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**AMERICAN CENTER FOR LAW AND JUSTICE'S
MEMORANDUM OF LAW REGARDING THE CRIMINAL TRIAL OF
ABDUL RAHMAN FOR CONVERTING FROM ISLAM TO CHRISTIANITY**

March 24, 2006

The American Center for Law and Justice is a public interest law firm specializing in litigation that protects the freedom of speech and religious conscience. Along with the European Centre for Law and Justice, we have defended religious liberty before numerous courts worldwide including the Supreme Court of the United States and the European Court of Human Rights. Our Chief Counsel, Jay Sekulow, has presented oral arguments before the Supreme Court of the United States in several key religious freedom cases. The trial of Abdul Rahman for converting from Islam to Christianity violates both the Afghan Constitution and international law. We respectfully request that the government of Afghanistan free Abdul Rahman and publicly declare that no future trials for converting from Islam to another religion will take place.

I. Abdul Rahman's Criminal Trial Clearly Violates the Afghan Constitution.

The criminal trial of any Afghan, including Abdul Rahman, for changing his religion from Islam to Christianity contradicts several provisions of the Afghan Constitution of 2004. While the Constitution establishes Islam as the national religion and prevents the National Assembly from passing laws that contradict Islam, it also protects religious freedom and speech

for Muslims and non-Muslims alike. One of the purposes of the Constitution stated in the Preamble is the “creation of a civil society free of oppression, atrocity, discrimination, and violence, based on the rule of law, social justice, protection of human rights, and dignity, and ensuring fundamental rights and freedoms of the people.”¹ The Preamble makes it clear that the Constitution was designed, among other things, to ensure the “fundamental rights and freedoms of the people” on a nondiscriminatory basis, including the freedom to choose one’s own religion and live accordingly.

The key constitutional provision regarding religious freedom is Article 2 which states:

The religion of Afghanistan is the sacred religion of Islam. ***Followers of other religions are free to perform their religious ceremonies within the limits of the provisions of law.***²

While establishing Islam as the national religion, this provision also guarantees that non-Muslims have the freedom to practice their own religion to the extent that they do not violate the law. The “provisions of law” that Article 2 speaks of are reasonable limitations on the “religious ceremonies” that non-Muslims may participate in that are necessary to protect other citizens’ health and safety.³ The fact that Article 2 guarantees non-Muslims a limited *freedom of worship* necessarily implies that non-Muslims have an inherent *right to exist* within Afghan society. In other words, Article 2 cannot logically be read to allow an Afghan who converts from Islam to another religion to be punished for doing so, as one is certainly not “free to perform [his]

¹ AFGHANISTAN CONST. preamble. The official version of the Constitution is written in Pashtu and Dari. This memorandum is based on the “Final Draft Constitution (Unofficial English Translation)” provided by the government of Afghanistan at <http://www.af/resources/aaca/constitution/FinalDraftConstitutionEnglish.pdf> (last visited Mar. 24, 2006).

² *Id.* at art. 2 (emphasis added). The English version of the Constitution provided by the Afghanistan Ministry of Justice’s website translates Article 2 as follows: “The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals.” http://www.moj.gov.af/pdf/constitution_2004.htm (last visited Mar. 24, 2006).

³ See INT’L COVENANT ON CIVIL & POLITICAL RIGHTS art. 18(3) (“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”).

religious ceremonies” if he risks losing his life for merely being a non-Muslim. The Constitution ensures that Abdul Rahman and other non-Muslims have the right to exist and are “free to perform their religious ceremonies within the limits of the provisions of law.”

Contrary to what some have argued, Article 3 of the Constitution does *not* conflict with the protection of religious freedom provided by Article 2; it actually serves to *reinforce* the provisions of Article 2. Article 3 states: “In Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this Constitution.”⁴ This provision is clearly a limitation on the actions of the National Assembly and other government officials who have the power to make “law.” Article 3 creates dual limitations on the law-making power of legislators and other government officials:

- “no law can be contrary to the sacred religion of Islam,” and
- “no law can be contrary to . . . the values of this Constitution”

For example, while Article 90(1) of the Constitution provides the National Assembly with the authority of “ratification, modification, or abrogation of laws and/ or legislative decrees,”⁵ Article 3 limits that authority by precluding the National Assembly from ratifying a law that is contrary to “the sacred religion of Islam” or “the values of this Constitution.” Article 3 makes it clear that government officials may not enact laws or take other official actions that violate the tenets of Islam or infringe upon constitutional rights.

