

**AFGHANISTAN: THE LONG, HARD ROAD  
TO THE 2014 TRANSITION**

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## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY AND RECOMMENDATIONS</b> .....	<b>i</b>
<b>I. CONSTITUTIONAL CLASHES &amp; ELECTORAL CONTROVERSIES</b> .....	<b>1</b>
<b>II. PREPARING THE WAY FOR 2014</b> .....	<b>4</b>
A. TIMING IS EVERYTHING .....	4
B. REVISING THE LAW AND RESTORING CREDIBILITY .....	8
1. The Electoral Law .....	8
2. IEC and ECC.....	10
3. ICSIC and Supreme Court .....	13
<b>III. TECHNICAL DIFFICULTIES</b> .....	<b>15</b>
<b>IV. SECURITY CHALLENGES</b> .....	<b>16</b>
<b>V. CONCLUSION</b> .....	<b>20</b>
<b>APPENDICES</b>	
A. MAP OF AFGHANISTAN .....	21
B. GLOSSARY .....	22

## **AFGHANISTAN: THE LONG, HARD ROAD TO THE 2014 TRANSITION**

### **EXECUTIVE SUMMARY AND RECOMMENDATIONS**

Plagued by factionalism and corruption, Afghanistan is far from ready to assume responsibility for security when U.S. and NATO forces withdraw in 2014. That makes the political challenge of organising a credible presidential election and transfer of power from President Karzai to a successor that year all the more daunting. A repeat of previous elections' chaos and chicanery would trigger a constitutional crisis, lessening chances the present political dispensation can survive the transition. In the current environment, prospects for clean elections and a smooth transition are slim. The electoral process is mired in bureaucratic confusion, institutional duplication and political machinations. Electoral officials indicate that security and financial concerns will force the 2013 provincial council polls to 2014. There are alarming signs Karzai hopes to stack the deck for a favoured proxy. Demonstrating at least will to ensure clean elections could forge a degree of national consensus and boost popular confidence, but steps toward a stable transition must begin now to prevent a precipitous slide toward state collapse. Time is running out.

Institutional rivalries, conflicts over local authority and clashes over the role of Islam in governance have caused the country to lurch from one constitutional crisis to the next for nearly a decade. As foreign aid and investment decline with the approach of the 2014 drawdown, so, too, will political cohesion in the capital. To ensure political continuity and a stable security transition, action to correct flaws in the electoral framework and restore credibility to electoral and judicial institutions is needed well before the presidential and provincial council polls. Tensions have already begun to mount between the president and the Wolesi Jirga (the lower house of the National Assembly), as debate over electoral and other key legal reforms heats up. Opposition demands for changes to the structures of the Independent Elections Commission (IEC) and Electoral Complaints Commission (ECC) and an overhaul of the Single Non-Transferable Vote (SNTV) election mechanism have become more vigorous by the day.

There is also, as yet, no sign of an agreement on the timing of the 2014 elections or the following year's parliamentary elections, though President Karzai insisted on 4

October that the former would be held on time and "without interruption". The IEC has hedged on publicly announcing the planned postponement of the provincial council polls, for fear that such an announcement could deepen the political crisis. At a minimum, the IEC must announce a timetable and a plan for the 2014 elections that adhere closely to constitutional requirements by December 2012, and a new IEC chairman must be selected to replace the outgoing chairman, whose term expires in April 2013, as well as a new chief electoral officer.

It is a near certainty that under current conditions the 2014 elections will be plagued by massive fraud. Vote rigging in the south and east, where security continues to deteriorate, is all but guaranteed. High levels of violence across the country before and on the day of the polls are likely to disenfranchise hundreds of thousands more would-be voters. The IEC will likely be forced to throw out many ballots. This would risk another showdown between the executive, legislature and judiciary. Under the current constitution and electoral laws, the government is not equipped to cope with legal challenges to polling results. Nearly a decade after the first election, parliament and the president remain deeply divided over the responsibilities of constitutionally-mandated electoral institutions. The IEC, its credibility badly damaged after the fraudulent 2009 and 2010 elections, is struggling to redefine its role as it works to reform existing laws. There is also still considerable disagreement over whether the ECC should take the lead in arbitrating election-related complaints.

It will be equally important to decide which state institution has final authority to adjudicate constitutional disputes before the elections. The uncertainty surrounding the responsibilities of the Supreme Court versus those of the constitutionally-mandated Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC) proved to be a critical factor in the September 2010 parliamentary polls. The Supreme Court's subsequent decision to establish a controversial special tribunal on elections raised serious questions about its own impartiality. Institutional rivalries between the high

court and ICSIC have increased considerably since then, with the Wolesi Jirga aggressively championing the latter's primacy in opposition to the president.

The tug of war between these two constitutionally-mandated institutions has extended to Supreme Court appointments; two of nine positions on the bench are held by judges whose terms have already expired, and the terms of three more expire in 2013. The ICSIC faces similar questions about its legitimacy, since only five of its required seven commissioners have been appointed by the president and approved by parliament. Ambiguities over the roles of the Supreme Court and the constitutional commission must be resolved well before the presidential campaign begins in earnest in early 2013. An important first step would be to appoint the required judges and commissioners.

Institutional rivalry between the high court and the constitutional commission, however, can no more be resolved by presidential decree than it can by a simple parliamentary vote. Constitutional change will ultimately be necessary to restore the Supreme Court's independence and to establish clear lines of authority between it and the ICSIC. Even if wholesale constitutional change is not possible in the near term, legal measures must be adopted within the next year to minimise the impact of institutional rivalry over electoral disputes and to ensure continuity between the end of Karzai's term and the start of the next president's term.

Although Karzai has signalled his intent to exit gracefully, fears remain that he may, directly or indirectly, act to ensure his family's continued majority ownership stake in the political status quo. This must be avoided. It is critical to keep discord over election results to a minimum; any move to declare a state of emergency in the event of a prolonged electoral dispute would be catastrophic. The political system is too fragile to withstand an extension of Karzai's mandate or an electoral outcome that appears to expand his family's dynastic ambitions. Either would risk harming negotiations for a political settlement with the armed and unarmed opposition. It is highly unlikely a Karzai-brokered deal would survive under the current constitutional scheme, in which conflicts persist over judicial review, distribution of local political power and the role of Islamic law in shaping state authority and citizenship. Karzai has considerable sway over the system, but his ability to leverage the process to his advantage beyond 2014 has limits. The elections must be viewed as an opportunity to break with the past and advance reconciliation.

Quiet planning should, nonetheless, begin now for the contingencies of postponed elections and/or imposition of a state of emergency in the run up to or during the presidential campaign season in 2014. The international community must work with the government to develop an action plan for the possibility that elections are significantly delayed or that polling results lead to prolonged disputes or a run-

off. The International Security Assistance Force (ISAF) should likewise be prepared to organise additional support to Afghan forces as needed in the event of an election postponement or state of emergency; its leadership would also do well to assess its own force protection needs in such an event well in advance of the election.

All this will require more action by parliament, less interference from the president and greater clarity from the judiciary. Failure to move on these fronts could indirectly lead to a political impasse that would provide a pretext for the declaration of a state of emergency, a situation that would likely lead to full state collapse. Afghan leaders must recognise that the best guarantee of the state's stability is its ability to guarantee the rule of law during the political and military transition in 2013-2014. If they fail at this, that crucial period will at best result in deep divisions and conflicts within the ruling elite that the Afghan insurgency will exploit. At worst, it could trigger extensive unrest, fragmentation of the security services and perhaps even a much wider civil war. Some possibilities for genuine progress remain, but the window for action is narrowing.

## RECOMMENDATIONS

*To assure a peaceful political transition in 2014*

### **To the Independent Elections Commission (IEC):**

1. Announce no later than December 2012 a date for the 2014 presidential election and publicly outline a realistic timetable for the launch of a new voter registry program.
2. Conduct jointly with the ELECT II support program of the UN Development Programme (UNDP) a feasibility study on modifying the voting mechanism to include a mixed system that combines proportional representation with the Single Non-Transferable Vote (SNTV) system as an interim step; and undertake an evaluation of prospects for a gradual move to full proportional representation by 2019.

### **To the Parliament:**

3. Reach internal consensus before April 2013 on reforms to the electoral law and the law on the structure of the IEC; negotiate a compromise with the president on such critical issues as seat allocations for nomadic tribal groups (*kuchis*) and women and a move to a mixed voting mechanism; and use this period also to revise areas of the law that will impact the presidential election, as well as to restore credibility to key institutions such as the IEC and the Electoral Complaints Commission (ECC).

