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IN DEMOCRATIZATION**

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**Case Study
Afghanistan**

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Table of Contents

| | <i>Page #</i> |
|------------------------------------|---------------|
| A. Introduction | 03 |
| B. Context | 06 |
| The Bonn Process | 07 |
| The Emergency Loya Jirga | 09 |
| C. Process | 11 |
| Drafting and Consultation | 12 |
| The Constitutional Loya Jirga | 17 |
| After the CLJ | 20 |
| D. International Assistance | 21 |
| E. Implementation | 23 |
| F. Conclusions | 24 |

Bibliography

...xxx...

...xxx...

...xxx...

A. Introduction

The Constitutional Loya Jirga, or constitutional grand assembly of Afghans, had argued since the middle of December, sometimes bitterly, over the draft constitution, but key issues remained unresolved at the beginning of January, 2004, including the form of government, the place of Islam, the structure of the state, language and ethnic identity, and women's rights. A substantial number of delegates refused to vote on critical issues. Gridlock threatened the process and any possible outcome. Hamid Karzai, President of the Transitional Authority, asked Lakhdar Brahimi, the Special Representative of the Secretary General of the UN, and Zalmay Khalilzad, the U.S. Ambassador, to mediate. They listened, they talked, and on 04 January 2004, the delegates to the Loya Jirga, standing to show consensus, adopted a new constitution for Afghanistan. This was the culminating moment in a process which, although not without flaws, demonstrated concrete efforts to come to grips with the issues facing Afghanistan. Critical questions include the degrees to which this process may come to stand, along with the constitution itself, as a cornerstone of national reconciliation and the building of peace, as well as any extent to which it may contribute to future conflict.

The issue is whether Afghanistan can make any system of government work which puts the need for functional national unity through diversity ahead of everything else. The challenge is one of leadership and vision in the service of a country emerging into the rule of law. The 2004 Constitution, a document heavy with rights, responsibilities and the requirements of implementation, is the principal tool by which these challenges will be applied to that issue. It is a complex document, both nuanced and blunt, and the work ahead will not be easy. It is the purpose of this paper to describe how the 2004 Constitution came to be, in a spirit of solidarity and candour with the people of Afghanistan, with respect to the great advances, as well as the difficulties, which this process has seen.

A constitution serves to establish a binding framework for the rule of law, through which the constituted body (a state in this case) is required to serve the public interest of the constituted body as a whole. A constitutional process may be invoked in order to adopt a new constitution, or to amend an existing constitution. This may be both to engage a process through which such fundamental principles may be negotiated (thus setting the framework for the rule of law), and in order to have a record of what those fundamental principles are (thus allowing implementation of

the framework for the rule of law). Overall, this may be in order to build a new state or nation, to resolve a political gridlock between sub-sovereign nations or minorities which threatens the integrity of a state, to contribute to a process of post-conflict peace-building and national reconciliation, or some combination of all of those.

In order for a constitution, and the process leading to its adoption, to fulfill any of the roles suggested above, it ought to be reasonably sustainable and functional over many years, and hopefully for at least several generations. In order for that goal to have any chance of being achieved, the process must be as inclusive as is reasonably possible. This is not just a question of including “the public”. There are many publics. The question is the inclusion of stakeholders and interested parties, as well as those “ordinary people” who may have no interest or stake in the outcome other than the efficient provision of government services.

A stakeholder’s interest may be legitimate, illegitimate, legal, illegal, political, commercial, moral, immoral, religious, personal, professional, financial, or otherwise. Stakeholders may be individuals, institutions, agencies, organisations, governments or corporations. Their interests can derive from real or perceived rights or entitlements and may be enforceable through military or armed force, because of status and prestige, or financial wealth, or because of historical or accepted practices, customs and conventions. The benefits of interest-based stakeholder inclusion in peace- and nation-building processes include a reduction of the risk that the entire process, and all potential outcomes, will fail, the adjudication of real or perceived claims to rights and entitlements, and a greater chance that the process and its outcomes will be or become sustainable and locally or nationally owned, as opposed to subject to foreign control and interference.

In the case of the recent constitutional process in Afghanistan, the stakeholders or interested parties may be generally described as those who had power and still have it (such as the Mujahedin and various foreign interested parties), those who had power and have lost it (such as the previous regime), and those who did not have power and now have a claim to it (such as those who would describe themselves as “the people” or “the barefoot people” of Afghanistan).

The principle of inclusion is a guide, but is by itself of no particular merit. Inclusiveness is a worthy goal if it helps to advance the emergence of a society based on the rule of law (Islamic, international, democratic, or however else that may be characterised,) in pursuit of the broad public

interest of all peoples united in the nation. The goal of inclusion must be applied reasonably, and having regard to all of the circumstances. The standards that might be applied in a functioning rule of law state in the same or another region of the world may be inappropriate, granted cultural or traditional norms which have yet to be tested, or impossible granted available resources, or so politically volatile that the loss of integrity resulting from exclusion may be worth the risk of non-inclusion. These are very difficult decisions to make, and those who sit later in judgment must bring a realistic perspective, a certain tolerance, and the understanding that a less than perfect process may still yield a good enough outcome.

That is, if the standard of inclusion is seen as a goal in and of itself, the process will become nothing more than a popularity contest. Both evil and incompetence may be done by and in the name of “the people”, as easily as good and competence. The real test, it may be argued, is the public interest, or common good or welfare, of Afghanistan. What is in the public interest is, of course, a complex set of questions and issues, which will be determined by, among other things, both vision and leadership, as much as the numerical inclusion of people or peoples.

