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WOMEN AND AFGHANISTAN'S
CONSTITUTIONAL LOYA JIRGA

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AT THE CROSS-ROADS OF CONFLICT AND DEMOCRACY: WOMEN AND AFGHANISTAN'S CONSTITUTIONAL LOYA JIRGA

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INTRODUCTION

A peace process that fails to include women in agenda setting, substantive talks and implementation has no democratic legitimacy and lacks the inclusiveness to generate any sense of ownership among women.¹

Afghanistan's recent Constitutional Loya Jirga (CLJ) has put into sharp relief the cross-roads at which the country is rendered in its effort to institute a peaceful democracy where women will have their rights respected and enshrined. Events before, during, and after the CLJ have made it clear that Afghanistan is far from being a "post-conflict" nation; and that the conflict occupies dimensions additional to the war being played out on the ground. Afghanistan is faced with reversing the damage done by 25 years of sustained conflict, one of the more devastating consequences of which is the deplorable human rights situation facing Afghan women. To state that women still face considerable challenges in exercising their right to political participation would be a misleading understatement. Yet Afghan women are mobilizing the little resources they have available to them and taking advantage of a window of opportunity in the form of Afghanistan's constitutional process.

What is strikingly clear from women's experience during the constitutional process is that security remains Afghanistan's pre-eminent priority. Afghan women civil society leaders have articulated a long list of goals, including the need for capacity-building, access to education, training, a viable healthcare system and the extension of economic opportunities for women; yet they reiterate that meeting these needs is wholly dependent

¹ United Nations Division for the Advancement of Women Report of the Expert Group Meeting, "Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women—A Framework of Model Provisions", Dec. 10, 2003, p. 12.

on an environment of security and stability throughout the country. Therefore a critical assessment of how Afghanistan's stakeholders have measured up in this regard to date is timely.

This report is based on Rights & Democracy's observation at the Constitutional Loya Jirga (CLJ) in Kabul during December 2003 and January 2004, more than 20 in-depth interviews with delegates, observers and civil society representatives, careful analysis of the political atmosphere throughout the country in the days leading up to and following the CLJ, as well as documentation from other international observer missions, including Amnesty International, the International Crisis Group, Human Rights Watch, and the United Nations. Further, a critical analysis has been made of the final Constitution text in an effort to determine the potential hindrances to women's rights that may result, as well as the ways in which women can use the text to their advantage.

The first section will focus on the experience of women during the CLJ, as voters, delegates and observers and will assess the actions of the relevant Afghan government departments, as well as international actors, such as UNAMA. The second section will look at the Constitution itself in order to analyze the meaning of the final product of this peacebuilding exercise to the lives of Afghan women. Commentary will be made on relevant articles in the new Constitution of Afghanistan that relate to fundamental rights, affirmative action, the interpretation and implementation of the Constitution, among other issues.² The strong and weak points of the Constitution will be analyzed from a gender perspective and consideration given to potential legal challenges in order to test the new constitutional provisions and attempt to create jurisprudence that contributes to a gender-sensitive interpretation of the Constitution. Finally, consideration will also be given to international law mechanisms available to Afghan women. How can Afghan women use international law in the context of the Constitution to advance women's rights?

It is essential to point out that the legal reform of Afghanistan's Constitution is only one step along the road towards changing women's status in practice, in Afghanistan. As noted by Women Living Under Muslim Laws: "Whether or not laws afford protection for women's rights depends not only on how the laws are worded, but also on the social rela-

² We focus on these sections based on consultations in 2002 and 2003 with Afghan women as to the Constitutional lobbying priorities they expressed.

tions of the context in which they operate.”³ Thus, the proposed legal challenges that aim at testing the constitutional provisions are merely a starting point for discussion towards improving women's equality in Afghanistan by practical means and do not take account of the broader issue of access to justice.

³ Women Living Under Muslim Laws, *Knowing Your Rights, Women, family, laws and customs in the Muslim World*, 2003, p. 33.

THE CONSTITUTIONAL PROCESS IN AFGHANISTAN

The Constitutional process is a core stipulation of the Bonn Agreement, the guidelines structuring Afghanistan's new administration and efforts towards moving into a post-conflict stage of nation-building, signed in Germany in December 2001. The Bonn Agreement specified that the Transitional Islamic State of Afghanistan, which replaced the initial Interim Administration, produce a draft Constitution within 18 months of this government's establishment. In his decree of October 5th, 2002 President Karzai mandated nine legal scholars, including two women, to form the Drafting Commission which would draft Afghanistan's new Constitution. The Commission began its work the following month, and in December 2002, the Drafting Commission met once more in Bonn to make preparations around the draft. The meeting revolved around the core issues to be addressed in the drafting, including the role and input of civil society, human rights and women's rights, and freedom of speech,⁴ and Commission members were given the chance to consult with international constitutional experts. The Preliminary Draft produced by the Constitutional Drafting Commission was then taken over by a new commission, the Constitutional Review Commission, mandated in a presidential decree dated April 26th, 2002.

The new Commission was comprised of 35 members, varying from religious figures to legal scholars and judges and included seven women.⁵

⁴ Amin Tarzi news article, Dec. 2002, www.globalsecurity.org/military/library/news/2003/01/3-160103.htm.

⁵ Amena Afzali, Fatema Gailani, Shukrya Barakzai, Sediqa Balkhi, Parwin Muman, Parwin Ali Majruh, and Hakema Mashal.

The Constitutional Review Commission worked from previous Afghan constitutions, constitutions from other Muslim countries, as well as from post-conflict states. Originally scheduled to take place in October 2003, the Constitutional Loya Jirga convened on December 14, 2003 to debate and approve the draft presented by the Constitutional Review Commission, eleven months after the Commission began its work.

The Consultations: An Overview

A core decision coming out of the Bonn Agreement was that the people of Afghanistan would have the right "to freely determine their own political future".⁶ This commitment became the prerogative of the Constitutional Commission, which was mandated with involving as many citizens as possible in public consultations feeding into the final drafting of the Constitution: "one of the principle tasks of the Commission is to consult broadly with the public and key stakeholders."⁷ To accomplish this, the Commission's functions included holding public consultations in each of the 32 provinces, in areas with large refugee populations outside of Afghanistan including Iran and Pakistan, as well as collecting written submissions from Afghans both within the country as well from members of the Afghan diaspora throughout the world.

In addition to the consultations, the Commission was charged with carrying out a public education campaign on the Constitution and process. Information was to be made as widely available as possible to reach as many Afghans in every province. Copies of the draft Constitution were distributed throughout the country with the assistance of the United Nations Assistance Mission to Afghanistan (UNAMA), which planned to make use of the Afghan Transitional Authority's (ATA) access to television stations, radio, government publications, and other media. Early on, UNAMA was criticized for ambiguous planning and a lack of funding for such purposes and ambitious promises did not seem to match up with a realistic outcome.⁸ The findings of the consultations were also to be compiled in a public report and disseminated around the country. The UN reported that a total of 556 consultative meetings were held throughout the country to elicit the views of Afghans in regards to the draft constitu-

⁶ Bonn Agreement, December 2001.

⁷ Secretariat of the Constitutional Commission of Afghanistan, March 10, 2003, p. 5.

⁸ ICG report, "Afghanistan's Flawed Constitutional Process", June 2003, p. 17.

tion.⁹ A survey carried out during this period found significant differences in the awareness levels of men and women: 78% of Afghan men compared to 61% of women¹⁰ knew about the Constitutional process in urban locations with a high degree of government presence and comparatively good security. Significantly, there were also higher levels of optimism about the potential outcome of the constitutional process among men.

The Bonn Agreement also recognized that special provisions would be necessary for women's participation. The Constitutional Review Commission worked with the Ministry for Women's Affairs and UNIFEM in Kabul to hold public education workshops for women. It was specifically recommended in the Secretariat's explanatory document, "The Constitution Process in Afghanistan", that the Commission work closely with women's civil society organizations in order to tap into grassroots networks of women throughout the country.¹¹ In the end, however, only 19% of those who participated in the consultations were women.¹²

Despite the extensive legal framework and ambitious goals around the Constitution, the main criticism on the part of observers of the process was the insufficient time allotted for public consultations and education. This complaint was voiced by both Afghan civil society and international organizations closely following the events. The commitment to stick to the timeframe stipulated in the Bonn Agreement overrode all other concerns and undermined the legitimacy and quality of the process. The attitude taken seemed to be one of simply wishing to check "Constitution" off of the to-do list of nation-building in Afghanistan, rather than recognizing the constitutional process as the very basis of a new state's political framework. Further, the rushed consultations meant little time to integrate the opinions expressed by Afghans into the new draft, which was then disseminated as part of the public education campaign. This resulted in negligible transparency during the drafting process, veiling the consultations in thinly disguised tokenism. The transitional government succeeded in meeting its deadlines and in setting up all the institutions nec-

⁹ United Nations General Assembly report, "The Situation in Afghanistan and its Implications for International Peace and Security", December 2003, p. 4.

¹⁰ Human Rights Research and Advocacy Consortium, "Speaking Out", Nov. 2003, p. 26.

¹¹ Secretariat of the Constitutional Commission of Afghanistan, March 10, 2003, p. 3.

¹² United Nations General Assembly report, "The Situation in Afghanistan and its Implications for International Peace and Security", December 2003, p. 4.

essary to structure the constitutional process; but it failed to make all Afghans feel a part of the process, including women.

Though there was insufficient time allotted to begin with, the Commission, support ministries facilitating the consultations and public education initiatives in the provinces, and UNAMA could have made substantially better use of that available time. As late as March 2003, only five months before the CLJ was originally scheduled to take place, no plans had been made in preparation, nor in the execution of strategies to involve the public in the process.¹³ The reasons for why none of these institutions felt the obligation to begin moving on the need for public consultations and education should be investigated, but clearly come down to a lack of coordination, communication and committed planning between UNAMA and the ATA. What is at least clear now, however, is a distinct lack of coordination between those bodies with the responsibility to bring the constitutional process to the Afghan people. Terminology and forecasted plans cited in UN documents differed from those in Commission documents. The consultations were a vaguely defined step in the overall process, rather than consisting of a tenable, organized method through which Afghans could have an impact on the draft.

This outcome could have been prevented if UNAMA had taken a more proactive, organized role in both the consultative and educational processes expected to take place throughout the country before October 2003. The intentions existed on paper, for example with the creation of the Constitutional Commission Support Unit; however, these were merely short-term technical units which were not designed to instil a long-term commitment to widespread civic education throughout the country. UNAMA's involvement lacked drive and the end result was a missed opportunity to effectively include the voices of Afghans, ensure their awareness of the implications of constitutional law, and extend a feeling of ownership over the process which would translate into stable legitimacy.

Insecurity during the Consultations

Compounding the inadequate timeframe, and suffering as a result of it, was the dismal security situation throughout the country. While security

¹³ ICG report, "Afghanistan: The Constitutional Loya Jirga", December 2003, pp. 1-2.

was certainly significantly worse in some areas, measures could have been taken to at least partially rectify this imbalance. Other than playing an advisory role in terms of security, UNAMA did not set up any structures which could have improved the security in areas where consultations were supposed to be carried out, despite their acknowledgement of the decrepit security situation.¹⁴ Owing to the security situation, consultations were only held in the country's provincial capitals, and failed to reach any rural areas. UNAMA consistently maintains that its role is to support the Afghan government, not to replace it. However, in the provinces, it is often the government itself that people fear. Notorious warlords double as provincial governors and this was the norm until President Karzai's recent crackdown on certain governors. People's willingness to move about freely, visibly exercise their right to free association, or voice their opinion is hampered by the pervasive ongoing control of warlords, backed up by their own armed militias. Further, what is explicit in UNAMA's mandate is the commitment to address "gender issues";¹⁵ security being one area where the support of this UN body could have gone a long way.

UNAMA's failure to implement security measures during the consultations is inexcusable considering the experience during the Emergency Loya Jirga in June 2002. UNAMA reported significant challenges "related to the state of insecurity that existed due to tensions or open conflicts between tribes and local commanders in some regions."¹⁶ They acknowledged as well that this situation led to manipulation and control of the Emergency Loya Jirga by those looking to expand or sustain their own power base outside of the central government. For example, warlords who had not been elected to the Emergency Loya Jirga were able to attend sessions alongside elected delegates in the Loya Jirga tent and women delegates reported being threatened by such individuals.¹⁷ Although concern over such incidents was expressed in speeches, neither the Afghan nor the international authorities responsible for ensuring the protection of delegates and the legitimacy of the event, were prepared with appropriate measures to respond to such problems. This experience should have been an obvious lesson in planning for future Loya Jirgas.

¹⁴ UNAMA "Political Affairs" fact sheet, UNAMA website.

¹⁵ UNAMA Fact Sheet, September 2002.

¹⁶ UNAMA "Political Affairs" fact sheet, UNAMA website.

¹⁷ Human Rights Watch Human Rights News "Afghanistan: Loya Jirga Off to a Shaky Start", June 13, 2002.

Increased security measures could have also addressed the exclusionary nature of local political processes in most areas of Afghanistan, by monitoring women's access to participation in these processes. *Shuras*, meetings held at the village-level, were the means by which delegates were nominated for participation in the Emergency Loya Jirga in 2002. This ad-hoc form of decision-making is generally comprised of village elders, landlords, khans and military commanders "without clearly defined roles"¹⁸ and *never* includes women participants.¹⁹ The process is noted to have become increasingly militarized during the last two decades,²⁰ and while it may resolve issues consensually, it is by no means broadly inclusive of all village members. For example, in Herat, Ismail Khan reportedly took measures to ensure that *shuras* were controlled by members of the same political stream and ethnic background as himself, and excluded anyone he considered to be a political opponent.²¹ Most women would not attempt to break into this male-dominated hold, but if they did, they could well expect to experience threats, intimidation and other forms of discrimination.

Officially, all Afghans can vote for their preferred candidate to represent their district in a Loya Jirga. However, the selection of those candidates is usually the result of a decision taken at a *shura*. Further, Afghans living in territory under the control of a regional warlord are often subject to coercion to contribute to electing the name advanced by the regional power. Thus voters, most of whom are men, are not necessarily voting independently. This constraining atmosphere aside, entrenched traditional norms of discrimination against women and women's low status in village households, mean most husbands forbid their wives from voting in the first place. A marginally increased acceptance of women's participation in basic political processes such as voting in *some* urban areas in Afghanistan should not be assumed to have a parallel in rural areas, which encompass the vast majority of Afghanistan's female population.

Careful and diligent monitoring of all *shuras* and intervention by an independent, external actor, such as the Afghan Independent Human Rights Commission (AIHRC) or UNAMA, would have made the consultations

¹⁸ Ali Wardak, "Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan", p. 5.

¹⁹ Dyan Mazurana, personal interview, March 4, 2004.

²⁰ Ali Wardak, "Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan", p.5.