The policy that prohibits converting from Islam to another religion which prompted Abdul Rahman’s trial clearly violates Article 3 of the Constitution. Given that the Constitution protects Mr. Rahman’s right to freely practice Christianity (subject to reasonable limitations), his trial for converting from Islam is directly “contrary to . . . the values of this Constitution.” The drafters of the Constitution certainly did not intend to only protect the religious freedom of those

⁴ AFGHANISTAN CONST. art. 3.

⁵ *Id.* at art. 90(1).

who were non-Muslims at the time of the Constitution's ratification while leaving those who may convert to other religions after ratification wholly unprotected and subject to criminal punishment. Article 2 places no temporal limitation on its protection of the religious freedom of non-Muslims; rather, it protects the freedom of religious practice regardless of whether one was born into a non-Muslim family or converted to a non-Muslim religion as an adult. Article 3 makes it clear that Article 2's protection of religious freedom takes precedence over any "law" that conflicts with it, including a law criminalizing conversion to a non-Muslim religion.

An opposing argument that bears no credibility is that Article 3 somehow nullifies Article 2's protection of religious freedom for non-Muslims—or any other constitutional provision for that matter—that may be interpreted as being "contrary to the sacred religion of Islam." The only logical interpretation of "law" in Article 3's statement that no law can contradict Islam or the Constitution would exclude the Constitution itself. Otherwise, Article 3 would essentially state that "no [Article of the Constitution] can be contrary to . . . the values of this Constitution." Article 3 in no way suggests that the tenets of Islam can be invoked to ignore or alter the express provisions of the Constitution; it merely ensures that any "law" passed by the National Assembly must be consistent with both the religion of Islam and the provisions of the Constitution. Rather than pitting Islam and the Constitution against each other, Article 3 requires legislators and other public officials to ensure that their actions comply with both.

This conclusion becomes inescapable when Article 3 is considered in conjunction with other provisions of the Constitution. For example, Article 35 states:

the citizens of Afghanistan have the right to form political parties . . . provided that . . . [t]he program and charter of the party are not contrary to the principles of the sacred religion of Islam, and the provisions and values of this Constitution.⁶

⁶ *Id.* at art. 35.

Article 35 is quite similar to Article 3 and is consistent with the idea that the Constitution and the principles of Islam provide two independent, coexisting limits on permissible government action. Article 122—the only provision other than Article 3 where the phrase “no law” appears—states: “No law, under any circumstance, can transfer a case from the jurisdiction of the judicial branch to another organ as has been determined in this Constitution.”⁷ Like Article 3, the “law” that Article 122 speaks of clearly does *not* include the Constitution itself. Also, Article 160 provides:

This Constitution is enforced upon its approval by the Loya Jirga, and will be signed and announced by the President of the Transitional Islamic State of Afghanistan. Upon the enforcement of it, laws and decrees contrary to the provisions of this Constitution are invalid.⁸

While Article 160 invalidates “laws and decrees” that existed at the time the Constitution was approved that were contrary to the Constitution, Article 3 voids any “law,” regardless of when it was enacted, that violates either the Constitution or the teachings of Islam.

The official statement made by Professor Naimatullah Shahrani, the Vice President and Chairman of the Constitutional Commission of Afghanistan, after the Draft Constitution was completed is instructive in this regard:

The Draft Constitution is aimed at providing a basis for unity throughout Afghanistan. It aims to create a society free of oppression, atrocity, discrimination, and violence, based on legitimacy, social justice, protection of human rights, and dignity, and ensuring fundamental rights and freedoms of the people with a government based on people’s will and democracy. *The draft is based on Islamic principles and recognizes that no law can be contrary to the sacred religion of Islam.*⁹

Professor Shahrani’s statement that the Constitution is “based on Islamic principles” sharply undercuts the claim that the Constitution itself contains provisions (like Article 2) that are

⁷ *Id.* at art. 122.