Whatever errors or flaws were incorporated into the process, and we will argue that they did exist, they were within tolerance levels for a country on the edge of emergence from the most profound forms of violence and internal and external conflict. No such process had been seen or conceived of in Afghanistan for more than a quarter century. Almost no institutional memory was left alive of such possibilities. It should be noted that the very concept of a wide and effective public consultation process was unprecedented in Afghanistan.

The test will be timely and concrete implementation according to the provisions of the constitution itself. If this occurs, then the process will stand as having been good enough. If it does not, the process will come to stand as no more than the latest in a decades-long series of failed efforts to institutionalise the rule of law and the pursuit of the public interest on a national level.

B. Context

Afghanistan has enjoyed, since the 1920s, what can only be described as a remarkable history of constitutional activism, with constitutions being adopted in 1923, 1931, 1964, 1977, 1987, 1990, and now 2004. The 2004 Constitution will be the seventh such document, creating an average of one every 11 - 12 years for the last 81 years. This does not include constitutional initiatives that did not result in the actual adoption of a new constitution, as with the “Interim Constitution” of 1990 and the “draft Constitution” of 1992.¹

Historically, it is not uncommon for the constitutions of Afghanistan to have relatively little to do with the political and legal lives of the country or its people. “The ideals of Afghan society are more or less expressed in the 1931 constitution, but the government never implemented the pr[e]scribed constitutional monarchy within the parliamentary system. The institutions created by the document appeared to allocate authority to various government offices, but, in reality, power centred in the monarchy and the royal family, creating a veritable oligarchy. ... Therefore, the constitution created the illusion of popular participation without proper enforcement provisions.”²

Considerable attention has been paid in the current constitution building process in Afghanistan to both the reality and the perception of “popular participation”, without which neither the process nor its outcome will be or can be seen as either fair or legitimate. What that means, however, in the context of Afghanistan, is not easy to determine.

The peoples of Afghanistan differ by ethnic background and religion, with the great gender divide running through all. The four main ethnic groups are Pashtun (traditionally the dominant group), Tajik, Hazara and Uzbek. Different sects of Islam have lived together for centuries, not always without conflict, and there is a small history of Christianity and Judaism. Conflict in Afghanistan is characterised by ethnic difference, but is not, at its roots, caused by ethnic difference. The deepest and most violent conflict has arisen from political differences with real or fabricated origins in religion, which then become exacerbated by regional and tribal opportunism and self-interest. These fault lines have been fed by differences between the single great urban centre, Kabul, an on-going magnet for foreign intervention and manipulation, and the rest of the country. Around, over and under all of this lies the bedrock of a profound inequality, as harsh as any in the world, between women and men, and a decades-old loss of education and access to the basic necessities of

¹ Sources of past constitutions of Afghanistan include web-sites (e.g., <http://www.afghan-web.com/history/>) and *The Constitutions of Afghanistan (1923 – 1997)*, available at Shah Books in Kabul.

² Louis Dupree, *Afghanistan*, 1980 Princeton University Press, p. 464.

life, for the overwhelming majority of the population. Politically, Afghanistan remains caught between various internal factions and forces of varying degrees of political reaction, fundamentalism, liberalism and progressiveness, on the one hand, and on the other hand between the country as a whole and the international community, itself a diverse collection of interested parties of differing political agendas and strategies.

Of particular and on-going interest is a pattern of recurring or cyclical support afforded by the international community to Afghan commanders. This group of individuals, and their various followers and supporters, have been the objects, to greater or lesser degrees, of regular arming and re-arming initiatives (*e.g.*, to fight the Soviets and then the Taliban,) followed by regular exclusion, again to greater or lesser degrees, from the political processes. This process of legitimation, re-legitimation, marginalisation and exclusion has led to consequences which continue to be very real in Afghanistan today. One of the core challenges facing the new state, from a constitution building perspective, will be the integration of the commanders, and their supporters, into a society based on the rule of law.

In late 2001 and early 2002, in this complex and difficult environment, Afghanistan set out, with the assistance of the international community, to place itself within the rule of law by creating a constitutional framework which does in fact reflect, we argue, the public interest overall of the country, and of Afghanistan as a unified nation and state.

The Bonn Process

Following 11 September 2001, a coalition led by the United States launched a bombing campaign against the Taliban regime in Afghanistan. By 17 November 2001, the Taliban had fled Kabul, and forces of the Islamic United Front for the Salvation of Afghanistan, generally known as the Northern Alliance, had entered the capital city and taken over much of the country, with the support and backing of the international community.

After the fall of the Taliban, the public political process was launched by a conference held under the auspices of the United Nations in December 2001 in Bonn, Germany. This was the first step in what was conceived to be a multi-year peace process with constitutional and electoral components, to result in the establishment of a fully representative government. The Bonn Conference was, in effect, a gathering of some interested groups which set out to allocate positions of power and

determine a sequence of events and timeline for this to take place. This was done through the mechanism of the Bonn Agreement, the product of the Bonn Conference. The Bonn Conference did not, itself, set out or attempt to deal with the causes or roots of conflict, or to resolve those, or to reconcile or even bring together all the parties involved.

The Bonn Agreement called for a succession of temporary governments, with the appointment or election of key leaders, the interim application of the 1964 constitution in general, (save, *e.g.*, to the extent of any inconsistency with the Bonn Agreement), the adoption of a new constitution, and elections. Hamid Karzai, a Pashtun from Kandahar who had returned from exile under the authority of the United States to participate in the fight against the Taliban, became the Chairman of the Interim Authority. The Northern Alliance, and in particular its Shora-y-Nezar or Supervisory Council faction, which controlled the capital Kabul, dominated the talks and secured key security sector and other posts at the end of the Conference, including the chiefs of the police, of the army and of the intelligence services. A fully representative constitutional government was to be achieved, however, in two and a half years. The Interim Authority was to govern for six months, followed by a Transitional Authority to be established for two years by an Emergency Loya Jirga, followed by a Constitutional Loya Jirga and the transfer of power to “a fully representative government elected through free and fair elections” no later than mid-2004.

