

## **Striking a Balance in Post-Conflict Constitution-Making: Lessons from Afghanistan for the International Community**

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## Abstract

Afghanistan is one of the more recent examples of the international community engaging in state building. One major reconstruction effort envisaged from the start was the drafting and passing of a new constitution as groundwork for increased democracy, rule of law, and good governance at a later stage. In this paper, I argue that the constitution-making process in Afghanistan, as carried out by the Afghan authorities assisted by the international community, was flawed. The main shortcoming of international actors was not only their failure to prevent the spread of "warlordism", but their active encouragement of the rise of regional power structures through their actions. The ensuing security situation, brought about by a lack of enforcement and policing powers on the part of the Afghan authorities in combination with the negative influence of regional warlords, had a direct impact on the way in which constitution-making was carried out. More importantly, it had a noticeable negative effect on how the process was perceived by the Afghan population. The main lesson to be taken away from Afghanistan is that process matters as much as substance. Failure to recognise this may jeopardise the legitimacy of state building efforts with long-lasting consequences that go far beyond the immediate written document arising from the constitution-making process.

*"The chief foundations of all states ... are good laws and good arms ... [T]here cannot be good laws where there are not good arms."*

Niccolo Machiavelli, *The Prince*, 1513

## I. Introduction

In *The Prince*, Machiavelli argues that states that are unable to defend themselves cannot hope to survive, regardless of the excellence of their laws. This takes on renewed importance when considering the all-too-common 21<sup>st</sup> century scenarios of states invading weaker neighbours for territorial gains or economic advantage, of countries without law enforcement powers sliding into civil

war, or of governments feeling the necessity to pursue nuclear weapons programmes. This paper will argue that Machiavelli's reasoning can easily be applied to post-conflict arenas in which international actors (state and nongovernmental entities) operate in attempts to assist failing or recently established governments. I will attempt to show this in relation to one particular aspect of reconstruction in problem countries: the re-establishment of national laws and, in particular, a country's written constitution.

Following Machiavelli's conclusion, I will argue that the constitution-making process in Afghanistan—carried out by the Afghan authorities and assisted by the international community—was flawed. The main shortcoming of the international community, I will conclude, was not only its failure to prevent the spread of "warlordism," but its active encouragement of the rise of regional power structures. The ensuing insecurity, brought about by an absence of sufficient force by the authorities, in combination with the negative influence of regional warlords, had a direct impact on the way in which constitution-making was carried out. More importantly, it had a noticeable negative effect on how the process was perceived by the Afghan population. The international community failed to create conditions that would have otherwise given vital legitimacy to the Constitution.

Following the 2001 U.S.-led military campaign that led to the collapse of the Taliban, the entry of Northern Alliance forces into Kabul, and the eventual signing of the Bonn Agreement in December 2001, the ensuing international reconstruction processes in Afghanistan have for the most part been inspired by a desire to build a peaceful and stable state. One major reconstruction effort envisaged in

Bonn was the drafting and passing of a new constitution. While constitutions are not always able to effect political change, they do serve as a clear symbol of a country's direction, can provide important citizens' rights safeguards, and lay the groundwork for increased democracy, rule of law, and good governance at a later time.<sup>1</sup> However, it is vital for governments to build a minimum level of legitimacy in the eyes of their countries' populations—a lesson learned from the constitution-making processes in East Timor and Brazil, for example. It is important to bear in mind that a constitution's legitimacy does not merely rest on its *substantive* content, but equally on the *process* surrounding its adoption.<sup>2</sup>

Afghanistan's history suggests that, in 2001, important factors were how and by whom the new constitution would be drafted and implemented."<sup>3</sup> The importance of process is also well explained in the words of Maja Duruwala of the Commonwealth Human Rights Initiative in relation to Indian and South African constitutional reform processes:

*It is only through the process that rests on a knowledge of, and input from, the community level that solutions will emerge. Then, even if there is no political will to implement those solutions, the people will have benefited from the exercise by being better informed about their own governing document which makes them sovereigns of their country and from which they have derived too little benefit for too long.*<sup>4</sup>

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<sup>1</sup> Khaled M. Abou El Fadl, Said Arjomand, Nathan Brown *et al.*, *Democracy and Islam in the New Constitution of Afghanistan* (RAND: California, 2003), 1.

<sup>2</sup> J Alexander Thier, "The Making of a Constitution in Afghanistan," Panel Presentation at a Conference on State Reconstruction and International Engagement in Afghanistan: Re-Establishing a Legal System, Bonn, Germany, June 1, 2003, available from <<http://bglatzer.de/arg/arp/thier.pdf>> (accessed October 26, 2004).

<sup>3</sup> "Assessing the Draft Constitution (Part 1): Presidential Powers and the Role of Religion," *RFE/RL Afghanistan Report*, November 6, 2003, Volume 2, Number 39, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>4</sup> Commonwealth Human Rights Initiative, Letter from Maja Daruwala to Justice Venkatachelliah entitled "Civil Society Involvement in Constitutional Review," March 30, 2001, available from <[www.humanrightsinitiative.org/publications/const/civil\\_society\\_involvement\\_in\\_constitutional\\_review.pdf](http://www.humanrightsinitiative.org/publications/const/civil_society_involvement_in_constitutional_review.pdf)> (accessed December 10, 2004).

It is thus process, not substance, I will focus on in this paper. A lesson learned from past experiences is that democratic constitution-making must be the result of a "home-grown process" that necessarily involves the public through processes of participation and furthering their feeling of "ownership."<sup>5</sup> In Afghanistan, it was regarded as a given that the new Constitution should first reflect the realities of Afghan society and, therefore, not bow to the wishes of a few, nor the ideals imposed by the outside world.<sup>6</sup> One fundamental difference to previous constitution-building was that Afghanistan concerned legal reform in an *Islamic* post-conflict environment, something with which the international community has had little experience. A major concern the internationals held was whether the vision of Islamic law that would be enshrined in the new constitution would be "antidemocratic." Additionally, Afghanistan has been riddled by security problems deeply affecting the constitution-making process, an issue that will be analysed in this paper.

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<sup>5</sup> Vivien Hart, "Democratic Constitution Making, Special Report", *United States Institute of Peace No 107* (2003): 1.

<sup>6</sup> "Role of the Media in Afghan State Building: The Case of the Afghan Constitution," *RFE/RL Afghanistan Report*, April 3, 2003, Volume 2, Number 12, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

In summary, this paper analyses the effectiveness of actions taken by the international community in Afghanistan's constitution-making process. I will briefly explain the legal framework established in post-Taliban Afghanistan, and examine in detail the structures and stages of the constitution-building process. The focus will be on assessing the strengths and weaknesses of the approach chosen by the international community.

## II. Background

### *The Legal Framework since 2001*

After the defeat of the Taliban, the international community assembled several Afghan representatives in Germany for a conference on the country's future. The result was a contract between these parties and the UN, the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, which was signed in Bonn on December 5, 2001 (the *Bonn Agreement*).<sup>7</sup> It described the goal of legal reform in Afghanistan as "rebuild[ing] the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions"<sup>8</sup>. Further, it set out a number of rules that guided the process of institution building over the two years following Bonn. The Afghan system of government was to be based temporarily on the 1964 Constitution (although without a monarchical

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<sup>7</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, December 5, 2001 (the *Bonn Agreement*), available from <<http://afghangovernment.com/AfghanAgreementBonn.htm>> or <<http://www.unama-afg.org/docs/bonn/bonn.html>> (both accessed October 10, 2004)

<sup>8</sup> Bonn Agreement, fn. 7 above, Article II(2).

system or legislature), an interim government was elected to function for six months, and was then duly tasked with organising an emergency Loya Jirga to elect a transitional government. The transitional government was tasked in advance with the responsibility to create a Constitutional Commission within a year and a half and to organise elections for a new government within two years.

### *Key International Actors*

Unlike most other post-conflict scenarios, the Bonn Agreement was not a peace agreement between belligerents, but a statement of general goals and intended power sharing among the victors of a conflict. The local Afghan "victors" had previously been enemies with separate structures of power and different foreign patrons. As a result, the starting point for international assistance was quite different from other scenarios of the 1990s.<sup>9</sup> In contrast to Kosovo and East Timor, where the UN assumed *de facto* and *de iure* control, the UN mission to Afghanistan was a small operation designed to leave only a "light expatriate footprint."<sup>10</sup> This phrase indicates that the international community has had no intention of running Afghanistan or involving itself directly with troops or administrators.

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<sup>9</sup> Astri Suhrke, Kristian Berg Harpviken and Arne Strand, "After Bonn: Conflictual Peace Building," in Sultan Barakat, ed., *Reconstructing War-Torn Societies: Afghanistan* (Basingstoke: Palgrave Macmillan, 2004), 77, 78; and United States Institute of Peace, *Establishing the Rule of Law in Afghanistan* (United States Institute of Peace: Washington D.C., March 2004), 4.

