”<sup>15</sup> Information on the annual budget and other

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<sup>7</sup> See October 2011 Conflict Detainee Report, *supra* note 4, pp. 14-15.

<sup>8</sup> *Ibid*, citing the National Security Law, Articles 6, 3 & 5.

<sup>9</sup> Law on Crimes against Internal and External Security, *supra* note 2, Articles 1-8, 23 and 9.

<sup>10</sup> Law on Combat against Terrorist Offenses, Official Gazette No. 952, 1 July 2008, English translation cross checked with Official Gazette by JSSP Translators, March 13, 2013. The Official Gazette Issue No. 952 consists of two laws: The Law on Combat against Terrorist Offenses and the Law on Combating Abduction and Human Trafficking.

<sup>11</sup> The Law on Fire Weapons, Ammunitions and Explosive Materials, Official Gazette No. 855, 21 June 2005 (1384), translation unknown.

<sup>12</sup> Penal Code, Official Gazette No. 347, published 1976/10/06 (1355/07/15 A.P.). Available on Afghanistan Legal Documents Exchange Center: <http://afghantranslation.chechiconsulting.com>.

<sup>13</sup> At the time of this writing, the Interim Criminal Procedure Code (ICPC) was governing law. A new Criminal Procedure Code was signed into law on February 23, 2014; however, a copy was not available for review prior to publication. Interim Criminal Procedure Code, Official Gazette No. 820, published 2004/02/25 (1382/12/06 A.P.)(hereinafter ICPC). Available on the Afghan Attorney General’s Office website: <http://ago.gov.af/en/documents>; or <http://www.asianlii.org/af/legis/laws/icc175/>.

<sup>14</sup> October 2011 Conflict Detainee Report, *supra* note 4, p. 15.

<sup>15</sup> *Ibid*, citing the National Security Law, Art. 23. See Chapter 2.2: The Afghanistan Military Court System.

operational expenditures of the NDS are also considered classified, however, “UNAMA received information that NDS’ current budget is primarily funded from international sources.”<sup>16</sup>

NDS consists of a number of departments, which are sometimes referred to as directorates and sub-directorates. Often the departments are designated by numbers for confidentiality and security.<sup>17</sup> The most commonly known departments are Department 40 (Investigations), previously numbered Department 17, and Department 90 (Counter-Terrorism), previously numbered Department 124.<sup>18</sup> Separate from these NDS departments is PIES, an independent directorate of the AGO that is responsible for prosecuting national security cases.<sup>19</sup> As noted, PIES is often referred to as the NDS Prosecution Department, but it is important to remember that it is a directorate of the AGO, not NDS.

### **Process of a National Security Case<sup>20</sup>**

The NDS Intelligence and Detection Unit is responsible for the detection of crimes within a 72-hour period. This is similar to the time frame allowed for police to “comprehensively detect the crime and the criminal” as discussed in Chapter 3.2: The Process of a Criminal Justice Case in Afghanistan.<sup>21</sup> The Detection Unit handles all detections and investigations, arrests and seizures, warrant applications and executions, as well as ensuring all the work is carried out lawfully. Prosecutors work in the Detection Unit and are available 24-hours a day in order to execute search and arrest warrants. Before the end of the 72-hour period, the NDS Detection Unit must turn over the file and the suspect to PIES for investigation. Once PIES receives the case it is given to the Primary Prosecution Department. The Primary Prosecution Department comprises three subunits: 1) the Investigation Department; 2) the Detection and Investigation Department; and 3) the Legal Civilians Department. Like all other criminal cases, the prosecutor has an initial period of 15 days from the date of arrest to conduct an investigation, with an additional 15 day extension if requested of the court.<sup>22</sup> At the conclusion of the investigative phase the prosecutor must either release the suspect from custody or present an indictment to the primary court.<sup>23</sup>

The PIES departments operate under different systems depending on whether the case is in Kabul, in the provinces, or coming out of the Afghan National Detention Facility in Parwan

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid, p. 14.