4. Clarify the roles of the Supreme Court and the ICSIC both in law and in practice by August 2013; adopt amendments to the 2008 law on the mandate and functions of the ICSIC that further outline its role in interpreting the constitution; work with the president to strike a swift compromise on candidates to replace judges with expired and expiring terms on the Supreme Court by August 2013, so that it has a full complement for the crucial year of 2014.

**To the international community, in particular the U.S., European Union (EU), UK, International Security Assistance Force (ISAF) and other main donor institutions:**

5. Maintain aid commitments in support of the election, contingent on the Afghan government meeting key benchmarks for reform; consider, if benchmarks are not met, withholding related funding so as to spur the Afghan government to action; and coordinate better, including with the UN Assistance Mission to Afghanistan (UNAMA), their support for elections.
6. Begin contingency planning immediately to ensure adequate security for the necessary number of voting centres, as well as for the possibility that elections are postponed and/or a state of emergency is declared before or during the 2014 presidential campaign; U.S. military leaders in ISAF and political leaders in Washington should be especially wary of the temptation to allow the military drawdown to dictate the pace and shape of the presidential, provincial council and parliamentary polls.

**Kabul/Brussels, 8 October 2012**

## AFGHANISTAN: THE LONG, HARD ROAD TO THE 2014 TRANSITION

### I. CONSTITUTIONAL CLASHES & ELECTORAL CONTROVERSIES

Since the first constitution was promulgated in 1923, Afghanistan has struggled to reconcile its history of legal pluralism, in which strains of statutory law, Islamic law and customary justice have frequently clashed. Longstanding disagreements over the role of Islam in shaping the legal order and structure of government, tensions over the distribution of power at the national and local levels and ambiguous judicial review principles have consistently undermined the cohesiveness of the constitutional order.<sup>1</sup> Conflicts over the authority of the executive versus the power of the parliament and protections for minorities and women, as well as barriers to political participation, have formed the substance of most political debate. From the monarchy to the Soviet-backed regime and the Taliban's Islamic emirate, successive constitutions have raised fundamental questions about which institutions or individuals have the power to decide whether a law is sufficiently Islamic, the limits of citizenship and protections afforded to those deemed vulnerable to exploitation and those deemed to lie outside the Muslim community.

Ethnic and tribal rivalries have further complicated matters, with local religious leaders, tribal elders and strongmen frequently relying on competing customary law practices to resolve disputes, often without regard to either Sharia or constitutional requirements. The country has consistently failed to progress toward a constitutional order that allows minorities, women and other vulnerable individuals to join the majority in influencing public policy and to enjoy fair application of the law. Repeated governmental failures to conduct comprehensive public consultations on its many

constitutions have likewise fuelled conflict. Throughout the country's history, its leaders have failed to include sufficient institutional safeguards. There have been few provisions for separation of powers in the nine constitutions adopted by various regimes over the last 89 years.<sup>2</sup> The evolution of constitutionalism has been characterised by cycles of revolt and regime collapse that gradually metastasised into full-blown civil war following the unsuccessful attempt to establish a constitutional monarchy in 1964.<sup>3</sup>

Under the 1964 constitution, the legislature (Shura) was a bicameral body with 214 members in the Wolesi Jirga (lower house) and 84 members in the Meshrano Jirga (upper house). Wolesi Jirga members were directly elected by single-member districts.<sup>4</sup> The Meshrano Jirga membership was divided into thirds, with one third directly elected, one third appointed by the king for a five-year period and one third appointed by each provincial council. Legal prohibitions against political parties, however, prevented the Shura from actively forming alliances to push through legislation, and for the bulk of its existence (1965-1973), it was paralysed.<sup>5</sup> This might have been remedied by a constitutional amendment or supplementary laws that would have given greater freedom for party formation. Indeed, articles pertaining to a Loya Jirga (grand council), consisting of both chambers of the Shura and the chairman of each provincial council, provided for such an amendment process. But in practice the king's power to dissolve the legislature<sup>6</sup> and the comparative lack of constraints in forming such a Loya Jirga made it too unwieldy to be useful.

<sup>1</sup> Crisis Group has extensively analysed the deficits in Afghanistan's constitutional order and the long-term implications for political settlement of the conflict, most notably in Asia Reports N°221, *Talking About Talks: Towards a Political Settlement in Afghanistan*, 26 March 2012; N°195, *Reforming Afghanistan's Broken Judiciary*, 17 November 2010; and N°56, *Afghanistan's Flawed Constitutional Process*, 12 June 2003; and Asia Briefings N°117, *Afghanistan's Elections Stalemate*, 23 February 2011; and N°29, *Afghanistan: The Constitutional Loya Jirga*, 12 December 2003.

<sup>2</sup> There is some debate as to the actual number of constitutions that have been ratified. In preparing its analysis, Crisis Group gave primary consideration to those promulgated in 1923, 1931, 1964, 1977, 1980, 1987, 1990, 1992 and 2004.

<sup>3</sup> Mohammad Hashim Kamali, "Islam and its Shari'a in the Afghan Constitution 2004 with Special Reference to Personal Law", in *The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law*, Nadjma Yassari and Mohr Siebeck (eds.) Max Planck Institute (2005), pp. 23-43.

<sup>4</sup> Article 43.

<sup>5</sup> J. Alexander Thier, "The Making of a Constitution in Afghanistan", *New York Law School Law Review*, vol. 51, 2006/2007, pp. 562-563.

<sup>6</sup> Article 9, Part 6, 1964 constitution.

The 1964 constitution lacked the necessary flexibility to accommodate the political and economic life of the country and thus precipitated the end of the monarchy. Rigidity has characterised all subsequent attempts to install a constitutional order, including the most recent. In essence, the 2004 constitution was a return to the 1964 blueprint. References to the king were removed, but the same authoritarian institutional structures were kept in place, and the weak system of checks and balances remained wholly intact. This all but ensured that the structural flaws that led to the disintegration of the state under Zahir Shah in 1973 would undermine rule of law in post-Taliban Afghanistan.

The constitutional review process adopted under the aegis of the 2001 Bonn Agreement could potentially have corrected some of these flaws. Interference from Washington and internecine squabbling among Afghan elites, however, torpedoed even modest remedial measures.<sup>7</sup> The balance of power between the three branches of government was consequently skewed heavily in favour of a powerful executive in Kabul, while the reach of government was sharply limited in the provinces. The president under the current constitution is in effect both king and kingmaker, with powers to issue decrees that are next to impossible to challenge because of barriers to political party formation and to coalitions in parliament. In addition to war powers and command of the security forces, the president is empowered to appoint all high-level ministers and issue legal decrees with only narrow legislative input.<sup>8</sup> The legislature has been all but neutered, and uncertainty about the parameters of judicial review in the constitution has allowed him to operate unchecked.

Since the 2004 constitution was ratified and the Wolesi Jirga was elected in the first post-Taliban elections in 2005, executive overreach and legislative bickering have become increasingly commonplace, while the independence of the judiciary has been under constant threat. The crux of each political crisis has been the lack of constitutional safeguards to ensure separation of powers. As the system has struggled to mature, elections have formed the basis of the major constitutional battles precisely because of these imbalances. While on the surface flaws in the electoral process often seem the result of technical or administrative failures or the caprice of powerful individual actors, they more often reflect the inability of the three branches of government to reach consensus on how to

share power – and on the structure of the state itself. As an experienced international election observer explained recently, “in Afghanistan, technical issues very often quickly spin off into the political, and usually there is no turning back”.<sup>9</sup>

Even before the deeply flawed 2009 and 2010 elections, it was evident that profound distrust for and dissatisfaction with the electoral system, along with institutional rivalries, were likely to have a destabilising effect.<sup>10</sup> Although parliamentarians first voted into office in 2005 vigorously debated revisions to the laws governing elections, the Wolesi Jirga was unable to reach consensus on essential revisions. In the absence of a disciplined, structured political party system, it could not overcome President Hamid Karzai’s concerted campaign to quash perceived threats to the presidential system.<sup>11</sup>

The president’s wide-ranging power to change the law or fill in statutory gaps by decree has deeply impacted the legal framework for elections. The electoral law is based on several presidential decrees, including a 62-article document outlining provisions for conduct of the polls issued in 2004.<sup>12</sup> That decree has long been a matter of dispute and debate within parliament, as has a subsequent one on elections issued in February 2010, only months before the parliamentary polls. Their most contentious points pertain to the range and scope of regulatory powers of electoral institutions, the appointment of electoral officials, the processes for dealing with complaints and irregularities, the format of electoral mechanisms and the preservation of quotas for women and minorities.