Four Afghan factions were invited to Bonn: the Northern Alliance (militarily the strongest); the Rome Group (mainly Afghans living abroad, affiliated with the former King who had broad but disorganized support in the country); and less influential factions represented by the Peshawar Group and the Cyprus Process. Determining genuinely representative leaders of the peoples of Afghanistan was difficult, in the winter of 2001 and 2002, after decades of large-scale foreign interference. Arguably, one of the purposes of the Bonn Conference was to put in place a process by which the people could identify and select such individuals in the future. In the meantime, many ordinary Afghans did not feel represented by those who claimed to represent them.

However, Afghans generally welcomed the Bonn Agreement, as noted by the Secretary General in his March 2002 report to the General Assembly: “...reaction to the signing of the Bonn Agreement was largely positive... the majority of the population – exhausted, impoverished and desperately yearning for peace – recognised that a unique opportunity presented itself for the country finally to start down the path to peace and sustainable development after more than 23 years of war...”.

The Bonn Agreement identifies certain issues which remain to this day the checklist of challenges facing Afghanistan. The Agreement is about, as it declares in its title, “[t]he re-establishment of permanent government institutions,” and the great topics in the Bonn Agreement are the legal framework and the judicial system, emerging forms of government administration, security (including all questions to do with mujahedin and armed forces as well as the fight against terrorism, drugs and organised crime,) international human rights and humanitarian law, and”... the participation of women as well as the equitable representation of all ethnic and religious communities...”.

As well as being one of the core issues and challenges for Afghanistan, the situation of women is one of the great indicators of progress and development in all areas. This is for a number of reasons, including the fact that women and girls are almost certainly more than half the population (thus making it a very large phenomenon), their situation in comparison with men is easily identifiable as very difficult (thus making a baseline relatively easy to set even in the absence of detailed statistics,) and comparative figures and analyses are easily retrievable,(this being an area of very active long-term work around the world.) The international community has taken the position, beginning with the Bonn Agreement, that the “participation of women” is to be treated as a key issue and indicator of change, and the Interim Authority and subsequently the Transitional Authority and now the Constitutional Loya Jirga have all taken up this challenge, with the result that, from a position of exclusion from virtually all forms of public life, gender equity and gender mainstreaming are the subject of intense institution-building efforts, there are women in leadership positions in government and civil society, and women now have a constitutional right to be treated, without exception, on the basis of equality with the men of Afghanistan. Indeed, concrete change has already begun to take effect, as can be seen by the fact that approximately 41% of the total number of people who registered to vote in the October, 2004, election, were women. This is a marked distance to have come in three years, and the fact that implementation of full gender equality rights is still to come does not in any way diminish that advance.

The Emergency Loya Jirga

The Emergency Loya Jirga of June, 2002 was the next milestone in the Bonn Process, and was mandated to elect a head of state as well as “approve proposals for the structure and key personnel of the Transitional Administration. It was also expected to provide legitimacy to the administration

by electing delegates to represent the people and paving the way for an ethnically balanced, accountable and effective government.

A 21-member Independent Emergency Loya Jirga Commission was established by the Interim Authority with the assistance of the United Nations after consultations with representatives of civil society and others. Most members of the Commission were educated and politically unknown from Kabul. The people did not see them, or the Commission, as representative. Criticism was most severe from Pashtuns, not surprisingly since seven southern provinces of the country were entirely un-represented.

The Commission decided to call a large assembly, 1051 delegates to be elected (a number which was increased probably to 1100,) and the remainder to be appointed, including 160 women. The logistical and technical challenges of the electoral process were enormous, and paled only in comparison to security challenges, which resulted in violent and deadly conflict in some locations. Elections were held, according to a traditional two-stage mechanism, in all but a few districts, primarily because of the overwhelming support of the people, which was sufficient to compel cooperation even from those commanders who were threatened by the process.

The Emergency Loya Jirga opened on 11 July, 2002, with more than 1600 delegates, of whom more than 10% were women. One woman was elected to be a deputy chair of the ELJ. There were, overall, three major groups of interested persons: supporters or followers of the King (as a unifying force, not necessarily as monarchists or royalists); mujahedin, jihadi leaders and commanders; and a rather more amorphous group that may be described as new democrats. It was a rowdy, disorganised, politically combative affair operating generally without regard to the rules of procedure that had been developed. Certain messages were, however, clear: the delegates wanted a government of national unity and institutions, including an Afghan army to disband private militias, rehabilitation of the infrastructure, and a re-building of their livelihoods.

Hamid Karzai emerged as the lead choice of all groups for President of the new Transitional Authority of all groups – he had participated in the fight against the Soviets, turned against the Taliban, was educated and progressive, had offered positions to people of opposing camps, and was the choice of the international community. He comfortably beat two unknown candidates with more than 80% of the vote.

After the election of Hamid Karzai, the proceedings became mired in non-essential debates. Officials of the factionalised intelligence agency openly intervened in the proceedings and intimidated active participants. Two main items on the agenda -- the structure of government and the approval of appointments to key posts -- received almost no discussion. The form of the government, whether to be presidential, parliamentary or a constitutional monarchy, was not debated at all. For the appointments to key posts were concerned, the President introduced fourteen ministers at the last hour and called for a show of hands. Not surprisingly, a number of people raised their hands, including security staff, guests and workers. The list of ministers included some of the most powerful and feared men in the country. There was no call for a show of hands against their appointment. In the absence of discussion and decision, the structure of the administration under the new Transitional Authority was to remain as it had been under the Interim Authority, the legitimacy of which derived from the Bonn Agreement, which provided for a "Chairman" (by this time called the "President").