<sup>18</sup> See *ibid*.

<sup>19</sup> See Chapter 2.1: Afghanistan’s Formal Justice Institutions.

<sup>20</sup> Information provided by the Department of Defense, Group Judge Advocate, Asymmetric Warfare Group and the author of the Primer, Kristine Ziems, INL Justice Advisor Kabul (2009-2010).

<sup>21</sup> See Chapter 3.2: The Process of a Criminal Justice Case in Afghanistan; see also Police Law, Official Gazette No. 994, August 27, 2009, translated by NATO Training Mission-Afghanistan (NTM-A)/Combined Security Transition Command-Afghanistan (CSTC-A), Wasseel Ahmad Jamal Esq., Naikan Afghan Logistic/Service Company), Art. 25.

<sup>22</sup> See Chapter 3.2: The Process of a Criminal Justice Case in Afghanistan; see also ICPC, *supra* note 13, Art. 36.

<sup>23</sup> ICPC, *supra* note 13, Art. 36.

(ANDF-Parwan). In Kabul, all activities are carried out under the authority of the Legal Civilians Department, which comprises three sub-departments: Investigative, Primary, and Appeals. The Legal Civilians Department is responsible for drafting the indictment and filing it with the public security *dewan* (chamber) of the primary court for Kabul Province.<sup>24</sup> Once a decision is made at the primary court the case is sent back to the Legal Civilians Department for review. If a decision to appeal is made, the case file is sent to the Legal Civilians Department Appeals Department. The Legal Civilians Department Appeals Department will assess the case and if it agrees with filing an appeal, an appeal is lodged with the public security *dewan* of the Kabul Court of Appeal. At the conclusion of the appellate case, the Legal Civilians Department Appeals Department will again assess the court's decision and the file is submitted to the General Director for a final decision on whether to appeal to the Supreme Court.

The Provincial PIES are limited to five prosecutors who act as investigators or primary prosecutors only. Cases are filed with the public security *dewan* of the provincial primary court. At the conclusion of the primary court case, the Provincial PIES pass the case to the appellate prosecutor in the provincial AGO department. Any appeal is filed by the provincial AGO department with the public security *dewan* of the Provincial Court of Appeals. After the provincial appellate court's decision, the case is turned over to the PIES in Kabul to make a decision regarding appeal to the Supreme Court.

A third system is in place for cases going through the Justice Center in Parwan (JCIP). In 2010, the JCIP was created through an agreement between the Afghan and U.S. governments to allow the international community to transfer military detainees from the Detention Facility in Parwan (DFIP) into Afghan civilian custody, where they could be indicted and prosecuted under Afghan law.<sup>25</sup> The Supreme Court of Afghanistan, pursuant to the Law of the Organization and Jurisdiction of the Courts, established specialized public safety and criminal *dewans* within the Parwan court system to handle the cases coming out of the DFIP.<sup>26</sup> The DFIP, which was a U.S. controlled detention facility for detainees held under the Law of Armed Conflict, was officially handed over to the Government of Afghanistan and renamed the ANDF-Parwan on March 25, 2013. The JCIP continues to retain jurisdiction over the few remaining cases coming out of the ANDF-Parwan.

The JCIP consists of Afghan judges, prosecutors, defense attorneys, and investigators. There are two primary courts (adult and juvenile), and two appellate courts (adult and juvenile). A case coming out of the ANDF-Parwan must be investigated by the JCIP investigators and prosecutors

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<sup>24</sup> See Chapter 2.1: Afghanistan's Formal Justice Institutions for a discussion of the different *dewans* within the primary and appellate court structure.

<sup>25</sup> U.S. Department of State, Corrections Programs in Afghanistan Fact Sheet, Bureau of International Narcotics and Law Enforcement Affairs, May 4, 2012: <http://www.state.gov/j/inl/rls/fs/189319.htm>.

