



Afghanistan Human Rights Review #1: Arbitrary Detention

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The UC Irvine School of Law’s International Justice Clinic has launched an Afghanistan Human Rights Project, led by Mr. Hashmat Nadirpor. The Project will release periodic overview reports monitoring and highlighting the human rights situation in Afghanistan since the takeover by the Taliban in August 2021. This is the first in a series of short reports summarizing key findings by the UN and other monitors of the human rights situation in the country.

Arbitrary detention is one of the most common types of violations committed against the right of individuals to liberty in Afghanistan. Recent reports by the United Nations Assistance Mission in Afghanistan (UNAMA) and Amnesty International, among others, show that Afghan men and women are arbitrarily detained by the *de facto* government of the Taliban throughout Afghanistan.^[1] Between 15 August 2021 and 15 June 2022, UNAMA has recorded 178 arbitrary arrests and detentions of former security forces and government officials, 135 arbitrary arrests and detentions of individuals accused of affiliation with armed groups, 122 arbitrary arrests and detentions of journalists and media workers, and 47 arbitrary arrests and detentions of human rights defenders by the Taliban authorities.^[2] In a series of interviews with women, Amnesty International also reported dozens of arbitrary arrests and detentions of women by the Taliban.^[3]

Afghanistan has a binding legal obligation to promote and protect fundamental human rights, including the right to liberty and freedom from arbitrary arrest or detention, both of which are guaranteed in customary international law and human rights treaties to which Afghanistan is a party. Moreover, the right to liberty is protected by the 2004 Constitution of Afghanistan. However, the Taliban purported to repeal the 2004 Constitution, announcing in September 2021 that they temporarily enacted at least portions of Afghanistan’s 1964 constitution.^[4]

Regardless of the status of Afghan law since August 2021, the Taliban, as the *de facto* government, have a duty to respect the still-in-force international legal obligations of the state and bear responsibility for any breaches of these obligations.^[5]

The Right to be Free from Arbitrary Detention in International Law

The right to be free from arbitrary detention is one of the most fundamental, consistent guarantees found in international human rights law. Major international and regional instruments provide specific and detailed sets of protections to prevent detention of individuals. In relevant part, Article 9 of the International Covenant on Civil and Political Rights stipulates:

- 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 procedures 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 judgement.*

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.*^[6]

One hundred and seventy-three (173) states, including Afghanistan, are party to the ICCPR^[7] and, in keeping with the Covenant's obligations, the right to be free from arbitrary detention is widely protected by law in national constitutions and legislation globally.^[8] Furthermore, such protections may also be found in Article 3 of the Universal Declaration of Human Rights, which states that "everyone has the right to life, liberty and security of person"^[9], echoed by article 4 (a) of the Cairo Declaration of the Organization of Islamic Cooperation on Human Rights, which provides that "every person has the right to liberty and security",^[10] and article 5 (1) of Arab Charter on Human Rights which states that "every human being has the inherent right to life".^[11] While the ICCPR is binding on Afghanistan, it is worth emphasizing the universal acceptance of the right to be free from arbitrary detention, a principle found in all regional human rights bodies and regularly reinforced by such bodies as the United Nations Working Group on Arbitrary Detention.

The widespread ratification of multiple treaties on the right to be free from arbitrary detention and its translation into national laws establish "a near universal State practice" which gives the right to be free from arbitrary detention a customary if not peremptory nature.^[12] For instance, article 14 of the Arab Charter on Human Rights restates the ICCPR's right to be free from arbitrary detention in similar terms; Article 5 of the European Convention on Human Rights prohibits arbitrary detention and sets out the strict legal grounds on which detention is permissible.^[13]

Arbitrary Detentions by the Taliban

The UN Human Rights Committee states that "arbitrariness" is not equal to "against the law", rather it should be interpreted in a broader term to include elements of inappropriateness, injustice, lack of predictability and due process of law.^[14] According to the UN Working Group on Arbitrary Detention, a detention is arbitrary under the following categories, according to which it is possible to assess the Taliban's unlawful practices:

- A) when there is no legal basis to justify the deprivation of liberty;
- B) when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by international law;
- C) when the detention occurs in a manner that does not observe totally or partially international norms which gives the deprivation of liberty an arbitrary character.^[15]

Category (A) – Deprivation of Liberty without Legal Justification: This category concerns any detention in the absence of a legislative provision and the failure of authorities to invoke a legal basis for it.^[16] Examples of this category include detaining individuals who have never been provided with legal justification, or keeping a person in detention after completion of his/her sentence or despite an amnesty law applicable to the detainee.^[17] For this purpose, existence of a law permitting the arrest is not sufficient; the authorities must justify the detention by invoking that particular law through notice of the reasons for arrest and charges, providing a lawful arrest warrant and the regular judicial review.^[18]