The Independent Elections Commission (IEC), along with the Independent Commission for the Supervision of Implementation of the Constitution (ICSIC) and the Afghanistan Independent Human Rights Commission (AIHRC), is one of three constitutionally-mandated commissions.<sup>13</sup>

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<sup>7</sup> See Crisis Group Report, *Afghanistan’s Flawed Constitutional Process*, op. cit.

<sup>8</sup> Article 64 of the 2004 constitution enumerates ten separate presidential “authorities and duties”, including “determin[ing] the fundamental lines of policy of the country with the endorsement of the National Assembly”; Article 76 reinforces this, calling for the president to “implement fundamental lines of the policy of the country and regulate its duties”.

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<sup>9</sup> Crisis Group telephone interview, 9 August 2012.

<sup>10</sup> See “Post-Election Strategy Group Progress Report”, Joint Election Management Body (JEMB), 27 September 2005; and “Elections White Paper. Supporting Feasible, Sustainable and Affordable Elections in Afghanistan”, Election Working Group paper for the Joint Coordination and Monitoring Board (JCMB), April 2007.

<sup>11</sup> In addition to the 2004 constitution, several supplementary presidential decrees outline the administration of elections. The 2009 presidential and provincial council polls were conducted primarily under Presidential Decree no. 28 on the 2004 electoral law; the 2010 parliamentary elections were conducted under the presidential decree issued in February 2010.

<sup>12</sup> Presidential Decree no. 28 was signed by Karzai on 12 May 2004 and published on 27 May.

<sup>13</sup> Article 156 of the 2004 constitution states that: “[t]he Independent Election Commission shall be established to administer and supervise every kind of elections as well as refer to general

Although establishment of the chief electoral body is required by law, structural specifics were left out of the constitution. Since the IEC was created in 2006, it has operated primarily under a 2005 presidential decree that gives only the vaguest organisational outlines and little detail on the mechanics of administration. This lack of a clear, substantive structure has been a chief bugbear of the electoral process, leaving questions about the extent of its authority to be negotiated ad hoc, often as disputes arise during the polling process. Several times during the 2009 and 2010 elections, the IEC tried to act as judge and jury in such disputes, raising a spectre of conflict of interest that badly damaged its credibility and opened the entire electoral process to deeper conflicts over the Supreme Court's role in determining constitutional authority.

Compounding these problems is the use of the highly impractical Single Non-Transferable Vote (SNTV) system in multi-seat constituencies. Under this system, each voter indicates on the ballot a single favoured candidate. This would make sense for an electoral system in which seats are allotted for single-member constituencies. However, in Afghanistan's multi-seat constituencies thousands of votes are often wasted, while representatives are elected in many cases by a slim margin. In the absence of political parties, there is little incentive for candidates to work together to cultivate voters, since a handful of ballots may mean the difference between winning or losing a seat. A number of remedies have been suggested, as discussed below, but perennial deadlock in parliament over changing the system and fierce resistance to reform from the president and his allies have thus far left the polling method unchanged.

The impact of these deficiencies might not be so keenly felt if flaws in the voter registry were not also rife. The system has been flawed since the 2004 presidential election. Some twelve million cards were issued to voters in 2003, before polling sites were even properly identified. Without such identification, each voter could not be allocated to a specific polling station, and it was impossible to draw up site-specific voter lists from the registry. Despite efforts over the last eight years to correct the registry, it still contains insufficient information to produce voter lists. Moreover, according to UN estimates, nearly seven million surplus voter cards are in circulation.<sup>14</sup> The absence of a national census and failed efforts to create a national identification card compound these problems.

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public opinion of the people in accordance with the provisions of the law".

<sup>14</sup> "Afghanistan Voter Registration Feasibility Study", report prepared at the request of the Independent Electoral Commission of Afghanistan (IEC) under the UN Development Programme (UNDP) ELECT II support program, August 2012, p. 9.

Observers of the elections process, including Crisis Group, repeatedly warned in 2009 and 2010 that failure to implement reforms and address technical flaws would result in disaster; these calls went largely unheeded.<sup>15</sup> The president and the Supreme Court repeatedly violated the constitutional mandate of the IEC and the legislature in both elections, intervening in disputes without a mandate and directly threatening IEC and ECC leadership when disputes were not favourably resolved. Confusion, meanwhile, reigned over the role and responsibilities of the IEC's counterpart, the ECC, and the electoral complaints process was mired in controversy.<sup>16</sup> Both polls ended with millions of fraudulent votes tossed out; in the case of the September 2010 parliamentary election, prolonged battles over the results all but destroyed the credibility not only of the IEC but also of the judiciary. Risks are high that the 2014 presidential election could result in a similar or worse outcome.

The main battle lines on elections have more or less already been drawn. The debate is squarely focused on five key areas: the timing of the elections; the roles, responsibilities and structure of electoral institutions; the format of the voting mechanism (SNTV versus a mixed proportional representation system); the status of the voter registry; and the procedures for resolving electoral complaints and disputes. All these issues have generated heated political wrangling since 2005. Each has the potential to unravel the entire electoral process at the peak of the security transition. There are considerable fears that, without strong signals of support for reform from the presidential palace, parliament and the international community, the same political paralysis that prevented reform in the past will rear its head again in 2014.

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<sup>15</sup> For an analysis of the security and political situation preceding the 20 August 2009 presidential polls, see Crisis Group Asia Report N°171, *Afghanistan's Election Challenges*, 4 June 2009; and Asia Briefing N°89, *Afghanistan: New U.S. Administration, New Directions*, 13 March 2009.

<sup>16</sup> For detailed analysis of the electoral complaints process in the 2010 parliamentary polls, see Martine van Bijlert, "Untangling Afghanistan's 2010 Vote: Analysing the electoral data", Afghanistan Analysts Network, March 2011.



## II. PREPARING THE WAY FOR 2014

If past is indeed prologue, then the chaotic battle over the 18 September 2010 parliamentary elections holds important clues for the challenges Afghanistan faces in the 2014 polls, as well as in those for parliament in 2015. In late October 2010, the IEC announced that it had invalidated 1.3 million fraudulent votes, roughly a quarter of the estimated 5.6 million votes cast.<sup>17</sup> The news set off a firestorm among Pashtun candidates, many of whom were disqualified, and prompted a swift reaction from President Karzai, who feared loss of control over parliament. On 24 November, the IEC announced the final results for all 34 provinces, except multi-ethnic Ghazni, where results were bitterly contested after eleven Hazara candidates swept the board. Clashes and protests over the hotly disputed results reached their peak in December, when Karzai issued a decree calling for the Supreme Court to establish a five-member special tribunal to review fraud complaints.

The crisis ended in an untidy compromise, nearly a year after the balloting, eight months after Karzai reluctantly agreed under pressure to inaugurate the parliament in January 2012 and after a highly controversial recount in several provinces under orders of the Supreme Court-appointed special elections tribunal.<sup>18</sup> On 22 June 2011, that tribunal disqualified 62 candidates, provoking sharp condemnation from both the legislature and IEC officials, who claimed that the decision trampled on the electoral commission's constitutional mandate.<sup>19</sup> Within days of the announcement, the Wolesi Jirga summoned Attorney General Mohammad Ishaq Aloko and acting Supreme Court Chief Justice Abdul Salaam Azimi for hearings, but both refused to attend. In response, the Wolesi Jirga passed a no-confidence vote against six of the nine Supreme Court judges on 25 June and called for them to be tried by a special constitutional court. A little more than a week later, fights erupted in parliament during a heated debate over whether to initiate impeachment procedures against President Karzai.<sup>20</sup>

A deal was eventually struck; the IEC, under intense political pressure, disqualified nine of the 62 candidates named by the special tribunal in August 2011.<sup>21</sup> The bargain appeared to bring the electoral crisis to a close for the time being, but much damage had been done. Unless new electoral laws are adopted and institutional rivalries resolved, it seems likely that the political system will experience a similar or worse meltdown in 2014. With nearly two years to go before the presidential election is constitutionally mandated to be held, time – for the moment – is on the side of reform.