<sup>10</sup> First envisaged in "The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General to the Security Council and the General Assembly," *UN Document A/56/875-S/2002/278*, March 18, 2002: para 98 (d), available from <<http://daccessdds.un.org/doc/UNDOC/GEN/N02/289/20/PDF/N0228920.pdf?OpenElement>> (accessed May 25, 2005).

Emphasis has been placed instead on capacity building for the interim administrations and promoting and defending Afghan "ownership" of the state recovery process.<sup>11</sup>

However, the Bonn Agreement did mandate both a military and a civilian international presence, albeit small ones.<sup>12</sup> Under UN Security Council Resolution 1386 of December 20, 2001, an International Security and Assistance Force (*ISAF*) was established, and under Security Council Resolution 1401 of March 28, 2002, a UN Assistance Mission to Afghanistan (*UNAMA*) followed. *ISAF* has to be categorised as a "coalition of the willing" under a UN resolution rather than a full UN mission. The relationship to *UNAMA* is merely one of "close consultation."<sup>13</sup> The UN Security Council authorised *ISAF*'s area of operations to include all of Afghanistan, but did not further define *ISAF*'s mandate. So far, no significant expansion outside of Kabul has occurred. Instead, the Coalition has begun to deploy small numbers of so-called Provincial Reconstruction Teams to the regions. These do, however, have a somewhat confusing mandate, as they are designed to provide assistance in rebuilding local infrastructure and ensuring local security, but not to perform police functions.<sup>14</sup> This absence of "heavy" international commitment to ensure the security of Afghan

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<sup>11</sup> Antonio Donini, "Principles, Politics, and Pragmatism in the International Response to the Afghan Crisis" in Antonio Donini, Norah Niland and Karin Wermester, eds., *Nation-Building Unraveled? Aid, Peace and Justice in Afghanistan* (Bloomfield: Kumarian, 2004), 137.

<sup>12</sup> Bonn Agreement, fn. 7 above, Annex 1 and 2, respectively.

<sup>13</sup> UN Security Council Resolution 1386/2001 of December 20, 2001, para 4, available from <<http://daccess-ods.un.org/TMP/1078470.html>> (accessed on December 10, 2004).

<sup>14</sup> United States Institute of Peace, fn. 9 above, 4.



citizens or to assist with the reconciliation process also has been aptly characterised as "nation-building lite."<sup>15</sup>

In January 2002, the international community met in Tokyo for the International Conference on Reconstruction Assistance to Afghanistan (*Tokyo Conference*). Overall, the Tokyo Conference stressed the pivotal role the UN and other international governmental and non-governmental organisations would play in the reconstruction of Afghanistan, while placing primary responsibility on the Afghan interim government.<sup>16</sup> A corollary to the UN's "light footprint" approach, which transpired in Tokyo, has been to assign certain donors "lead nation" responsibility for particular sectors – thus, Germany is responsible for police reform, Italy for justice reform, Japan for disarmament, demobilisation and reintegration, etc.

The lead-donor approach has been criticised, particularly in the rule of law area.<sup>17</sup> Arguably, by limiting the responsibility of each donor country to one field, this limited not only the commitment of each state, but also the oversight to which each state was subject in that field. Quite possibly due to the sensitivity associated with constitution-making, and to avoid allegations of undue influence by a "lead nation," it was decided not to assign the constitution-making field to a particular state.<sup>18</sup> Instead, the UN would provide support to the constitutional process in Afghanistan, and UNAMA and UNDP

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<sup>15</sup> Michael Ignatieff, "Nation-Building Lite," *The New York Times*, July 28, 2002.

<sup>16</sup> Tanya Domenica Bosi, "UN Report: Post-Conflict Reconstruction: The United Nations' Involvement in Afghanistan," 19 *N.Y.L. Sch. J. Hum. Rts.* 819 (Summer, 2003): 825.

<sup>17</sup> United States Institute of Peace, fn. 9 above, 2.

<sup>18</sup> E-mail interview with UN official, December 1, 2004.

developed a joint project. This placed the primary responsibility for the coordination of international technical and financial support with UNAMA, and the primary responsibility for financial management, administrative and operational support with UNDP.<sup>19</sup> The UN channeled most of the donor support to the Constitutional Commission through the latter's Secretariat. However, the Secretariat was established late in the process, which played a role in the delay between November 2002 and April-May 2003 when the constitution-making process was hardly moving forward at all.<sup>20</sup> It should also be kept in mind that the constitution-making process took place in two separate processes—the drafting process and the enactment at the Constitutional Loya Jirga (*CLJ*). International involvement was far bigger for the CLJ process, where donors sponsored expensive logistics and security components.<sup>21</sup>

Although it indeed appears sensible to avoid designation of the constitution-making process to a lead-nation, the fact that it was the one area that fell outside the lead-donor approach may well have meant that no donor states felt responsible to "make it work."<sup>22</sup>

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<sup>19</sup> The Secretariat of the Constitutional Commission of Afghanistan, *The Constitution-Making Process in Afghanistan*, March 10, 2003, available from <[www.constitution-afg.com/resrouces/Constitution-Making%20Process%20Final.doc](http://www.constitution-afg.com/resrouces/Constitution-Making%20Process%20Final.doc)> (accessed on October 15, 2004), 9.

<sup>20</sup> E-mail Exchange with J Alexander Thier, December 9, 2004.

<sup>21</sup> For example, the Germans paid to provide the logistics at Kabul Polytechnic College where the CLJ took place. See Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, "Der Beitrag Deutschlands zum Wiederaufbau und zur Entwicklung Afghanistans," *Internationale Konferenz zum Wiederaufbau Afghanistans*, January 20-22, 2002, available from <[www.bmz.de/themen/arbeitslaender/laender/afghanistan/services/hintergrund/](http://www.bmz.de/themen/arbeitslaender/laender/afghanistan/services/hintergrund/)> (accessed October 15, 2004).

<sup>22</sup> E-mail interview with UN official, December 1, 2004.

## *Overview of Constitution-Making Process*

### Afghan Interim Administration, Emergency Loya Jirga, and Afghan Transitional Authority

The Afghanistan Interim Administration (*AIA*) based on Article I.1 of the Bonn Agreement and elected in Bonn was officially established on December 22, 2001. Later, an Emergency Loya Jirga (*ELJ*) was held in June 2002, to choose a head of state, decide the structure of the new Afghan Transitional Authority (*ATA*), and agree its key personnel. The selection of delegates included a nationwide campaign of local nominations and secret balloting. In the end, 1,051 elected delegates took part in the ELJ, supplemented by approximately 550 appointed delegates.<sup>23</sup> However, there appears to be a general consensus in the literature that the ELJ process was disappointing—due to behind-the-scenes orchestration (such as forcing the former King not to run for President), procedural confusion, poor leadership, delay in the publication of procedural rules, exclusion of women, violence,<sup>24</sup> and intimidation by “security” providers of the internal intelligence branch who entered the terrain with UN acquiescence.<sup>25</sup> Many Afghans complained that due to these shortcomings, the ATA that was elected was not significantly more representative than its predecessor.<sup>26</sup>

### Drafting the Constitution

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<sup>23</sup> Chris Johnson, William Maley, Alexander Thier, and Ali Wardak, “Afghanistan’s Political and Constitutional Development,” *Overseas Development Institute*, January 2003, #4.2.

<sup>24</sup> Chris Johnson, *et al*, fn. 23 above, #4.2; International Crisis Group, *The Afghan Transitional Administration: Prospects and Perils* (Washington D.C.: International Crisis Group, 2002), 2-6; and J Alexander Thier, fn. 2 above, 4.

<sup>25</sup> International Crisis Group, fn. 24 above, 3.

<sup>26</sup> Barnett R. Rubin, “Crafting a Constitution for Afghanistan,” 15 (3) *Journal of Democracy* July 2004, 9.

Following these elections, the Bonn Agreement set out a very tight timeline for drafting and approval of Afghanistan's constitution: within two months of the establishment of the ATA, a Constitutional Commission was to be set up to draft a new constitution. Within 18 months, a CLJ was to be convened to approve the draft. A Secretariat was set up to support the preliminary Constitutional Drafting Commission, the Constitutional Commission, and the Constitutional Loya Jirga. Table 1 below illustrates how tight the deadlines under the Bonn Agreement were.

### Constitutional Drafting Commission

The newly elected president of the ATA, Hamid Karzai (who had also been head of the AIA), appointed a Constitutional Drafting Commission (*CDC*) on October 5, 2002 to draft a preliminary Constitution. He appointed nine members, who were considered "technical drafters,"<sup>27</sup> under the Chairmanship of Nematullah Shahrani.<sup>28</sup> The CDC first internally presented its recommendations on the content, as well as format, of the Constitution on March 16, 2003; although it is important to note that the draft was *not* made available to the public at large. At this stage, when official plans still envisaged the CLJ to be held in October 2003, the Afghan government only had six months to educate

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<sup>27</sup> Chris Johnson, *et al*, fn. 23 above, #4.1.