The Emergency Loya Jirga provided legitimacy to the President by being elected through secret ballot with a high margin. The majority of the delegates and, it is clear now, the majority of the people were disappointed, however, by the cabinet of the President. Except a few new professional faces, the cabinet simply re-cycled previous ministers. Instead of being smaller and more effective, cabinet was now larger than during the Interim Authority, no more representative, and stood as a consolidation and legitimisation of the commanders. "Warlords Win in Kabul" were the words in *The New York Times*, and many agreed. It may be that the very large number of 1600 delegates was a mistake, and contributed to the unmanageability of the event. In the end, public perception was that the Emergency Loya Jirga, and its backers the United Nations, the United States and the international community as a whole, had failed to deliver on the promises of the Bonn Agreement. To the extent that the situation of women, as we have argued, is an of indicator of progress the ELJ provided a forum for the articulation of a gender agenda for the new administration, which was institutionalised by the establishment of the Ministry of Women's Affairs.

C. Process

The language of the Bonn Agreement suggested a participatory and consultative process which would heal the differences and wounds of the past, and enable Afghans to live in harmony and peace. It aimed to 'end tragic conflict in Afghanistan and promote national reconciliation, lasting peace, stability and respect for human rights'. It spoke of the 'right of the people of Afghanistan to freely determine their own political future in accordance with the principles of Islam, democracy, pluralism and social justice'. The process of adopting a new constitution was itself intended to be a new beginning for Afghanistan, and thus was designed to draw in all stakeholders, including ordinary people, in four overall segments: an initial drafting process; consultation with interested parties or stakeholders; revision of the draft; and final debate and adoption at a Constitutional Loya Jirga. All of these four segments did in fact take place over 14 – 15 months, from October, 2002, to January 2004: initial drafting took place from October 2002 through April 2003; a public process was pursued from May through July, 2003, a drafting revision process took place from the summer of 2003 through October 2003; and the Constitutional Loya Jirga was held from 14 December 2003 – 04 January 2004.

The Transitional Authority intended to have a process similar to that adopted for the 1964 constitution, in which a small group of legal experts would first prepare a draft which would then be reviewed and finalised by a larger multi-disciplinary and more representative group. The final draft would then be presented to the Constitutional Loya Jirga for adoption. As such the process would gradually open up to the public. This very cautious approach was intended to curb domination by extreme ideological, religious and regional tendencies. At the same time, the re-entry of the international community after the defeat of the Taliban had raised expectations of openness and broad public involvement among Afghans. Progressive groups and individuals expected to fully participate in the constitutional process, not unreasonably in light of the pro-democracy language in the Bonn Agreement. The trade-off, in the end, was that the public view would be taken on board by a large and representative Constitutional Commission, which would among other things conduct a public consultation process, and, most importantly, then by the Constitutional Loya Jirga, which would include elected representatives.

Drafting & Consultation

A Constitutional Drafting Commission of nine Afghan experts, including two women, (approximately 22%) was established by presidential decree in October, 2002, with the mandate to

draft a constitution for consideration by a larger commission. They adopted by-laws and a committee structure. Members had access to the past constitutions of Afghanistan and many other countries.

The Commissioners consulted with Afghan and international legal experts, the Justice Reform Commission and the Independent Human Rights Commission, and various civil society organisations including those representing women and people with disabilities. These meetings took place in the offices of the Commission in Kabul. Groups such as the Human Rights Commission, the Judicial Reform Commission, and various ministers with technical backgrounds were invited or requested such meetings, and in some cases written recommendations were sent to the Commission.

A preliminary draft constitution was presented to the President of the Transitional Authority on the last day of March, 2003.

The Constitutional Review Commission was established by presidential decree in April, 2003, with thirty-five members, including seven women, or 20%, made up of legal experts, tribal elders, religious scholars, professionals and academics, and community leaders. They were mandated to conduct research, to raise public awareness and consult widely with the people of Afghanistan, both in-country and in refugee camps in Iran and Pakistan, to review, analyze and discuss all provisions of the preliminary draft, suggest necessary amendments, and submit a completed draft for the Constitutional Loya Jirga.

The Review Commission developed working procedures and a committee structure. The preliminary draft was studied and debated separately by each of four committees or working groups of approximately eight members each, each working group reviewing the entire draft constitution. Changes and recommendations were then presented to an Executive Board made up of two elected leaders of each committee together with the Chairman and Vice-Chairman of the Review Commission. The Executive Board compiled, discussed and refined the proposed changes for presentation to the General Assembly of the Commission, which in turn discussed, debated and made final decisions. A Secretariat supported the work of the Commission. A multi-donor fund of approximately US\$12 million for the entire constitutional process, from the fall of 2002 to February 2004, was managed by the UN Development Fund in Kabul.

The next major steps were public education and public consultations. Public education was the key for meaningful public consultations. After orientation of the staff of the Secretariat on the nature and strategy of a public education campaign, the Public Education Unit of the Secretariat developed a curriculum, information material, posters, and a guide for public educators. Regional offices used these and also created materials appropriate for their area. Local and international partnerships were established, for instance with the Afghan Civil Society Forum, which formed a consortium to partner with the Secretariat of the Commission in the public education campaign. The plan was to base the civic education project on an information dissemination campaign through print and broadcast media, and to hold meetings with ordinary Afghans, involving whenever possible educators and prominent members of communities.

The public awareness and education campaign began in early May 2003. Regional offices organised widespread educational campaigns focusing on the significance of a constitution for Afghanistan, with an overview of past constitutions, the on-going constitution-making process, the importance of peoples' views, and the impact on their lives. The campaign reached all 32 provinces and refugee camps in Iran and Pakistan. The commission itself published a bulletin, *Asasi Qanun*, which was circulated through the regional offices and the network of NGOs.