²¹ Human Rights Watch, "Q & A on Afghanistan's Loya Jirga Process", April 15, 2002.

more conducive to free and open participation by women and helped support independent women candidates. Additionally, without taking full responsibility for the public education campaign UNAMA could have made a considerable impact by coordinating the channelling of resources into widespread civic education for rural women. Many local and international NGOs worked to implement modest workshops and seminars on voter education; however, these were largely confined to Kabul and a small number of other urban locations. Such efforts could have perhaps increased the number of women voters and countered local efforts to exclude their voices from consultations, including in *shuras*. Instead, UNAMA's unquestioned full endorsement of the discriminatory *shura* process and their absence from making arrangements to counter the security situation left more room for warlords and political parties to manipulate the isolation of strategic areas to their own ends. As a result, the constitutional process became even less democratic and even more distant from meeting the needs of women.

At the same time that UNAMA did little to impact the security situation during the consultative phase, the International Security Assistance Force (ISAF) remained in Kabul only, devoid the international political will to expand to the provinces. An international peacekeeping presence in key provinces could have greatly raised participation rates in the consultations and made information about the constitution accessible to a greater number of citizens. Security threats in Afghanistan are not always difficult to detect and simple measures can be taken to counter systems where insecurity thrives. For example, it is common knowledge among Afghans and the international community working in Afghanistan that roadside checkpoints and provincial/territorial border areas are points where human rights violations and intimidation tactics occur frequently. ISAF personnel or UNAMA observers could have been installed at checkpoints to ensure that women attempting to travel to vote, to attend consultations or to attend the CLJ were not harassed or prevented from continuing on. While ISAF has finally responded to the urgent need to provide security in the provinces, albeit avoiding the most insecure provinces such as Kandahar, it missed contributing to the success of a critical step in Afghanistan's effort to democratize, by failing to have a presence in the provinces in the months leading up to the Loya Jirga.

While Loya Jirgas have a long history of resolving conflicts in Afghanistan and are an accepted form of political decision-making,²² they are not the sole source of legitimacy for Afghanistan's new Constitution. A draft presented to delegates at the beginning of the CLJ should reflect the views and opinions of as representative a majority of the population as possible. Those institutions, particularly UNAMA, ISAF, and the Constitutional Commission, who had the power to make the most of the period leading up to the CLJ, placed too much dependency on the event of the CLJ itself. The CLJ included only 20% women, had minimum representation from minority groups, and at many times was completely dominated by factional and partisan politics, disenfranchising others who were there to bring the will of their constituency to the assembly. As it turns out, it was not the nucleus of legitimacy UNAMA and others intended for it to be, and the consultative and public education phases would have been key to consolidating a true sense of legitimacy and democracy in the overall process.

Mobilization of Civil Society

Afghan women immediately recognized the window of opportunity presented by the Commission's rhetoric of consultations and public education, and mobilized in the minimal time allotted to have an impact on the process. Initiatives to channel women's voices into the drafting process, to ensure progressive women participated in the Constitutional Loya Jirga (CLJ), and to inform women of the process, took place from the grassroots level to the international lobbying level. Small women's organizations organized workshops on the Constitution in rural villages, while women in the government organized to create the Gender and Law Working Group and pass on their recommendations to the Commission and to the delegates who would attend the CLJ.

As early as April 2003, initiatives were taking place to include civil society's priorities in both the content and the procedures of the Constitution. The Foundation for Culture and Civil Society brought together NGO representatives, members of the judiciary, the Afghan Independent Human Rights Commission, professors from Kabul University, among others to formulate a list of recommendations regarding the process of the CLJ. In-

²² Ali Wardak, "Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan", 2003.

cluded were recommendations for the need to include civil society in the proceedings and to introduce measures which would increase women's participation. They found the 20% allocation of seats for women to be insufficient and that the lack of women's representation would jeopardize the legitimacy of the CLJ. In July 2003, the organization Women Activities and Social Services Associations (an independent women's organizations in the province of Herat) brought together 110 participants in a public meeting to discuss constitutional law and women. Their findings were also publicized and passed on to the Commission.

In addition to making recommendations based on carefully-gathered opinions of women, women's civil society actively organized to raise awareness among women about the constitutional process and their right to participate in it. The Afghan Women's Resource Centre started a training programme for high school teachers, who could in turn educate their students on the Constitution, the CLJ and women's rights. The Health and Development Centre for Afghan Women organized a six-month project holding workshops at the village level in Parwan for illiterate and semi-literate women. As a result, most participants decided to vote to elect delegates in the CLJ and one participant ran as a candidate. Networking initiatives were established out of Kabul to facilitate women leaders' ability to easily communicate with each other, by groups such as the independent NGO Mujtam-e-Azadi. Development of Civil Society of Afghanistan set up programming to reach women refugee returnees from Iran and Pakistan and the Iranian organization HAMI worked in cooperation with Afghan women's organizations to hold workshops in Tehran for Afghan women refugees to learn about the constitutional process. The women's newspaper, the Women's Weekly Mirror passed on information on such opportunities and reported on the Commission's progress in consulting with citizens and the international community's involvement. Similar activities were held by dozens of other groups, who utilized what resources they had and worked with minimal support from the formal apparatus, such as UNAMA and the ATA ministries.

Swisspeace's Afghan Civil Society Forum assembled a coalition of Afghan NGO representatives who provided training to community leaders throughout the provinces to ensure that civic education around the Constitution would reach as many people as possible. The Gender and Law Working Group, established in 2002, comprises 20 members representing a mix of both government and civil society institutions working on

women's rights in Afghanistan. In November 2003, the Group submitted a list of recommendations to the Constitutional Review Commission, designed to entrench women's human rights in the new Constitution. The involvement and endorsement of the Minister for Women's Affairs, as well as the State Minister for Women's Affairs, helped to make this a prominent document among CLJ delegates and Commission members.

Closer to the CLJ, a broadly representative coalition of civil society groups compiled a list of more than 60 women, with 25 individuals prioritized, based on their progressive agenda for women's rights. The list was presented to President Karzai, who selected only three women from this list out of the 50 delegates the president appoints to the CLJ.

Outside of the capital, women organized, albeit under more constraining circumstances. A community radio station in Mazar-i-Sharif broadcast information on the CLJ process during their radio programme. Also in Mazar-i-Sharif, 220 women attended workshops organized by a local women's organization to learn about the constitutional process. Those organizations with the capacity to do so, moved outside of the capital to reach rural women in the countryside surrounding Kabul and in villages in Parwan province. Unfortunately, however, women's organizations were overwhelmingly confined to working in urban areas and the majority of Afghan women, who reside in rural areas, were totally unaware of the constitution process²³ and how the Constitution will be relevant to their lives.

The growth of a dynamic, resourceful civil society in Afghanistan is perhaps this country's brightest hope for peace and stability.²⁴ The fledgling Afghan civil society movement has demonstrated in the months prior to the CLJ, that they are capable of mobilizing quickly to have an impact on political processes. However, conservative forces harbouring an agenda harmful to the rights of women are also well organized to impact political processes, and importantly, were also well-resourced. Evidence of this will be demonstrated in the following section; however, it should be noted that well before the CLJ itself, conservative forces were preaching orchestrated, consistent demands during consultations with government officials. The ICG reported "evidently rehearsed demands for constitu-

²³ Dyan Mazurana, personal interview, March 4, 2004, based on information included in forthcoming report, "Human Security and Livelihoods of Rural Afghans 2002-2003".

²⁴ Dyan Mazurana, personal interview, March 4, 2004.

tional recognition of the 'rights' of the mujahidin and made statements critical of civil liberties and women's rights"²⁵ during consultations carried out in Herat and Kabul. The agenda being pushed by those belonging to conservative parties such as Jamiat-e-islami, warlord factions such as Ismail Khan's in Herat, or other fundamentalist political alliances dominate all aspects of political participation and effectively filter the flow of information, both in terms of what Afghans want the government to know and of what messages the central government are able to relay to Afghans. The likelihood that women in particular can safely speak their minds openly about their priorities for the constitution is slim in territories under the continued control of warlords and their armies.

Thus while civil society, collectively prioritizing demands for human rights and gender equality, took actions in the little time available to feed their input into the consultative phase, a high level of insecurity restricted their impact. As insecurity perpetuated by the continued dominance of warlords and fundamentalist forces hindered the legitimacy of consultations with Afghans, it also hindered the meaningful involvement of civil society. The impact for the constitutional process is one of deprivation within an overall intolerable security situation. Had Demobilization, Disarmament & Reintegration (DDR) programmes been allocated higher priority for donors, the demobilization process would have already been stabilizing the provinces and could have made the environment more conducive to carrying out a free and fair political process. Further hampering participation was the insufficient time allotted for civil society to make full use of the opportunity for dialogue with those mapping the constitutional process. Finally, had the Constitutional Review Commission, with more support from UNAMA and other international actors recognized the need for more pervasive and committed measures to provide security during consultations, civil society could have played a more key role in democratizing the process and in ensuring that the priorities of Afghan women for the Constitution were heard. The lack of commitment to meeting security needs is representative of the disproportionate attention given to urban areas, where women have marginally better access to political participation and where the on-going conflict is less immediately threatening.

²⁵ ICG report "Afghanistan: The Constitutional Loya Jirga", December 2003, p.2.

In addition to preventing the implementation of effective security measures facilitating women's participation, the lack of time for the consultative and public education phases of the constitution process also hampered the impact the women's movement could make during this phase. The UN Division for the Advancement of Women Experts Group meeting on Peace Agreements as A Means for Promoting Gender Equality and Ensuring Participation of Women, which met in November 2003, included among their key findings that "pressures from the international community, or other sponsors of peace negotiations...to arrive at a peace agreement within a proscribed period of time may create constraints for the women's groups to undertake effective consultation processes", as well as "impede the creation of civil space where women can develop effective strategies for conflict prevention and resolution, and may likewise reduce the ability of women's groups to set their own priorities".²⁶ Thus, the overriding priority to go through with the CLJ as soon as possible without due consideration for making an investment through time for meaningful consultation with the population, acted as a severe barrier for women's civil society organizing. Where women's voices are barred from contributing to the consultative phase and where their numbers make up less than one fifth of the CLJ, the "democratic" nature of this process has to be questioned.

The Constitutional Loya Jirga

Afghanistan's Constitutional Loya Jirga is, in essence, a peace agreement. It is an attempt to bring together all sides and agree on a legal framework for a country starting out anew. It is a process imperative to repairing the fractured state of the country, divided up into a myriad of fiefdoms controlled by warlords with differing agendas, rarely progressive agendas. It is the arena in which to confirm the common values and principles of the population.

It is clear from the words and actions of both civil society broadly, the women's movement in Afghanistan, and female citizens in general,²⁷ that a respect for women's human rights is central to these common values and principles. Women activists have worked tirelessly to ensure this

²⁶ United Nations Division for the Advancement of Women Report of the Expert Group Meeting, "Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women—A Framework of Model Provisions" , Dec. 10, 2003, p. 9.

²⁷ Human Rights Research and Advocacy Consortium, "Speaking Out", Nov. 2003, pp. 27-29.

message is clear. As a result, the ATA and regional commanders have been forced to reckon with their demands and make official the recognition of the need to include women, at least on paper.

A wealth of evidence supports the finding that women's participation at *all levels* of conflict resolution, peace processes, and subsequent nation-building exercises, drastically raises women's status in the post-conflict state,²⁸ streamlining their voices at the decision-making table. It is not sufficient to bring women into the process at any other point than at the very beginning. This criteria is explicit in the text of Security Council Resolution 1325, which points to constitutional processes in particular as the space in which to implement permanent measures for the protection of women's human rights. However, a peacebuilding exercise such as the creation of a new Constitution, requires the integration of women's human rights not only as an obligation, but also as an *opportunity*. In Afghanistan, women have never enjoyed full equality with men, and the Taliban period was the epitome of this history, as well as a demonstration to the world of the extremities violations against women's human rights can reach. The establishment of a new government and renewed commitment from the international community is an opening for women to move into and declare a reordering of the old society.

The experience of women at the CLJ, therefore, is more than a one-time trial for women's capacity to partake in and influence the process. It is a critical moment for the international community, the Afghan government, international civil society and all other stakeholders to mobilize their resources to use this opportunity to right a very grave wrong. All efforts should have been made to maximize the leverage of women's demands and to protect their right to participate. An event as critical to setting the foundations of a democracy as the constitution-making process was not the moment to grant concessions to those working against the interests of women's human rights or to observe piecemeal strategy in terms of women's gains.

²⁸ United Nations Division for the Advancement of Women Report of the Expert Group Meeting, "Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women—A Framework of Model Provisions", Dec. 10, 2003.

Participation of Women in the CLJ

Once again, the security situation posed the most immediate threat to women's full participation. Women delegates coming from provinces outside of Kabul were required to travel through hostile territory. They risked harassment by regional militias, detainment at police and military checkpoints, and sexual violence, including rape. The UN Special Representative of the Secretary-General outlined the situation as impeding the CLJ when he noted, "the process as a whole is challenged by the deterioration in the security environment, which stems from daily harassment and intimidation, inter-ethnic and inter-factional strife, increases in the elements linked to the Taliban and Gulbuddin Hekmatyar, and the drugs economy."²⁹

Concrete measures could have been taken by both UNAMA and the ATA to counter such threats.³⁰ Specific recommendations were made by human rights organizations, including Rights & Democracy,³¹ Human Rights Watch,³² and Amnesty International.³³ There were clear indications that the process would not be open to women well ahead of the CLJ: "women's rights activists are deeply concerned that provision for security at the Constitutional *Loya Jirga* will be as ineffective as that provided at the Emergency *Loya Jirga* in June 2002."³⁴ Unfortunately, however, no measures were taken to ensure the safety of women candidates.

Many women candidates and delegates were confronted with intimidation tactics and a pervasive atmosphere of fear months before the actual Constitutional Loya Jirga. Women who were not affiliated with the dominant political-military factions found themselves not only isolated in their campaigning, but also singled out for harassment, intimidation and explicit death threats.³⁵ For example, in Badakshan, a popular candidate withdrew his candidacy after receiving death threats from a local military

²⁹ SRSR Lakhdar Brahimi's address to the Security Council, May 6, 2003.

³⁰ After the incident of intimidation of CLJ delegate Malalai Joya, UNAMA worked jointly with Afghan police to ensure Joya's protection during the rest of the CLJ. See below.

³¹ See Appendix A: Rights & Democracy's Letter to President Karzai on Security Provisions for Women at the CLJ. Also available at: www.ichrdd.ca/frame2.iphtml?langue=0

³² See Human Rights Watch Letter dated October 29, 2003, <http://hrw.org/press/2003/10/loyajirga1029.htm>

³³ See Amnesty International report "No one listens to us and no one treats us as human beings: Justice Denied to Women", October 6, 2003.

³⁴ Amnesty International report, "No one listens to us and no one treats us as human beings: Justice Denied to Women", October 6, 2003.

³⁵ Rights & Democracy's interviews with women candidates and delegates from Herat, Bamyan, Zabul, and Kabul, January 2004.

commander.³⁶ His stepping down facilitated the win of Burhanuddin Rabbani, the notorious warlord and former Afghan president from 1992-1996, under whose leadership women experienced extreme levels of abuse and sexual violence at the hands of his soldiers. He has maintained a reputation as a ruthless military commander and a conservative Islamist who sees no place for women's rights in the new Constitution.

