

MILITARY CRIMINAL PROCEDURE CODE

CHAPTER ONE GENERAL PROVISIONS

Article 1. Purpose

This Code is enacted, according to articles 122 and 134 of the Constitution, to regulate the procedures relating to discovery, investigation and trial of duty related crimes of Armed Forces (Afghan National Army) service members.

Article 2. Record of Procedural Activities

All actions taken to implement the provisions of this law for hearing criminal cases shall be recorded by relevant offices.

Article 3. Definitions and Persons Subject to this Code

(a) The following terms in this code mean:

(1) The term “suspect” refers to a person who is, during discovery and investigation, suspected of committing a crime.

(2) The term “accused” refers to a person whose case has been prosecuted, and referred to military court by the prosecutor.

(3) The term "legal officer" means any officer who has legal certification, designated to perform legal duties in ANA units.

(4) Terms used in the Military Courts Law also apply in this code.

(b) A person is considered service member of the Armed Forces if:

1. Taken military oath;
2. Enlisted voluntarily in the Armed Forces;
3. Met the mental competence and minimum age qualifications for service at the time of voluntary submission to Armed Forces authority;
4. A person who is on active duty (his active duty service is not been terminated).

5. A member of a reserve component, who is not on active duty but committed a criminal act while he was on active duty, will be involuntarily ordered to active duty for the purpose of investigation and trial by military court;

6. A person who has obtained his discharge through false and forged documents;
or,

7. A person who deserted from the Armed Forces, and then apprehended.

© A person over whom the authority for the exercise of jurisdiction by a military court is delegated by laws of Afghanistan, from a treaty or international agreements.

Article 4. Jurisdiction of Military Courts

(a) The jurisdiction of a Basic Military Court or Appeals Court is entirely penal or disciplinary, and has no power to adjudge civil cases.

(b) Except as otherwise provided by law, a civilian employee of the Ministry of Defense or of a component of the Afghan National Army is subject to the civilian law and the jurisdiction of the civilian courts and is not subject to the jurisdiction of the military courts.

(c) To the extent permitted by the constitution, military courts can try an offense under Constitution, this Code and other laws of the country.

(d) The military court can try cases committed within its jurisdiction.

Article 5. Territorial Applicability of this Code

This code applies on members of the Armed Forces in all places.

Article 6. Holding Members of the Armed forces Separately while under Custody and Detention

No member of the Armed Forces who is suspected or accused of committing a crime may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the military.

Article 7. Delivery of the Accused to Civil Authorities

(a) A member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(b) When delivery under this article is made to any civil authority of a person undergoing sentence of a military court, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the military court, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence.

Article 8. Temporary Military Tribunals

Temporary Military Tribunals can be established, within military courts, by the approval of president.

Article 9. Prohibition against Illegal Punishment

No person or Armed Forces authority can punish a person, except by the decision of an authorized court. Disciplinary restriction and precautionary detention can be effected.

Article 10. Prohibition against Retrial for a Single Criminal Act

No person can be tried a second time for a single criminal act.

Article 11. Time Limitation on Criminal Proceedings

(a) Any person charged with absence without leave during war or any other offense punishable by death can be prosecuted at any time without limitation.

(b) Except for the matters mentioned in Article 13(a), no other crimes may be tried if ten years have passed from the date the crime was committed.

(c) If a crime, resulting in serious consequences, committed during time of war is not prosecuted within ten years after commission of the crime, the offender can be prosecuted if charges are served upon the accused within three years of the end of the war.

Article 12. Period of Custody and Detention

If the accused is convicted, a one-day confinement credit for each day that the accused spent in pretrial detention shall be awarded.

Article 13. Taking of Confession

(a) No person can compel or force any person to make a statement against him.

(b) Any statement or confession taken from the suspect by compulsion or force will be invalid.

© No person may take a statement which is not material to the issue.