In June 2003, the Afghan Civil Society Forum (ACSF), supported by Swisspeace, launched a separate civic education project in all 32 provinces of Afghanistan, training community leaders from all approximately 354 districts of Afghanistan. These individuals went on to provide outreach to others, thus creating a multiplier effect. On 09 July, 2003, the ACSF project went into its second phase, with eight regional feedback meetings, (Mazar-i-Sharif, Jalabad, Herat, Kunduz, Bamyan, Gardez, Kandahar, and Kabul,) in which community leaders provided their views to members of the Review Commission.

Public consultation was carried out in June and July 2003. Members of the Review Commission traveled in groups of three throughout the country, and to Iran and Pakistan. The purpose was to give the Commission the benefit of the views and recommendations of a broad cross-section of the Afghan population, to provide as many Afghans as possible with an accurate picture of the issues at stake and the solutions envisaged by the Commission, and to support the up-coming Constitutional Loya Jirga by showing that the final draft could reflect compromise. No draft of the constitution,

however, was released or distributed to the public prior to or during the public consultation process, a circumstance which may have impeded these overall goals.

No means are available for quantifying the specific involvement of women, or the impact which the public education and consultation processes had on their perceptions, consciousness, understanding or determination for the future. Working on the edges of what is essentially a vast home-bound and village-bound population is extremely complex and requires a very long period of preparation for any impact to be both significant and measurable. The time required was simply not available under the Bonn Agreement. This does not mean that genuinely substantial efforts were not made, however; they were, and a diversity of techniques were adopted including the use of womens' NGOs, training-of-trainers (ToT), partnerships with local authority structures and figures, and outreach through those national and international organisations with the resources and funding to allow a nation-wide footprint.

There was widespread consensus in Afghanistan that the draft of the constitution should have been shared. Several newspaper articles criticised the non-publication of the draft as "un-democratic." In response, the Commissioners argued that the draft was incomplete and would be completed only after the views of the public were incorporated. The Commissioners undertook to make the draft available to the public before the Constitutional Loya Jirga, and to explain how the publics' views were incorporated. It should be noted that the latter task was not carried out as promised as, in the end, the Commissioners visited only very limited areas to explain how the peoples' views were incorporated into the draft.

There was considerable concern that the public consultation process would be targeted as a forum by extremist elements, as well as by commanders with resources and positions in local government. The Commissioners accordingly gave thought as to how to manage public participation meetings so as to provide an adequate opportunity for members of the public to express their views while avoiding the greatest risks of de-railment of the entire process. Therefore, a portfolio of diverse methods of consultation was devised. Members of the public could either provide views in writing in memorandum format, or fill in a questionnaire, or speak either at public meetings or specialised meetings held with targeted groups, including women, youth, ulema, community and tribal elders, delegates to the ELJ, businesspersons, university professors, professionals, and Afghan members of NGOs and intergovernmental agencies. As needed and where possible, other groups were also

consulted. In the end, although some meetings were manipulated by strong local actors, there was no serious disruption of the process overall. Approximately 523 meetings involving perhaps as many as 150,000 Afghans were held by the Review Commission throughout Afghanistan and the refugee camps in Iran and Pakistan. The Commissioners were assisted at these meetings by members of the Secretariat, with UNAMA staff attending as observers.

Approximately 80,000 – 100,000 copies of the questionnaire were completed and returned. Questions included the fundamental values of the state, religion, the duties and rights, including language rights, of the people, the system of government, parliament, the structure of the administration, the Loya Jirga, the judiciary, the police and armed forces, and citizenship. Some of the questions turned out to be difficult for people to answer, sometimes large numbers of the questionnaire appeared to be filled out by the same person, and tallying and analysis of the results was difficult. It may be that the scope of the task was simply too great, granted the timeline and that greater resources should have been dedicated to this part of the process. This was, however, another way in which views, opinions and ideas could be brought to the attention of the Review Commission. In addition, the diaspora could and indeed did send written comments and had access to the questionnaire through the web-site of the Commission.

The record of the public consultation process shows that Afghans expressed strong views on such topics as the role of Islam, the place of women's rights, the need for a strong government and the rule of law, the significance of national and official languages, the form of government to be adopted, the creation of a national army and police to replace local commanders and their militias, and the place of 'western' notions and 'foreign' Afghans. The people of Afghanistan have after a quarter century of war developed politically sophisticated and strong views on all of those issues which will come together to determine their futures.

The fact that there were diverse methods for gathering public opinion complicated the task of analysis and agreement within the Commission as to what the public had actually said to them. However, the fact that such consultations were conducted at all is noted as one of the successes of the process, and one which fostered a spirit and practice of broad public exchange on aspirations for the future of the country.

The draft was subjected to a final joint review by the Review Commission and the National Security Council, which is made up of select and powerful members of the cabinet such as the ministers of defense, foreign affairs, the interior, and justice. No women were members of the National Security Council. This process was complicated by being parallel to on-going negotiations within the Review Commission, and between it and the NSC, as well as with President Karzai. Further consultations were taken with international advisors and on a bi-lateral basis with key representatives of foreign interests. Throughout this process of complex negotiation it must be stressed that the Constitutional Review Commission itself retained a high degree of independence and changes could be brought to the text only by the Review Commission.

On 03 November, 2003, a draft of the constitution was released by the Constitutional Review Commission for consideration by the people of Afghanistan and presentation to the Constitutional Loya Jirga, which had been delayed until December.

Throughout November and into December, elections for delegates took place on the basis of the traditional two-stage selection and balloting mechanism used for the Emergency Loya Jirga. More than 20,000 first stage delegates from the Emergency Loya Jirga were summoned to eight regional centres, where they elected more than 400 representatives to the Constitutional Loya Jirga through secret ballot. Elections for women delegates were held separately.