Elections in Kandahar were marked by a distinctive climate of violence. Gunmen under the command of Gul Agha Sherzai and Mullah Naqibullah monopolized the process and prevented the possibility of free and fair candidacy. Even in Kabul, arguably Afghanistan's safest city, UNAMA officials witnessed two representatives of Shura-e Nazar, a powerful jihadi faction in Kabul, checking people's ballot cards.³⁷ The presence of gunmen, Afghan intelligence agency officers, Ministry of Defense staff, and Zalmay Tofan, a senior commander under Sayyaf, was also noted in and around voting sites in Kabul.

The province of Herat stands out as being exceedingly transgressing against women's participation in any form in the constitution process. Women stood no chance of openly campaigning to run as delegates in the CLJ, under the vigilant eyes of governor Ismail Khan and his private army of approximately 30,000 men. Khan is perhaps Afghanistan's most well-known warlord. He has risen to notoriety recently when his upholding of Taliban-era policies restricting women in Herat were brought to light in the international press.³⁸ In addition to imposing forced chastity tests against unmarried girls, his ban on co-education, and an edict against women driving, Khan is well-known for his dislike of women's attempts to participate in local politics or civil society. Women in Herat are forbidden from holding meetings in the community or even discussion groups in their university classrooms. This atmosphere did not encourage Herati women to be represented at the CLJ despite the fact that an estimated 12% of Afghans live in Herat. Nevertheless, two female delegates from Herat won seats and participated in the CLJ. Upon their return, they

³⁶ Human Rights Watch letter to President Karzai, October 29, 2003.

³⁷ PakTribune.com, "Afghanistan's warlords still call the shots", January 2, 2004.

³⁸ "Rivalry of warlords 'hindering democracy" Peter Kammerer, South China Morning Post, March 23, 2004; IRIN reporting "AFGHANISTAN: Concern over women's education in Herat" January 16, 2003; Amnesty International report "No one listens to us and no one treats us as human beings: Justice Denied to Women", October 6, 2003; Human Rights Watch "We Want to Live as Humans: Repression of Women and Girls in Western Afghanistan", www.hrw.org/reports/2002/afghnwmn1202 December 17, 2002; Amin Tarzi, "Herat Governor Bans Women from Co-Ed Language Courses" RFE/RL Newline, December 18, 2002.

were threatened for the views they expressed at the CLJ on the Constitution.³⁹

UNAMA and the ATA were well aware of the problems facing women in Herat and the need to take measures to ensure their participation in the CLJ. In January 2003, Kamal Hossain, the UN Special Rapporteur on Human Rights in Afghanistan, released a report⁴⁰ on the situation of human rights in Herat, including human rights violations against women as his foremost concern. There was also substantial documentation of human rights abuses against women who attempted to run as candidates in the last Emergency Loya Jirga in June 2002. A well-known Herati woman doctor organized a meeting of 120 women to discuss women's issues prior to the Emergency Loya Jirga. As a result, "her private office was searched, locked and put under armed guard, her private practice effectively closed for two months. Fighting her case only brought more armed men to her house and four hours of interrogation."⁴¹

Originally scheduled to take place in October 2003, pressure from civil society helped win more time for the consultative process. Organizational delays caused the convening to be further delayed from December 5, 2003 to December 14, 2003, the official opening day of the CLJ. Two delegates were appointed to represent disabled Afghans alongside 50 other presidential appointments to the CLJ, making a total in the end of 502 delegates. Of these, 100 were women. Two women had been elected from quotas in each province, for a total of 64 and the remainder were elected except for the presidential appointees. Of these, Karzai was advised by the UN that half of his appointees should be women. As mentioned earlier, civil society groups mobilized to present lists of their preferred candidates to the President. In the end, although he selected 26 women, few were chosen from the names put forth in the recommendations made by civil society. This was the first major disappointment for the women's movement and signaled to the women's organizations that the degree of measures actually taken to include women may not necessarily reflect the rhetoric coming from the ATA and the UN.

³⁹ Interview conducted by Rights & Democracy with CLJ delegates, January 2004.

⁴⁰ Report of the Special Rapporteur (SR), Kamal Hossain (E/CN.4/2003/39), 13 January 2003.

⁴¹ Mariam A. Nawabi Statement Before the House Committee on International Relations, *Women's Participation in Civil Society and the Political Sphere in Afghanistan*, November 19, 2003.

Delegates were elected according to Afghanistan's electoral districts in the 32 provinces and worked from an electoral college system of approximately 19,000 electors. The method meant that at least some "semblance of democratic process would be observed".⁴² Unfortunately, however, despite a relatively high voter turn-out, insecurity, threats and intimidation delayed voting in several provinces, particularly in the South. Furthermore, the legitimacy of the elections was greatly undermined by vote-buying and political intimidation, particularly in Herat, Kabul province, Ghor, and Badakhshan.⁴³ Several women reported to Rights & Democracy that they had chosen not to vote because they did not trust that their vote was kept secret and feared the consequences from local warlords for voting independently.⁴⁴ As a result, the majority of delegates elected had links with the warlord controlling the province they came from. This was particularly the case in Herat, where the most powerful delegates were all allied with Ismail Khan and his officials.

Factional Domination and Intimidation Inside the CLJ Tent

The voting process was dominated by loosely-organized coalitions of Islamist parties varying somewhat in the extremities of their views as pertains to women's roles in Afghan society and politics. Many of the most influential political parties in Afghanistan hold deeply conservative views on women's rights, and these same parties were reported to have taken part in frequent vote-buying throughout the CLJ. The precedent set by such parties and ad hoc political coalitions during elections would be thoroughly maintained at the CLJ. Both inside and outside of the tent, delegates affiliated with certain extremist coalitions and parties, as well as hardliner members of the current government (including judges in the Supreme court), were reported to have intimidated other members, expressed both explicit and implicit threats against those advocating for constitutional change against the interests of these Islamist parties, as well as resorting to illegal means to co-opt the process.

In addition to powerful warlords and Islamists like Sayyaf who came to the CLJ through elections, Karzai contributed to consolidating their presence by including several known jihadi members in his list of presidential

⁴² Dr. G. Rauf Roashan, "Afghan Constitution: An Exercise in Nation-building, a Test in Social Organization", p. 1.

⁴³ ICG briefing, "Afghanistan: The Constitutional Loya Jirga", December 12, 2003, p. 10.

⁴⁴ Interview conducted by Rights & Democracy with CLJ delegates, December 2003.

appointees, including Pir Ahmed Gailani, Ayatollah Mohammad, Asef Muhseni, Ahmad Nabi Mohammadi, Mohammad Akbari, Abdul Rashid Dostum and Ustad Farid . His list of appointees is telling of the consistent ascendancy of factional representatives. The central government will have little choice but to continue incorporating political actors affiliated with violent, ultra-conservative factions as long as DDR programmes lack proper planning and long-term commitment, insecurity is allowed to prevail in the provinces, and the US, Iran, Russia, Pakistan and other countries continue to fund private armies under the control of regional warlords. Under such circumstances, civil war is the alternative to a government at the mercy of warlords with a minimal inclination for women's inclusion.

A *majority* of the female delegates at the CLJ were affiliated with violent, conservative factions and voted in line with their demands, dividing women in accordance with ethnic, religious and factional identities, rather than under their shared identity as women. Intimidation tactics employed by these women representatives were alleged by some women candidates, for example, accusing one woman of theft or alleging to another's husband that his wife (a delegate) had committed adultery⁴⁵. In Afghanistan, such an accusation can lead to serious consequences, including severe domestic abuse, imprisonment, or death. Further, those women delegates attempting to push for articles in favour of women's rights were prevented from coordinating with other women and making effective joint efforts, because they risked serious danger should they talk to the wrong women at the CLJ.⁴⁶ Thus, women worked individually, isolated from each other and restricted in the impact they could make.

Many of the women who experienced such intimidation were unwilling to report incidents to UNAMA's complaints registry. There was no effort made on the part of UNAMA to explain the procedure thoroughly to the assembly or to assure delegates that their reports would remain confidential and their names would be protected. Women delegates reported that the complaints registry was considered useless⁴⁷ and possibly even cause for danger once one's name was recorded alongside a documented accusation.

⁴⁵ Interview conducted by Rights & Democracy with CLJ delegates, January 2004.

⁴⁶ Medica Mondiale observer report, December 19, 2004.

⁴⁷ Interview conducted by Rights & Democracy with CLJ delegates, January 2004.

The widely-reported incident of Malalai Joya's speech, a woman delegate from Farah province, was a telling example of the atmosphere inside the CLJ tent. Joya broke a legacy of silence around human rights abuses committed by jihadi fighting forces and the control such factions continue to hold over critical political processes such as the CLJ. Her outspokenness triggered an uproar in the room, as delegates immediately took sides. Witnesses present observed that approximately half the room applauded Joya's apparently spontaneous speech, while half began yelling offences towards her,⁴⁸ giving a rough indication of the political orientation of the CLJ gathering. The tension reached a climax when some delegates attempted to physically attack Joya, who was immediately surrounded by nearby women aiming to protect her. The CLJ Chairman, Sebghatullah Mojadeddi, threatened to expel Joya from the remainder of the proceedings and accused her of having disrupted the assembly and implicitly of being a communist. Later, observers overheard other delegates threatening to kill her and she was put under the protection of UNAMA. The incident was indicative of the overall climate of guarded discussion and the fear of speaking openly in the tent.

In addition to cases of overt threats and intimidation, there is another loss to the legitimacy of the CLJ, which is much more difficult to measure. Most notably after Malalai Joya's speech, a visible shift in the CLJ atmosphere took place. Women were conspicuously silent and unwilling to participate vocally in debates. Some delegates reported seeing female delegates shaking in their chairs, as male delegates affiliated with warlords or fundamentalist parties perpetrated aggressive behaviour during the proceedings,⁴⁹ including rampant verbal abuse, and contributed to an environment where women were notified directly and indirectly that their input was not welcome. Such behaviour on the part of some male delegates was unlikely to be condemned when those in charge were participating as well. Only a few days into the CLJ, the CLJ Chairman Sebghatullah Mojadeddi announced in front of all delegates "Do not try to put yourself on a level with men. Even God has not given you equal rights because under his decision two women are counted as equal to one man."⁵⁰ The lack of neutrality on the part of facilitators severely hampered equal in-

⁴⁸ Interviews conducted by Rights & Democracy with CLJ delegates, January 2004; and Amy Waldman and Carolotte Gall, New York Times article "A Young Afghan Dares to Mention the Unmentionable", December 18, 2003.

⁴⁹ Interview conducted by Rights & Democracy with CLJ delegates, January 2004.

⁵⁰ Speech by Sebghatullah Mojadeddi, as recorded by Samir Popalzai, December 17, 2003.

clusion for the voice of moderates and others who tried to contribute opinions in the debate, who were abruptly cut off by Mojadeddi.⁵¹ Mojadeddi also allegedly threatened to remove the access cards of three delegates from Kabul who were calling for a centralized presidential system in the Constitution, contrary to the demands of the jihadi factions. Mojadeddi was popularly believed among delegates to be aligned with fundamentalist Islamists and an ardent supporter of the jihadi parties, and his speeches and subtle remarks throughout the CLJ reflected this political orientation. Certainly, such an environment affected the final voting process. As a result, it is impossible to determine what gains women could have made, had they not been understandably fearful of the consequences of working together to demand change.

To structure discussion around the 162-article draft Constitution, delegates were divided into 10 committees of 50 members each. Each working committee was headed by an elected delegate, all of whom were male. Further, half of the committee leaders, who had significant sway over discussions, are associated with conservative Islamist jihadi factions. For example, both Burhanuddin Rabbani and Abdul Rasul Sayyaf, leader of the Itihad-Islami faction, headed committees. Their coordinated efforts to block progressive articles favouring women's human rights provisions were apparent within most of the working committees according to witnesses. Physically and verbally aggressive reactions against women delegates proposing changes to the text contrary to the status quo were recorded during several sessions of deliberating. In one incident, a female delegate was physically forced out of the working committee's meeting room and refused re-entry.⁵²

A coalition of conservatives, apparently led by Rabbani and Sayyaf, were extremely well organized in ensuring that each of their allies in all the different committees were repeating the same demands. This was evident from the highly specific wording proposed by various individuals dispersed among the committees. At one point during the CLJ, an international observer came across a written document in Dari articulating key demands around the wording of articles, all of which were aimed at entrenching the superiority of Islamic law and vaguely defined "Islamic principles". This is the text, "Proposed Amendments to the Constitu-

⁵¹ Interview conducted by Rights & Democracy with CLJ observer, Khalid Majidyar, January 5, 2004.

⁵² Interview conducted by Rights & Democracy with CLJ delegate from working committee, January 2004.

tion”,⁵³ many of the conservative elements within the CLJ appeared to have been working from and it was apparent that it had been circulating among political leaders in Eastern Afghanistan long before the CLJ started. Included in its recommendations were the superiority of shari’a law, special status for former jihadi fighters, a ban on dual citizenship, provision of *huddud* punishments, that the president of the country only be a male, the removal of the word “democracy” as an aim of the country, among others. The ambiguous wording of their propositions left ample room for interpreting “Islam” and “shari’a” as tools to restrict women’s freedoms and ensured that the implementation of Islamic law would be left to those with little commitment to improving the status of women in Afghanistan.

Fighting against members of coalitions opposing women’s rights and demanding the implementation of Islamic law based on a hard-line interpretation of Islamic jurisprudence, took up the majority of the time of women delegates in the working committees. Women who expressed themselves independently from the dominating factions were isolated and excluded from the remainder of the working committee’s proceedings.⁵⁴ Name-calling, harassment and threats occurred frequently within the committees’ sessions. Women constituted a minority in every committee and such atmosphere did not encourage their ability to participate more vocally in order to ensure the sessions included women’s perspectives. Compounding this co-opting of their energy and resources was the need to mobilize to resist more specific urgent incidents such as the petition forwarded by Jamiat-e-islami calling for an article stipulating mandatory *hijab* in the Constitution. The forces working against women’s voices succeeded in being extremely counter-productive to women’s effective involvement in the process as whole and ultimately made the process less democratic.

Despite the odds, women delegates did succeed in making some critical gains during the CLJ through quick, resourceful mobilization. For example, the increase of reserved seats for women representatives in the Wolesi Jirga from one reservation per province to two women, was a direct achievement of women’s rapid organizing to push for an amendment to this article in each of their working committees. Similarly, women were

⁵³ “Changes to Constitution Proposed by Rabbani and Sayyaf” (December 16, 2003), transcribed by Dr. Barnett Rubin.

⁵⁴ Interview conducted by Rights & Democracy with a woman CLJ delegate, January 2004.

also prepared to ensure that the provision that guarantees equality between the sexes, was upheld.