Reports show dozens of individuals have been arrested and detained with no legal justification since the Taliban takeover in August 2021. To give but one example, according to UNAMA, “on 27 December in Faryab province, *de facto* General Directorate of Intelligence detained a former national defense security officer on unknown charges. He was released on 30 December following mediation by tribal elders. He was beaten and had electric shocks used against him while in detention.”^[19] Similarly, women are being arbitrarily arrested and detained for not having a *mahram*^[20] in public.^[21] This happens notwithstanding the fact that freedom of movement is guaranteed by international human rights law.^[22] A prison staff member interviewed by Amnesty International stated: “there was an older woman with a heart problem. She said, ‘they took me from the market and brought me here’.”^[23]

In Panjshir province, where the National Resistance Front^[24] (NRF) is active, ordinary men have been arrested and detained in accusation of having an association with the NRF.^[25] According to former detainees, in an incident in June 2022, “Taliban forces detained about 80 residents in Panjshir’s Khenj district and beat them to compel them to provide information about the NRF.”^[26] In another incident, “*De facto* authorities arrested a shopkeeper, accusing him of affiliation with NRF. His dead body was found the following day...”^[27]

Category (B) – Deprivation of Liberty Resulting from Exercising Fundamental Human Rights: In category (B), a detention is arbitrary when it results from the exercise of fundamental rights guaranteed in international law, such as those rights articulated in the Universal Declaration of Human Rights and codified by the ICCPR.^[28] Under this category, people are unlawfully detained because they were exercising their legitimate human rights such as, for example, freedom of opinion and expression, freedom of assembly and freedom association.^[29]

Since the Taliban takeover, the ability of individuals and communities to exercise human rights, in particular the freedom of opinion and expression and freedom of peaceful assembly, have been limited. As a result, journalists, human rights defenders, and peaceful protestors have been arbitrarily arrested and detained by Taliban authorities.^[30] Between August 15, 2021 and June 15, 2022, UNAMA recorded 122 arbitrary arrests of journalists and media worker by the authorities.^[31] For instance, on September 7, the Taliban arrested and detained two journalists for covering protests by women in Kabul.^[32] Furthermore, on January 8, 2022, the Taliban arrested Professor Faizullah Jalal, a Kabul law professor, for making comments considered controversial on social media.^[33]

Category (C) – Deprivation of Liberty Resulting from Violations of the Right to Fair Trial: Articles 9 and 14(3) of the ICCPR provide for necessary procedural protections to prevent arbitrary detention. According to article 9 paragraphs (3) & (4) of the ICCPR, a detainee has the right to be brought promptly before a judge or other officer who has legal authority to exercise judicial power; a right to trial within reasonable time; and a right to have a court decision on lawfulness of his detention.^[34] Additionally, article 14 of the ICCPR states that everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal established by the law and has the right to a presumption of innocence until proven guilty.^[35] The article further provides minimum due process guarantees.^[36]

When the international norms relevant to the right to a fair trial are totally or partially disregarded, this gives the detention an arbitrary character.^[37] According to Reporters Without Borders (RFS), on May 7, 2022, an Afghan journalist was tried in a military court in western city of Herat and was sentenced to one year in prison for posting “content critical of the Taliban” on

Facebook.^[38] The journalist was not defended by a lawyer and the authorities forced him to sign a document renouncing his right of appeal.^[39] On another occasion, according to Amnesty International, Taliban authorities denied access to lawyers for women and girls who were detained on the charges of “moral corruption” or for fleeing abuse and abusive conditions.^[40]

Permissibility of Detention in International Human Rights Law

Lawfulness is the most fundamental requirement for detention explicitly stipulated in international instruments protecting the right to be free from arbitrary detention. Under article 9(1) of ICCPR, in addition to other instruments at the regional and global levels, as mentioned above, lawful detention must be based on grounds and carried out by procedure which are established by law.^[41] Additionally, these grounds and procedures, according to the Working Group on Arbitrary Detention, must be “accessible, understandable, non-retroactive” and equally applicable to everyone in a constant and predictable way.^[42]

Furthermore, it is widely accepted in international human rights law that detention is permitted by virtue of a conviction by a competent court, for non-compliance with the lawful order of a court, and to bring an individual before a competent legal authority based on reasonable suspicion of having committed an offence or if it is reasonably necessary to prevent a detainee from committing an offence or fleeing after having done so.^[43] In each circumstance the detention must be lawful.

After the collapse of the lawful government in August 2021, the former court system and judicial structure stalled and then resumed functioning by Taliban authorities under ‘Islamic law’ while the status of existing laws are unclear.^[44] This lack of a clear substantive and/or procedural legal framework challenges applicability of international standards such as the principle of legality and due process for any detention carried out by the authorities.

CONCLUSION

The right to be free from arbitrary detention is protected by customary international law and treaties to which Afghanistan is a party, in particular the ICCPR. The *de facto* government of the Taliban is obliged to fulfill the country’s international obligations, including protecting citizens’ fundamental human rights. Arbitrary arrest and detention violate these human rights instruments. Any detention by the authorities must be lawful, respect international standards of due process and fair trial, and be subject to accountability in the instance of violations.