<sup>28</sup> "Afghanistan's New Constitution: Towards Consolidation or Fragmentation?", *RFE/RL Afghanistan Report*, January 16, 2003, Volume 2, Number 3, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004); The Secretariat of the Constitutional Commission of Afghanistan, fn. 19 above; and J Alexander Thier, fn. 2 above.

the Afghan people on the type of constitution proposed,<sup>29</sup> but no efforts to that end were made until much later.

Event	Date	Bonn Timeframe	Bonn Article
Bonn Agreement	Dec 5, 01	--	--
Interim Administration (AIA)	Dec 22, 01	Dec 22, 2001	Article I.1
Tokyo Conference	Jan 21-22, 02	--	--
Emergency Loya Jirga (ELJ)	Jun 10-19, 02	June 2002 [+6 mths from AIA]	Article I.4
Transitional Authority (ATA)	Jun 19, 02	June 2002 [+6 mths from AIA]	Article I.4
Drafting Commission (CDC)	Oct 5, 02	August 2002	Article I.6
Constitutional Commission	Apr 24, 03	[+2 mths from ATA]	
Constitutional Loya Jirga (CLJ)	Dec 13, 03 - Jan 4, 04	December 2003 [+18 mths from ATA]	Article I.6
Elections now split:			
- Presidential Elections	Oct 9, 04	June 2004	Article I.4
- Parliamentary Elections	planned: [Sept, 18]	[+2 yrs from ELJ]	

It appears that the input of the international community at this initial drafting stage was minimal.

Internationals had recommended that the CDC draw specialists from other countries to share their experience<sup>30</sup> and suggested experts from Kenya (on constitution drafting), South Africa (on constitutional negotiations) and Colombia (on federal options).<sup>31</sup> There is evidence that the CDC did study foreign systems, and obtained foreign advice to do so.<sup>32</sup> Advisors were supplied by UNAMA,

<sup>29</sup> *RFE/RL Afghanistan Report*, April 3, 2003, fn. 6 above.

<sup>30</sup> Chris Johnson, *et al*, fn. 23 above, Recommendations Box for #4.

<sup>31</sup> Chris Johnson, *et al*, fn. 23 above, #4.1.

<sup>32</sup> For example, the director of the Tehran office of the Commission was quoted as setting out that the Commission studied the constitutions of both Islamic and non-Islamic countries in order to incorporate "internationally accepted criteria and values" into the future Afghan Constitution, see "Afghan Constitution To Avoid 'Official Religion'," *RFE/RL Afghanistan Report*, April 24, 2003, Volume 2, Number 14, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

the Asia Foundation, and the Government of France.<sup>33</sup> One consultant who had been present in Afghanistan for years described the Commission as "generally wary of outside input" and the handful of foreign advisors as "all extremely frustrated by the process at various points."<sup>34</sup> Apart from this circumscribed drafting assistance, international civil society and the donor nations mainly assisted

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The Commission does seem to have taken on board the fact that it would need advisors with special experience. Three external advisers are mentioned who appear to have worked closely with the Commission, Barnett Rubin of the U.S., Yash Pal Ghai of Kenya, and Guy Carcassonne of France. In his presentations to the Commission, Rubin appeared to be treading very carefully so as not to be perceived as interfering with the process. He made a few general suggestions, e.g. to create checks and balances among the different parts of government during the law-making process, on republican forms of government (the inclusion of a prime minister), relation of the central government to the rest of the country, how locally elected provincial or district councils might strengthen national unity, and the suitability of judicial review. Rubin's Center on International Cooperation also made available to the Commission various papers from international experts on constitutional issues, which it translated into Pashto and Dari. See Barnett R. Rubin, "Presentation to Constitutional Commission of Afghanistan," Kabul, June 5, 2003, available from <[www.cic.nyu.edu/conflict/conflict\\_translations.html](http://www.cic.nyu.edu/conflict/conflict_translations.html)> (accessed on December 6, 2004); and Barnett R. Rubin, fn. 26 above, 10 (fn. 2).

Many other international experts offered advice on a more *ad hoc* basis, such as the Swiss government which was consulted by Hamid Karzai on whether a federal canton-based government system might work for Afghanistan, see RFE Report, fn. 28 above, and French advisers who submitted proposals on the restructuring of the administration made by French advisers based on their experience with introducing a greater degree of local self-government into a highly centralised administration, see Barnett R. Rubin, "Summary of Proceedings of Meeting of Legal Affairs Working Group," *Afghanistan Reconstruction Project* (Geneva: Center on International Cooperation, February 20-21, 2002), 6.

<sup>33</sup> The Asia Foundation provided organisational, logistical, and substantive technical assistance to the country's Constitutional Commission and to the Constitutional Loya Jirga on December 14, 2003. This included a team of international and Afghan legal experts to support the work of the Commission and its Secretariat.

<sup>34</sup> E-mail Exchange with J Alexander Thier, December 9, 2004. This impression was somewhat confirmed by a researcher at the Max Planck Institute for Comparative Public Law and International Law who stated that the Institute "was not involved in giving legal advice during the constitutional drafting process. The Afghan constitutional drafting process can be characterised as having been controlled by the Afghan authorities, who only referred to international experts very occasionally. It is not comparable with the drafting process of the Iraqi Interim Constitution (Transitional Administrative Law), where the Coalition Provisional Authority under Paul Bremer had significant influence on the process and the outcome." E-mail correspondence, December 1, 2004 and May 27, 2005.

with workshops.<sup>35</sup> German diplomats acknowledged that foreign influence on the drafting process was "limited", despite attempts by the international community to influence the content of the constitution by using Western-oriented Islamic states such as Egypt, Jordan or Malaysia as examples (in order to avoid a legal system based on conservative Islamic values such as Iran or Saudi Arabia).<sup>36</sup>

The Afghans themselves portrayed international and UN assistance as mainly limited to "material and technical" support, although they acknowledged that they were "consulting ... international experts [on] options for various constitutional issues."<sup>37</sup> The Secretariat of the Constitutional Commission referred briefly to envisaged assistance by UNAMA's Constitutional Commission

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<sup>35</sup> For example, the Afghan Independent Human Rights Commission (*AIHRC*) held various roundtables for civil society leaders, legal professionals and Loya Jirga delegates from the provinces with the assistance of the Harvard Program on Humanitarian Policy and Conflict Research (*HPCR*) in Kabul, the first of which took place in July 2003; see Afghan Independent Human Rights Commission and Program on Humanitarian Policy and Conflict Research, "Human Rights and Rule of Law: Constitutional and Legal Reform," Roundtable Report, September 2003, available from <[www.preventconflict.org/portal/centralasia/AIHRC\\_Roundtable.pdf](http://www.preventconflict.org/portal/centralasia/AIHRC_Roundtable.pdf)> (accessed November 15, 2004). The group discussed various issues such as whether customary law should be recognised in the Constitution (pp. 12/13), the inclusion of a bill of rights in the Constitution (pp. 14-15), and the role which Shari'a law should play in the Constitution (pp. 15-16).

In May 2003, international NGO Droit et Démocratie, in coordination with the State Ministry of Women's Affairs, the Constitutional Commission and a local NGO organised a workshop on women's rights in constitutions and family laws, aimed at female judges, lawyers, doctors, women's rights activists, students, journalists etc, see Ariana Brunet and Isabelle Solon Helal, *Seizing an Opportunity: Afghan Women and the Constitution-Making Process*, Rights & Democracy Mission Report, May-June 2003 (Droits et Démocratie: Montréal, September 2003): 22.

Similarly, the German government funded various workshops with international lawyers, for example one with the International Center for Transitional Justice on how to promote a new draft constitution paying particular attention to human rights aspects, see Government of the Federal Republic of Germany, *German Reconstruction and Humanitarian Assistance to Afghanistan* (Berlin: German Government, 2002), 5.

<sup>36</sup> "Berlin dringt auf Rechtsstaat in Afghanistan," *Berliner Zeitung*, Politik, p. 6, March 7, 2003, available from <[www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2003/0307/politik/0056/](http://www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2003/0307/politik/0056/)> (accessed October 10, 2004).

<sup>37</sup> The Secretariat of the Constitutional Commission of Afghanistan, fn. 19 above, 2, 4.

Support Unit, the fact that the latter had commissioned "options papers by experts on constitutional issues," and the fact that senior constitutional experts (both Afghan and international) would be available to the Commission for discussion.<sup>38</sup> However, the Afghans felt that it was "clearly [they] who lead this process and produce and finalise documents related to the process."<sup>39</sup>

This sentiment is in line with what Thomas Carothers describes as standard occurrence in constitution-making, since "[t]he state design element of a constitution ... is not something the major political actors in a country are likely to be willing to turn over to foreign advisers."<sup>40</sup> Whereas Carothers claims that advisers' emphasis is often on substance and the question of public participation is being neglected,<sup>41</sup> it appears that in Afghanistan, the "greatest foreign input" into the constitutional process was "in helping to put together the public awareness and consultation components."<sup>42</sup>

### Public Debate Before May 2003

At the same time, there was vocal criticism over the absence of public debate on the new Constitution.<sup>43</sup> In fact, the draft was not released by the CDC during the consultation period that took

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<sup>38</sup> The Secretariat of the Constitutional Commission of Afghanistan, fn. 19 above, 4.