A confluence of factors in early 2013, however, could trigger a paradigm shift that would make another failed election inevitable. There are already signs that changes to the electoral framework could become bogged down in protracted procedural battles between the upper and lower houses of parliament and a standoff between the president and opposition members in both chambers. It is critical that all three branches of the government make an effort to work together to reach a compromise on the timetable and procedure for elections. The international community must likewise strike a careful balance between maintaining its aid commitments in support of the polls and leveraging assistance to ensure that key benchmarks for reform are met. Above all, the next eighteen months must be used to revise areas of the law that will impact the elections and restore credibility to key institutions such as the IEC, ECC, the Supreme Court and the constitutional commission.

### A. TIMING IS EVERYTHING

Its reputation badly damaged by its handling of the 2009 and 2010 polls, the IEC initiated internal discussions on electoral reform shortly after the crisis triggered by the disastrous parliamentary elections was nominally defused in August 2011. Conscious that the dual debacle of the presidential and parliamentary polls had raised serious questions about the commission's credibility, its leaders acknowledged they were "in a sensitive situation" that obliged them to both fulfil the commission's constitutional mandate and navigate "a seemingly intractable political

<sup>17</sup> Jonathan Burch, "Almost a quarter of votes in Afghan election invalid – officials", Reuters, 20 October 2010.

<sup>18</sup> For a comprehensive analysis of the 2010 parliamentary elections, see Crisis Group Briefing, *Afghanistan's Elections Stalemate*, op. cit.

<sup>19</sup> "Kabul court throws out quarter of parliamentary election results", Radio Free Europe/Radio Liberty, 23 June 2011.

<sup>20</sup> "Supreme Court strikes back at parliament", Pajhwok Afghan News Service, 27 June 2011. Alissa J. Rubin and Sangar Rahimi, "Brawl erupts during impeachment talks in Afghan parliament", *The New York Times*, 5 July 2011.

<sup>21</sup> The nine disqualified candidates and their replacements by province are 1) Badakhshan: disqualified candidate Abdul Wali Niazi, replaced by Abdu Rauf; 2) Baghlan: Mohammad Zahir Ghani, by Ashaquallah Wafa; 3) Faryab: Shakir Kargar, by Gul Mohammad Pahlawan; 4) Helmand: Massoud Noorzai, by Muallem Mirwali; 5) Herat: Samin Barakzai, by Rahima Jami; 6) Herat: Rafiq Shaheer, by Nesar Ahmad Ghoryani; 7) Paktia: Abdul Qadir, by Mahmoud Khan Salim Khel; 8) Samangan: Mohammad Tahir Zahir, by Ahmad Khan Samangani (Samangani was killed along with several others in a bomb attack in Samangan in July 2012; his seat is still vacant); 9) Zabul: Habibullah Andiwal, by Hamidullah Tokhi.

impasse”.<sup>22</sup> The commission established a working group of commissioners and select senior staff from its secretariat to draft a revised electoral law and a law on the structure of electoral institutions, as well as to outline a strategic vision for the IEC itself.<sup>23</sup>

The strategic vision identified several goals as critical to increasing the institution’s credibility and regaining the trust of the Afghan people, including increased participation in the elections process, wider consultation with stakeholders and reduction of electoral expenses.<sup>24</sup> With these and other objectives in mind, further consultations on proposed amendments to the draft electoral law and the long-pending draft law on the structure of the IEC were held with civil society election observer groups. One-day conferences were also held at the regional level in six of the larger provinces, including Kabul, Nangarhar and Balkh. Though no attempt was reported to conduct similar consultations at the local level in southern or western provinces, where large numbers of Pashtuns live, the effort was an encouraging first step toward dispelling the dark cloud that had hovered over the elections commission in the two years that followed the ill-fated 2009 presidential polls.

Wider public debate over the electoral system began in earnest in April 2012, after Karzai suggested during a press conference with NATO Secretary General Rasmussen that the presidential poll be held in 2013, rather than 2014 as the constitution mandates. He cited concerns that NATO’s 2014 withdrawal would leave the country vulnerable to security threats ahead of the transfer of political power. Although a decision of this magnitude would deeply impact NATO withdrawal plans, Rasmussen kept silent. The suggestion set off a frenzy of speculation in Kabul and prompted a sharp response from critics, who suggested it was a pre-emptive ploy to gain an advantage for Karzai’s preferred successor, or perhaps even to clear the way for him to stand again. Karzai indicated in August he would not seek re-election and was searching for a successor.<sup>25</sup> Rumours and scattered news reports suggest he may seek to support his brother, Qayum,<sup>26</sup> an ex-member of parlia-

ment and adviser to the president on such critical issues as reconciliation with the Taliban, who has made no announcement and demurred when asked about his decision.<sup>27</sup>

A little more than a week later, on 21 April, the IEC responded with a pre-emptive strike of its own: Chairman Fazl Ahmad Manawi unveiled the commission’s five-year strategic plan for an overhaul of the system and introduced the newly revised draft electoral law it planned to submit to the justice ministry.<sup>28</sup> Manawi subtly though sharply replied to Karzai’s proposal at a day-long public conference at Kabul University, saying the commission “will assert its independence based on the law” and “rely on the constitution to fix the term of the elections”.<sup>29</sup> This and other statements by Manawi indicate that battle lines are already being drawn, and the debate over the timing of the elections may well figure prominently in a prospective next constitutional crisis.

Under the constitution, the presidential election should be held 30 to 60 days before Karzai’s mandate ends on 22 May 2014, meaning between 22 March and 22 April.<sup>30</sup> The constitution requires provincial council elections to be held every four years, which means they should be in 2013, but IEC officials have indicated that the commission has decided to postpone them, due to financial and security concerns, and hold them simultaneously with the presidential election in 2014.<sup>31</sup> To ensure broad participation,

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2012. James Risen, “Intrigue in Karzai family as an Afghan era closes”, *The New York Times*, 3 June 2012.

<sup>27</sup> Richard Gorelick, “I’m not mulling,’ says Qayum Karzai”, *The Baltimore Sun*, 4 June 2012.

<sup>28</sup> “Strategic Plan of the Independent Election Commission of Afghanistan”, op. cit.

<sup>29</sup> Manawi made his comments during a lengthy question and answer session at the end of the conference; Crisis Group was one of several non-governmental organisations the IEC invited to attend the conference.

<sup>30</sup> Article 61 of the 2004 constitution states that the “[P]resident shall be elected by receiving more than fifty per cent of votes cast by voters through free, general, secret and direct voting. The presidential term shall expire on 1st of Jawza (22 May) of the fifth year after elections. Elections shall be held within thirty to sixty days prior to the end of the presidential term. If in the first round none of the candidates gets more than fifty per cent of the votes, elections for the second round shall be held within two weeks from the date election results are proclaimed, and, in this round only the two candidates who have received the highest number of votes in the first round shall participate. In case one of the presidential candidates dies during the first or second round of voting or after elections, but prior to the declaration of results, re-election shall be held according to the provisions of the law”.

<sup>31</sup> IEC officials have been publicly circumspect about plans for the provincial council elections; no official announcement has yet been made about their postponement. In telephone interviews with Crisis Group on 26 September 2012, a senior IEC

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<sup>22</sup> “Strategic Plan of the Independent Election Commission of Afghanistan: 2011-2016”, IEC, released on 21 April 2012, p. 32.

<sup>23</sup> “On Completion of the Electoral Law Draft”, IEC secretariat press release, 19 June 2012.

<sup>24</sup> “Strategic Plan of the Independent Election Commission of Afghanistan”, op. cit., p. 36.

<sup>25</sup> Kenneth Katzman, “Afghanistan: Politics, Elections and Government Performance”, Congressional Research Service, 5 June 2012, p. 37.

<sup>26</sup> “Joint Press Conference with NATO Secretary General Anders Fogh Rasmussen and Afghan President Hamid Karzai in Kabul Afghanistan”, [www.nato.int/cps/en/natolive/opinions\\_85884.htm](http://www.nato.int/cps/en/natolive/opinions_85884.htm). Dion Nissenbaum, “Karzai considers early vote, before foreign forces leave”, *The Wall Street Journal*, 12 April

logistical preparations – from distribution of voter identification cards and voter education programs to the placement and security for polling centres, distribution of ballots and ballot protection procedures – would have to take place in the winter, when whole swathes of the country are likely to be inaccessible due to weather, and be completed by February 2014. IEC officials and international election observers insist the timetable can be maintained; experience, however, indicates that this is at best optimistic.<sup>32</sup>

Six months before the 2009 presidential election, the IEC announced that it would be conducted in August, that is five months after Karzai's constitutional mandate was officially scheduled to expire. Citing "harsh weather" as the main reason, it also stated that security conditions during the spring, the traditional start of the fighting season, would be an impediment. The decision provoked considerable rancour in parliament, including from Mohammad Yunus Qanooni, then speaker of the lower house and a leading Northern Alliance opposition figure, who complained that it was a veiled attempt by Karzai to extend his grip on power.<sup>33</sup> The president quashed the debate by referring the issue to the Supreme Court, which ruled that he could continue in office a little more than seven months beyond the legal expiration of his term.<sup>34</sup> A similar scenario is well within the realm of possibility, and it is as likely that it would provoke a violent response from aggrieved presidential contenders or their supporters.