Article 14. Rights of the Accused

(b) Before taking any action, persons in charge of discovery, investigation and trial are required to inform the suspect or the accused of the following rights:

1. Right to remain silent;
2. The right to be informed of the nature of charges and investigation; and,
3. The right to be informed that if he makes any statement it can be used against him in the court.

Article 15. Exclusionary Rule

The evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid and the Court cannot base its judgment on it.

CHAPTER TWO DISCOVERY AND INVESTIGATION OF CRIMES

Article 16. Discovery of Crimes

Commanders and Military Police are required, within the scope of their responsibility, to discover military crimes, and identify the perpetrator, and submit him to relevant authority for prosecution.

Article 17. Report of Crimes

- (a) All members of the Armed Forces are required to report, as soon as practicable, all the crimes they happen to know to relevant authority.
- (b) Other persons can also report military violations to relevant authority.
- (c) The authority receiving the report shall, as soon practicable, forward the report and other information to the immediate commander of the suspect.
- (d) Commanders notified of military crimes committed by service members under their command are obliged to conduct a preliminary inquiry into the facts and circumstances surrounding the alleged crime. If the commander's inquiry reveals that there is good cause for continued disciplinary proceedings, he will, in appropriate cases, refer the matter to the prosecutor for further investigation pursuant to Chapter Three of this code.

Article 18. Apprehension

- (a) For the purpose of this code, apprehension is the taking of a person into custody.
- (b) Any person authorized under this Code to apprehend persons subject to this Code may do so upon collecting good and legal reasons.
- (c) Discovery activities must be completed within 72 hours, and apprehended person shall be submitted to relevant authority for investigation.

Article 19. Apprehension of Deserters

Any civil law enforcement officer may summarily apprehend a deserter from the Armed Forces and deliver him into the custody of Armed Forces.

Article 20. Imposition of Restraint

- (a) Arrest is the restraint of a person, not imposed a punishment for an offense, directing him to remain within certain specified limits in order to take precautionary measures.
- (b) Arrest and taking under custody happen pursuant to an order from a competent authority.
- (c) No person may be ordered into arrest or confinement except for probable cause.

CHAPTER THREE INVESTIGATIONS

Article 21. Investigation by Military Prosecutor

- (a) Military prosecutor is required to interrogate the person within 72 hours of receiving the case and person from the commander, and the responsibility to investigate rests upon him.
- (b) Interrogation must be conducted in the presence of the accused's defense counsel, and the accused has the right to remain silent.
- (c) If the military prosecutor determines that it is necessary to detain the accused, he shall formally present his reasonable recommendations to a relevant military court. The court can make a decision that the accused be prosecuted or released.

Article 22. Collection of Evidence

- (a) The military prosecutor has primarily responsibility for collecting all relevant evidence to either inculcate or exculpate the accused.
- (b) Methods of gathering evidence include: witnesses interviews; interrogations; line-up procedures; inspections; searches; seizure; expert evaluations and interviews; and collection of physical evidence.

Article 23. Defense Counsel Presence

- (a) The defense counsel at all stages of the case has equal rights with the prosecutor to gather and review evidence relating to the case, ask questions and get answers to obtain information and clarify the case.
- (b) The defense counsel has the right to be present at all interrogations of the accused.
- (c) The accused and defense counsel have the right to be present during all searches, line-up procedures, witness interrogations, expert examinations, and the trial itself. The defense counsel will have equal opportunity to ask questions or gather information during these sessions.
- (d) In the case of searches, interviews, interrogations, line-ups or expert examinations arranged by the prosecutor, either himself or through military criminal investigators, the prosecutor will give the accused and defense lawyer at least 72 hours advance notice of the activity, so that the defense can attend.

(e) In emergency situations where there is potential of an immediate loss of evidential facts, the prosecutor may gather evidence without prior notice to the accused or defense counsel. The prosecutor must, however, forward all information gained from the evidence to the accused and defense counsel as least within 72 hours of collecting the evidence.

Article 24. Conclusion of the Investigation

(a) At the conclusion of the investigations phase, the military prosecutor will dismiss the case, if there is not sufficient evidence to prosecute.