As disagreement rose over amendments added after voting by the committees, a proposal was accepted to review amendments or articles in the Constitution which had been left unchanged. Delegates could petition for the change they wanted if they were able to present the signatures of more than 150 delegates to the Chairman's committee. Many delegates took advantage of this opportunity to try a second time for their proposals. A criticism of this method was the visibility of delegates' names on the petition sheet. One particular petition asked for the removal of the word "Islamic" before "Republic of Afghanistan". The CLJ Chairman, Sebghatullah Mojadeddi, whose role is superscribed to be neutral and non-interfering, announced upon receipt of this petition "People who suggest such things are infidels", and went on to say that those who signed the petition should be "identified and punished".⁵⁵ This caused not unwarranted fear among the numerous delegates who had signed the document and whose names were visible to anyone who wanted to see them. It is one more incident symptomatic of the lack of protective measures for delegates and the ample opportunities jihadi factions had for influencing the process.

One positive outcome early on in the CLJ was the decision to vote by secret ballot. This change offered a critical wall of protection for both male and female delegates coming from provinces where a vote by a show of hands would mean their choice was dictated by the regional power of their province. Had voting not been by secret ballot the most important factor guiding a delegate's vote would have been the security situation in their province, and little to do with judgment based on the needs of their constituency. Despite this gain; however, voting was far from independent. The dominance of factional leaders of the entire process, tolerated by the ATA, UNAMA and the international community, undermined the democratic element of this traditional form of decision-making and its legitimacy in the eyes of Afghans. However, a more immediate cause for concern is the implications for delegates returning to their home provinces. Mid-way through the CLJ, Amnesty International reported that "some delegates fear for the safety of their families and for their own lives, especially after they return home at the end of the CLJ."⁵⁶ After the

⁵⁵ Afghanistan Television broadcast transcript, "Loya Jirga Day 19: Delegates Start Voting", January 1, 2004.

⁵⁶ Amnesty International press release (ASA 11/001/2004), January 2, 2004.

final day of the CLJ, several delegates indicated to Rights & Democracy that their voting had been driven by the knowledge they would be returning to provinces where they answer to a regional militia commander, not to the central government. Those who voted independently said that they feared for the safety of themselves and their families.⁵⁷

There were also widespread rumours of under-the-table negotiations taking place both inside and outside of the CLJ tent. Lavish parties were hosted each night after the day's proceedings, usually by warlords holding powerful positions in the ATA. The parties were an opportunity for vote-buying and corruptive negotiations, the promises of which swayed many delegates to support the desired changes for the Constitution of the dominant factions.⁵⁸ At one point, rumours circulated in the Kabul press that the average price paid for a single vote from a CLJ delegate was US\$500.⁵⁹ Despite efforts by UNAMA and the ATA to isolate delegates from individuals not attending the CLJ, they failed to realize that many of those interested in co-opting the process were in fact already inside the tent. The lack of faith many Afghans felt towards the process as a whole was compounded by a belief that the international community in Afghanistan, notably American advisors such as Zalmay Khalilzad and United Nations representatives, were legitimating the power of warlords and religious extremists through their negotiations and collaboration with known warlords.⁶⁰

Problems such as these are symptomatic of a political culture developed as a result of protracted warfare. In a country where violence has become a means of survival, orienting oneself along tribal or ethnic lines is a way to organize for protection under threatening circumstances. As a result, high levels of entrenched distrust exist not only between factions, but also among women and within the same ethnic or linguistic groups. This is the social parallel to the physical destruction conflict has left on the Afghan landscape and it is not easily undone. The implications for women are that religious-political, or tribal and ethnic identities can take precedence over their identities and particular needs as women. Under the dominant organizing of male factional leaders, the women's movement

⁵⁷ Interview conducted by Rights & Democracy with CLJ delegates, January 2004.

⁵⁸ Interviews conducted by Rights & Democracy with CLJ delegates and Afghan observers, December 2003 and January 2004.

⁵⁹ Interview conducted by Rights & Democracy with Khalid Majidiyar, January 5, 2004.

⁶⁰ Interview conducted by Rights & Democracy with Afghan CLJ observer, January 4, 2004.

becomes fractured this way, preventing the orchestration of common demands. Afghan political actors will continue to easily relapse into such divisive strategies in the absence of strong civic education programmes and extensive DDR initiatives in all provinces, but particularly in areas suffering from rampant insecurity. Furthermore, the donors must equip institutions such as the AIHRC and Afghan civil society organizations to be proactive in implementing measures to protect women attempting to participate in the CLJ, whether in consultations, as voters, as candidates, or as Loya Jirga delegates. The UN itself has acknowledged the ambitious task which lies ahead: "it will take much more than 36 months to heal the wounds left by 23 years of war."⁶¹ While international donors, UNAMA, and the ATA must remain astutely engaged ensuring and monitoring that such measures are implemented, it is equally important that civil society be supported, as it is civil society which will ultimately be the instigators of the peacebuilding process over the long-run in Afghanistan. This implies protection for activists from intimidation and harassment, freedom for civil society organizations to establish and run their programmes, and the availability of external funding.

Two national Loya Jirgas have now taken place in Afghanistan since the fall of the Taliban government. The experience of women in these historical political processes has provided ample opportunity for the international community and the Afghan government to foresee potential hindrances to women's participation in future political processes, such as the upcoming elections scheduled for the fall of 2004. Addressing the challenges well ahead of time and sending a clear message that intimidation, harassment, threats and other human rights abuses against women delegates will not be tolerated, is integral to the success of the peacebuilding effort in Afghanistan.

As important as the Constitution itself is the process by which it is formulated. In his detailed analysis of political decision-making at Loya Jirgas throughout Afghanistan's history, Ali Wardak concludes that the Loya Jirga "has the potential to bridge tradition with modernity; it has the capacity to express traditional values in a modern setting", but "it particularly needs to be a more inclusive institution that represents both men and women as equal citizens of Afghan society."⁶² In order for Afghans to

⁶¹ Kofi Annan, Report of the UN Secretary-General, 18 March 2002.

⁶² Ali Wardak, "Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan", p. 17.

view this new political framework as a fair and legitimate ordering of their lives and representative of the country in which they live, it needs to have come about in such a way as there is little opportunity for those working on behalf of their own interests to dominate the process. Further, it must be a peacebuilding exercise, where the aim of reaching durable stability and an acceptable level of security for Afghan women to safely go on with their lives, is of centrality to the process. Instead, some delegates, whose presence in the CLJ in the first place should be questioned, were provided the grounds for preserving a system where they maintain control over their pockets of territory, over their private armies, and over the power to deny women their most basic human rights.

A GENDER ANALYSIS OF AFGHANISTAN'S NEW CONSTITUTION

Afghanistan's Constitutional-making process came to an end on January 4, 2004, upon the approval of a new Constitution by the Constitutional Loya Jirga (CLJ) assembled in Kabul. The new Constitution of Afghanistan explicitly recognizes the fundamental principals of non-discrimination and equal rights for women and men.⁶³ In addition to these equality guarantees, the Constitution sets out to embrace democracy, social justice, human rights and to respect international law, including the Universal Declaration of Human Rights. Afghan women's groups have celebrated the entrenchment of these rights and principles that they worked to secure. At the same time, it is important to note that they remain cautious due to other constitutional provisions that proclaim Afghanistan an "Islamic Republic" and declare that the "beliefs and provisions of the sacred religion of Islam"⁶⁴ have precedence over any law in Afghanistan.

Fundamental Rights

The objectives of a country's constitution are to limit the arbitrary action of the government, to guarantee the rights of the governed and to define the position of the sovereign power. A constitution makes an individual's funda-

⁶³ Previous Afghan Constitutions contained provisions prohibiting discrimination and guaranteeing equality among the people of Afghanistan. The only Afghan Constitution that explicitly mentioned that these equality guarantees were afforded to "both women and men" is the Constitution of Afghanistan of February 27, 1977 (Hoot 5, 1355).

⁶⁴ See Article 3.

mental rights legal in the eyes of the state. By becoming legally binding, the state owes each citizen the fundamental rights included in its constitution. This means that fundamental rights of the citizens guaranteed in the country's constitution can be upheld in a court of law. Constitutional rights are what elevate people living in a given country to the status of citizens, rather than merely subjects to be governed arbitrarily.

When rights included in a constitution are designated as "fundamental", this implies that these rights are considered politically essential to the existence of society in the state and necessary to guarantee individuals a sense of dignity and respect.⁶⁵

The definition of Afghan citizens, as being explicitly 'men and women' is a historic article for the statutory recognition of women's rights in Afghanistan. As mentioned above, there are a few other references to equality, human rights and social justice in the Constitution as they relate to the obligations of the State. These are all significant results of civil society and international pressure for such provisions.

In addition, to the civil and political rights that are guaranteed in Chapter 2,⁶⁶ the Constitution also guarantees the right of every citizen to education and preventative health care and medical treatment. With regard to the right to education, the Constitution guarantees that the state will provide free education at all levels, including at the university level. The inclusion of this guarantee is the positive result of intensive lobbying by civil society representatives during the CLJ (the draft of the Constitution only guaranteed state funded primary and secondary education).

Article 26 and 54 are important provisions that could lead to outlawing the practice of forced marriage and *baad*⁶⁷ in Afghanistan:

Article 54 of the draft Constitution says the state will take steps to eliminate "traditions contrary to the principles of the sacred religion of Islam", according to which a woman's consent is required for a marriage to be legal.

Marriages are forced on women in Afghanistan for a number of reasons: young and beautiful girls are sold off at a good price; parents sometimes get their daughters married to avoid the expense of caring

⁶⁵ See Brunet and Solon Helal, *Women's Rights in Afghanistan, Report of Rights & Democracy Mission to Afghanistan*, (September 2002), Annex II (The fundamental rights section of Annex II was written by Sohail Warraich).

⁶⁶ For example the right to life, the right to vote and the right to freedom of expression, among others.

⁶⁷ This practice entails criminally sentencing women for crimes committed by their male relatives. See Brunet and Solon Helal, *Women's Rights in Afghanistan, Report of Rights & Democracy Mission to Afghanistan*, (September 2002), p. 15.

for them; widows may be compelled to marry the brother of their deceased husband; and sisters must sometimes pay for the crimes of their brothers by marrying their victims.

Article 26 could stop the latter, as it specifies that only the criminal should pay for his actions.⁶⁸

It is important to note that the fundamental rights provisions of the Constitution can not be amended unless the purpose of the amendment is to expand fundamental rights (Article 149). This article is very significant because it ensures that existing constitutional rights will not be restricted by the legislature. The constitution only authorizes an amendment that aims at expanding or broadening the fundamental right guarantees. While the above mentioned fundamental rights provisions are a positive step for women's rights, certain provisions within Chapter 2 of the Constitution may be problematic for women's rights advocates:

- In general, a country's constitutional rights are exclusively reserved for the citizens of that country. Different countries guarantee different constitutional rights; however, there are some basic rights that should be available to all persons within a country, even if they are in that country temporarily. Such rights that are generally guaranteed irrespective of citizenship or residency status include basic civil liberties such as the right to life, protection from arbitrary arrest and detention, the right to a fair trial, the right to be innocent until proven guilty.⁶⁹

In the Constitution of Afghanistan, different terms are used in the description of fundamental rights: sometimes the Constitution refers to "citizens", "human beings", "persons", "individuals" and at places "Afghan". Use of these different terms is problematic to determine when rights are for citizens only, and when rights are for others irrespective of their status as citizens.

- While the definition of citizens in Article 22 is positive for women's rights, the equality provision is incomplete in comparison to internationally recognized standards and therefore should be considered weak.⁷⁰ Indeed, the provision would provide more complete protec-

⁶⁸ *Forced Marriage Ban Possible* By Haseena Sulaiman and Lailuma Saded in Kabul (ARR No. 87, 17-Dec-03) Institute for War & Peace Reporting.

⁶⁹ See Brunet and Solon Helal, *Women's Rights in Afghanistan, Report of Rights & Democracy Mission to Afghanistan*, September 2002, Annex II.

⁷⁰ For example, see CERD General Recommendation XIV (Forty-second session, 1993): On Article 1, Paragraph 1, of the Convention, A/48/18 (1993) 114, para. 1.

tion for women's rights if it guaranteed equality before the law *and* equal protection of the law. Equality before the law recognizes that women and men should be treated equally in the processes of the law. For example, they should be treated equally by the police and the courts, regardless of characteristics such as their class, race, ethnicity, income, gender, religion, tribe or language. The missing element in Article 22, i.e. equal protection of the law, relates to legal status and would provide guarantees against the adverse effect of the law (for example, whether the law grants women and men equal rights to choice in marriage).⁷¹

Many of the articles of the Constitution include the phrase "in accordance with the law" but these articles make no reference to reasons or situations of curtailment of the respective right. This chosen formulation may lead to arbitrary actions by the state. In this vein it is relevant to note that Article 51 allows any person suffering "undue harm" as a result of government action to claim compensation by appealing to a court.

Affirmative Action

Affirmative action describes special measures aimed at providing opportunities to disadvantaged and underutilized groups (specifically women and minorities) who are unable to enjoy basic rights and opportunities as a result of long-term discrimination. The institution of affirmative action policies acknowledges the impact of discrimination and is designed to correct past injustices, and promote the full participation of all citizens in the social and economic life of a society. Affirmative action is about promoting the creation of societies founded on principles of justice, equity and human rights and is essential to internal peace and social stability of Afghan society.

The main affirmative action related provisions in the Constitution of Afghanistan are contained in paragraph 2 of the Preamble, Articles 44 and 53.

In the recognition of past injustices at paragraph 2 of the preamble,⁷² can be read the justification for affirmative action policies, such as in the area

⁷¹ Women Living Under Muslim Laws, *Knowing Your Rights, Women, family, laws and customs in the Muslim World*, 2003, p. 31.

⁷² See paragraph 2 of the preamble: "Realizing the injustice and shortcoming of the past, and the numerous troubles imposed on our country".

of education. Indeed, Article 44 of the Constitution renders the state responsible for affirmative action policies in education.

However, since the discrimination and equality provision (Article 22) does not speak of "unfair discrimination" but rather of all discrimination as being prohibited this omission could be problematic to the establishment of affirmative action policies in other areas. It would have been helpful in order to correct past injustices and promote the full participation of girls and women in the social and economic life of Afghan society, to have included a provision, such as can be found in the South African Constitution that acknowledges the following: in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

The wording of Article 53 and 54 creates an opening for women's rights advocates and others to lobby for affirmative action policies that provide advantages to the disabled, pensioners, the elderly, women without caretakers, mothers, orphans, among others. Since the Constitution does not define the measures that will be taken by the state, these are left to the domain of public policy – and thus could be the object of lobbying campaigns by civil society actors.