As yet, no official date has been announced for the presidential poll, and there has been virtually no discussion of plans for the parliamentary elections scheduled for 2015. The delay in setting a date has huge implications, not only logistically but also for the constitutionally-mandated transfer of power at the end of Karzai's final term. According to the constitution, the president, first-vice president and second-vice president are allowed to serve no more than two five-year terms.<sup>35</sup> Karzai, therefore, should leave office when his term ends in May 2014.

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official indicated that they would be held in 2014, and a former senior government official said that IEC officials decided in July 2012 on postponement due to concerns about security and the financial impact of holding successive polls in 2013, 2014 and 2015. IEC officials have indicated discussion on the issue is ongoing.

<sup>32</sup> Crisis Group interviews, senior IEC official, Kabul, 17 July 2012; (phone), international elections expert, 14 August 2012.

<sup>33</sup> "Statement of the Independent Election Commission regarding the determination of the date for holding the presidential and provincial council elections", IEC, 4 March 2009.

<sup>34</sup> Salahuddin Loudazai, "Wolesi Jirga speaker: There was an occult hand behind the Supreme Court decision", Pajhwok Afghan News, 28 April 2012.

<sup>35</sup> 2004 constitution, Article 62.

The 2004 constitution, however, contains loopholes that could allow the president to keep power longer. The strongest option for extension of his term is a state of emergency. Chapter nine sets out the conditions.<sup>36</sup> Article 143 empowers the president to declare a state of emergency "[i]f because of war, threat of war, serious rebellion, natural disasters or similar conditions, protection of independence and national life become impossible". Several articles would be suspended, leading to martial law; the government would also have the right to "inspect personal correspondence and communications".<sup>37</sup> Article 145 further empowers the president to "transfer some of the powers of the National Assembly to the government [executive]" in consultation with the presidents of the National Assembly as well as the chief justice. This article neither stipulates which powers may be transferred nor what constitutes sufficient consultation with the designated members of the parliament and Supreme Court.

Article 147 states that "if the presidential term or the legislative term of the National Assembly expires during the state of emergency, the new general elections shall be postponed, and the presidential as well as parliamentary terms shall extend up to four months". Should the state of emergency extend beyond four months, the president is empowered to call a Loya Jirga.<sup>38</sup> And therein lies one of several problems with the state of emergency provisions. Although the primary requirements for convening a Loya Jirga provide for it to consist of the National Assembly, presidents of district assemblies, the attorney general and members of the Supreme Court, no express role is stipulated for the president.<sup>39</sup>

If President Karzai declares a state of emergency ahead of or during the 2014 election campaign, there would be very high risks of major violence.<sup>40</sup> It could also bring to the surface the factionalism long latent in the Afghan national security forces (ANSF) and possibly trigger the break-up of parts of the army, police and intelligence services. Martial law would place a tremendous burden on not only Afghan security forces but also ISAF, precisely as the NATO withdrawal was developing. Karzai himself

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<sup>36</sup> Ibid, Articles 143-148.

<sup>37</sup> Article 145 provides for full suspension of Articles 27 and 36, as well as the second clause of Article 37, on protection against government surveillance of communications and correspondence.

<sup>38</sup> The final clause of Article 147 states: "Within two months after the termination of the state of emergency, elections shall be held".

<sup>39</sup> Articles 110-115 describe conditions and requirements for convening a Loya Jirga.

<sup>40</sup> On 4 October, President Karzai told a press conference in Kabul that the presidential election "will definitely happen" and "without interruption". He added: "Go on and choose your own favourite candidate. My term, if prolonged by even a day, will be seen as illegitimate". Reuters, 4 October 2012.

has indicated concerns about security ahead of elections, and no doubt this is very much on the minds of ISAF leadership as well as officers in the defence and interior ministries. But in Afghanistan foreseeing danger does not always mean preventing it. An official announcement on the date and timetable for presidential polls before the end of 2012 could do much to avert this worst-case scenario.<sup>41</sup> Karzai critics have publicly voiced fears of just such a scenario, most notably his long-time political rival, Mohammad Younus Qanooni:

Our view is that the president does not want to hold the election early; rather he wants to delay the election. This is a political game and a political trick so that he can call a Loya Jirga, 80 of whose members are in his circle of cronies. The Jirga could decide that he should remain president until the security situation returns to normal. ... If the president makes this mistake, the people will take to the streets, and the Arab Spring will be replicated here.<sup>42</sup>

On the logistical side, determining a date well in advance would aid in assuring a smooth transition at the IEC. Chairman Manawi's term expires in April 2013.<sup>43</sup> As yet, there is no clear shortlist of candidates, and even if one or two candidates do emerge, it is not at all certain that Manawi's successor would accede to the chairmanship without lengthy consultations between the president and powerbrokers in his inner circle such as First-Vice President Mohammad Qasim Fahim and others. In addition to clearing the path for top IEC appointments, setting a date for the election and timetables for the overall process before the end of 2012 would allow ample time to clean up the voter registry, hire and train IEC staff, conduct voter and candidate education and set the parameters for handling electoral complaints.

Determining a date sooner rather than later would also reduce the possibility of protracted wrangling pushing the debate over the electoral calendar into the courts and/or a prolonged legal battle over an extension of Karzai's term. The 2010 experience shows that such a scenario, discussed further below, could easily set off a battle between the Supreme Court and the ICSIC. In times of crisis, when his grip on power appears threatened or he needs to gain leverage, Karzai has outsourced controversial decisions to the high court and the commission, casting a long shadow over the credibility of both. Without clarity on the

electoral calendar, it is quite conceivable that legal skirmishes between the two institutions could combine with deteriorating security conditions to prevent the elections from happening at all.

On a positive note, with the possible exception of Karzai himself, stakeholders on all sides appear to recognise the imperative of setting the electoral schedule as soon as possible. Opposition groups have made this a centrepiece of their electoral reform demands. In a rare if coincidental show of unity, several leaders of newly formed political factions, such as the National Front of Afghanistan, the National Coalition of Afghanistan and the Right and Justice Party, have all called for the IEC to announce a date before the end of 2012.<sup>44</sup>

The international community signalled its concern about the lack of clarity on the electoral calendar at the July 2012 Tokyo Conference, calling on the government to hold "credible, inclusive and transparent presidential and parliamentary elections in 2014 and 2015 according to the Afghan Constitution" and to "develop, by early 2013, a comprehensive election timeline through 2015 for electoral preparations and polling dates".<sup>45</sup> This laudable goal is only likely to be achieved if donors aggressively leverage what is said to be their unwritten pledge to withhold future funding if the government fails to meet these and other basic benchmarks agreed in Japan.<sup>46</sup> The Tokyo Declaration is, nonetheless, vague in many areas and leaves the president far too much room to manoeuvre on electoral reform, omitting for instance a more specific target date for replacing outgoing IEC Chairman Manawi.

Several Western and Afghan officials have suggested the government and donors reached specific understandings in Tokyo pertaining to long pending draft laws, including

<sup>41</sup> Mujib Mashal, "The question of succession", Afghanistan Analysts Network, 18 May 2012.

<sup>42</sup> Crisis Group interview, Mohammad Younus Qanooni, member of parliament (Kabul) and former speaker of the lower house, Kabul, 18 April 2012.

<sup>43</sup> Crisis Group interviews, senior Afghan officials, Kabul, April and July 2012.