<sup>26</sup> See 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), Articles 50 & 53 (translation provided by UNAMA); see also Government of Afghanistan, High Council of Supreme Court, Approval Number 138 dated April 27, 2010.

within the same 15 + 15 day time frame allotted all criminal cases. Within the investigatory time frame, the JCIP primary prosecutor must file an indictment with the JCIP primary court or release the suspect. Appeals are handled by the JCIP appellate prosecutors and the JCIP appellate court. The Supreme Court's order states that the "Appellate Court of Parwan Province will proceed the cases forwarded to this court in appeal stage."<sup>27</sup> Cases from the JCIP appellate court are sent to the PIES in Kabul for a final decision on appeal to the Supreme Court.

Regardless of whether a case originates in Kabul, the provinces, or JCIP, when a case is considered final the file is sent to the Finalization Department to ratify the decision. The Department of Implementation of Decisions is responsible for properly implementing the court decisions for all national security cases.

It is important to note that according to the Law on Combat against Terrorist Offenses, "During the investigation and trial, the suspect and accused of terrorist offences shall have the same legal rights as the suspects and accused of other offences."<sup>28</sup> The NDS is frequently criticized and commonly understood to violate human rights. PIES has limited staff capacity and although it is an independent directorate of the AGO, it does occasionally rely on NDS Department 40, which has its own investigation unit, for support. As more fully discussed in the next chapter, this has caused and continues to cause difficulties for the international community in providing support to PIES, as well as to NDS investigators and other personnel.

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<sup>27</sup> Government of Afghanistan, High Council of Supreme Court, Approval Number 138 dated April 27, 2010.

<sup>28</sup> Law on Combat against Terrorist Offenses, *supra* note 10, Art. 6. See Chapter 3.6: The Afghan Judge for a brief overview of fundamental rights and procedural guarantees.

## Resources

- 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission):  
[http://supremecourt.gov.af/Content/Media/Documents/constitution2004\\_english3012201016726844.pdf](http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf).
- National Security Law, Presidential Decree No. 89, 4 November 2001 (13/12/1380) – unpublished. Information from the Treatment of Conflict Related Detainees in Afghan Custody, United Nations Assistance Mission in Afghanistan (UNAMA) and UN Office of the High Commissioner for Human Rights (UNHCHR), October 2011:  
[http://unama.unmissions.org/Portals/UNAMA/Documents/October10\\_%202011\\_UNAMA\\_Detention\\_Full-Report\\_ENG.pdf](http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf).
- Law on Combat against Terrorist Offenses, Official Gazette No. 952, 1 July 2008, English translation cross checked with Official Gazette by JSSP Translators, March 13, 2013.
- Law on Crimes against Internal and External Security of the Democratic Republic of Afghanistan, Decree No. 153, Oct. 1987, Cheechi Translation Unit/Fayeq/Ashraf/Sharif, June 23, 2005.
- The Law on Fire Weapons, Ammunitions and Explosive Materials, Official Gazette No. 855, 21 June 2005 (1384), translation unknown.
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<http://afghantranslation.chechiconsulting.com>.
- Interim Criminal Procedure Code, Official Gazette No. 820, published 2004/02/25 (1382/12/06 A.P.). Available on the Afghan Attorney General’s Office website:  
<http://ago.gov.af/en/documents>; or <http://www.asianlii.org/af/legis/laws/icc175/>. A new CPC was signed into law on February 23, 2014.
- Police Law, Official Gazette No. 994, August 27, 2009, translated by NATO Training Mission-Afghanistan (NTM-A)/Combined Security Transition Command-Afghanistan (CSTC-A), Wasseel Ahmad Jamal Esq., Naikan Afghan Logistic/Service Company.
- 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), Articles 50 & 53 (translation provided by UNAMA).
- Government of Afghanistan, High Council of Supreme Court, Approval Number 138 dated April 27, 2010.
- U.S. Department of State, Corrections Programs in Afghanistan Fact Sheet, Bureau of International Narcotics and Law Enforcement Affairs, May 4, 2012:  
<http://www.state.gov/j/inl/rls/fs/189319.htm>.