The Interpretation of the Constitution

Article 3 of the Constitution states: "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam." It has been said that the reference to the provisions of Islam in the above article leaves the door open to the application of an extremist and conservative interpretation of "shari'a" law in Afghanistan⁷³: conservatives within Afghanistan have often referred to "shari'a" as an immutable set of rules based on the will of God. However, shari'a is an individual and collective normative system which is supposed to regulate the lives of Muslims.⁷⁴ There are many interpretations of shari'a. At the same time, the possibility of a state applying shari'a has been contested:

(...) An Islamic state as a political institution is conceptually impossible,

⁷³ See for example the article in The Guardian by Jonathan Steele and AP, *Afghanistan's constitution to be unveiled*, 3 November 2003 available at: www.guardian.co.uk/international/story/0,3604,1076303,00.html

⁷⁴ See Abdullahi A. An-Na'im, "Islam and Human Rights: Beyond the Universality Debate," *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 2000, p. 97

historically inaccurate, and practically not viable today. (...) An Islamic state is conceptually impossible because for a political authority to claim to implement the totality of the precepts of shari'a in the every day life of a society is a contradiction in terms: enforcement through the will of the state is the negation of the religious rationale of the binding force of shari'a in the first place. Since enforcement by the state today requires formal enactment as the law of the land or adoption of clear policies specifying certain action by organs of the state, the legislature and government of the day (whatever their form may be) will have to choose among equally authoritative but different interpretations of the Qur'an and Sunnah. In other words, any principles or rules of shari'a simply cease to be part of a religious normative system by the very effort to enact and enforce them by the organs of the state because the state can only enforce its own political will, not that of God.⁷⁵

While the application of "shari'a" by the state of Afghanistan may have been the intention of the more conservative members of the CLJ, the fact is that the article can be read as recognizing that there are diverse interpretations of Muslim laws, thus encouraging a debate about the meaning of the Qur'an and the Sunnah for Muslim women and men in present day Afghanistan and their role in the constitutional framework. Indeed, the vagueness of the wording, over the long term, can be viewed as an advantage, enabling a progressive interpretation of Article 3 that is compatible with the Constitution's fundamental rights provisions as well as Afghanistan's international law obligations, including the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). For example, agents of social change in Afghanistan could use this opportunity to ensure that the constitutional framework is interpreted in light of interpretations of Muslim laws that respect women's human rights while at the same time exposing interpretations and practices that raise human rights concerns. The nature and implications of the relationship between Islam and the state must be defined and specified by each Islamic society for itself. Article 3 thus poses a challenge to Afghan civil society as well as to the Afghan state, including the judiciary, to engage in a democratic debate about the role of Islam in the national constitutional framework.

Article 130 directs the courts to give precedence to the Hanafi school of law over other schools. In cases involving Shia Muslims the courts are di-

⁷⁵ Abdullahi A. An-Na'im, "Sharia and Positive Legislation: is an Islamic State Possible or Viable?" In Eugene Cotran and Chibli Mallat, General Editors, *Yearbook of Islamic and Middle Eastern Law*, vol. 5 (1998-1999). The Hague: Kluwer Law International, 2000, pp. 29-42 at 37.

rected to follow the Shia school of law, including in “personal matters” cases. However, as mentioned above, Article 3 is subject to various interpretations since schools of law such as the Hanafi school, have various interpretations of the same issue. As a result, the courts are left with the critical role of deciding which interpretations of Muslim laws are to overrule in the interpretation of the Constitution. Thus the composition of these courts and the quality of the access of women to them will be crucial to working towards interpretations of the Constitution that are gender sensitive.

Further, according to Article 3, the interpretation of Muslim laws would take precedence over other laws in Afghanistan. This risk limiting the applicability of the Constitution's fundamental rights provisions such as has been observed in Malaysia and Iran and might enable conservative forces to impose their vision of the laws and legal system in Afghanistan. However, in case of conflict between the privileged interpretation of Muslim laws by the state and the equality guarantees contained in Afghanistan's Constitution and in the international treaties it has ratified, in our view, it is the responsibility of the judiciary to apply the interpretation that is consistent with the social, economic, and political context of today's Afghanistan:

As Asbjorn Eide puts it, it (the right of self determination) is the right to co-determination, to be exercised in collaboration with others, rather than an exclusive right of the self, whatever that may mean. In particular, all the states of Islamic societies are bound by customary international law and humanitarian law, like any other state in the world, as well as all the international treaties that they have ratified, such as the Charter of the United Nations which is binding on them as members of the organization. All these sources set clear and categorical limits on what the states of the Islamic societies may or may not do, within their own borders as well as in dealings with other states and their citizens. (...) Whether it is the organization and operation of the state in general, the treatment of vulnerable persons and groups who are their own citizens, or the treatment of citizens of other countries, the states of Islamic societies are not free to behave as they please.⁷⁶

The Supreme Court of Afghanistan reviews compliance with the Constitution of laws, legislative decrees, international treaties, and international conventions (Article 121). At the same time, the Supreme Court and other

⁷⁶ Ibid., 38.

courts have the mandate to adjudicate all lawsuits (Article 120). While there is no explicit mention in the Constitution that an individual can approach the Supreme Court to seek enforcement of the fundamental rights guarantees nor that the Supreme Court can declare an administrative action as void of any legal force for being contrary to the fundamental rights provisions of the Constitution, it may still be possible to seek redress for violations of fundamental rights via the Supreme Court by invoking Article 120. This Article will have to be tested by women's rights advocates through a legal challenge that would help define the jurisdiction of the Supreme Court.

At the same time, women's rights proponents should be vigilant when faced with the possibility that the government could invoke Article 121 in order to request that CEDAW (or any other international human rights treaty that has been ratified by Afghanistan), be reviewed for its compliance with the Constitution of Afghanistan. Such a review would only be beneficial to the recognition of women's rights if it leads towards ensuring that national laws in Afghanistan enable the full realization of the rights recognized in the Convention and not the withdrawal of Afghanistan as a party to the Convention. It is imperative to note that the CEDAW Convention does not contain a specific provision dealing with withdrawal. States Parties wishing to withdraw from the CEDAW Convention would therefore need to proceed in accordance with Article 54 of the Vienna Convention on the Law of Treaties.⁷⁷ Under this Article a party may withdraw at any time by consent of all the parties after consultation with the other contracting States—this is a rare occurrence and considered an exceptional measure. Further, it is not possible for the government of Afghanistan to enter reservations to CEDAW now that it has already acceded to the Convention: reservations are only permissible when a state signs, ratifies, accepts, approves or accedes to a treaty.⁷⁸

The composition of the judiciary will be crucial to individual and collective attempts to access justice and to the way women's rights are interpreted in the Constitution. According to Article 117, the Supreme Court is composed of nine members who are appointed by the President with the approval of the Wolesi Jirga (lower house). According to Article 118, the

⁷⁷ While Afghanistan is not party to this treaty, the Vienna Convention on the Law of Treaties is widely considered as embodying customary international law.

⁷⁸ Article 19 of the Vienna Convention on the Law of Treaties

Supreme Court judges will have “higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan”. In order to establish jurisprudence that progressively interprets gender equality in the Constitution it is important to ensure that the composition of the Supreme Court is gender balanced and that the judges are adequately trained in gender issues. To this end, civil society actors may be interested in lobbying for the creation of an institute that serves the Afghan judiciary, by planning, coordinating and delivering judicial education dealing with the law, the craft of judging and the particular social context.

Other issues relating to the interpretation of the Constitution include:

- As a result of Articles 130⁷⁹ and 131,⁸⁰ a parallel system of law is created for personal status issues. Article 130 explains that courts shall apply Shia school of law in cases dealing with personal status involving the followers of Shia sect. According to these Articles, courts apply Hanafi school of law when adjudicating personal status issues for other Muslims. The Constitution is not explicit about the regime that should be applied in personal status cases for non-Muslims in Afghanistan. This could potentially mean that personal status cases for non-Muslims are governed by the constitutional law system unless specific laws are enacted to deal with religious minorities.
- According to Article 130, when there is no provision in the Constitution or other laws regarding the applicable law on an issue, the decision of the court shall be within the limits of this Constitution in accordance with the Hanafi jurisprudence and in a way to serve justice in the best possible manner. If there is no law on an issue, how can there be a cause of action to agitate before a court?

Provisions Related to the Implementation of the Constitution

Many provisions relate to the implementation of the Constitution: sections 5, 56, 64, 75, 142, 157 and 159. According to these articles, the Presi-

⁷⁹ Article 130: “While processing the cases, the courts apply the provisions of this Constitution and other laws. When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts’ decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.”

⁸⁰ Article 131: “Courts shall apply Shia school of law in cases dealing with personal matters involving the followers of Shia Sect in accordance with the provisions of law. In other cases if no clarification by this Constitution and other laws exist and both sides of the case are followers of the Shia Sect, courts will resolve the matter according to laws of this Sect.”

dent is ultimately responsible for the implementation of the Constitution. He supervises the implementation by the government/state (used alternately) of the Constitution. As such the government is mandated to create departments to ensure the implementation of "the provisions of the Constitution and ensuring the values of the Constitution", including the Independent Commission for the Implementation of the Constitution whose members are appointed by the President. It is essential that the Independent Commission for the Supervision of the Constitution, whose members will be appointed by the President of Afghanistan, be representative of the Afghan population, therefore including female appointees from civil society who are gender-sensitive.

Article 142 of the Constitution makes room for the establishment of public remedy mechanisms such as a Gender Equality Commission that facilitates access to justice and works to respect, promote, protect and fulfill fundamental rights in the country. For example, in South Africa, the Commission on Gender Equality⁸¹ is one of six state institutions set up in terms of the Constitution to promote democracy and a culture of human rights in the country.

Questions remain with regard to the implementation of the Constitution: What is the mandate of the Independent Commission for the Implementation of the Constitution? What will be its timeframe? What are its links with the Supreme Court? Is it an advisory body or will it have the capacity to enforce its decisions?

The Role of the AIHRC in the Implementation of the Constitution

Article 58 of the Constitution states:

The State, for the purpose of monitoring the observation of human rights in Afghanistan, to promote their advancement (behbud) and protection, shall establish the Independent Human Rights Commission of Afghanistan.

Any person, whose fundamental rights have been violated, can file complaint to the Commission.

The Commission can refer cases of violation of human rights to the legal au-

⁸¹ The Commission's functions are to monitor all organs of society to ensure that gender equality is safeguarded and promoted; assess all legislation from a gender perspective; commission research and make recommendations to Parliament and other authorities; educate and inform the public; investigate complaints on gender-related issues; monitor South Africa's progress towards gender equality in relation to international norms. The Commission on Gender Equality co-operates with other institutions set up under the Constitution to promote human rights and democracy, including the South African Human Rights Commission and the Public Protector. It also works closely with government, particularly the Department of Justice, Office on the Status of Women, and Parliament.

thorities, and assist in defending the rights of the complainant.

The structure and functions of this Commission shall be regulated by law.

According to this article, any person whose fundamental rights have been violated can file a complaint to the AIHRC who has the mandate to decide whether or not to refer the case to the courts and represent the complainant. Can the AIHRC forward it as a complaint after having examined the maintainability or after holding an initial inquiry to see if *prima facie* the complaint has content to be entertained? The legal authorities that are referred to in Article 58 are not defined. It would be useful if a quasi judicial role be assigned to an ombudsperson to whom the AIHRC could forward such complaints for adjudication. In this case, findings of the ombudsperson should be mandatory for government. In order to understand the mandate of the AIHRC and its role in the implementation of the Constitution this Article will have to be tested, through strategic litigation, by the AIHRC and civil society representatives.

It is important to mention that at a UN-sponsored meeting of representatives of national institutions in Paris in 1991, a detailed set of principles on the status of national human rights institutions were developed – the Paris Principles.⁸² These principles, subsequently endorsed by the UN Commission on Human Rights (Resolution 1992/54 of 3 March 1992) and the UN General Assembly (Resolution 48/134 of 20 December 1993, annex) have become the foundation and reference point for the establishment and operation of national human rights institutions. In summary the key criteria of the Paris Principles are: the independence of the institution as guaranteed by statute or constitution; autonomy from government; pluralism, including in membership; a broad mandate based on universal human rights standards; adequate powers of investigation and adequate funding and resources.

The Paris Principle relating to the status of national institutions are important because they clarify and provide minimum standards on the status and advisory role of national human rights commissions. When the law that regulates the AIHRC is drafted it is recommended that it include the following in its mandate:

- To promote and protect human rights in Afghanistan;

⁸² The 1993 General Assembly resolution relating to the Paris Principles is available at: www.asiapacificforum.net/about/paris_principles/Paris_Principles.pdf

- To submit to government and the parliament or any other competent body, on an advisory basis opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights in the following areas: any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights (including legislation in force as well as bills and proposals); any situation of violation of human rights which it decides to take up; the preparation of reports on the national situation with regard to human rights in general, and on more specific matters; alleged human rights violations in any part of the country that it decides to investigate and make proposals to the government as to the initiatives it should take to put an end to such situations and, where necessary expressing an opinion on the positions and reactions of the government.
- To recommend the adoption of new legislation and administrative measures as it deems necessary to ensure respect for the fundamental rights provisions of the constitution;
- To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
- To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
- To contribute to the reports which Afghanistan is required to submit to United Nations bodies and committees, and to regional institutions, pursuant to its treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
- To develop national strategies for human rights education;
- To cooperate with government institutions to advance human rights;
- The AIHRC should be linked to an apex court with the power of judicial review.

An apex court of the country should be established with the power of judicial review on all actions and acts of the administration and legislature relating to the fundamental rights provisions of the Constitution. This apex court should have the power to provide individual relief on any individual's breach of fundamental rights and principle of public remedy

be adopted on matters of public importance. The decisions of the apex court should be binding on all authorities of the state.

At this time, the AIHRC has identified four key areas of work: "building its capacity in Kabul and across the country through the opening of satellite regional offices; designing and implementing a programme of human rights education; promoting the human rights of women and children; and organising a nationwide debate of options for transitional justice, i.e. ways to address the abuses of the past and promote national reconciliation." ⁸³

The role of the AIHRC in addressing past injustices is one of the keys to ensuring the future implementation of the Constitution. Addressing past injustices and ending impunity for human rights and humanitarian law violations would send a clear message to perpetrators that these actions are no longer tolerated in Afghanistan, contributing to the establishment of the rule of law and facilitating the implementation of the Constitution.

Yet there are no provisions in the Constitution for prosecuting war crimes and crimes against humanity committed in Afghanistan and no mention of transitional justice mechanisms to address past atrocities. Still, the Constitution does provide some scope for excluding war criminals from positions in government "which requires the current politicization of the judicial system to be addressed and the prevalence of impunity to be curbed." ⁸⁴ Given the present context of insecurity and continued impunity, it is unfortunate that the Constitution does not categorically exclude war criminals from government and address in clear terms that the commission of war crimes and crimes against humanity, including gender crimes, will not be tolerated.

At the same time, a positive step forward in the struggle to ending impunity is the recent ascension of Afghanistan to the International Criminal Court in 2003. Still, mechanisms to address past injustices will have to be debated nationally and designed in order to work towards building national reconciliation and to consolidate the peace process. In the vein, we recommend that an international and independent Commission of Inquiry be established, as called for by the UN Special Rapporteur on Arbi-

⁸³ Rami Mani, *Ending Impunity and Building Justice in Afghanistan*, Afghanistan Research and Evaluation Unit (December 2003), p. 21.