(b) If there is sufficient evidence to prosecute the case, the military prosecutor will prepare the indictment, and forward the indictment together with all evidence to the basic military court. A copy of the indictment will be served on the accused and his defense counsel at the same time it is forwarded to the court.

(c) Military prosecutor is required to complete the above mentioned activities within 120 days (it means that he shall complete the investigation process within 120 days).

(d) The accused has the right to prepare his defense within 10 days of receiving the indictment.

CHAPTER FOUR THE TRIAL

Article 25. Number of Judges

Criminal cases will be heard and adjudicated by three military judges. If a military judge is unable to carry out his duties due to abstention, disqualification, physical disability or other good cause, the Head of the Legal Department for the General Staff shall complete the number of judges. When a military judge is unable to continue his duties during a trial in progress, the proceedings shall be stopped, and be resumed after the designation of the new judge, and the previous proceedings of the trial will be read to the judge newly assigned in the presence of both parties.

Article 26. Clerk of the Court

An eligible and qualified person shall be appointed to record the proceedings of and testimony taken before the court.

Article 27. Continuances

The military judge may, for reasonable cause, grant a continuance at the request of either party, provided that it does not violate the speedy trial right of the accused.

Article 28. Immunity of the Court

If a person or authority influences a military judge, prosecutor or defense, he will be punished according to the provisions of law.

Article 29. Abstention of the Military Judge

(a) A military judge cannot handle the case if:

1. The crime was committed against him or his relatives to third degree; or,
2. He has performed duties of the military police, military criminal investigators, military prosecutor, military defense counsel, or has given witness or functioned as an expert in the same case.

(b) When the cases indicated in paragraph (a) occur, the judge shall request the senior military judge of his basic military court to authorize him to abstain.

(c) When the cases indicated in paragraph (a) occur and the military judge in question is the senior military judge for a basic court, the senior military judge shall request the Head of the Legal Department for the General Staff to authorize him to abstain.

(d) When a senior military judge or the Head of the Legal Department for the General Staff accepts the request to abstain, the decision cannot be protested or appealed.

(e) When a senior military judge authorizes abstention, he or she shall substitute the requesting judge for the handling of the case.

(f) When the Head of the Legal Department for the General Staff authorizes abstention, he or she shall order the substitute of another military judge.

(g) Pending a decision on abstention, the military criminal procedures in that case shall be stayed.

Article 30. Disqualification of Judges

Both parties to a case have the right to request the director of the court to disqualify the concerned judge, if matters mentioned in Article 28 (a) exist.

Article 31. Date of the Trial

(a) The military court, after having received the indictment from the prosecutor determines the date and day of trial, and informs the parties ten days before starting the trial proceedings.

(b) The court is required to hear the case within one month.

Article 32. Access to Witnesses and Evidence

The prosecutor, the defense counsel, and the accused shall have equal possibility to obtain lawful witnesses and other lawful evidence. The procedure to collect other evidence, listen to the statement of the witnesses, and the accused access to documents and evidence is subject to Civilian Criminal Procedure Code.

Article 33. Mentally Insane Accused

(a) If during the investigation or trial it appears that the accused suffers a mental illness which prevents him from the possibility of a defense, the court either on its own, or at the request of the prosecutor, will stay the proceedings and submit the accused to a mental examination.

(b) If the examination confirms the accused has mental illness, and the illness is believed to temporary, the resumption of proceedings is postponed until the suspect recovers.

(c) In the case the accused is later on sentenced to imprisonment, the time spent in a mental institution for examination is detracted from the prison term.

Article 34. Accused's Obligation to Appear

The accused is required to, when his appearance is deemed necessary, appear before military court.

Article 35. Obligation of Witnesses and Experts to Appear in Court

Witnesses and experts are required based on an order issued by a court to appear and testify. If they refuse to appear without good cause, the court will force them to appear. The court can impose a fine for not appearing up to 1000 Afghanis.