⁸ *Id.* at art. 160.

⁹ Message of His Excellency, Professor Naimatullah Shahrani, Vice-President and Chairman of the Constitutional Commission of Afghanistan, available at <http://www.af/resources/aaca/constitution/SharaniStatmentEnglish.pdf> (last visited Mar. 24, 2006) (emphasis added).

inconsistent with the tenets of Islam. Moreover, Professor Shahrani's statement that the Constitution "recognizes that no law can be contrary to the sacred religion of Islam" becomes incoherent if one assumes that "law" includes the Constitution itself. If those who drafted the Constitution desired to make all of the rights, privileges, and duties provided by the Constitution subject to elimination in accordance with one's interpretation of Islam, they would have said so. Such an interpretation of the Constitution would eviscerate the rule of law by leaving Afghans' freedom religion, speech, and the press¹⁰ as well as their right to life,¹¹ liberty,¹² vote and run for office,¹³ nondiscrimination,¹⁴ the presumption of innocence,¹⁵ and bodily integrity¹⁶ subject to being ignored at the whim of public officials. Article 3 bolsters the protection provided by Article 2 and dictates that the charges against Mr. Rahman must be dropped.

The trial of Abdul Rahman also violates Article 7 of the Constitution which provides:

The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.¹⁷

The Preamble to the Constitution also states that Afghanistan "observ[es] the United Nations Charter and respect[s] the Universal Declaration of Human Rights."¹⁸ As the next section explains, Mr. Rahman's trial constitutes a blatant violation of international law, including the Universal Declaration of Human Rights. By proceeding with the trial in contravention of international law, Afghan officials have also violated Article 7 of the Afghan Constitution. Mr. Rahman's right to hold the religious beliefs of his choosing must be protected.

¹⁰ AFGHANISTAN CONST. art. 34.

¹¹ *Id.* at art. 23.

¹² *Id.* at art. 24.

¹³ *Id.* at art. 33.

¹⁴ *Id.* at art. 22.

¹⁵ *Id.* at art. 25.

¹⁶ *Id.* at art. 29.

¹⁷ *Id.* at art. 7.

¹⁸ *Id.* at preamble.

II. Abdul Rahman's Trial Violates International Law.

It is well settled that international law protects the freedom of religious conscience, including the right of people like Mr. Rahman to choose his own religion. Article 18 of the Universal Declaration of Human Rights—part of the Afghan Constitution due to Article 7—applies directly to Mr. Rahman's case. It provides:

Everyone has the right to freedom of thought, conscience and religion; **this right includes freedom to change his religion or belief**, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹⁹

Article 18 is consistent with the Declaration's Preamble which provides that "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people." Article 7 of the Afghan Constitution ensures that Abdul Rahman and other Afghans enjoy "the right to freedom of thought, conscience and religion . . . [which] includes freedom to change [their] religion or belief." There could be no clearer violation of Article 7 and the Universal Declaration of Human Rights than the criminal trial and punishment of a person for exercising his right to change his religion. Mr. Rahman cannot be forced to choose between his life and his faith without blatantly violating Article 18 of the Universal Declaration of Human Rights.

Furthermore, Article 7 of the Afghan Constitution provides Mr. Rahman the protections of the International Covenant on Civil and Political Rights because Afghanistan has ratified it. Article 18 of that Covenant states in relevant part:

1. Everyone shall have the right to freedom of thought, conscience and religion. **This right shall include freedom to have or to adopt a religion or belief of his choice**, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

¹⁹ UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 18 (emphasis added).

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.²⁰

Article 18 of this Covenant protects Mr. Rahman's "freedom to have or to adopt a religion or belief of his choice" due to Article 7 of the Afghan Constitution. The criminal trial and threat of possible execution he has been subjected to surely constitutes "coercion which would impair his freedom to have or to adopt a religion or belief of his choice." If Mr. Rahman may lawfully be executed for converting to Christianity, Article 18 of the International Covenant on Civil and Political Rights and Article 7 of the Afghan Constitution will become meaningless.