⁸⁴ See Articles 62, 72, 78, 134, 85 and 118. Rami Mani, *Ending Impunity and Building Justice in Afghanistan*, Afghanistan Research and Evaluation Unit (December 2003), p. 23.

trary, Summary and Extrajudicial Executions, Ms. Asma Jahangir.⁸⁵ This Commission of Inquiry would be a first step towards addressing past human rights violations, including extrajudicial executions, rape, kidnapping and sexual assault committed by any of the various factions who have participated in any part of the armed conflict in Afghanistan spanning 24 years. The mandate of this Commission should "be limited to undertake an initial mapping-out and stocktaking of grave human rights violations of the past, which could well constitute a catalogue of crimes against humanity. The Commission should carry out its activities in coordination with the AIHRC and the period of inquiry should begin from the "Saur Revolution" (1978) and end with the establishment of the Interim Authority.

Political Representation of Women

Articles 83 and 84 of the Constitution grant women a substantial role in the country's proposed parliament. Approximately 25 percent of the 250 seats in the lower chamber of parliament (the Wolesi Jirga) are reserved for women. The Constitution requires two women members of the Wolesi Jirga per province. In addition to the Wolesi Jirga, women also must account for 50 percent of the president's appointees to the upper house of parliament, the House of Elders. This gives Afghan women more space for political participation independent of association with political parties.⁸⁶ The Constitution reserves seats for the Kochie minority (nomads) in the national assembly.

Claiming Afghan Women's Rights in International Law

According to Article 7, the state of Afghanistan has the obligation to abide by the United Nations Charter and the Universal Declaration of Human Rights and international treaties that Afghanistan has signed.

To date, Afghanistan is party to the Rome Statute of the International Criminal Court,⁸⁷ CEDAW Convention,⁸⁸ the Convention on the Elimina-

⁸⁵ In her report E/CN.4/2003/3/Add.4 submitted pursuant to Commission on Human Rights resolution 2002/36, Mission to Afghanistan, October 13 to 23, 2002.

⁸⁶ Abubaker Saddique, *Constitutional Guarantee of Equal Rights for Afghan Women So Far Brings Little Change to Everyday in Life*, 8 March, 2004.

⁸⁷ Afghanistan acceded to the Rome Statute in February 2003.

tion of All Forms of Racial Discrimination⁸⁹ (CERD), the International Covenant on Civil and Political Rights⁹⁰ (ICCPR), the International Covenant on Economic Social and Cultural Rights⁹¹ (ICESCR), the Convention Against Torture⁹² (CAT), the Convention on the Rights of the Child⁹³ (CRC) and its Optional Protocols on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography.

It is essential that the Afghan government take the necessary steps to adopt such laws or measures as may be necessary to give effect to the rights contained in the international treaties that it has signed and ratified and that national NGOs and the international community monitor compliance to these treaties.

CEDAW

The Committee on the Elimination of Violence Against Women was established to monitor state compliance with the CEDAW. The Convention obligates state parties to submit to the Secretary General a report on measures they have adopted to implement the Convention within a year after its entry into force and then every four years thereafter or whenever the Committee requests it. As such, Afghanistan's report to the Secretary General that was due on 5 March 2004 has not been submitted to date. It is important that the Afghan government follow-up on its commitment to CEDAW by submitting a report to the Committee and ensuring that national NGOs can input in the process.

Advocates do not have formal access to the process but the Committee encourages governments to include NGO input in their reports and has invited direct NGO input, in the form of independent or "shadow" reports and informal presentations, to bring women's concerns to national and international attention. The International Women's Rights Action

⁸⁸ Afghanistan signed CEDAW on 14 August 1980 and acceded to CEDAW on 5 March 2003, without reservations.

⁸⁹ Afghanistan is a party to the CERD since 1983 it has not accepted article 14.

⁹⁰ Afghanistan is a party to the ICCPR since 1983.

⁹¹ Afghanistan is a party to the ICESCR since 1983.

⁹² Afghanistan is a party to the CAT since 1987 it has not accepted article 22 of CAT.

⁹³ Afghanistan is a party to the CRC since 1994 and signed on the optional protocols in October 2003 and October 2002, respectively.

Watch (IWRAW) has published a procedural guide for NGOs to submit shadow reports to CEDAW.⁹⁴

It is recommended that Afghanistan sign and ratify the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. This mechanism could supplement the reporting mechanisms under the CEDAW convention as well as the ambiguous constitutional enforcement mechanisms. Indeed, the Optional Protocol to CEDAW contains two procedures: a communications procedure allowing individual women, or groups of women, to submit claims of violations of rights to the Committee on the Elimination of Discrimination against Women; and an inquiry procedure enabling the Committee to initiate inquiries into situations of grave or systematic violations of women's rights.

⁹⁴ It is available at: www.hku.hk/ccpl/research_projects_issues/cedaw/shadowreports.html

CONCLUSION

The recent constitution-making process has laid some of the initial foundation required for building a democratic system in Afghanistan. However, major roadblocks remain along the unpredictable road to democratization. Afghanistan's foremost concern is continued rampant insecurity coupled with impunity for human rights violations pervasive throughout the country. Democracy requires security *and* justice. As explained, the dismal security situation restricted women's exercising of their civil and political rights throughout the constitution-making process. If the international community does not act to correct this situation and implement security measures with a gendered lens, Afghanistan's electoral process risks disenfranchising Afghan women, who represent over half of the population. In this context, not only would Afghan women continue to work against all odds to exercise their right to vote and to be elected, but they would also struggle to ensure that their newly sanctioned constitutional rights to equality be respected. But, without security and stability Afghanistan's new constitutional guarantees will prove to be meaningless in practical terms.

The democratization processes have presented opportunities for Afghan women to raise their voices and work together towards seeing their rights guaranteed during this critical window of opportunity for building peace. However, the experience of women voters, observers and delegates before and during the Constitutional Loya Jirga made it evident that the degree of insecurity, political barriers and lack of commitment and cooperation from international actors such as UNAMA, were not conducive to women's fruitful participation. The present spotlight on Afghanistan, the commitment of women activists, and the beginnings of a peace process make this an opportune time to entrench standards of women's political participation in time for Afghanistan's first presidential elections in

40 years, scheduled to take place in September 2004. At the same time, creating an environment where women can safely exercise their constitutional rights, vote, run for office, lobby, raise awareness, and organize with other women should be seen as an urgent priority. This is because the narrow opening which has been exposed where women can begin to build an agenda for peace, human rights and democratic governance threatens to shut prematurely. This threat has been made ever more acute in recent weeks with the outbreak of fighting in the province of Herat, a turn of events which could easily destabilize the modest gains made in working towards peace. Practical, simple measures can be taken immediately, as outlined in the recommendations of this report.

Despite its ambiguities and dangers, the new Constitution can serve as a tool in the strategies used by Afghan women towards the practical realization of their fundamental rights. Still, women's access to justice will depend on various factors including the re-establishment of the security situation and the commitment of the ATA and the international community to ending impunity and bringing perpetrators to justice. Actions must be taken to enforce the rule of law. Without a clear commitment to this end, respect for the Constitution will not be fostered. Thus, given the present context, it is essential that the implementation of the Constitution not only become the *raison d'être* of the government and the courts, but also of civil society, including the women's rights movement. It is only when constitutional rights are claimed that they can begin affecting social change. To work towards the implementation of the Constitution and facilitate access to justice, civil society representatives should consider the following lobbying priorities and recommendations:

- An institute that serves the judiciary, by planning, coordinating and delivering judicial education dealing with the law, the craft of judging and the particular social, economic and political context should be established.
- A public remedy mechanism such as a Gender Equality Commission that facilitates access to justice and works to respect, promote, protect and fulfil fundamental rights in the country should be created.
- The Independent Commission for the Supervision of the Constitution whose members will be appointed by the President of Afghanistan, should be representative of the Afghan population, therefore include female appointees from civil society who are gender-sensitive.

- A quasi judicial role should be assigned to an ombudsperson to whom the AIHRC could forward complaints of violations of fundamental rights for adjudication.
- In order to understand the mandate of the AIHRC and its role in the implementation of the Constitution, Article 58 of the Constitution should be tested, through strategic litigation, by the AIHRC and civil society representatives.
- The AIHRC and civil society representatives should urge that the Paris Principles relating the status of national human rights institutions be considered as minimum standards for the drafting of the law that regulates the AIHRC.
- Mechanisms to address past injustices should be debated nationally and designed in order to work towards building national reconciliation and to consolidate the peace process. In this vein, an international and independent Commission of Inquiry be established, as called for by the UN Special Rapporteur on Arbitrary, Summary and Extrajudicial Executions.
- A popular education campaign about the Constitution throughout the country will be key to both its legitimacy and its effectiveness as a democracy-building and peacebuilding tool. Distribution of a popularized version of the Constitution to literate, as well as illiterate Afghans is another essential factor.

Further, civic education about the Constitution and Afghanistan's international human rights obligations must be conducted at all levels and in all sectors of society, in urban and rural areas alike. The Constitution's fundamental rights provisions should be discussed in different forums and at all levels of state and civil society. It is important to ensure that legal professionals, the judiciary, agents of social change, religious leaders, among others, are encouraged to discuss the Constitution and its links with international human rights law, family laws and Muslim laws. International donors must provide funds and support the popular education campaign.

Indigenous institutions that command confidence and respect in the community should be mobilized to debate the constitutional framework and discuss their role in its implementation. These institutions must be accessible to women through the creation of safe and secure environments where women's rights issues can be discussed, a situation that is

not presently the case in most of Afghanistan, particularly in rural areas. It is only when the Constitution becomes understood as a concrete tool for everyday use by the people that it will gain legitimacy. The document must become a living instrument of social change.

Afghanistan's constitutional process, and the approaching elections, are strategic components of the peace process; events which can abscond or guarantee the emergence from conflict. They are also, however, as much *opportunities* to reverse a traumatic history of abuse against women. Should women be granted a platform from which to advocate their rights, they will substantiate a foundation from which peace and security will be entrenched. A successful peace process is dependent on women's presence at every step and at all levels of decision-making. Those aiming at impeding the perpetuation of violent conflict in Afghanistan will find that this condition cannot be negotiated if the objective is stability.

RECOMMENDATIONS FOR THE ELECTIONS PROCESS

To the United Nations Assistance Mission to Afghanistan (UNAMA):

- UNAMA, in collaboration with ISAF and the ATA, must prioritize extensive DDR programmes in all provinces under the authority of warlords and private armies. Successful implementation of Constitutional provisions is dependent on the simultaneous DDR of all armed forces outside of the Afghan National Army (ANA).
- A well-staffed, fully-resourced unit should be established within UNAMA's department for Human Rights to coordinate civic education programming in rural areas in collaboration with the AIHRC. This unit should devise work methods which would make its programming accessible to rural women, for example, by using mobile units and collaborating with local grassroots organizations based in rural villages.
- UNAMA should clearly outline and publicize its role in coordinating, monitoring, funding, and its other functions in upcoming national elections and future political processes, such as Loya Jirgas. The relationship with relevant ATA ministries, ISAF and other institutions working in Afghanistan should be made explicit in order that the division of roles and areas necessitating coordination and collaboration are clear to all parties.
- UNAMA should dispatch a large number of mobile voting units to all rural areas, in order that women with no means of traveling to district

electoral offices are able to vote. Personnel should be made available, who speak the local language of the area in question, to inform people verbally about women's right to vote and the importance of voting in the election. In areas with a higher level of literacy, printed material should be distributed.

- UNAMA, in collaboration with ISAF, should have a strong presence in particularly insecure areas with a record of denying women the right to political participation, such as in Herat. Careful monitoring should take place to prevent intimidation and harassment of women voters, as well as civil society actors trying to organize initiatives around the elections.
- UNAMA must ensure that protection mechanisms are prepared for those fearing retaliation or abuse from political/military factions, for freely expressing themselves before, during, or after the CLJ. Protection arrangements should be long-term when such assistance is required by the victim.
- UNAMA can serve a proactive function in coordinating international organizations to support the appropriate ATA ministries in providing women's human rights training to police forces and ANA personnel, focusing on forces working in rural areas. Such a task would be greatly facilitated with a fully-staffed Gender Unit under the auspices of UNAMA.

To the Afghan Government

- The ATA must use its access to various forms of media to send a clear message regarding basic principles that should be followed during elections, including the illegality of intimidation, threats and harassment, consequences for such behaviour, the right of women to participate in all political processes on an equal basis, where to register complaints of intimidation, threats and harassment and other forms of human rights abuses, and information about "protected routes" to district electoral offices in areas where mobile voting units will not be available.
- The ATA should enforce punitive measures for individuals, political party representatives, or members of military factions, who use intimidation tactics against women voters and women candidates. The ATA should publicly express a serious commitment to enforce puni-

tive measures against those who violate women's rights to participate in political processes.

- The ATA, in collaboration with UNAMA, should welcome and facilitate the presence of international elections observers.
- The Ministry of Justice should instruct its local police forces, as well as additional to arrest and prosecute individuals or groups who intimidate, harass or threaten women activists, members of non-government organizations, or others involved in civil society initiatives in the provinces. Independent monitors from the AIHRC and women's NGOs with a background in trauma counseling and violence against women should have a presence in areas where cases of intimidation against women organizers is especially acute, to act as an additional check on police forces. Women's organizations and others working to provide civic education should be ensured an environment where they are free to carry out their work in safety.
- Restrictions should be legislated and enforced against factions and militarized political parties who attempt to interfere and undermine the legitimacy of political processes by committing human rights abuses and exercising intimidation tactics against other political actors. There should be a policy of "0 tolerance" against politically-influenced cases of intimidation, threats and harassment in all their forms.
- Strict measures should be installed determining who has access to voter ballots and voter registration lists, and voting booths should be well-protected from any individuals entering with any intention other than to enter their ballot. Personnel staffing voter booths should have no affiliation to political parties or military factions and should be neutral actors who will not interfere with the voting process.
- International election monitoring teams should be invited and welcomed by the ATA.

To International Donors and the International Community in Afghanistan

- DDR must top the priority list of Afghanistan's major donor countries, and careful attention should be paid to the implementation of such programming and its appropriateness. For example, DDR should, in all cases, be accompanied with job training programmes, and should take place in a coordinated fashion in order that demobi-

lized regions do not feel the need to re-arm when neighbouring regions have not also undergone DDR simultaneously.

- Funds should be reserved for civil society initiatives focusing on peacebuilding and civic education, and particularly for Afghan organizations working with women in rural areas.
- Continued and expanded financial support should be made available to ISAF for an expansion of the peacekeeping force to insecure provinces and so that ISAF will remain in Afghanistan for an additional five years.
- Donors should prioritize capacity-building opportunities for Afghan civil society organizations working to support women's human rights, such as regional and international training for women civil society leaders; and the acquiring of appropriate resources for national training programmes on civic education, women's rights, human rights and political participation.
- States must immediately cease providing financial and military support to private armies under the control of provincial warlords. Support should be diverted to the ANA and should be bolstered with professional human rights training for all ANA troops.