Elections for delegates to the Constitutional Loya Jirga were clearly more orderly and free than those for the ELJ. There were, however, some reports of harassment, intimidation and abuse of process before delegates went to the eight regional centres to vote. This had been expected, and the CLJ decree of July, 2003, provided for the establishment of an Executive Committee "...for the purpose of monitoring the elections of observers and convening of the Constitutional Loya Jirga." The powers of this Committee included "receiving complaints of threats, intimidation, pressure, interference and other abuses," and "taking measures aimed at correcting, deterring, prosecuting and punishing such abusers." Beginning in the second half of November, 2003, this Committee did in fact sit, hear complaints, and take remedial action. Prior to the opening of the Loya Jirga, the jurisdiction of the Executive Committee was expanded to include the CLJ itself.

The fact that there were incidents of harassment, intimidation and abuse has not undermined the overall credibility of the constitutional process, or the constitution itself, in the eyes of at least the majority of Afghans.

The Constitutional Loya Jirga

The CLJ opened on 14 December, 2003. In addition to the 500 delegates contemplated by the CLJ decree of July, 2003, at least two additional delegates, being persons with disabilities, were present, in a laudable attempt to be as broadly inclusive as possible. Approximately 19% of the total were women, of whom 71 were elected and 26 were appointed. Further, three women were elected to the seven member leadership Bureau of the CLJ; one woman was elected as the Deputy Chair while two other were elected as Rapporteurs-General.

The Constitutional Loya Jirga took place for 22 days, until 04 January, 2004. Rules of procedure were adopted and a pre-CLJ orientation session was held for all delegates, with a special session for women. Registration of delegates and observers, and their entry to the CLJ, was regulated and enforced. A Bureau was established, made up of the Chairman of the Loya Jirga, three Deputies and three Rapporteurs-General, to coordinate and manage the constitution-making process. A system of ten working groups was implemented which allowed for individual input on an on-going basis. A Reconciliation Committee, a 37-member group including the Bureau and the Chair, Deputy and Rapporteur of each working committee, was struck to harmonise the results of those groups together. Meetings of the plenary were chaired with a clear attempt to bring and maintain some sort of order to the discussions.

Each of the ten working groups or committees had a facilitator and a note-taker, and the committee members elected the group's Chair, Deputy and Rapporteur. Each committee discussed the entire draft constitution article by article, and voted where they could not agree. The results of this process were then presented to the Reconciliation Committee for harmonisation and incorporation into the new draft of the constitution. The Reconciliation Committee called in experts where necessary. After debate amendments were presented to the plenary of the CLJ. An amendment at that stage needed the supporting signature of 151 delegates or one-third of the CLJ for consideration and/or a simple majority for inclusion in the draft. Adoption of the constitution, however, would require a majority of two-thirds of the delegates.

The role which women effectively demanded at the CLJ, and were allowed, was notable. In addition to the election of three women in the leadership of the Bureau, women assertively took the space, and the time, to speak out, in plenary session and in working groups and committees. One delegate became instantly famous when she gave a short speech against those whom she called "the felons", "the criminals" that had those who "turned our country into the nucleus of national and international wars" and who were "... the ... most anti-women people in the society ...". This young speaker may have been right or wrong in her analysis of those she targeted for such vitriol, but the fact is that she stood up to speak, and was allowed to say what she wanted to say on a subject which is as controversial and as political as any in Afghanistan, and she was not attacked, and she was provided protection by the international community, and returned home safely after the conclusion of the CLJ. It is probably true to say that for the rest of her life she will be a woman at heightened risk in Afghanistan, but the fact is that the risk is not as high as perhaps would have been forecast had there been notice of her speech to come.

It is even more critical to realise that this one incident was not a single or standalone event. It occurred in a context, which was acceptance of the role of women in a public and political process. Women spoke regularly in plenary, in working committee, and in informal meetings. Women delegates at the Constitutional Loya Jirga played an assertive and, in the end, a critical role for the future of their country.

The rules of procedure regarding the final stages of the adoption proved to be cumbersome and complicated. They allowed a minority of one-third of the delegates to introduce new and sensitive issues late in the process, and allowed the majority to oppose their inclusion. On the one hand this

allowed the introduction of extreme issues by a small number of delegates at a very late stage and on the other hand allowed a majority to dictate what was included in the draft – both scenarios being arguably contradictory to the spirit and tradition of the Loya Jirga.

Order at the CLJ broke down when more than twelve major issues were introduced for consideration on about the 20th day of the proceedings, when about half of the members refused to cast votes on proposed amendments, fearing that the other half was against them. The boycotters argued that the constitution could not be adopted by a majority vote. This point was considered valid by many, even though it was technically irrelevant, because the vote, at that point, was not to adopt the constitution but to settle amendments to the draft. Those in favour of voting used arguments based on principles of democracy and stated that if twenty days of debate had not resolved the issues, the majority at the ballot boxes should resolve them and that a minority should not be able to block the adoption of the constitution. Both arguments clearly had merit, but the Loya Jirga had ground to a halt. Emotions ran high, with serious possibilities for escalating confusion and chaos.

The substantive issues at that moment were extremely complex, as they will remain throughout the early constitutional implementation period. These include the merits of a presidential as opposed to a mixed president/prime minister system, the relationship of dual citizen Afghans returned from the diaspora to those who never left, the multi-ethnic nature of Afghanistan and the official status of languages, the role of religion in relation to the state and of Shari'a (the law of Islam) in relation to international law, the status of constitutional values themselves, and the role of women in the public life of the nation. In the smaller tents around the big Loya Jirga tent, several groups of ministers and influential factional leaders discussed how to untangle the proceedings. The sense that disagreements in the constitutional tents had gone dangerously too far permeated these meetings, as well as a feeling that the fate of the government and, indeed, the future of the state, hung in the balance, if it were to fail to pass the constitution. The President was closely following the events from his office in another part of Kabul. Key ministers mobilised competing groups inside the big tent. The Constitutional Loya Jirga, and with it the peace process as envisioned by the Bonn Conference two years earlier, hung in the balance.