<sup>39</sup> Letter from Farooq Wardak, Director of the Secretariat of the Constitutional Commission to Gareth Evans, President of the International Crisis Group, "Response of the Secretariat of the Constitutional Commission of Afghanistan to the ICG Report," July 1, 2003, available from <[www.constitution-afg.com/resrouces/The%20ICG%20Report,%20edited%20by%20Farooq%202.doc](http://www.constitution-afg.com/resrouces/The%20ICG%20Report,%20edited%20by%20Farooq%202.doc)> (accessed October 15, 2004).

<sup>40</sup> Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, D.C., 2003): 160.

<sup>41</sup> Thomas Carothers, fn. 40 above, 161, 162.

<sup>42</sup> E-mail Exchange with J Alexander Thier, December 9, 2004.

<sup>43</sup> *RFE/RL Afghanistan Report*, January 16, 2003, fn. 28 above.



place during June/July 2003, and was not published before November 2003. In April 2003, local news reported that Afghan people knew "nothing about the contents of the draft constitution," although the spokesman of the CDC insisted that "people [would] be consulted and their viewpoints ... reflected." However, it had already been reported that consultation would be limited to religious leaders, tribal elders and legal experts, and that no referendum was planned.<sup>44</sup> Ultimately, the question is if the CDC should have delayed the process to work transparently on a new workable version for Afghanistan.<sup>45</sup> The UN seemed to have been of the opinion that it was "better to proceed and achieve an imperfect result than delay waiting for perfection which [they would] never realize."<sup>46</sup>

### The Constitutional Commission

On April 24, 2003, the President appointed a Constitutional Commission (the *Commission*) with 35 members of diverse regional and ethnic composition, including seven women. The primary responsibilities of the Commission were to consult widely with the people of Afghanistan and to produce a Draft Constitution (based on the work of the CDC) for submission to the Constitutional Loya Jirga. The Commission planned several phases of work, including organisation (in which to

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<sup>44</sup> "Afghan Paper Calls For Public Participation in Approving Constitution ... And Afghan Official Gives Assurances that Public Will be Consulted ... But Doubts Are Raised About Extent of Public Participation in Debate," *RFE/RL Afghanistan Report*, April 10, 2003, Volume 2, Number 13, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>45</sup> Cf. suggestions in *RFE/RL Afghanistan Report*, January 16, 2003, fn. 28 above.

<sup>46</sup> Nigel Fisher, Deputy Special Representative of the Secretary-General in Afghanistan, UNAMA, at a Press Briefing, Kabul, July 10, 2003; cited in Brunet and Helal, fn. 35 above, 6.

adopt rules of procedure), public education and a public consultation, research and expert consultation, report writing, drafting and finalisation, and publication and dissemination of the draft constitution.<sup>47</sup>

### Public Education and Consultation after May 2003

Public consultations finally began in June and continued through July. Planning for this was done extremely late – as late as March 2003, no public education staff had been hired, no plans drafted and no public education material prepared.<sup>48</sup> The two month consultation period compares unfavourably with South Africa, where the consultation process took two years.<sup>49</sup> In addition, the draft constitution had at this point still not been released to the public (even though bodies such as the Afghan Independent Human Rights Commission had repeatedly asked the Commission to “share the draft with the people of Afghanistan for consultation purposes”).<sup>50</sup> The Commission, on the other hand, considered the consultations as a way of determining Afghans’ aspirations and desires for the Constitution; it did not expect ordinary Afghans to comment on the content of any existing drafts (plus, apparently, no publishable version of the Constitution existed before November).<sup>51</sup> According

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<sup>47</sup> The Secretariat of the Constitutional Commission of Afghanistan, fn. 19 above, 4.

<sup>48</sup> International Crisis Group, *Afghanistan: The Constitutional Loya Jirga* (Kabul/Brussels: International Crisis Group, December 12, 2003), available from <[www.icg.org/home/index.cfm?id=2417&l=1](http://www.icg.org/home/index.cfm?id=2417&l=1)> (accessed October 10, 2004); see also UNAMA Press Briefing by Manoel de Almeida e Silva, June 15, 2003, p. 5.

<sup>49</sup> Brunet and Helal, fn. 35 above, 13; and Timothy D. Sisk, *Negotiating Democracy in South Africa: Conclusions for Constitution-Making as Conflict Management* (Denver: United States Institute of Peace, Draft October 1, 2004), 14-16.

<sup>50</sup> Brunet and Helal, fn. 35 above, 13 see also Agence France Presse, “Afghanistan Launches Public Consultation on Constitution Amid Criticism,” June 3, 2003, available from <[http://quickstart.clari.net/qs\\_se/webnews/wed/bdf/Qafghanistan-politis.R15F\\_Du2.html](http://quickstart.clari.net/qs_se/webnews/wed/bdf/Qafghanistan-politis.R15F_Du2.html)> (accessed on November 15, 2004).

<sup>51</sup> Interview with UN Official, February 24, 2005.

to commentators, the UN did play a role in this consultation process. For example, the UN "trained the trainers": a group of community leaders who would in turn travel to districts and villages;<sup>52</sup> and UNDP/UNAMA organised conferences intended to help entrench women's rights in the future constitution.<sup>53</sup> In addition, the UN assisted the Commission by attempting to collect views on the constitution through distributing questionnaires, inviting written recommendations and holding public meetings. The Constitutional Commission worked closely with the Afghan Ministry of Women's Affairs and UNIFEM to collect input, hold seminars and other public education programs about the constitutional rights of women.<sup>54</sup> The consultation process also involved the distribution of posters, radio and TV programmes etc.<sup>55</sup>

However, by September 2003, it was reported that "many Afghans [were] beginning to feel that they [had] been left out of the process" and that potential decision makers "expressed a deep disappointment in the Constitutional process." The population appeared to perceive that views in consultations were not taken seriously and that the questionnaire project was ill-designed and inadequate for collecting popular input.<sup>56</sup> A shortage of educated and experienced staff, forced the Secretariat to make use of existing authorities for education efforts in the regions (i.e. the *ulama*).<sup>57</sup>

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<sup>52</sup> Dr. G. Rauf Roashan, "Afghan Constitution Building Exercise: Taking the Case to the People," June 27, 2003, available from <[www.cic.nyu.edu/pdf/TakingtheCasetothePeople.pdf](http://www.cic.nyu.edu/pdf/TakingtheCasetothePeople.pdf)> (accessed October 10, 2004)

<sup>53</sup> Brunet and Helal, fn. 35 above, 22.

<sup>54</sup> Brunet and Helal, fn. 35 above, 20.

<sup>55</sup> International Crisis Group, fn. 48 above, 9. See also Chris Johnson *et al*, fn. 23 above, #4.2.3; and RFE Report April 3, 2003, fn. 6 above, suggesting the use of radio as the only viable media to reach the majority of the Afghan population.

<sup>56</sup> AIHRC and PHPCR Report, fn. 35 above, 4, 5, 11.

<sup>57</sup> International Crisis Group, fn. 48 above, 9.

The Secretariat of the Commission vehemently denied the accuracy of reports regarding the shortcomings of the public consultation process. It stressed the fact that it had, supported by UNAMA and UNDP, deployed staff in all 32 provinces, that it had established eight offices in the provinces and four abroad, and had appointed Provincial Coordinators for public education at the provincial level. It was reiterated that the Commission's efforts were "received very well by the people and the authorities." Also, the Commission trained more than 1,600 public education trainers and stated that consultations would be held in every district in Afghanistan's southeast where stability and security were major issues.<sup>58</sup> However, reports on how the process was perceived within the population cannot simply be ignored, and suggest a troublesome disconnect between the actual process of constitutional reform and the impression of those people most affected.<sup>59</sup>

### The April 2003 Draft Constitution

While the final draft of the Constitution was not presented to the public until November 3, 2003, an earlier version of the draft constitution was leaked to the press in April 2003. Its content provides an interesting insight into how the drafting process worked, and what role advisers and public consultation played. Most articles in the draft were directly transcribed from the 1964 Constitution. In relation to some of the major issues of potential controversy and public concern, the draft Constitution set out the following:

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<sup>58</sup> Letter from Farooq Wardak, fn. 39 above.

<sup>59</sup> AIHRC and PHPCR Report, fn. 35 above, 11.