To the International Security Assistance Force in Afghanistan (ISAF)

- ISAF should mobilize peacekeeping forces to the least secure provinces and establish clearly-indicated protected routes for women who must travel from neighbouring villages to vote in the electoral district office in their province. There should be a peacekeeping presence around all voting sites in the country and anyone found to be interfering with women trying to access voting sites should be apprehended and investigated.
- ISAF should target its forces to be present at security check points and patrol stations operated by local armies and police forces to ensure that women are free to pass through without harassment.
- It is imperative that ISAF expand its forces throughout the country, prioritizing areas where factional fighting persists and where women fear for their safety. A strong peacekeeping presence throughout the country is necessary condition for implementation of the new Constitution.

- ISAF should seek international political support in order to commit to a minimum five year term upon the end of its present term.

To the Afghan Independent Human Rights Commission (AIHRC)

- The AIHRC should make available personnel to observe proceedings in village-level *shuras*, in order to ensure women's rights to access and participate in such meetings are upheld.
- The AIHRC, in collaboration with UNAMA, should compile a report of all incidents of intimidation, threats and harassment reported against women during the CLJ. The names of those who registered complaints should be protected.

APPENDIX A: RIGHTS &
DEMOCRACY'S LETTER
TO PRESIDENT KARZAI
ON SECURITY
PROVISIONS FOR
WOMEN AT THE CLJ

Honourable Hamid Karzai
President of the Islamic Republic of Afghanistan
Islamic Transitional Authority of Afghanistan
Shahr-e-Now

Cc: Afghan Independent Human Rights Commission
Consortium for Rights based Research and Advocacy
UNIFEM

Re: Security for Women during Afghanistan's Constitutional Loya Jirga

Kabul, Afghanistan

September 25, 2003

Your Excellency,

As Afghanistan's second Loya Jirga approaches this Fall, the event is a significant turning point in the crossroads the country has reached since falling under the authority of the Afghanistan Transitional Authority (ATA) administered by President Karzai. With an intense mandate for reconstruction, nation-building and political consolidation, the ATA, working with what resources it has, has made substantial gains towards these ends. However, a long road still lies ahead in these areas, as well as in other areas that risk neglect yet threaten to undermine all advances made so far. One such issue is security. And in a country that witnessed five years of gender apartheid, providing security to women should be of primary consideration.

The Loya Jirga is the highest level arena for meaningful political participation and democratic representation in the leadership of Afghanistan. It offers an important opportunity for the voices of women to be heard at the decision-making table. While representatives of both UNAMA and the ATA have asserted their support for women's equal participation in this process, such support is only rhetoric when it is not followed up with concrete measures to ensure women have the logistical means of equal and full participation. And in Afghanistan's present political climate, the provision of appropriate security will make the difference between whether a woman can attend and participate in the Loya Jirga or not.

Continuing conflict along the border with Pakistan, gang-rapes, attacks from warring factions against civilians, bombs, landmines, forced sex-trafficking and discriminatory edicts against women and girls in Herat and elsewhere all jeopardize women's freedom of movement, freedom of association and freedom of expression. Women must be allowed to safely travel from outside of Kabul, from as far away as the Western provinces of Herat and Farah or the Southern provinces of Kandahar and Helmand. Furthermore, the present atmosphere of general intoler-

ance towards gender rights and women's equal political participation on the part of high-placed government officials, some male candidates in the Loya Jirga, and local men in Kabul, make proper security measures for women necessary at the Loya Jirga itself. The particular threats that women face require that security provision take into account the special needs of women members, participants and attendees.

Main Recommendations to the Afghan Transitional Administration, the Constitutional Commission and UNAMA Regarding Security for Women Delegates, Observers and Lobbyists during the CLJ:

- The UN-mandated International Security and Assistance Force (ISAF) must take charge of security in the provinces as well as in Kabul through out the Constitutional Loya Jirga (CLJ) process.
- It is essential that the security personnel at the CLJ be able to guarantee the human rights of *all* the participants of the CLJ.
- All reported threats and coercion of CLJ participants should be investigated promptly by security personnel (in coordination with the Executive Committee and civil society observers) who should act with due diligence and in conformity with international human rights standards. It is essential that these violations also be addressed when they take place in the private sphere, for example when the perpetrators are women's family members or community leaders.
- Transportation (buses for example) for women traveling from the provinces to attend or lobby at the CLJ should be provided.
- Women-only accommodation for women delegates of the CLJ as well as for women attending the CLJ as observers or to lobby should be provided. The accommodation must be secured 24 hours a day.
- Women attending the CLJ must be protected from threats by warlord factions before, during and after the CLJ.
- The security unit at the CLJ must include female security personnel and female health and trauma counseling practitioners who are trained on gender issues.
- Women should be accompanied by a person of their choice when being interviewed by security personnel at the CLJ.
- Members of the Afghan Independent Human Rights Commission as well as civil society observers of the CLJ should have access to women and women delegates during the CLJ and they should accompany the security personnel during the CLJ.
- Women participants of the CLJ must have a safe, secure and private meeting space close to the main meeting area to discuss issues of concern and strategize.

I am calling for the immediate implementation of the above recommendations in the interest of protecting the lives and basic rights of Afghan women. Furthermore, I strongly urge the interim Afghan Transitional Authority and the United Nations Assistance Mission to Afghanistan to

work in collaboration with international non-governmental organizations, UNIFEM, and the Independent Afghan Human Rights Commission to ensure that the highest level of security is provided for Afghan women, and that security for women is an equally important priority during the upcoming electoral process in Afghanistan

Respectfully yours,

Jean-Louis Roy

President

Rights & Democracy – Droits & Démocratie

APPENDIX B: RIGHTS &
DEMOCRACY'S LETTER
TO PRESIDENT KARZAI
ON WOMEN'S RIGHTS IN
THE NEW
CONSTITUTION

Honourable President Hamid Karzai
President of the Islamic Republic of Afghanistan
Presidential Palace
Kabul
Afghanistan

October 30, 2003

Excellency,

The Afghanistan Transitional Authority (ATA) has made commendable headway in establishing the infrastructure of a modern, democratic state that will be able to respond to the needs of a population ravaged by more than two decades of deadly conflict. The recent completion and dissemination of the draft Constitution in Dari is a significant achievement for the future of Afghanistan. The constitution-making process, now well underway, has presented Afghans with a window of opportunity to engage in a democracy-building exercise. Notwithstanding a climate of insecurity, Afghan citizens availing this window of opportunity continue to engage in dialogue about the Constitutional reforms, raise awareness about human rights and democratic institutions.

This year, Rights & Democracy met with Afghan citizens, in particular Afghan female judges, lawyers, doctors, women's rights activists, students, journalists, among others, in order to discuss the on-going constitutional reform. Afghans expressed a desire for constitutional governance which guarantees civil, political, economic, social and cultural rights. Given the social, political and historical context of Afghanistan, and as other countries that have emerged from conflict and civil strife have done in the past, it is essential that effective mechanisms are provided within the Constitution to ensure fundamental rights to citizens and those living within the Afghan territories.

Concerned with ensuring that Afghan women's voice are taken into consideration throughout the process and joining our voices to theirs, we encourage the ATA and the Afghan Constitutional Commission to take steps to ensure that the following principles are clearly spelt out in the final version of the Constitution to realize the dreams of Afghan citizens for democracy:

We recommend that the following issues be clearly included in the Constitution:

- The Constitution be the supreme law of the land and all administrative and legal instruments are brought into conformity with the letter and spirit of the Constitution including laws and systems predating the Constitution. A definite time-frame be fixed within which all the laws must be brought into conformity with the provisions of the Constitution.

- The Constitution provides for a system of governance on the principle of separation of powers of the executive, judiciary and legislature.
- An apex court of the country be established with the power of judicial review on all actions and acts of administration and legislature on the touchstone of fundamental rights provided in the Constitution. This apex court should have the power to provide individual relief on any individual's breach of fundamental rights and principle of public remedy be adopted on matters of public importance. The decisions of the apex court should be binding on all authorities of the state.
- An advisory role for the Afghan Independent Human Rights Commission (AIHRC) be specified in the Constitution and the AIHRC be linked to the apex court and legislature.
- The fundamental rights provisions must be based upon the dual principles of equality before law and equal protection of the law (citizen or non-citizen) irrespective of religion, gender, class, ethnicity, etc. The equal rights of women must be specified; all religious and ethnic minorities must be guaranteed freedom to practice, preach and propagate their religion and culture and their status as Afghan citizens should not be affected under any circumstance.
- The principle of affirmative action must be adopted in order to guarantee substantive equality to all. Ensure the inclusion of affirmative action articles to ensure the full political participation of women, minorities and other disadvantaged/vulnerable groups. The institution of affirmative action policies acknowledges the impact of discrimination and is designed to correct past injustices, and promote the full participation of all citizens in the social and economic life of a society.
- Accountability mechanisms for civil servants and all those in authority, even in the highest offices, should be included in the Constitution and procedures specified.
- Any deviation or curtailment of fundamental rights for example in times of public emergency must be specified in the Constitution. The apex court must be given the power to examine the validity of the proclamation of an emergency.
- A clear provision must be made in the Constitution to give effect to international commitments of the state in domestic legislation as a member of the United Nations.

As you know, Afghan women have borne the heaviest burden of conflict, gender apartheid and ongoing human rights abuses at the hands of warlords' soldiers, police, other officials, and male family members. Afghan women and girls remain in great peril and the Constitution must address this situation with concrete measures that will bring long-awaited change to the lives of half of the population, including provisions for gender-based judicial reform. As recommended above, such measures include strong, clear wording to begin changing the present discrimination and inequality which women in Afghanistan face on a daily basis and which will undermine all attempts at peacebuilding in the country.

I strongly urge you to take these recommendations into account when considering Afghanistan's next Constitution.

Respectfully yours,

Jean Louis Roy

President

Rights & Democratie – Droits et Démocratie

APPENDIX C: GENDER AND LAW WORKING GROUP RECOMMENDATIONS FOR THE CONSTITUTION

GENDER AND LAW WORKING GROUP KABUL, AFGHANISTAN

Rationale

The Gender and Law Working Group is based on the support and participation of the Ministry of Women Affairs and the State Minister of Women's Affairs. Chaired by the State Minister, Professor Mahbuba Hoquqmal, the Working Group consists of jurists and experts from the Judicial Reform Commission, the Independent Human Rights Commission, the Supreme Court, the Attorney General, the University Faculties of Law and Shari'a, and national and international women's legal and professional non-governmental organizations. It is supported by the UNIFEM Gender Justice Programme.

The Working Group was established on December 28, 2002 with the goal of providing a forum for government and non-government actors concerned with women's human rights to ensure that these issues are addressed in Afghanistan's constitutional, legal and electoral reform processes. As such, the Working Group welcomes that draft Constitution and commends the dedication of the Constitution Commission to this historic project. The drafting of a new Constitution for the Islamic Republic of Afghanistan provides an important opportunity to strengthen this country's societal commitment to enhancing the rule of law, justice, equality and peace.

The people of Afghanistan are deeply committed to Islam and Shari'a and this Working Group is determined to apply the most prominent of Islamic teachings safeguarding human dignity and rights. Due to the grave injustices toward women, in particular, and society at large, which were perpetrated under the name of Holy Islam, it is the intention of this group's recommendations to rectify these violations perpetrated even against Islam itself and to manifest the elevated and humane component of Islamic great ethical and legal teachings, affording women the utmost respect and rights protection.

It is with full recognition of the destruction of conflict and war on the Afghan community and the struggle of all Afghans, including women, to create a more prosperous and secure environment that the Working Group seeks to strengthen the contributions of Afghan women through the new Constitution. It is with sadness that the Working Group highlights that the maternal mortality rate in Afghanistan is 1,700 deaths per 100,000 live births (or one death every 30 minutes); only around 8 percent of girls have the opportunity to attend primary education; and 97 per cent of children under 16 have witnessed violence. The effects of high levels of food insecurity, water scarcity and limited social support services are disproportionately felt by women and girls.

The devastating impact of past discrimination and, despite the Afghan society's best traditional practices, the maintenance of certain unjust traditional practices have resulted in violations of Afghan women's dignity and rights and severely hampered their ability to participate in society. Constitutionally based obligations that guarantee affirmative action to increase opportunities for women in all spheres, including in political representation at every level, are essential to addressing this past and current discrimination.

The Working Group acknowledges the important role of Afghanistan's international obligations, most particularly its ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in the formulation of the country's preeminent legal document. It is with commitment to and conformity with these internationally developed and accepted norms on human rights and freedoms for all people, including equality between women and men, that the Working Group formulated its recommendations.

Consequently, the Working Group presents these recommendations on the draft constitution with the goal of strengthening women's development, human rights and their participation in all fields of Afghan life. In order to achieve this, there are recommendations in the following areas:

- Preamble
- State Obligations
- Gender Equality, Non-discrimination and Positive Action
- Human Rights
- Political Participation

The Working Group finds it imperative to emphasize that it is the enforcement of the new Constitution which will lead to the achievement of these essential goals. It is with this in mind that the Working Group expresses its hope that the Afghan community, supported by the international community, will dedicate its efforts to ensuring the implementation of the new Constitution and fulfillment of its promises for all Afghan people, especially women.

Presented by the Gender and Law Working Group with support and participation of:

Professor Mahbuba Hoquqmal
State Minister for Women's Affairs

Dr. Habiba Surabi
Minister for Women's Affairs

Preamble

We the people of Afghanistan:

1. With firm faith in God Almighty and relying on His mercy, and Believing in the Sacred religion of Islam,
2. Observing the United Nations Charter and respecting the Universal Declaration of Human Rights,
3. Realizing the injustice and shortcoming of the past, and the numerous troubles imposed on our country,
4. While acknowledging the sacrifices and the historic struggles, rightful Jihad and resistance of the Nation, and respecting the high position of the martyrs for the freedom of Afghanistan,
5. Understanding the fact that Afghanistan is a single and united country and belongs to all ethnicity residing in this country,
6. For consolidating, national unity, safeguarding independence, national sovereignty, and territorial integrity of the country,
7. For establishing a government based on people's will and democracy,
8. For creation of a civil society free of oppression, atrocity, discrimination, and violence, based on rule of law, social justice, protection of human rights, and dignity, and ensuring fundamental rights and freedoms of the people,
9. *For securing equal rights for women and men and eliminating all forms of discrimination and violence against women,*
10. For strengthening of political, social, economic, and defensive institutions of the country,
11. For ensuring a prosperous life, and sound environment for all those residing in this land,

12. And finally for regaining Afghanistan's deserving place in the international community, Have adopted this constitution in compliance with historical, cultural, and social requirements of the era, through our elected representatives in the Loya Jirga dated / /1382 in the city of Kabul.