Article 36. Taking an Oath

Witness who appear in court to testify are required to take an oath in the name of Allah, before they testify, that whatever they say is true in the best of their knowledge.

Article 37. Exemption from Testimony

Spouses, even if divorced, the accused's ancestors and descendants, and his close relatives to third degree can refuse to testify against the accused, unless they are the victims of committed crime.

Article 38. Order of the Trial

- (a) The judge presiding over the proceedings explains the order of trial and maintains it.
- (b) Trials are open to the public except when the court decides all or part of it shall be closed to the public for reasons of public order, or national security.
- (c) The military prosecutor is required and the accused, and his defense counsel have the right to be always present; however, should the accused's behavior disrupt the proceedings, he can be excluded by the military judge for part or all of the duration of the trial. He will be readmitted to the trial when the verdict is read out.

Article 39. Conduct of the Trial

- (a) The military prosecutor is required to participate in the trial, read out the indictment and answer questions asked by the court.
- (b) The accused and his defense counsel are required to be present in the trial, and ask the witnesses and experts to provide necessary information.
- (c) The military judge can, at any time, address questions to the accused and to any witness in the trial.
- (d) The accused can refuse to answer the questions of the military judge consistent with his right to remain silent.

Article 40. Contempt of Military Court

The military court has authority to punish any person who disturbs the trial proceedings, by evicting him from the courtroom, imposing up to one month confinement, or a fine up to 10,000 Afghanis.

Article 41. Issuing Order

(a) The decision to impose the death penalty will be made unanimously by the three judges present in the trial proceedings. The death penalty will not be adjudged in one-judge trials.

(b) Except in death penalty cases, findings and punishment in all other cases will be imposed by a majority of votes of the judges present in the trial proceedings.

Article 42. Announcement of Findings

The judge presiding over the proceedings will announce the findings and sentence to the parties in open court.

Article 43. Decision of the Basic Military Court

The decision of the court will be provided by administrative office of the court in writing within 15 days of issuing the decision, to the accused, defense council, and the prosecutor. The decision shall be in detail, containing all of the reasons for it.

Article 44. Effective Date of Sentences

(a) The decision of a basic military court is final after there is no future opportunity for appeal, and the case is considered final. A final case means that all appeals have been exhausted; the parties agreed not to appeal; or more than 20 days have passed since the basic court decision.

(b) The accused is detained, if required, until final decision is made.

(c) Before issuance of final decision of the court, pay and other privileges of the accused must not be postponed or forfeited.

Article 45. Execution of Confinement

Persons convicted to confinement by a military court will serve the period of confinement in Armed Forces or civilian prisons.

Article 46. Appeal against the Decision

If one of the parties is not satisfied with the decision of the basic military court, and he appeals the decision, he can submit an appeal to the court issuing the order or the Military Court of Appeals.

CHAPTER FIVE APPELLATE PROCEDURES

Article 47. Appeal Against the Decision of the Basic Military Court

- (a) The person who has been sentenced can appeal the decision of the court by filing an appeal. The act of appeal shall be filed with the clerk of the court issuing the order or Military Court of Appeal within twenty-days. This time limitation starts from the last notification.
- (b) The prosecutor can, after the verdict is issued, appeal the decision of the Basic Military Court. The appeal must be in writing, and filed with clerk of the court issuing the decision or the Military Court of Appeals within ten days.

Article 48. Stay of the Procedure and Appeal of the Decision in the Case of the Not Found Accused

- (a) After the decision of the court in the case of the not found accused (trial in abstentia) the procedure stays until when the accused personally or the defense counsel delegated by him lays down an appeal. In this case the beginning of the appeal term starts for the accused from the moment he has been found, and also a notification has been delivered to him.
- (b) If the accused does not lay down an appeal during the said term in article 47 (a) the decision becomes final.