- While Islam was established as the sacred religion (as in the 1964 Constitution), the draft mostly avoided references to the Sunni *Hanafi* school of jurisprudence, taking into account concerns of the Shi'ite minority (about 20%);<sup>60</sup>
- The draft constitution expressed clear preference for an administrative system favouring centralisation, and a presidential system over a federal or parliamentary system which might have further empowered regional warlords.<sup>61</sup>

### The November 2003 Draft Constitution

Originally, the CLJ was set for October 2003, with the release of the draft Constitution promised for September 1, 2003. In a September 7, 2003 decree President Karzai revised this timetable, and postponed the CLJ until December 2003 (still in line with the Bonn Agreement timetable).<sup>62</sup> The official explanation for this was that the Commission needed more time to evaluate public questionnaires. However, indications abounded that the reason behind the delay was disagreements between various factions within the Commission and some outside conservative religious factions.

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<sup>60</sup> "Afghanistan's New Draft Constitution: A Sneak Preview", *RFE/RL Afghanistan Report*, April 24, 2003, Volume 2, Number 14, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>61</sup> *RFE/RL Afghanistan Report*, fn. 60 above.

<sup>62</sup> "Afghan Leader Decrees Postponement of Constitutional Loya Jirga...", *RFE/RL Afghanistan Report*, September 18, 2003, Volume 2, Number 32, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

This also explained why the draft Constitution that had been promised to have been published by September 1, was being kept secret.<sup>63</sup>

The draft constitution was finally unveiled to the public on November 3, 2003. The Commission appeared to think that public consultation would happen between the publication date of November 3 and the beginning of the CLJ on December 13. The head of the Commission was quoted as saying that the draft constitution was "not set in stone" and that it could be changed to "take into account opinions and views expressed by the Afghan people."<sup>64</sup> Radio Free Europe reported that the consultation process actually continued after the draft was published in November 2003. It mentioned that "thousands of copies" were being sent to remote parts of the country and that views expressed by Afghans during the month of November "could be incorporated into a final draft."<sup>65</sup> The idea that this was going to happen within one month, however, appears unrealistic, particularly when compared to previous consultation processes in other countries. Also, the November 3 draft surprised many who had seen an earlier working version of the text, which had suggested a power split between a president and a prime minister.

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<sup>63</sup> In fact, it was allegedly the UN which had first suggested to push the CLJ forward to October, according to AFP; see "Why the Delay in Afghanistan's Constitutional Loya Jirga?," *RFE/RL Afghanistan Report*, September 18, 2003, Volume 2, Number 32, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>64</sup> "Constitutional Commission's Chairman Says Draft Still Subject To Change," *RFE/RL Afghanistan Report*, November 13, 2003, Volume 2, Number 40, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>65</sup> "Public Debate on Constitution Moves Into Full Swing," *RFE/RL Afghanistan Report*, November 6, 2003, Volume 2, Number 39, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

More importantly, between July and November 2003 (the time between the conclusion of the consultation process and the release of the draft to the public), substantial changes were apparently made to the draft, which now placed a much greater emphasis on concentration of power in the presidency. President Karzai had been presented with a draft of the Constitution in September 2003, but it had then been resubmitted to him on October 15 with changes made at his request by a subcommittee of the Constitution and two external advisers (Professor Barnett Rubin, an American, and Prof. Yash Ghai, a Kenyan). It appears that the draft was then substantially amended by the Afghan National Security Council between October 15 and its publication on November 3, 2003.

The new draft provided for a strong presidential system (without a prime minister as originally suggested in the draft leaked to the press); the role of religion (despite calling the country "an Islamist Republic," the draft was essentially a secular document without clear roles for the Sunni and Shi'a jurisprudence), and the high centralisation of the government.<sup>66</sup> Human Rights Watch pointed out that human rights institutions were merely paid lip service to in the new draft constitution, and had not been empowered sufficiently to investigate or prosecute war criminals or other human rights abusers. Suggestions that would have given the institutions more powers did not make it into the new Draft and that was "no accident ... [t]here were people who wanted that language gone—and they won."<sup>67</sup>

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<sup>66</sup> *RFE/RL Afghanistan Report*, fn. 3 above, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004); and "Assessing the Draft Constitution (Part 2): The Rights of Women and the Monopoly on the Use of Force," *RFE/RL Afghanistan Report*, November 13, 2003, Volume 2, Number 40, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>67</sup> Interview with John Sifton from Human Rights Watch referred to in *RFE/RL Afghanistan Report*, fn. 65 above.

Similarly, it is clear that whoever drafted the final version of the draft constitution failed to follow other advice given by international advisers—for example, they rejected proposals to allow positive discrimination or affirmative actions as a means of remedying the effects of past discrimination against women and minorities,<sup>68</sup> as well as proposals for a parliamentary democracy.<sup>69</sup> Instead, the November draft concentrated powers in the president's hands—something seen to be in the interests of the U.S.<sup>70</sup>

An Afghan civil society leader, in fact, expressed his concerns that it was international interests behind President Karzai which effected the drafting changes: "What the international community—the United States and the European Union—should do is to invest in the Afghan nation not in individuals. They should work with the people not with individuals. What will [they] do if an individual dies?"<sup>71</sup> This view was also confirmed by others who wryly observed that "a strong presidency is not necessary for democracy, but it is a lot easier for an external empire to exert control if one person holds most of the power."<sup>72</sup>

The U.S. countered that a strong presidency would weaken warlordism. However, such comments ignored the implicit legitimacy that U.S. strategies have afforded warlords, and put the burden for

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<sup>68</sup> International Crisis Group, fn. 48 above, 7.

<sup>69</sup> Werner M. Prohl, *Zum Verfassungsentwurf für die Islamische Republik Afghanistan* (Kabul: Konrad-Adenauer-Stiftung, November 10, 2003), fn. 10; see also Barnett R. Rubin, fn. 32 above.

<sup>70</sup> International Crisis Group, fn. 48 above.

<sup>71</sup> Hakim Nurzai, Deputy Head of the National Unity Movement, December 4, 2003, cited in International Crisis Group, fn. 48.

<sup>72</sup> James Ingalls, "The New Afghan Constitution: A Step Backwards for Democracy," *Foreign Policy in Focus*, Mar 2004, 4.



disempowering local warlords on Afghans. Secondly, although the lack of a prime ministerial position may ensure that no warlord will currently be able to share power with Karzai, a presidency with few checks or balances might make Afghanistan vulnerable to a takeover by such figures in the future.<sup>73</sup>

In brief, the November 2003 draft represented a radical shift from the draft originally proposed by the Commission.<sup>74</sup> There is strong evidence that the U.S. had an interest in the changes in the new draft. This re-drafting from an official version prepared by a body authorised under the Bonn Agreement by unauthorised individuals appears highly questionable. If anything, it resulted in the process being perceived—by the Afghan public and international commentators alike—to have been shrouded in secrecy and illegitimacy.

#### Adoption of the Constitution by the Constitutional Loya Jirga

In July 2003, President Karzai had issued a decree that established the procedure for electing the CLJ's 500 representatives (450 to be elected, and 50 appointed). In anticipation of the CLJ Convention, provincial registration meetings were conducted in 32 provinces to register the Emergency Loya Jirga district representatives who formed the electorate for the elections of 344 CLJ delegates in December. Due to a lack of a computerised database, UNAMA and Commission Secretariat members had to review data on paper. Therefore, a final list with data on potential

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<sup>73</sup> James Ingalls, fn. 72 above, 5.

<sup>74</sup> International Crisis Group, fn. 48 above, 3. See also Barnett R. Rubin, fn. 26 above, 10, 12.

delegates was not available until September 2003.<sup>75</sup> Interestingly, the registration process was remarkably successful, with up to 96% registration rates in the North and Southeast, but with much lower figures (about 60%) in the South and only 70% in Kabul. The elections themselves more or less reflected the balance of power in the provinces, i.e. most elected delegates were linked to local governors.<sup>76</sup>

The Convention itself convened on December 13, 2003 at a convention site at Kabul Polytechnic Institute and adopted the Constitution by consensus on January 4, 2004. Apparently, this consensus had only been reached because of the efforts of the UN's special envoy and the U.S. ambassador to Afghanistan who held closed-door negotiations with rival delegates on January 3, 2004.<sup>77</sup>

The new constitution differed little from the draft released in November, and reinforced the provisions on a strong presidency advocated by President Karzai.<sup>78</sup> For the process of the CLJ itself, there were allegations of irregularities during the voting, cases of intimidation and corruption,<sup>79</sup> and

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<sup>75</sup> International Crisis Group, fn. 48 above, 9.

<sup>76</sup> December 8, 2003 UNAMA figures cited in International Crisis Group, fn. 48 above, 10 (fn. 54).

<sup>77</sup> "Loya Jirga Approves Constitution, But Hard Part May Have Only Just Begun," *RFE/RL Afghanistan Report*, January 8, 2004, Volume 3, Number 1, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004). See also James Ingalls, fn. 72 above, 4; "Last-Ditch Effort Secures Afghan Charter," *Associated Press*, January 4, 2004; Ahmed Rashid, "Rebuilding Afghanistan," *The Nation*, January 8, 2004, available from <[www.thenation.com/doc.mhtml%3Fi=20040126&s=rashid](http://www.thenation.com/doc.mhtml%3Fi=20040126&s=rashid)> (accessed October 15, 2004); and "Wahlen in Afghanistan: Verfassung und Wirklichkeit in Afghanistan," *Neue Zürcher Zeitung*, January 10, 2004, available from <[www.nzz.ch/dossiers/2004/wahlen\\_afghanistan/2004.01.10-al-kommentar9C0M5.html](http://www.nzz.ch/dossiers/2004/wahlen_afghanistan/2004.01.10-al-kommentar9C0M5.html)> (accessed October 15, 2004).