Articles of Draft Constitution State Obligations	Recommended Additions to Articles
<p>Article 4 (Ch. 1, Art. 4) National sovereignty in Afghanistan belongs to the nation that exercises it directly or through its representatives. The nation of Afghanistan consists of all individuals who are the citizen of Afghanistan. The word Afghan applies to every citizen of Afghanistan. None of the citizens of the nation shall be deprived of his Afghan citizenship. Affairs related to the citizenship and asylum are regulated by law.</p>	<p>National sovereignty in Afghanistan belongs to the nation that exercises it directly or through its representatives. The nation of Afghanistan consists of all individuals who are the citizen of Afghanistan. The word Afghan applies to every citizen of Afghanistan. None of the citizens of the nation shall be deprived of his Afghan citizenship. <i>Men and women shall have equal rights to acquire, change or retain their citizenship.</i> Affairs related to the citizenship and asylum are regulated by law.</p>
<p>Article 6 (Ch. 1, Art. 6) The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.</p>	<p>The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, <i>equality among women and men</i>, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country. <i>The state shall recognize the considerable role women play in Afghan society.</i></p>
<p>Article 7 (Ch. 1, Art. 7) The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights. The state prevents all types of terrorist activities, production and smuggling of narcotics.</p>	<p>The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights. The state prevents all types of terrorist activities, production and smuggling of narcotics <i>and trafficking in human beings.</i></p>
Gender Equality, Non-discrimination and Positive Action	
<p>Article 22 (Ch. 2, Art. 1) Any kind of discrimination and privilege between the citizens of Afghanistan is prohibited. The citizens of Afghanistan have equal rights and duties before the law.</p>	<p>Any kind of discrimination and privilege <i>based on gender, language, religion, ethnicity, sect, family origin, social, economic and civil status</i> between the citizens of Afghanistan is prohibited. <i>Notwithstanding, the state is obligated to take neces-</i></p>

	<p><i>sary measures to safeguard women's property rights and to promote women's participation in all political, economic, social, cultural, civil or any other affairs in order to reach gender equality.</i></p> <p>The citizens of Afghanistan have equal rights and duties before the law. <i>Women have full and equal rights with men before the law and the courts. All laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which constitute discrimination against women are prohibited.</i></p>
Human Rights	
<p>Article 44 (Ch. 2, Art. 23)</p> <p>The state shall devise and implement effective programs for balancing and promoting of education for women, improving of education of nomads and elimination of illiteracy in the country.</p>	<p>The state shall devise and implement effective programs for balancing and promoting of education for women, improving of education of nomads and elimination of illiteracy in the country.</p>
<p>Article 45</p> <p>The state shall devise and implement a unified educational curriculum based on the provisions of the sacred religion of Islam, national culture, and in accordance with academic principles, and develops the curriculum of religious subjects on the basis of the Islamic sects existing in Afghanistan.</p>	<p>The state shall devise and implement a unified educational curriculum based on the provisions of the sacred religion of Islam, national culture, <i>equality of women and men</i>, and in accordance with academic principles, and develops the curriculum of religious subjects on the basis of the Islamic sects existing in Afghanistan.</p>
<p>Article 48 (Ch. 2, Art. 26)</p> <p>Work is the right of every Afghan.</p> <p>Working hours, paid holidays, rights of employment and employee, and other related affairs are regulated by law.</p>	<p>Work is the right of every Afghan.</p> <p>Working hours, paid holidays, rights of employment and employee, <i>fair and just working conditions including those for working women</i>, and other related affairs are regulated by law.</p>
<p>Article 49 (Ch. 2, Art. 27)</p> <p>Forced labor is forbidden.</p> <p>Forced labor, in times of war, calamity, and other situations threatening lives and public welfare are exceptions to this rule.</p> <p>Children shall not be subjected to the force labor.</p>	<p><i>Slavery, slave-like practices, and forced labor</i> is forbidden.</p> <p>Forced labor, in times of war, calamity, and other situations threatening lives and public welfare are exceptions to this rule.</p> <p>Children shall not be subjected to the force labor.</p>
<p>Article 52 (Ch. 2, Art. 30)</p> <p>The state is obliged to provide the means of preventive health care and medical treatment, and proper health facilities to all citizens of Afghanistan in accordance with.</p> <p>The state encourages and protects the establishment and expansion of private medical services and health centers in accordance with law.</p> <p>The state in order to promote physical education and improve national and local sports adopts necessary measures.</p>	<p>The state is obliged to provide the means of preventive health care and medical treatment, and proper health facilities to all citizens of Afghanistan in accordance with. The state is obligated to provide special health services for mother and child during the period of pregnancy, delivery and nursing.</p> <p><i>The state encourages and protects the establishment and expansion of private medical services and health centers in accordance with law.</i></p> <p>The state in order to promote physical education and</p>

	improve national and local sports adopts necessary measures.
<p>Article 53 (Ch. 2, Art. 31)</p> <p>The state takes necessary measures for regulating medical services and financial support to descendants of martyred, lost or disabled and handicapped individuals in accordance with Law.</p> <p>The state guarantees the rights of pensioners and renders necessary assistance to needy elders, women without caretakers, and needy orphans in accordance with the law.</p>	<p>The state takes necessary measures for regulating medical services and financial support to descendants of martyred, lost or disabled and handicapped individuals in accordance with Law.</p> <p>The state guarantees the rights of pensioners and renders necessary assistance to needy elders, <i>female-headed households</i>, and needy orphans in accordance with the law.</p> <p><i>The state shall ensure adequate housing for those in need through a national policy of housing according to priority of needy people.</i></p>
<p>Article 54 (Ch.2, Art. 32)</p> <p>Family is a fundamental unit of society and is supported by the state.</p> <p>The state adopts necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the principles of sacred religion of Islam.</p>	<p>Family is a fundamental unit of society and is supported by the state. <i>Marriage must take place freely and with the agreement of both parties.</i></p> <p>The state adopts necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the principles of sacred religion of Islam.</p>
Political Participation	
<p>Article 83 (Ch. 5, Art. 3)</p> <p>Members of the Wolesi Jirga are elected by the people through free, general, secret, and direct elections. Their mandate ends on the 1st of Saratan of the fifth year after the elections, and the new assembly starts its work.</p> <p>The election of the members of the Wolesi Jirga shall be held within 30 to 60 days before the expiry of the term of the Wolesi Jirga.</p> <p>The number of members of the Wolesi Jirga, proportionate to the population of each region, shall be between two hundred and twenty, and two hundred and fifty.</p> <p>Electoral constituency and other related issues shall be determined by election laws.</p> <p>In the election law measures should be adopted for so the election system shall provide general and just representation for all the people of the country, and at least one female delegate should be elected from each province.</p>	<p>Members of the Wolesi Jirga are elected by the people through free, general, secret, and direct elections. Their mandate ends on the 1st of Saratan of the fifth year after the elections, and the new assembly starts its work.</p> <p>The election of the members of the Wolesi Jirga shall be held within 30 to 60 days before the expiry of the term of the Wolesi Jirga.</p> <p>The number of members of the Wolesi Jirga, proportionate to the population of each region, shall be between two hundred and twenty, and two hundred and fifty.</p> <p>Electoral constituency and other related issues shall be determined by election laws.</p> <p>In the election law measures should be adopted for so the election system shall provide general and just representation for all the people of the country, <i>and at least two female delegates should be elected from each province.</i></p>
<p>Article 84 (Ch. 5, Art. 4)</p> <p>Members of the Meshrano Jirga are elected and appointed as follows:</p> <p>1. From among the members of each provincial coun-</p>	<p>Members of the Meshrano Jirga are elected and appointed as follows:</p> <p>1. From among the members of each provincial coun-</p>

<p>cil, the respective council elects one person for a period of four years.</p> <p>2. From among the district councils of each province, the respective councils elect one person for a period of three years.</p> <p>3. The President from among experts and experienced personalities appoints the remaining one-third of the members for a period of five years.</p> <p>The president appoints 50% of these people from among women.</p> <p>A person, who is appointed as a member of the Mesh-rano Jirga, shall relinquish his membership in the respective council, and another person replaces him in accordance with the law.</p>	<p>cil, the respective council elects one person for a period of four years.</p> <p>2. From among the district councils of each province, the respective councils elect one person for a period of three years.</p> <p>3. The President from among experts and experienced personalities appoints the remaining one-third of the members for a period of five years.</p> <p>The president appoints 50% of these people from among women.</p> <p>A person, who is appointed as a member of the Mesh-rano Jirga, shall relinquish his membership in the respective council, and another person replaces him in accordance with the law.</p>
<p>Article 138 (Ch. 8. Art. 3)</p> <p>In every province a provincial council is to be formed. Members of the provincial council are elected in proportion to the population by free, direct, secret ballot, and general elections by the residents of the province for a period of four years in accordance with the law.</p> <p>The provincial council elects one of its members as Chairman.</p>	<p>In every province a provincial council is to be formed. Members of the provincial council are elected in proportion to the population by free, direct, secret ballot, and general elections by the residents of the province for a period of four years in accordance with the law. <i>The law shall ensure gender balance through all phases of the electoral process including women's representation in the provincial assembly.</i></p> <p>The provincial council elects one of its members as Chairman.</p>
<p>Article 140 (Ch. 8. Art. 5)</p> <p>In order to organize activities involving people and provide them with the opportunity to actively participate in the local administration, councils are set up in districts and villages in accordance with the provisions of the law.</p> <p>Members of these councils are elected by the local people through, free, general, secret and direct elections for a period of three years.</p> <p>The participation of nomads in these councils is regulated by law.</p>	<p>In order to organize activities involving people and provide them with the opportunity to actively participate in the local administration, councils are set up in districts and villages in accordance with the provisions of the law.</p> <p>Members of these councils are elected by the local people through, free, general, secret and direct elections for a period of three years. <i>The law will provide for the participation of women in the local councils.</i></p> <p>The participation of nomads in these councils is regulated by law.</p>

Members of the Gender and Law Working Group:

Professor Mahbuba Hoquqmal	State Minister of Women's Affairs
Dr. Suraya Subhrang	Ministry of Women's Affairs
Judge Mihro Hameed	Judicial Reform Commission
Prosecutor Hamida Sultani	Attorney General's Office
Judge Homa Alizoy	Afghan Women's Judges Association (AWJA)
Judge Wali Ahmad Asim	Supreme Court
Ms. Najiba Hossainy	Judicial Reform Commission
Ms. Palwasha Hassan	Rights and Democracy
Ms. Noorjahan	Kabul University, Faculty of Shari'a
Ms. Nadia	Kabul University, Faculty of Law
Judge Asifa Kakar	Supreme Court
Ms. Muneera	Ministry of Foreign Affairs
Ms. Karima Karimi	Afghanistan Independent Human Rights Commission
Judge Suraya Ahmadyar	Afghanistan Independent Human Rights Commission
Judge Rahela Saleem	Afghan Women's Network (AWN)
Ms. Shakila	Ministry of Women's Affairs
Ms. Shahla	Afghan Women's Lawyer Council (AWLC)
Ms. Orzala Ashraf	Human rights activist, HAWCA
Ms. Rida Azimi	International Human Rights Law Group (IHLRG)
Ms. Najia Zewari	United Nations Development Fund for Women (UNIFEM)

APPENDIX D: RECOMMENDATION BY COMMITTEE FOR THE PROTECTION OF WOMEN'S RIGHTS AT THE LOYA JIRGA

The text of this report is prepared and submitted by the Committee for the Protection of Women's Rights at the Loya Jirga.

This committee through holding seminars and meetings recommend the following points to be considered in the Constitutional Loya Jirga.

- 1. Article 4:** In regard to the rights of citizens, it is recommended that: National stability in Afghanistan is related to Afghan nation. It was agreed that it is of utmost importance to use direct and clear language on right of Afghan men and women to enjoy citizenship rights. The recommended text is underline in the following article: "National Sovereignty in Afghanistan belongs to the nation that exercise it directly or through its representatives. The nation of Afghanistan consists of all individuals who are citizen of Afghanistan. The word Afghan applies to every citizen of Afghanistan. None of the citizens of the nation shall be deprived of his Afghan citizenship. *Men and women shall have equal rights to acquire, change or retain their citizenship.* Affairs related to citizenship and asylums are regulated by law."
- 2. Article 5:** Because this article lists the state basic duties, it was unanimously agreed that inclusion of human rights should be amongst these duties. The recommended text is as follows: "Implementation provisions of this constitution and other laws, defending independ-

ence, national sovereignty, territorial, *citizens' Human Rights* and ensuring the security and defense capability of country, are the basic duties of the state."

3. **Article 7:** The following text on banning of trafficking in human being is added to the article in paragraph 2: "...The state prevents all types of terrorist activities, production and smuggling of narcotics *and trafficking in human beings.*"
4. **Article 22:** This article should serve as the corner stone in protection of human rights and promotion of women rights in the constitution. It should include the principles of equality before the law, non-discrimination assertion and affirmative actions for women rights. The recommended amendments are underlined as follows: "Any kind of discrimination and privilege based on gender, language, religion, ethnicity, sect, family origin, disability social, economic and civil status between the citizens of Afghanistan is prohibited.
Notwithstanding, the state is obligated to take necessary measures to safeguard women's property rights and to promote women's participation in all political, economic, social, cultural, civil or any other affairs in order to reach gender equality.
The citizens of Afghanistan have equal rights and duties before the law *and enjoy (both men and women) equal protection of the law.*"
5. **Article 43:** The meeting unanimously agreed that free education should include higher education, and that special measures should be afforded to guarantee that women and the disabled have adequate access to education. The recommended text is underlined as follows: "Education is the right of all citizens of Afghanistan, which shall be provided up to the first degree of higher education, free of charge by the state. The state is obliged to provide for special measures and policies to ensure women and disabled adequate access to education..."
6. **Article 52:** The meeting agreed that it is important to state the principle of free health care in the constitution in addition to noting special health services for mother and child. The following underlined text is recommended: "The state is obliged to provide the means of preventive health care, medical treatment and proper health facilities to all citizens of Afghanistan free of charge in accordance with the law. The state is obliged to provide special services for mother and child during the period of pregnancy, delivery and nursing..."
7. **Article 83:** In order to enhance women participation in the political process, the meeting unanimously agreed to double women representation stated by the article. The recommendation to paragraph B of the article is as follows: "...In the election law measures should be adopted for so the election system shall provide general and just representation for all the people of the country, *and at least two female delegates should be elected from each province.*"
8. **Article 138:** In order to enhance women participation in the political process, the meeting unanimously agreed to add an amendment that election laws should provide for gender balance to provincial council formation. The recommended text is as follows: "... Members of the provincial councils are elected in proportion to the population by free, direct, secret

ballot and general elections by the residents of the province for a period of four years in accordance with the law. *The law shall ensure gender balance through all phases of electoral process including women's representation in the provincial assembly...*"

9. **Article 140:** In order to enhance women participation in the political process, the meeting unanimously agreed to add an amendment to the effect that the law should ensure women's participation in the local councils, The recommended text is as follows: "... Member of these councils is elected by the local people through free, general, secret and direct elections for a period of three years. *The law will provide for the participation of women in local councils...*"
10. **Article 117:** In order to ensure women's voice and perspective in the legal system, the meeting felt it important that women judges should serve at the supreme court of justice. The recommended text is as follows: "The supreme court is composed of nine members *including women* who are appointed by the president for a period of ten years with the approval of the Wolesi Jirga..."
11. **Note amendments:**
 - The meeting agreed that in article 53 the wording of Female-headed households should replace the wording Women in with no guardian.
 - It was also recommended that the designation SHARWAND should be used to mean citizen instead of the word TABA which connotes subjects and not citizens.
 - Last the meeting agreed that the death penalty should be removed from the constitution of Afghanistan.