<sup>44</sup> The Right and Justice Party (Hizb-e Haq wa Edelaat), launched in November 2011, claims multi-ethnic membership. Former Interior Minister Hanif Atmar, AIHRC chairwoman Sima Samar and Rangin Dadfar Spanta, head of the National Security Council, are its best-known supporters. The National Coalition of Afghanistan (Etelaf-e Milli-ye Afghanistan) was formed in December 2011 under leadership of Dr Abdullah Abdullah, ex-foreign minister and presidential candidate. Both are considered left of centre. The National Front of Afghanistan (Jebhaye Mili-ye Afghanistan), supported by non-Pashtun factional leaders such as Abdul Rashid Dostum and Mohammad Mohaqqueq, represents a much more stridently anti-Taliban loyal opposition faction. The National Coalition of Afghanistan issued a draft white paper, "Improving the Electoral Process of Afghanistan", in January 2012 calling for the July Tokyo Conference to announce an electoral timetable.

<sup>45</sup> "The Tokyo Declaration, Partnership for Self-Reliance in Afghanistan: From Transition to Transformation", 8 July 2012.

<sup>46</sup> Crisis Group interviews, senior international and Afghan officials, Kabul, 12-21 July 2012.

the electoral law, and overdue government appointments. Failure to name a new Supreme Court chief justice who enjoys support from across the political spectrum and to fill other openings on the high court by the end of 2012 would be one of several triggers for withholding aid.<sup>47</sup> Since these understandings were never made public, there is no way to assess the credibility of the assertions. Early indications suggest, however, that donors are only just beginning to engage on elections; there appears to be little consensus among the U.S. and other leading donors on the exact timing for the presidential poll, or how best to leverage benchmarks set at Tokyo.<sup>48</sup> They must coordinate better on the elections agenda in the coming eighteen months and should be especially wary of the temptation to allow the military drawdown to dictate the pace and shape of the presidential and parliamentary polls.

On 26 July, Karzai, in an effort both to signal sincerity to donors after Tokyo and exert control over the reform agenda, issued a presidential decree outlining an electoral timetable of sorts. Its 164 articles touch on a number of corruption-related issues mentioned in the conference declaration but also direct the IEC to “prepare the plan for registering [candidates’] names for presidential elections ... and present it to the [presidential] Cabinet within a month”.<sup>49</sup> The decree further calls for the IEC to “create a comprehensive schedule for presidential, parliamentary and provincial council elections within three months”, that is by late October.

Given that the decree was quietly released by the president’s office late on a weekend day in the middle of Ramadan, the holy month of Muslim prayer and fasting, it immediately met criticism in the parliament. It does not seem likely that the order to set the electoral timetable will be heeded on time or executed.<sup>50</sup> Deliberations on changes to the newly revised draft electoral law were still underway in September 2012, and the justice ministry had yet to pass the draft to the cabinet for further review. The lower house of parliament passed a revised version of the law on the structure and mandate of the IEC and the ECC on 25 September; it now awaits review by the upper house. It appears likely, however, that the omnibus bill will be bogged down in haggling between the two chambers for several more weeks, if not months, and even more likely that the president would veto it in its current

form.<sup>51</sup> There is no time to waste. Electoral planning demands a definitive schedule, implementing the law and pushing the process forward in stages depends heavily on fixing the polling date.<sup>52</sup>

## B. REVISING THE LAW AND RESTORING CREDIBILITY

### 1. The Electoral Law

In June 2012, the IEC announced that it had submitted a revised version of the draft electoral law to the justice ministry’s legislative review department (the *taqin*). This contains a number of improvements and important clarifications in areas not touched on in previous decrees. But it would also introduce flaws that could prove fatal for efforts to reform the system before the 2014 election. The three most controversial elements are introduction of an electoral system combining proportional representation with SNTV; preservation of reserved seats for nomadic tribal groups (*kuchis*); and changes to the composition of the Electoral Complaints Commission.

Although it is likely the draft electoral legislation will undergo many significant changes as it passes through the system, from the council of ministers to the parliament and back to the president for signature, it is important to recognise the challenges. In the absence of an active political party system in the National Assembly, negotiations over electoral reforms are likely to stall repeatedly. The parliament will need to make a concerted effort to arrive at a compromise on the most controversial elements. If it is to ensure fair and transparent administration of the elections, it is highly desirable that the law be passed at least one year before the end of the president’s term, that is no later than May 2013, to allow for changes to be fully implemented well ahead of the polls.

Disagreements over the move to a mixed system are likely to prove the biggest obstacle. On its surface, SNTV appears simple: one voter, one vote, one successful candidate. In many single-seat or first-past-the-post constituencies such as those in “Westminster”-based systems, each voter casts a ballot for a single candidate. However, distortions arise in multi-seat constituencies such as those for Afghanistan’s parliamentary, provincial council and district council elections. If a large proportion of citizens vote for one

<sup>47</sup> Ibid.

<sup>48</sup> Crisis Group interview, international official, Kabul, 12 July 2012.

<sup>49</sup> Presidential Decree no. 45 of 5 Asad 1391 (26 July 2012), “On the Execution of Content of the Historical Speech of 1 Saratan 1391 [21 June 2012] in the Special Session of National Assembly”, released on 27 July.

<sup>50</sup> Abasin Zaheer, “Karzai’s decree a move toward dictatorship: MPs”, Pajhwok Afghan News Service, 28 July 2012.

<sup>51</sup> Crisis Group interview, Mohammad Abdoh, chairman of the Wolesi Jirga justice committee, Kabul, 25 September 2012.

<sup>52</sup> For more on scheduling and other challenges, see Martin Hess, Therese Pearce Laanela and William Maley, “Preparing for Elections in Afghanistan: Prospects and Challenges”, Summary Report, Australian National University, ANU College of Asia and the Pacific/Asia-Pacific College of Diplomacy, Canberra, 17-18 March 2012.

candidate, this numerous group will elect a single representative, while a much smaller number of voters will disproportionately elect their favoured candidates.<sup>53</sup> In Afghanistan, multi-member constituencies result in the election of representatives with wildly varying mandates; seats can be won in large provinces with small numbers and small margins. This sharply limits the incentives for candidates to cooperate and makes it easy to miscalculate the votes two or more allied candidates need to both win seats.<sup>54</sup>

The version of the electoral law submitted for review by the IEC in June 2012 proposes to remedy this by introducing a mixed system in which voters would vote for 80 of the 249-seats allocated for the Wolesi Jirga under a proportional representation system with party candidates. They would still, however, use SNTV to determine 159 lower house seats, which would be allocated for independent candidates.<sup>55</sup> With ten seats of the 249 seats reserved for *kuchis* and 68 seats overall allocated for women, however, this formula raises questions about the value of such proportional seat allocations.<sup>56</sup>

Analysts have further argued that the number of seats allocated for party candidates under this arrangement would be too low; party candidates in more than a third of provinces would compete for a single seat.<sup>57</sup> The draft law is likewise unclear how a ballot for this mixed system would be designed. Moreover, given the IEC's poor performance in promoting voter education in the past, it seems highly unlikely that it would have the resources to ensure that voters would understand these changes. Some civil society organisations, including the Free and Fair Elections Forum of Afghanistan (FEFA), the country's

largest and perhaps most influential election observation group, have, nonetheless, endorsed the draft.<sup>58</sup>

Arguments have been made for alternatives to the mixed system described in the pending legislation. One suggested by analysts at the Afghanistan Research Evaluation Unit (AREU), a Kabul-based independent research organisation, calls for a Limited Vote and Proportional Representation (LV-PR) system.<sup>59</sup> In such a system, a voter casts fewer votes than there are seats to be elected, thus guaranteeing that majority groups can win more than half the seats but not necessarily all.<sup>60</sup> Instead of being limited to selecting a single candidate, a voter would be allowed to choose two on the ballot. Seats allocated by party under a proportional system would also be distributed across all 34 provinces, which would ostensibly solve the problem of limited proportionality, encourage candidate alliances and address concerns raised during the 2010 polls about the distribution of the vote across ethnic groups in especially diverse provinces such as Ghazni.<sup>61</sup>

The alternative procedures may indeed offer a way to resolve the conundrum of replacing SNTV with a mixed system, but a great deal of work would be needed to educate Afghan political leaders and voters about the implications. Without vigorous, unqualified support from the international community, any attempt to integrate such changes would likely meet strong resistance from Karzai and his allies. The president has consistently resisted attempts to move toward proportional representation, and he and other political heavyweights have actively blocked the development of parties.<sup>62</sup> To overcome these obstacles, donors will need to invest heavily in programs to familiarise parliamentarians and government officials with the technical aspects of different voting mechanisms and their political ramifications. Without significant international funding and expenditure of political capital, there is a risk that changes to the system – even in draft form – could reinforce growing ethnic tensions between non-Pashtuns and Pashtuns, the dominant ethnic group.