The United Nations Charter (applicable through Article 7 of the Constitution) also dictates that Mr. Rahman must be set free. Article 1 of the Charter states that the purposes of the United Nations include "[t]o achieve international co-operation . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Similarly, Article 55 of the Charter provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote

....

universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

There is no more "fundamental freedom" than the right to life, as Article 3 of the Universal Declaration of Human Rights provides "[e]veryone has the right to life, liberty and security of person."²¹ Mr. Rahman's trial violates a core purpose of the United Nations Charter because it

²⁰ INT'L COVENANT ON CIVIL & POLITICAL RIGHTS art. 18.

²¹ UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 3.

denies him “fundamental freedoms” due to his religion and frustrates the goal of fostering “friendly relations among nations based on respect for the principle of equal rights.”

The United Nations General Assembly voiced its concern for the protection of religious freedom when it enacted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The Preamble states that “religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed.” Article 1 of the Declaration provides that “[e]veryone shall have the right to freedom of thought, conscience and religion. . . . [which] shall include freedom to have a religion or whatever belief of his choice.”²² It also states that “[n]o one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.” Article 6 adds in relevant part:

[T]he right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief.²³

The Declaration provides further evidence that international law protects a person’s right to choose any religion or no religion at all and live his life accordingly.

The European Court of Human Rights has interpreted international human rights law to protect one’s right to change religions and encourage other people to do the same. For example, in *Larissis v. Greece*,²⁴ the Court interpreted Article 9 of the Convention for Protection of Human Rights and Fundamental Freedoms—which contains language virtually identical to Article 18 of the International Covenant on Civil and Political Rights—to protect the right to try

²² DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE & OF DISCRIMINATION BASED ON RELIGION OR BELIEF art. 1.

²³ *Id.* at art. 6.

²⁴ *Larissis v. Greece*, Case No. 140/1996/759/958-960 (Eur. Ct. H.R. 1998).

to persuade others to change their religion. Article 9 provides that “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief.”²⁵ In *Larissis*, three Greek air force officers who shared their faith with several of their military subordinates as well as Greek citizens were convicted, under Greek law, of improperly proselytizing. The Court upheld the conviction of proselytizing the military subordinates due to the hierarchical nature of the military but reversed the conviction for proselytizing the citizens. The Court stated that, although “religious freedom is primarily a matter of individual conscience, it [encompasses] freedom to manifest one’s religion, including the right to try to convince one’s neighbour.”²⁶ The Court added that the officers’ “behaviour towards [the civilians] was [not] improper in any way.”²⁷ This decision reaffirmed that international law guarantees that all people, including Mr. Rahman, have the freedom to accept the religion of their choice and manifest their religious beliefs.

It is quite significant that Afghanistan recently proclaimed its intention before the international community to comply with international law, including provisions dealing with human rights. The *Afghanistan Compact*, a product of the recent London Conference on Afghanistan, provides:

The Afghan Government and the international community reaffirm their commitment to the protection and promotion of rights provided for in the Afghan

²⁵ Article 9 of the Convention for Protection of Human Rights and Fundamental Freedoms states:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

²⁶ *Larissis* at para. 45 (internal quotations omitted).

²⁷ *Id.* at para. 59.

constitution and under applicable international law, including the international human rights covenants and other instruments to which Afghanistan is party.²⁸

Mr. Rahman's situation provides a perfect opportunity for the Afghan government to demonstrate to the world its commitment to the promotion of basic human rights and international law. One's right to life and freedom of religious belief and practice are among the most fundamental of human rights, and Afghanistan has a legal and moral obligation to ensure that Mr. Rahman and all other Afghans may freely exercise these rights.

The American Center for Law and Justice again respectfully urges the government of Afghanistan to ensure that Mr. Rahman is released and that the freedom of religious conscience will be protected in Afghanistan. Mr. Rahman's life must be spared and the government must publicly declare its intention to afford all Afghans the freedom to choose their own religion. The stakes are enormous; the international reputation of Afghanistan, the protection of religious freedom worldwide, and an innocent human life all lie in the balance.

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²⁸ Building on Success: The London Conference on Afghanistan, *The Afghanistan Compact* (Jan./ Feb. 2006), available at <http://www.fco.gov.uk/Files/kfile/20060130%20Afghanistan%20Compact%20Final%20Final,0.doc> (last visited Mar. 24, 2006).