<sup>78</sup> "Afghan Leader Appears To Have Won The Day," *RFE/RL Afghanistan Report*, January 8, 2004, Volume 3, Number 1, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>79</sup> See all articles in RFE January 8, 2004 Report, *RFE/RL Afghanistan Report*, January 8, 2004, Volume 3, Number 1, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004). See also, e.g., James Ingalls, fn. 72 above.

later on, further allegations emerged which claimed that the document signed into law by Karzai on January 26 did not exactly conform to the draft agreed upon by the Loya Jirga.<sup>80</sup>

### **III. Strengths and Weaknesses of the Approach Taken to Constitution-Making**

#### *Legal Framework*

One criticism of the Bonn Agreement is that the parties invited to the negotiations were not representative of all Afghan groups—a fact acknowledged in the Agreement's preamble.<sup>81</sup> However, given the difficult circumstances, the international community undertook a sincere effort at a legitimate process. It is fair to say that they achieved 'the best they could' given the imperative of moving quickly to restore governmental structure.

Second, the wording of the Bonn Agreement is vague on vital points of procedure. The Agreement gave only 'skeletal guidance' on the precise process. This later created difficulties (bad chairmanship at the Loya Jirgas etc.) which might have been avoided. However, a lack of precision may have allowed flexibility to accommodate changes in the political landscape. The International Crisis Group suggested that the Transitional Authority should have used the flexibility granted by Bonn productively, but their failure to lay out a clear legal framework for their plans further undermined

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<sup>80</sup> "Hurdles in Implementing the New Afghan Constitution," *RFE/RL Afghanistan Report*, February 5, 2004, Volume 3, Number 5, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>81</sup> Alexander Thier and Jarat Chopra, "The Road Ahead: Political and Institutional Reconstruction in Afghanistan," in Sultan Barakat, ed., *Reconstructing War-Torn Societies: Afghanistan* (Basingstoke: Palgrave Macmillan, 2004), 102.

public confidence in the process.<sup>82</sup> Accordingly, it appears that this criticism is more directed at the Afghan authorities than the international community. However, one definite point which the international community may have wished to consider is the provision for an interim constitution within the Bonn Agreement. It could even have equipped the new interim constitution with a "sunset clause" or other mechanism to guarantee popular review after a certain period. This would have allowed the drafters of the interim constitution to craft measures with an eye to immediate state-building, yet would have limited these in time until the needs of long-term governance required different options. The type of institutional or political structure needed for state-building may not be the same political structure that will later provide the best governance, as is aptly demonstrated by the controversy surrounding the emphasis of the current constitution on a strong presidential system. It is true that Afghan officials were opposed to the idea, as they were wary of doing anything that could undermine a document already so beset with threats to its realisation and enforcement. President Karzai made the concession that the current constitution was not set in stone (or rather, was "not the Koran"), and could be changed a few years on, if need be.<sup>83</sup> But, if the international community had made provisions for such an arrangement early on in Bonn, this may have prevented a debate on the issue altogether and focused the Afghans on accepting the idea of an interim constitution.

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<sup>82</sup> International Crisis Group, *Afghanistan's Flawed Constitutional Process* (International Crisis Group: Kabul/Brussels, June 12, 2003), 11, available from <[www.icg.org/home/index.cfm?id=1639&l=1](http://www.icg.org/home/index.cfm?id=1639&l=1)> (accessed October 15, 2004).

<sup>83</sup> Barnett R. Rubin, fn. 26 above, 18; and Timothy D. Sisk, fn. 49 above, 14-16.

Third, the Bonn Agreement provided a tight timeline for the constitution-making process. Barnett Rubin charged that two and a half years could "hardly suffice to turn a failed state into a stable democracy" and that this time pressure set a "speed record."<sup>84</sup> Early on in the drafting process, analysts complained that the one-year time frame (October 2002 to October 2003) allotted by the Bonn Agreement for the drafting and approval of the new Afghan constitution had proven too short "to have a meaningful debate."<sup>85</sup> Fieldworkers described the public consultation process (equally prescribed by Bonn) as "rushed, superficial, and ineffectual."<sup>86</sup> This sentiment was mirrored by academic experts.<sup>87</sup>

#### *Drafting Process and Public Consultation*

The drafting process has frequently been described as secretive and unaccountable. Both CDC and the Commission were appointed without public process. There was a perceived absence of real public education or consultation. Further, the head of the Commission and other participants in the consultation process were perceived as voicing "rehearsed demands." They also stressed that the consultation was carried out with obvious regional disparities which meant the results favored some

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<sup>84</sup> Barnett R. Rubin, fn. 26 above, 6.

<sup>85</sup> 'But Doubts Are Raised About Extent of Public Participation in Debate', *RFE/RL Afghanistan Report*, April 10, 2003, Volume 2, Number 13, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>86</sup> E-mail Exchange with J Alexander Thier, December 9, 2004.

<sup>87</sup> Summary of Speech by Barnett Rubin at an Open Society Institute Forum in New York on April 11, 2003, available from <[www.soros.org/initiatives/cep/events/building\\_20030411/summary?skin=printable](http://www.soros.org/initiatives/cep/events/building_20030411/summary?skin=printable)> (accessed on November 16, 2004); see also International Crisis Group, fn. 82 above, 12, 31.

constitutional issues over others (e.g. parts of the North favoured federalism, but participation there was very limited).<sup>88</sup> The public was reported as being under the overwhelming impression that the result of the process was a foregone conclusion.

The ICG claimed vociferously that the public education and consultation efforts run by the UN were "far too late, with far too little funding, and virtually no planning."<sup>89</sup> The UN countered that fuller public process would have raised three concerns: security issues for members of the Commission, a risk that the process might have been hijacked by extremist groups; and danger of public confusion.<sup>90</sup> This could have had a destabilising effect or compromised the bargaining power of more moderate powers on other issues of importance.<sup>91</sup> Nonetheless, it seems difficult to follow an argument that explains one shortcoming (lack of consultation) with another (difficult security situation). Popular civic education and public participation are crucial in a constitution-making process,<sup>92</sup> and so, surely, it is also crucial for the process to be seen as "designed and implemented in a transparent and representative fashion."<sup>93</sup> The Secretariat of the Commission, however, saw the process as "probably one of the most participatory and transparent processes [in Afghanistan]."<sup>94</sup>

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<sup>88</sup> International Crisis Group, fn. 48 above, 2.

<sup>89</sup> International Crisis Group, fn. 82 above, 31.

<sup>90</sup> International Crisis Group, fn. 82 above.

<sup>91</sup> J Alexander Thier, fn. 2 above, 4.

<sup>92</sup> Louis Aucoin, "The Role of International Experts in Constitution-Making: Myth and Reality," *Georgetown Journal of International Affairs*, Spring 2004, Vol V, Issue 1: 94.

<sup>93</sup> Chris Johnson *et al*, fn. 23 above, #3.1.

<sup>94</sup> Letter from Farooq Wardak, fn. 39 above.

### *Content of Constitution*

The relative weakness of President Karzai's government based in Kabul has been identified by many as a "major threat to the successful implementation of the country's new constitution."<sup>95</sup> Regional warlords such as Abdul Rashid Dostum in Mazar-i-Sharif have been pitted in a constitutional power struggle with Karzai from the beginning. The U.S. pushed hard for a presidential system (favouring the centre rather than the provinces). However, a leading expert on Afghanistan assessed this push to have been "in line with certain Afghan interests" and therefore not necessarily a mechanism imposed by the U.S.<sup>96</sup> Barnett Rubin supports this analysis by mentioning that most Afghans were "in support of a strong central government." In essence, he says, this Afghan view was brought about by a strong popular opposition to continued rule by local commanders or "warlords."<sup>97</sup> Evidently, while the U.S. supported a central-based presidential system, they failed at the same time to provide the security needed to empower the centre over the regions.

### *Constitutional Loya Jirga*

Criticism was directed at the format of the CLJ which, it is claimed, was never adequate to debate more than 150 articles of such critical importance as the Constitution. Again, this point could have

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<sup>95</sup> See, e.g., Summary of Speech by Barnett Rubin, fn. 87 above.

<sup>96</sup> E-mail Exchange with J Alexander Thier, December 9, 2004.

<sup>97</sup> Summary of Speech by Barnett Rubin, fn. 87 above. This view is also supported by J Alexander Thier, fn. 2 above, 10, although he sees the reason for the desire for centralisation also in the level of interference from Afghanistan's neighbours.

been addressed if the consultation process had been perceived as a legitimate way to make the voices of the people heard.