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<sup>53</sup> Crisis Group Asia Report N°101, *Afghanistan Elections: Endgame or New Beginning*, 21 July 2005, p. 10.

<sup>54</sup> For detailed analysis on proposed alternatives to the current SNTV system, see Andrew Reynolds and John Carey, "Fixing Afghanistan's Electoral System: Arguments and Options for Reform", Afghanistan Research and Evaluation Unit (AREU), July 2012. The breakdown and discussion of seat allocations can be found on pp. 18-20.

<sup>55</sup> Chapter 5 of the 2012 Draft Electoral Law describes seat allocations in detail.

<sup>56</sup> Article 83 of the 2004 constitution states: "...The number of the members of the House of People shall be proportionate to the population of each constituency, not exceeding the maximum of two hundred fifty individuals. Electoral constituencies as well as other related issues shall be determined by the elections law. The elections law shall adopt measures to attain, through the electorate system, general and fair representation for all the people of the country, and proportionate to the population of every province, on average, at least two females shall be the elected members of the House of People from each province".

<sup>57</sup> Reynolds and Carey, op. cit., p. 20.

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<sup>58</sup> Crisis Group interview, senior FEFA official, Kabul, 19 July 2012.

<sup>59</sup> Reynolds and Carey, op. cit., p. 21.

<sup>60</sup> For a comparative analysis of electoral systems, see Robert G. Moser and Ethan Scheiner, "Mixed Electoral Systems and Electoral System Effects: Controlled Comparison and Cross-National Analysis", *Electoral Studies* 23 (2004), pp. 575-599; Pippa Norris, "Electoral Systems: Proportional, Majoritarian and Mixed Systems", *International Political Science Review*, vol. 18, no. 3, 1997, pp. 297-312.

<sup>61</sup> Reynolds and Carey, op. cit., p. 22. On 18 September 2010, nearly half the 272 polling centres in Ghazni were closed due to insecurity, many in predominantly Pashtun areas.

<sup>62</sup> On political party development, see Crisis Group Asia Briefing N°39, *Political Parties in Afghanistan*, 5 June 2005.

This was illustrated sharply in September 2010 in Ghazni, when the large-scale closure of polling centres and divisions among Pashtun candidates resulted in Hazara candidates taking all eleven allocated seats.<sup>63</sup> The subsequent standoff over the results exacerbated longstanding tensions between Hazaras and Pashtuns in the province and in parliament. Only two years earlier, Hazara members of parliament had staged a walkout over a provision in the electoral law for the allocation of ten seats in the lower house to the primarily Pashtun *kuchis*. Given these tensions, it is likely that the provisions for *kuchi* seat allocations, which have been retained in Article 19 of the 2012 version of the draft electoral law, will again be a deal-breaker.

## 2. IEC and ECC

The 2004 constitution designates the IEC as the primary institution responsible for administering and supervising elections.<sup>64</sup> Its role and organisation were further elaborated in two presidential decrees separately issued in 2004 and 2005.<sup>65</sup> Other than outlining the educational criteria and age requirements and prohibiting persons with criminal backgrounds from serving on it, however, the 2005 edict is vague about structure, not even stipulating, for example, the number of members.<sup>66</sup> Article 2 calls for the chairman and vice chairman to serve three-year terms and for the commission to appoint other staff but does not explain how.

The commission was, nonetheless, officially constituted in 2006 on the basis of these decrees. In November 2007, its officials tried to fill gaps in the legal framework by drafting a law on its basic structure, duties and mandate.<sup>67</sup> After considerable debate, a joint committee was formed in 2008 by the Wolesi Jirga and Meshrano Jirga, and the bill was passed and sent to the president for signature in

February 2009. Karzai rejected it the next month and returned it to parliament, arguing that a provision for parliamentary approval of presidentially-appointed IEC officers was not specified in the constitution, so would illegally abrogate the president's authority.

Debate on the legislation has focused primarily on the process for appointments to the commission and its basic composition. Karzai appointed the last two chairs on the basis of two legal mechanisms: a constitutional provision that allows an interim government to both establish the IEC and appoint its members,<sup>68</sup> and presidential decrees that parliament has yet to nullify. The constitution is silent on whether the president is required to seek the approval of the lower house for IEC appointments. To confuse matters further, there is no specific mention of a requirement to seek lower house approval in the constitution's rather imprecise reference to the "appointment of other high-ranking officials" under enumerated presidential powers.<sup>69</sup>

A loose reading of these stipulations might just be stretched to give the president the sole authority to appoint the chair and deputy chair of the commission, but such an interpretation would undermine the intent of checks and balances contained in the constitution. Legislative input on IEC appointments would be an important step toward restoring the balance of power between the executive and the legislature. It is conceivable that adjustments to electoral laws could be made to allow for broader institutional consultation on IEC appointments, but this would be only an interim measure, with few guarantees that disputes arising out of the appointment process could be timely resolved by judicial review. To protect the IEC's independence, any changes to the appointment process – a central part of the constitutional checks and balances – would necessarily require an amendment to the constitution. The requirements for the adoption of a constitutional amendment are too arduous under the current scheme and political barriers too numerous, however, to make this possible in the near term.

In view of these concerns, civil society organisations have suggested several paths to devising a selection process for commissioners. Notably, FEFA has proposed a nine-member commission instead of the seven in the 2009 draft law; the aim would be to achieve greater balance. It has also suggested lengthening terms from three years to six and called for the commission to elect its chair and vice chair itself, by a direct, secret ballot. Under FEFA's proposal, commissioners would be selected from among 27 nominees culled from a list of select civil society actors, scholars, scientists and university teachers.<sup>70</sup> A selection committee

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<sup>63</sup> Events in Ghazni during and after the 2010 parliamentary elections have been analysed from a number of angles by various observers and scholars. See, for instance, Thomas Ruttig, "Ghazni's election drama: it's the system", *Foreign Policy* (online), 2 December 2010; Noah Coburn and Anna Larson, "Undermining Representative Governance: Afghanistan's 2010 Parliamentary Election and Its Alienating Impact", AREU, February 2011; Emily Winterbotham, "Legacies of Conflict: Healing Complexes and Moving Forwards in Ghazni Province", AREU, October 2011.

<sup>64</sup> Article 156: "The Independent Election Commission shall be established to administer and supervise every kind of election ... as well as refer to general public opinion of the people in accordance with the provisions of the law".

<sup>65</sup> The composition and role of the IEC in administering elections are outlined in Presidential Decree no. 28 (chapter two), on the 2004 electoral law; structure and procedures are further elaborated in Presidential Decree no. 23, 24 January 2005.

<sup>66</sup> Presidential Decree no. 23, Article 3.

<sup>67</sup> Afghanistan Parliament Legislative Tracking Service, [www.legtrack.af/scr/BLS/BLS.aspx?Type=SP:82](http://www.legtrack.af/scr/BLS/BLS.aspx?Type=SP:82).

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<sup>68</sup> Article 159, Parts 1 and 3.

<sup>69</sup> 2004 constitution, Article 64, Part 13.

<sup>70</sup> "Proposal to amend the structure, duties and authorities law of the Independent Election Commission", FEFA, 26 March 2012.

composed of the speakers of the two houses of parliament, the ICSIC and AIHRC chairs, the attorney general, the director of the gender department and the chair of the High Office of Oversight (the anti-corruption agency) would winnow the candidates from 27 to eighteen.<sup>71</sup> The president would then appoint the nine commissioners for six-year terms from that list of eighteen finalists forwarded by the selection committee.

On 25 September 2012, the Wolesi Jirga passed a modified version of this amendment to the law in an omnibus bill that outlines the structure and mandate of the IEC and ECC. The bill called for the academic councils of state-subsidised universities to select twelve candidates and for private post-secondary education institutions to do likewise. An additional three candidates would be selected by undesignated civil society organisations. A multi-stage nomination and appointment process would follow, with fourteen nominees forwarded to the president by a selection committee composed of the Supreme Court chief justice, the chair of the ICSIC, the upper and lower house speakers and leaders of registered political parties. The president would ultimately appoint nine commissioners from this list for six-year terms, including at least two women. The chair, deputy chair and secretary would be elected by a secret direct ballot of commission members and would serve three-year terms.<sup>72</sup>

The omnibus bill additionally proposes to establish the ECC as a permanent body. Three candidates would be nominated for a list of fifteen by the Supreme Court, two by the attorney general's office, three by the Wolesi Jirga, two by the Meshrano Jirga, two by the AIHRC, two by the national bar association and one by unspecified electoral observer groups. The president would subsequently appoint five commission members from this list of fifteen. The draft does not describe a specific timetable for this process or offer alternate procedures in the event of disputes or deadlock. Perhaps most controversially, its Article 33 also calls for the UN Assistance Mission to Afghanistan (UNAMA) to introduce two foreign elections experts to the complaints commission on a temporary basis but does not specify how their votes would be weighted. Given the controversy over the appointment of foreign nationals to the ECC ahead of the 2010 elections, the reintroduction of this provision is likely to fuel clashes between the president and parliament again.