NOTES

^[1] See United Nations Assistance Mission in Afghanistan (UNAMA), *Human Rights in Afghanistan: 15 August 2021 to 15 June 2022* (2022), available at <https://unama.unmissions.org/human-rights-monitoring-and-reporting>; Amnesty International, *Death in Slow Motion: Women and Girls Under Taliban Rule* (2022), available at <https://www.amnesty.org/en/documents/asa11/5685/2022/en/>. For background and overview of the UNAMA report, see also Kate Clark, *Arbitrary Power and a Loss of Fundamental Freedoms: A look at UNAMA’s first major human rights report since the Taliban takeover*, Afghanistan Analysts Network, 20 July 2022, available at <https://www.afghanistan-analysts.org/en/reports/rights-freedom/arbitrary-power-and-a-loss-of-fundamental-freedoms-a-look-at-unamas-first-major-human-rights-report-since-the-taliban-takeover/>.

^[2] See UNAMA, *supra* note 1.

^[3] See Amnesty International, *supra* note 1.

- ^[4] Ayaz Gul, *Taliban Say They Will Use Part of Monarchy Constitution to Run Afghanistan for Now*, voanews (Sep. 28, 2021), available at <https://www.voanews.com/a/taliban-say-they-will-use-parts-of-monarchy-constitution-to-run-afghanistan-for-now/6248880.html>.
- ^[5] Ben Saul, “Recognition” and the Taliban’s International Legal Status, International Center for Counter Terrorism (Aug. 16, 2022, 11:48 AM), available at <https://icct.nl/publication/recognition-talibans-international-legal-status/>.
- ^[6] International Convention on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.
- ^[7] UNTC, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND (last visited Aug. 16, 2022).
- ^[8] Working Group on Arbitrary Detention: Compilation of Deliberations, para. 43, available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>.
- ^[9] Universal Declaration of Human Rights art. 3, Dec. 10, 1948.
- ^[10] Cairo Declaration of Human Rights in Islam art. 4, Aug. 5, 1990.
- ^[11] Arab Charter on Human Rights art. 5(1), May 22, 2004.
- ^[12] Working Group on Arbitrary Detention, *supra* note 8. para 43.
- ^[13] Convention for The Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 222 U.N.T.S. 1955.
- ^[14] Communication No. 458/1991, A. W. Mukong v Cameroon, para. 9.8, U.N. Doc. CCPR/C/51/458/1991 (1994)
- ^[15] Fact Sheet No. 26: The Working Group on Arbitrary Detention (2019), available at <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet26en.pdf>.
- ^[16] *Id.* at 6.
- ^[17] *Id.* at 5.
- ^[18] *Id.* at 6.
- ^[19] UNAMA, *supra* note 1, at 14.
- ^[20] According to Afghan traditional practice, a *mabram* is a member of one’s family with whom marriage is not allowed in Islam. In this context, a *mabram* is a male relative who should accompany a woman in public and excluding husband the male relative should be someone with whom marriage is not allowed, such as father or brother.
- ^[21] Amnesty International, *supra* note 1, at 49.
- ^[22] International Convention on Civil and Political Rights art. 12, Dec. 16, 1966, 999 U.N.T.S. 171.
- ^[23] Amnesty International, *supra* note 1, at 50.
- ^[24] National Resistance Front is an anti-Taliban movement that emerged from the Panjshir Valley and opposes the Taliban militarily.
- ^[25] Human Rights Watch, *Afghanistan: Taliban Torture Civilians in Panjshir* (Jun. 10, 2022), available at <https://www.hrw.org/news/2022/06/10/afghanistan-taliban-torture-civilians-panjshir>.
- ^[26] *Id.*
- ^[27] UNAMA, *supra* note 1, at 16.
- ^[28] Fact Sheet No.26, *supra* note 15, at 6.
- ^[29] *Id.*
- ^[30] UNAMA, *supra* note 1, at 20.
- ^[31] *Id.* at 26.
- ^[32] *Id.*
- ^[33] *Id.* at 27.
- ^[34] International Convention on Civil and Political Rights art. 9 (3) and (4), Dec. 16, 1966, 999 U.N.T.S. 171.
- ^[35] *Id.* art. 14 (1) & (2).
- ^[36] *Id.* art. 14 (3).
- ^[37] Fact Sheet No.26, *supra* note 15, at 6.
- ^[38] *Afghanistan: Afghan journalist tried by military court, sentenced to one year in prison*, RSF, (May 11, 2022), available at <https://rsf.org/en/afghanistan-afghan-journalist-tried-military-court-sentenced-one-year-prison>.
- ^[39] *Afghan journalist Khalid Qaderi sentenced to 1 year in prison*, Committee to Protect Journalists, (May 6, 2022), available at <https://cpj.org/2022/05/afghan-journalist-khalid-qaderi-sentenced-to-1-year-in-prison/>.
- ^[40] Amnesty International, *supra* note 1, at 48.
- ^[41] See International Convention on Civil and Political Rights; Arab Charter on Human Rights; Convention for The Protection of Human Rights and Fundamental Freedoms.
- ^[42] Working Group on Arbitrary Detention, *supra* note 8. at 8.
- ^[43] Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(1), Nov. 4, 1950, 222 U.N.T.S. 1955.

^[44] UNAMA, *supra* note 1, at 35.