Security at the CLJ was a major issue, and allegedly not paid enough attention.<sup>98</sup> There was no deployment of international military personnel to protect the process and no special Afghan police or army units had been trained. This partially resulted in the legitimisation of the very individuals deemed the most illegitimate by the majority of Afghans. A briefing paper by the Afghanistan Research and Evaluation Unit charges that the international community did not learn lessons from Liberia, Angola, and Bosnia, where elections were held before the peace was secure, where this resulted in legitimising the very forces they were meant to remove.<sup>99</sup> An opposing view is advocated by the German Center for Development Research which suggested that warlords should be "adequately represented" in the Loya Jirga so as to represent actual power relations.<sup>100</sup>

In addition, the CLJ seemed to make no provision to prevent warlords from being elected. While many Afghans are believed to have 'blood on their hands', some were convinced that some members of the current ATA lay well beyond what is acceptable. A number of key cabinet figures and local governors were deemed unacceptable in the eyes of many. Also, dealings by the international

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<sup>98</sup> Reports abounded on intimidation of women, for example a November 11, 2003 report by *The Voice of the Islamic Republic of Iran* referred to *ulama* in Parwan province preventing women from participating in the election process for the CLJ. Referred to in "...While Ulama in Parwan Province Prevent Women From Participating in Loya Jirga Election Process," *RFE/RL Afghanistan Report*, November 13, 2003, Volume 2, Number 40, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004). See also International Crisis Group, fn. 90 above.

<sup>99</sup> AREU, *Afghan Elections: The Great Gamble* (Kabul: AREU, November 2003).

<sup>100</sup> Andreas Wimmer and Conrad Schetter, *State-Formation First: Recommendations for Reconstruction and Peace-Making in Afghanistan* (Bonn: Center for Development Research, April 2002), 19.



community with these individuals accorded them unwarranted legitimacy.<sup>101</sup> This issue has been dealt with in other post-conflict areas such as the Balkans by imposing a ban on warlords against holding public offices. It is hard to explain why the same concept was not enforced in Afghanistan.

### *Ownership and Light Footprint v Lack of Commitment*

The main question is whether the international community has struck the right balance between not leaving more than a "light footprint" to allow Afghans to assume responsibility for the constitution-making process, without at the same time failing to provide sufficient assistance to a country which simply has not received the same resources and capacities as international donor countries. Afghanistan needed assistance to establish a choice mechanism which would help it set up its chosen state system free from intimidation. At the same time, the international community must always respect Afghan 'ownership.' There is a fine line between these two principles.<sup>102</sup>

When asked whether the extent to which the international community was involved in Afghanistan had been appropriate, a leading international consultant to Afghanistan answered that the international community should have pushed much harder on principles of process and less on substance, stating that "[t]he important thing [was] less what the constitution [said] in the end (within bounds, of course) than that the result [was] a valid consensus and compromise reached in the right way." Much more should have been done by the international community to ensure meaningful public participation, and

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<sup>101</sup> Chris Johnson *et al*, fn. 23 above, #3.1.

<sup>102</sup> Chris Johnson *et al*, fn. 23 above, #1.

a credible, accessible drafting process, instead of one shrouded in secrecy.<sup>103</sup> A UN official involved in the constitution-making process at the time thought that the "light footprint" was a necessary and useful element in maintaining and reinforcing Afghan ownership without which "public acceptance as well as confidence in the State's/transitional authority's sovereignty" would have diminished.<sup>104</sup>

Regarding substantive issues, the process appears to have been largely in Afghan hands.<sup>105</sup> The U.S. pushed hard for a presidential system, but since this was also in line with certain Afghan interests, it did not necessarily represent unwarranted outside influence. However, a major factor that should not be discounted is the fact that in this case, perception counts almost as much as fact. The fact is that many Afghans perceive the U.S. to be strongly supportive of President Karzai and of constitutional and other legal provisions that strengthen the status quo. The International Crisis Group quoted an Afghan law professor who commented that "every regime in Afghanistan has had its constitution; this [is] the Americans' constitution."<sup>106</sup> This is not helped by a strong belief among Afghans that the U.S. presence serves some broader U.S. interest to control the region, oil, and Islam. After 30 years of deliberate disinformation campaigns, the Afghans have little cause to believe

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<sup>103</sup> E-mail Exchange with J Alexander Thier, December 9, 2004.

<sup>104</sup> E-mail Interview with UN Official, February 24, 2005.

<sup>105</sup> E-mail Exchange with J Alexander Thier, December 9, 2004.

<sup>106</sup> ICG Interview, Kabul, April 16, 2003, cited in International Crisis Group, fn. 48 above, 10 (fn. 56). See also "Exil-Afghanen: Amerikaner verhalten sich wie seinerzeit die Russen," *Frankfurter Allgemeine Zeitung*, June 15, 2002 <[http://fazarchiv.faz.net/webcgi?START=A20&DOKM=17516\\_FAZN\\_0&WID=65963-8050574-23502\\_9](http://fazarchiv.faz.net/webcgi?START=A20&DOKM=17516_FAZN_0&WID=65963-8050574-23502_9)> (accessed November 1, 2004)

information provided by any party.<sup>107</sup> In these circumstances, Karzai's government even risks accusations that it is "propped up by outside forces."<sup>108</sup>

There appears to be a wide-spread recognition among commentators that the international actors failed to recognise the power of democratic *process*, particularly in a country like Afghanistan which continues to be dominated by warlords. This need not have been the case. Where the process includes education and awareness-raising activities, it ensures continuous scrutiny of functioning, greater accountability, and transparency.<sup>109</sup>

### *Security*

Security has been identified as a major shortcoming of the reconstruction process in Afghanistan, and as a factor which could turn the constitution-making process into a "meaningless exercise."<sup>110</sup> The international community itself recognised this factor when a UN Security Council delegation to Kabul said on November 2, 2003 that "the biggest problem [was] security. Without security, it won't be possible to prepare the elections so that they can take place in June. And without security, of course, political and economic reconstruction is difficult. Therefore, our biggest concern is the

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<sup>107</sup> J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan: State-and Security-Building Lessons from Afghanistan* (Stanford: Center on Democracy, Development, and the Rule of Law, September 1, 2004), 5. Although compare this with one commentator who argues that Afghan citizens "are very excited about the internationals coming, and there's hope for the future", William H. Spencer, "Securing the Rule of Law in Post-Taliban Afghanistan: Establishing the Rule of Law," 17 *Conn. J. Int'l L.* 445, 446.

<sup>108</sup> International Crisis Group, fn. 24 above, 8.

<sup>109</sup> Brunet and Helal, fn. 35 above, 15; and Commonwealth Human Rights Initiative, fn. 4 above.

<sup>110</sup> See, e.g., Summary of Speech by Barnett Rubin, fn. 87 above.

implementation of security in order to put the Bonn process into place.”<sup>111</sup> Even commentators that overall were very positive and optimistic about the progress made following Bonn and Tokyo identified warlords as “the primary threat to peace and stability” and as “sabotaging the goals of the Bonn and Tokyo Agreements.”<sup>112</sup> Warlords have no interest in cooperating, as they gain from the war economy.<sup>113</sup> The acceptance and implementation of the constitution was said to depend on whether disarmament of warlords would be implemented, whether there would be an end to the rule of different regional commanders, and whether the authority of the central government would be strengthened.<sup>114</sup>

This is one major area in which the international community, and in particular the U.S., fell foul of ideal conditions. The U.S. used warlords to fight the Taliban. Their policy appears to have been to minimise risk to U.S. troops, without really taking into account the effect this would have on the state building process.<sup>115</sup> These policies did, however, have a direct impact on the way in which the ELJ

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<sup>111</sup> “Afghanistan Unveils New Draft Constitution,” *RFE/RL Afghanistan Report*, November 6, 2003, Volume 2, Number 39, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>112</sup> Tanya Domenica Bosi, fn. 16 above, 825, 826. For criticism of warlordism see also Mark Sedra, “Afghanistan: Between War and Reconstruction: Where Do We Go From Here?,” Special Report, *Foreign Policy in Focus*, March 2003, available from <[www.foreignpolicy-infocus.org/pdf/papers/SRafghan.pdf](http://www.foreignpolicy-infocus.org/pdf/papers/SRafghan.pdf)> (accessed December 8, 2004); and Human Rights Watch, *HRW World Report 2001: Afghanistan's Bonn Agreement One Year Later – A Catalog of Missed Opportunities* (Human Rights Watch: New York, December 5, 2002), available from <[www.hrw.org/background/asia/afghanistan/bonn1yr-bck.htm](http://www.hrw.org/background/asia/afghanistan/bonn1yr-bck.htm)> (accessed December 8, 2004).

<sup>113</sup> Brunet and Helal, fn. 35 above, 6.

<sup>114</sup> Dadfar Sepanta (professor of political science at Aachen University; expert on Afghanistan) cited in “Loya Jirga Approves Constitution, But Hard Part May Have Only Just Begun,” *RFE/RL Afghanistan Report*, January 8, 2004, Volume 3, Number 1, available from <[www.rferl.org/reports](http://www.rferl.org/reports)> (accessed on October 10, 2004).