President Karzai asked Lakhdar Brahimi and Zalmay Khalilzad to mediate. After two days they secured the necessary compromises. On the 22nd day of the Constitutional Loya Jirga, on 04

January 2004, a new constitution for Afghanistan was adopted by consensus when virtually every delegate stood to show their agreement on 04 January, 2004.

One of the most remarkable outcomes in a remarkable constitutional document is the equality rights provision, which by all accounts was not adopted in an atmosphere of controversy, but was simply agreed to in the context of the negotiated settlement of all outstanding issues. The result is, from a legal perspective, an elegantly worded declaration, in Article 22: “[t]he citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.” It has been suggested that, had this proposal actually come to the explicit or conscious attention of the Constitutional Loya Jirga, or had this proposal been debated throughout the country in a fully public and consultative manner, it would not have survived the opposition of religious conservatives. The fact that such an outcome could have come to be, in Afghanistan, is not only a source of hope and an indicator of progress – it is a deeply empowering event, taken by almost all women, and by many men, to be a sign of the greatness of their nation, and of the future they will create together.

After the Constitutional Loya Jirga

A written version of the constitution was signed and published on 26 January, 2004. Unfortunately, although perhaps not surprisingly granted the final pressures as they had built up at the Loya Jirga, no final, clause-by-clause reading of the document for errors, residual confusions and unresolved issues was carried out at the CLJ before final adoption. A new amended draft constitution, which was supposed to incorporate compromise language reached at the last minute, was distributed. Aware that that text might contain errors, the Chairman of the CLJ stated as such in the last plenary session and invited the delegates to submit any corrections which they believed should be made once they had had a chance to review the document.

In fact the constitution as signed and promulgated by President Karzai on 26 January, 2004, contained a number of changes from the text of the document as distributed on the 4th of January, 2004, as well as from the compromise agreement which had been reached verbally prior to that, including, for instance, with respect to the number of women representatives to be elected to the lower house of parliament (two per province on average across the country in the signed version, as opposed to at least two per province as agreed to and as adopted by the CLJ), as well as other

changes, arguably characterised as being for “technical consistency”, as it was called, and/or grammatical correctness.

The constitution itself states in its final article “[t]his Constitution shall be enforced from the date of approval by the Loya Jirga, and endorsed and proclaimed by the President of the Islamic Transitional Government of Afghanistan” or “[t]his constitution enters into force upon its approval by the Loya Jirga, and will be signed and proclaimed by the President of the Transitional Islamic State of Afghanistan,” depending on which version. What was promulgated at a later date cannot be substantively different, with respect to content or meaning, than that which entered into force. Further, what entered into force can only be altered, amended or changed, in a substantive way with respect to content or meaning, according to the formula which is set out in Articles 149 – 152, and not by any means or mechanism which is set up by any appointed or elected government or agency of government. These are issues which may be raised by those who view the changes as going beyond correcting mistakes or bringing technical consistency to the text. In any event, these are matters which may and will influence the political situation at any one point in time, but pre-eminently go to the rule of law. Attached are copies of English translations of the 04 January and the 26 January texts labeled “#1” and “#2”.³

D. International Assistance

Afghans, and particularly Afghans who have lived continuously in Afghanistan, are highly suspicious of the motives and roles which foreigners seek to play in their country. There is, at heart, and with only a very few exceptions, no level of trust whatsoever. This extends to everyone, without fear or favour, and regardless of their nationality or place of origin, or ethnic background, and should surprise no one, since Afghanistan really has become the model, the standard by which foreign intervention and manipulation are judged internationally, and although Muslim foreigners are afforded somewhat more respect and tolerance than non-Muslims. This extremely low level of trust extends as well to what an earlier generation of westerners might have called “book-learning”, and what we in the 21st century might grace with the lines of an ivory tower.

³ Note that document #2, the text as promulgated, bears the date 03 January, 2004. This should read 04 January, 2004.

The international community has been key at every stage of the process. The relationship of international initiatives to national peace-, nation- and institution-building processes is always extremely complicated. The mere presence of foreigners can help to create a space and the opportunities for opposing elements to learn to work together. At best these collective efforts are characterised by what is known as “local ownership” or “national ownership”, in which the international community “leads from behind” and supports the emergence of local or national leadership at all levels and in all sectors. UNAMA has called for a “light footprint” by the international community, another way of referring to the same principle. This quality of local ownership is critical to the integrity and to the sustainability of any peace- or nation-building strategy. An absence of local ownership as the predominant characteristic of any such strategy tends to indicate a colonial attitude in the intentions of the international community.

In Afghanistan, the international presence has been led by the United Nations and certain foreign capitals. Overall, assistance has been by providing the space, in an institutional sense, in which parties or stakeholders with greater or lesser opposing interests can come together (the Bonn Conference, the Emergency and Constitutional Loya Jirgas, delegate elections), by intervening at particular points with substantive advice, and by funding the process from the Bonn Conference through the Constitutional Loya Jirga.