Article 49. Modalities of the Appeal

- (a) The act of appeal shall be signed by the accused or by his defense counsel when the latter represented the accused during the trial.
- (b) The clerk of the court receiving the act of appeal has to register it specifying the date and hour of the delivery.
- (c) If the accused who wants to file the appeal and delivers a written text is unable to sign it because illiterate or for any other reason he can fingerprint it and the clerk of the court shall certify this in the register.
- (d) If an illiterate person wants to file an appeal but is not in a position to present a written text, the clerk of the court shall write down in the register his verbal statements.

Article 50. Content of Appeal

(a) The act of appeal shall contain the indication of the contested decision and expose the reasons according to which the decision is considered wrong.

(b) The denunciation of the errors of the decision shall make reference to:

1. Wrong application of the law and definition of crime;
2. Wrong evaluation of the facts and circumstances;
3. Wrong application of the penalty and/or its amount.

Article 51. Activities of the Appeal Trial

(a) The Chief Judge of the Court of Military Appeals, upon receipt of the appeals shall fix the date and hour of the hearing.

(b) The notification shall be served to the accused and the prosecutor at least five days before the date of the hearing by the Executive Office of the Court.

Article 52. Powers of the Court of Military Appeals

(a) The Court of Military Appeals shall confine its review to the points of the decision to which the act of appeal makes reference.

(b) When the appeal is filed by the accused, the court can in no case increase the punishment inflicted by the Basic Military Court.

Article 53. Appeal Hearing

(a) Whenever the Court of Military Appeals deems that the activities accomplished in the previous procedure are not sufficient for making a sound decision, it can hear the witnesses and experts who appeared in the Basic Military Court and collect new documents and explore new proofs.

(b). Otherwise the court makes its decision on the basis of the existing material and of the arguments presented during the discussion.

Article 54. Decision of the Court of Military Appeals

- (a). The appeal is rejected if it has not been filed within the established term.
- (b). The decision of the Court of Military Appeals can confirm or modify in all or in part the previous decision.
- (c) In the verdict the court can order the confinement of the accused or the release of the accused under detention.
- (d) The Court of Military Appeals announces the verdict in open court.

CHAPTER SIX RECOURSE TO THE SUPREME COURT

Article 55. Recourse Against the Decision of the Court of Military Appeals

- (a) The person sentenced by the Court of Military Appeals, the victim or the prosecutor can lodge a recourse to the Supreme Court only if the complaint refers to:
 - 1. Violations in the application of the law or wrong interpretation of the law.
 - 2. A decision based on the rule excluding evidence which has been collected without respect of the legal requirements.
- (b) The period to file an appeal with the Supreme Court is 30 days of announcing the decision by Court of Military Appeals.

Article 56. The procedures for revision of a decision by the Supreme Court are subject to civil laws.

CHAPTER SEVEN

FINAL PROVISIONS

Article 57. The Powers of the Head of the Legal Department for the General Staff

- (a) The Head of the Legal Department for the General Staff has a leading role in the Afghan National Army military justice system. He has the authority to appoint legal military cadres in appropriate positions in accordance with provisions of Military Courts Law.
- (b) The Head of the Legal Department for the General Staff is responsible to oversee and control the performance of military judges, prosecutors and defense counsels of the Military Basic and appeals court, and the legal officers involved in military criminal

cases. Also, he has the authority to replace or substitute, in accordance with the provisions of law, the above mentioned persons in a case.

Article 58. Qualifications of Prosecutor and Defense Counsel

(c) Prosecutor or defense counsel must have the following qualifications:

1. Must be a judge advocate; or civilian having a certificate or license; and
2. Must be certified as competent to perform such duties by the Head of the Legal Department for the General Staff.
3. If the selected defense council by the accused is rejected by the Head of the Legal Department for the General Staff, he is required to present writing reasons about the rejection.

Article 59. Execution of Sentence

The death penalty will be executed after going through lawful process, and after the approval of the President.

Article 60. The Civilian Criminal Procedure Code will be applied on issues for which there is not any provision listed in this code.

Article 61. This code will come into effect when it is approved, and shall be published in the Official Gazette.