<sup>115</sup> Chris Johnson *et al*, fn. 23 above, Box 3.

and the CLJ were run,<sup>116</sup> and sent a message to the warlords that their power would not be challenged.<sup>117</sup> In fact, the U.S. even tipped the power balance in favour of some warlords over others by providing funds, weapons, training, other equipment (such as communications) and even supporting them with firepower in conflicts with other warlords.<sup>118</sup> Today, many pre-Taliban *mujahedin* warlords of 1992-1996 are back in power, "courtesy of the U.S. military."<sup>119</sup> Observers note that many ordinary Afghans question the U.S. approach and have been disappointed.<sup>120</sup> In Afghanistan, it therefore appears that the international community responded to the conflict in a manner that was heavily influenced by political agendas that were often at odds with humanitarian objectives.<sup>121</sup> One could also say that "[a]n all-consuming concern for short-term stability caused key Afghan and international decision-makers to bow to undemocratic sectarian demands."<sup>122</sup>

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<sup>116</sup> Chris Johnson *et al*, fn. 23 above, #2.1.

<sup>117</sup> Chris Johnson *et al*, fn. 23 above, #1. This also seems to belie to an extent the "light footprint" approach advocated by Lakhdar Brahimi. If the U.S. financed warlords to see through their goals, they were arguably taking an even more active role than if they had merely taken a more active role in advising on the constitution-making process.

<sup>118</sup> Chris Johnson *et al*, fn. 23 above, #2.1; Summary of Speech by Barnett Rubin, fn. 87 above; Barnett R. Rubin, fn. 26 above, 9; and Kathy Gannon, "Afghanistan Unbound," *Foreign Affairs*, May/June 2004.

<sup>119</sup> Antonio Donini, fn. 11 above, 138; see also James Ingalls, fn. 72 above. The U.S.' policy towards warlords is summed up quite well in two official statements quoted in James Ingalls' article, e.g. Deputy Secretary of Defence Paul Wolfowitz to the U.S. Senate in 2002: "I think the basic strategy here is first of all to work with those warlords or regional leaders, whatever you prefer to call them, to encourage good behavior", and U.S. Representative Dana Rohrabacher: "I've heard a lot of negative posturing about ... Dostam, Atta, Khan... They came to help us defeat people who slaughtered our own people [on September 11, 2001]. And I'm grateful for that. And I'm not about to label them in these pejorative terms [as warlords], especially when the Taliban are still on the border..."

<sup>120</sup> United States Institute of Peace, fn. 9 above, 15.

<sup>121</sup> Antonio Donini, fn. 11 above, 118.

<sup>122</sup> International Crisis Group, fn. 24 above, 1.

As Thomas Carothers noted in an exchange with the U.S. Undersecretary of State for Global Affairs, the portrayal of policies aimed at furthering American security and economic interests as democracy promotion "is part of a pattern of rhetorical overkill by administration officials that weakens rather than strengthens [the U.S.'] credibility in the eyes of others." In response, the U.S. Undersecretary Paula Dobriansky did, to a certain extent, acknowledge the influence of *realpolitik* and that U.S. foreign policy could not "be driven by a single imperative, no matter how important."<sup>123</sup>

It is important to bear in mind what effects the security situation has had on the current constitutional situation—in essence, if the constitution is deemed to have failed in 2005, it will not matter much whether the process in 2002-2004 was considered a success or not. In Kabul, the effort to build a stable, capable government is facing dangerous obstacles. President Karzai has begun to challenge warlords, but his factious cabinet born of political compromise has collapsed under the pressure of the country's hurried presidential elections. Outside of Kabul, Karzai's control remains tenuous in some places, nonexistent in others. The Supreme Court appears to be under the control of Islamic fundamentalists unconcerned with the dictates of Afghanistan's new Constitution. This led consultant J. Alexander Thier to challenge the efficacy of U.S. policy in Afghanistan in an op-ed for the *New York Times* on September 23, 2004. In three years, the U.S. has failed to create security, stability, prosperity or the rule of law, he says, and goes on to ask if we have we won the war in Afghanistan, but lost the peace.<sup>124</sup> The International Crisis Group concludes that "[w]ithout Western

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<sup>123</sup> Paula J. Dobriansky and Thomas Carothers, "Democracy Promotion," *Foreign Affairs*, May/June 2003.

<sup>124</sup> J. Alexander Thier, fn. 107 above, 1.

support for the various local commanders, it is far from certain that Afghanistan would be in the turmoil that it faces today."<sup>125</sup> The course chosen by the international community may turn out to have been short-sighted and end in a "shallow democracy, dominated by a cadre of strong men, with little economic development, an incapacity to deal with narcotics or terrorism concerns, and scant respect for human rights."<sup>126</sup> It is equally clear that if the international community does not fill the current security vacuum in Afghanistan (which, to a large extent, it helped create), somebody else will.<sup>127</sup>

#### **IV. Conclusion**

It is clear from the many criticisms that the constitution-making process in Afghanistan was far from a textbook exercise. Yet it should not be understated that the international community appears to have learned major lessons from past experiences in other post-conflict countries. They tried to make the process suitably Afghan and to promote Afghan ownership. The timeframe envisaged in Bonn was largely adhered to (with the exception of final parliamentary elections which have been postponed until 2005), and the constitution-making process was not derailed as threatened by insurgents. Although its commitment has been lacking in parts, the international community has so far not abandoned the country as it did after the departure of the Soviets in 1989.

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<sup>125</sup> International Crisis Group, fn. 82 above, fn. 3.

<sup>126</sup> International Crisis Group, fn. 82 above, 32.

<sup>127</sup> William H. Spencer, fn. 107 above, 446.

Despite these positive aspects of the constitution-making process, what matters in the end are perceptions. It is questionable if the constitution has managed to attract enough legitimacy in that respect. It is fair to say that the international community is guilty of failing to recognise the power of a legitimising democratic process, particularly in the case of a country where warlords continue to have so much influence.

Indeed most complaints about the constitution-making process regarded procedure. The one major substantial question (the extent to which the U.S. and the international community influenced the choice of a presidential system as Afghanistan's government structure) could also have been addressed if the process had worked better, i.e. if the warlord problem in the country had been combated effectively, there would not have been such a pressing need for imposing a presidential system. The process complaints are in essence directed at an allegedly unrealistic timetable, at international actors pursuing their own interest, and at conditions surrounding the constitution-making which threatened its legitimacy.

Finally, these factors all point in one direction: if the security situation had been different, these process complaints would not have occurred. If there had been no warlord problem, the UN would not need to have worried about the derailment of an extensive consultation process or the security of Commission members. If there had been no intimidation of delegates at the CLJ by thugs instructed by regional powerbrokers, the process would have gone more smoothly and been more inclusive.



The challenge going forward from here will be to achieve transition to a more broad-based government without warlord domination. In order to complete the constitutional process, the international community will now need to consider providing security depending upon wider social and political changes, including reestablishing legitimate economic activity, creating jobs, establishing a professional national army and police force, and ending the war economy and the climate of impunity.<sup>128</sup>

Another lesson to be learned from Afghanistan must surely be that power politics and national interests do play a role in the actions taken by international actors who arrive in a country with the laudable aim of rule of law assistance. No matter how often personal objectives are denied, they always exist. As Carothers said, it would be fairer if these were not dressed up in rhetoric but at least addressed directly. This would at least give other actors in the play the chance to react appropriately and plan accordingly, and would probably increase the respect for such actors within a local community. Additionally, it should be realistic to expect international actors not to be as short-sighted as they have proven in the past. By supporting power brokers who do not have a legitimate future in the eyes of the world, such as the Afghan warlords, they only ensure future problems. Finally, foreign actors should always convince the local population of their good intentions by demonstrating them through the provision of tangible benefits such as security, aid, and successful representative politics.<sup>129</sup>

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<sup>128</sup> Chris Johnson *et al*, fn. 23 above, #2.2.

<sup>129</sup> J. Alexander Thier, fn. 107 above, 5.

In Afghanistan, the international community did not remedy a difficult security situation but rather exacerbated it. That security situation had a direct impact on the way in which constitution-making was carried out. More importantly, the situation had an undeniable effect on how the process was perceived by the Afghan population. While efforts to grant "ownership" of the status to the Afghan authorities were laudable, ultimately, the international community failed to strike the right balance by not providing enough commitments in the security area. The implications on the legitimacy of the Constitution are clear. Whether the Constitution will recover from this stain remains to be seen.

## **LIST OF ACRONYMS**

AIA - Afghanistan Interim Administration

ATA - Afghan Transitional Authority

CDC - Constitutional Drafting Commission

CLJ - Constitutional Loya Jirga

ELJ - Emergency Loya Jirga

ISAF - International Security and Assistance Force

UNAMA - UN Assistance Mission to Afghanistan