Throughout the drafting, as well as the entire constitutional process, reliance was placed on international advisors. Most prominently these were a world renowned constitutional expert and constitutional professor at the University of Paris, Guy Carcassonne, another world-renowned constitutional expert with vast experience in constitution making processes, the head of the Constitutional Commission of Kenya and a constitutional professor at the Hong Kong University, Yash Pal Ghai and an author of many books on Afghanistan and the Director of the Center for International Cooperation at the New York University, Barnett Rubin. Through the Center, Dr Rubin also supervised the drafting of several papers by experts on various issues as requested by both the drafting and Review Commissions.⁴

Overall, it may be said that the process and its outcome, the Constitution of 2004, were and are substantially Afghan. The process in Afghanistan has not been in any way akin to that of foreigners writing and nationals rubber-stamping a new constitution. This is not to suggest that the foreigners

⁴ The papers generated by this process are housed as a collection at a web site of the New York University at http://www.nyu.edu/pages/cic/conflict/conflict_project4.html.

in this case did not argue strenuously, and in some cases successfully, for the inclusion of certain language and the adoption of certain sections. Most significantly, there were two red or bottom lines for the international community: that the constitution include adherence to international law, and that it be workable.

The advice which the international community has given throughout the constitutional process has been considerable. This has been from senior members of the international community on key questions during the drafting process, from other UNAMA staff who supported the work of the Constitutional Commission in a variety of ways, and from other international agencies and organisations who supported the development of a constitutional consciousness and practice independently of the processes set out by the Commission – most notably in the area of women’s participation, insofar as the international community supported the emergence of women’s leadership in the pre-CLJ period by facilitating meetings, forums, draft position papers, preparation for the CLJ, and on the floor of the CLJ itself.

E. Implementation

The great barrier to the constitutional process has been the security situation, which itself is rooted in deep divisions along political, religious and tribal lines, and which themselves have been supported in different ways at different times by the international community. Reflecting this is the failure of national and international processes to disarm, de-mobilise or re-integrate various armed factions in any significant way. Compounding this problem is the success of the opium industry, which is controlled by commanders and commanders throughout Afghanistan, which is reportedly in a substantial growth phase since the overthrow of the Taliban regime, and threatens to turn the country into what is commonly called a “narco-state”. If un-checked, these trends will render the constitutional process meaningless, including all attendant processes, such as the 2004 and 2005 elections.

Setting aside such barriers for the moment, the constitution is on its face a very pro-active document. The state and the President each have considerable responsibilities to ensure compliance and implementation, this being the first of the enumerated duties of each as set out in Articles 5 and

64, and Article 157 provides for the establishment of an “independent commission for supervision of the implementation of the constitution.” Establishment of this Commission is expected in 2005.

A critical question is the impact on democracy building. Democracy building has of course been the central endeavour since the Bonn Conference. Ministries and agencies of government were established and have become functional, to greater or lesser degrees, in the past three years. Vision, capacity and leadership have seen in some cases remarkable advancement. These have not required a constitution to take place. The constitution will harmonise these with the overall goals and structures which are now mandated by the people of Afghanistan through the mechanism of the Loya Jirga and under the rule of law. The scope of this challenge is enormous. It is still to be seen whether Afghanistan, as a nation, has the will to carry it out, and whether the international community has the endurance to pay over what will undoubtedly be a very long horizon of time.

F. Conclusions

The constitutional process from the Bonn Conference through the Constitutional Loya Jirga in Kabul took place in a period of significant yet fragile development and insecurity. In the aftermath of collapse of the Taliban in late 2001, the characteristics of radical social disorganisation and disintegration which are typical of early post-conflict environments, dominated all institution-building efforts and initiatives. Remnants of the Taliban, Al-Qaeda and other groups opposed to the presence of the US-led Coalition mounted attacks in different parts of the country. Large parts of Afghanistan, including rural areas, were in the grips of local commanders. No infrastructure existed, physical or institutional, which would allow for the development, roll-out and engagement with people of a constitutional process in any orderly or comprehensive way. In spite of these challenges, a constitution was adopted through a process which included considerable public participation. It also included certain errors which could have been avoided but were not. On the question of the participation of women – one of the great issues for Afghanistan, as well as an indicator of progress overall – it may be said as follows:

- women were reasonably represented, forming something just under one-fifth of the delegates and assuming some positions of authority;

- women achieved a reasonable degree of voice and articulation, and felt a reasonable degree of security;
- the CLJ itself served as an awareness-raising event when viewed against the long-term timeline which will be necessary for genuine gender equity to be established; and
- the constitution as approved establishes significant rights for women, particularly in the equality rights provisions of Article 22 and the parliamentary representation provisions of Article 83.

Overall, we argue, the constitutional process in Afghanistan from 2001 through early 2004 should be judged as having been what we have called “good enough”, by which we mean that the standard which is set must be reasonable having regard to all of the circumstances, and the public interest of Afghanistan as a nation and as a state. There were at least two ways in which improvements could have been made to the process at the time: **(a)** the Constitutional Review Commission could have published a draft of the constitution at the beginning of the public education and consultation process, and could have improved on the feedback mechanism from the public to the revised draft of the constitution; and **(b)** error could have been avoided by extending the Loya Jirga for long enough to conduct a proper review of the revised draft of the constitution based on the verbal compromise agreement reached during the last two days. These are not insignificant matters, but do not overshadow our overall conclusion that Afghanistan engaged a constitutional process which was reasonable, and reasonably inclusive, having regard to all of the circumstances, was legitimate and perceived to be so in the eyes of its people and the international community, and produced a highly credible constitutional document.

In the end, it was the responsibility of the Constitutional Loya Jirga to adopt a new constitution for Afghanistan. This task was completed in a process which was successful in furthering the peace process and will stand as an important benchmark of the Bonn Process as well as providing a constitutional framework for the peace process beyond Bonn. The constitution itself is a progressive document. The question now is how to apply it, according to the rule of law, in the public interest of Afghanistan and all of her peoples, for the purposes of building a sustainable peace and an architecture of national reconciliation and development.