The merit of these proposals is debatable, but they appear to be an attempt to strike a balance between executive privilege and broad consultation in the IEC appointment

process. Longer terms and an internal election process would also safeguard the independence of the institution and ensure greater continuity. But the proposals on offer, inside and outside of parliament, are shot through with inconsistencies, riddled with vagaries and far too convoluted to pass legal muster, let alone pass through the decidedly more conservative upper house that has a presidentially-appointed majority and must approve legislation before it is sent to Karzai for signature. Moreover, the introduction of greater complexity to the process is likely to hasten the already outsized entropy extant in the political system.

There is a high probability that the draft omnibus law on IEC and ECC structure will bog down in squabbling between the Meshrano Jirga and Wolesi Jirga and will moulder for several months in a joint commission of the two chambers. Even on the off chance that legislative consensus is reached, it is a near certainty that Karzai would reject any version that appeared to curtail his appointment powers. Parliament could conceivably override a presidential veto with a two-thirds majority vote in the lower house, but this too seems unrealistic.

It is highly unlikely that the parliament would even be able to achieve the necessary quorum to override a presidential veto. Lack of a quorum has been a perennial problem since its inception. Many members abstain from voting, and equally as many simply do not show up. Furthermore, without a political party system and clear parliamentary procedural rules, it would be tremendously difficult for the lower house to alter a law rejected by the president. In particularly high-stakes votes, promises of patronage and pay-offs, backed by not a little intimidation, have also proved a strong disincentive for legislators who might be looking to break from the pack and undercut presidential authority. Parliamentary leaders should work toward a compromise with the president on the IEC and ECC selection process, steering clear of overreaching the legislature's mandate. The overall goal of any legislation and deals brokered on the structure and mandate of electoral institutions must be to strengthen independence, ensure transparency and restore credibility to the polling process.

Reforms are necessary, but the consequences of each must be carefully considered, along with the likely prospect that changes of any kind will probably produce a backlash from several different stakeholders. A concerted campaign to convince political leaders and voters alike of the efficacy of enacting such reforms, therefore, needs to be launched as early as possible. If a compromise on legislation is to be struck before early 2013, as set out in the Tokyo Declaration, the international community will have to keep pressure on the government to consult widely across institutions and reach out to civil society and election observer groups.

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<sup>71</sup> A Supreme Court representative is notably absent from the proposed membership.

<sup>72</sup> Article 5, draft law on the structure, mandate and duties of the IEC and ECC, introduced in the Wolesi Jirga on 17 September 2012.



Ill-defined institutional structures, weak administrative capacity and poor leadership in the electoral institutions have, as noted, greatly undercut public confidence in the political system. Although the constitution establishes the IEC as the lead institution responsible for administering elections, a failure to build consensus on supplementary laws to define its mandate and internal procedures has stymied efforts to make it truly independent. The IEC has consequently been caught in a tug of war between a president bent on micromanaging all political competition and a parliament apparently incapable of resisting the lure of the politics of patronage and rent seeking.<sup>73</sup> As with other government institutions, the IEC has also struggled to meet demands from donors who are far from coordinated, much less unified, in their approach. These challenges have continually sapped the organisation's already limited capacity to administer itself efficiently and move forward with critical reforms.

Seven commissioners sit on the IEC board, which sets policy and oversees a secretariat headed by a chief electoral officer and comprising 34 provincial offices divided into eight regions. Before the 2009 presidential election, permanent staff was about 400; that number expanded, however, reaching 165,000, mostly temporary staff, on election day.<sup>74</sup> After 2009, the IEC fired roughly 6,000 staff implicated in fraud and introduced a new recruitment system.<sup>75</sup> But the country's chief electoral body continues to suffer charges of partisanship: commissioners are appointed by the president alone, and parliament has no legal avenues to influence that process.

The battle over IEC appointments is likely to come into sharper focus in the months leading up to April 2013, when Chairman Manawi's term expires. Karzai has not disclosed publicly whether he plans to reappoint him for another three years. However, the resignation in July 2012 of the IEC's chief electoral officer, Abdullah Ahmadzai, one of its most experienced staffers, has cast a long shadow over the appointment process and raised fears again that external interference in staffing issues could further imperil institutional independence.<sup>76</sup>

Several Afghan news outlets and long-time political observers predicted imminent changes in the IEC's leadership.<sup>77</sup> Manawi, formerly a Supreme Court deputy justice, has frequently been discussed for one of the two vacancies on that court or as a potential attorney general. The president's chief of staff, Abdul Karim Khurram, has been considered a potential replacement for Manawi. A member of Hizb-e Islami Afghanistan, the unarmed wing of Gulbuddin Hekmatyar's pro-Islamist faction, he generates much controversy for reportedly pro-Pakistani, anti-U.S. views.<sup>78</sup> His nomination would undoubtedly provoke rancour both inside the deeply divided presidential palace and outside, particularly among non-Pashtun opposition leaders allied with the National Coalition of Afghanistan and the National Front. In late September, it appeared Karzai was reconsidering, after coming under considerable international pressure. The president should consult broadly to prevent the appointment process from bogging down in factional politics.

Similar considerations apply to the appointment process for the ECC, but there the situation is in some ways even more perilous, since the complaints body remains only a temporary institution. Under the draft electoral law, it would continue to be dissolved within 30 days of the certification of election results. This could result in a repeat in 2014 of the disastrous handling of complaints witnessed in 2009 and 2010. To ensure institutional integrity and encourage the government's capacity to manage the electoral complaints process, it needs to be made permanent.

That would require a separate law outlining its mandate, structure and administrative procedures, as some civil society groups have already suggested.<sup>79</sup> A modicum of compromise over membership would be required both in parliament and between the lower house and the executive. As noted, above, the ECC board now is to contain three Afghans and two international experts. It is highly probable that in the current environment appointment of international experts would meet with even more virulent resistance than before. Any move to give the ECC permanent status thus would inevitably result in its "Afghanisation". However, it is likely that international advisers would still be needed to assist with more technical aspects of the work.

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<sup>73</sup> Noah Coburn, "Political Economy in the Wolesi Jirga: Sources of Finance and their Impact on Representation in Afghanistan's Parliament", AREU, May 2011.

<sup>74</sup> Crisis Group Asia Report N°171, *Afghanistan's Election Challenges*, 24 June 2009.

<sup>75</sup> In September 2012, IEC officials told Crisis Group that the commission's permanent staff stood at 400 but that no decision had been made yet as to how many additional staff will need to be hired before polling day in 2014.

<sup>76</sup> Zarghona Salehi, "Chief electoral officer resigns", Pajhwok Afghan News Service, 9 July 2012.

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<sup>77</sup> "Karzai dismisses Afghan intelligence chief", Tolo News, 29 August 2012.

<sup>78</sup> See Rod Norland and Graham Bowley, "Karzai aide says U.S. isn't providing enough details about Taliban talks", *The New York Times*, 10 January 2012; Qais Azimi and Mujib Mashal, "Karzai's team clash over relations with US", Al Jazeera, 21 March 2012.

<sup>79</sup> "FEFA's proposal on the Electoral Complaints Commission as a Permanent Institution in the Country's Electoral System", FEFA, August 2012.

If any progress is to be made, it must be understood that wrangling over appointments, hiring and training of new staff and purchase of equipment and materials at the start of each electoral cycle is cost-prohibitive. Given the financial constraints donors now face in allocating assistance, converting the ECC into a permanent body makes fiscal as well as political sense. The international community should set accomplishment of this by spring 2013 as a leading benchmark for the release of further elections aid.

### 3. ICSIC and Supreme Court

The 2009 presidential and 2010 parliamentary elections sorely tested the unsteady balance between the three branches of government. In both cases, constitutional ambiguities relating to the parameters of judicial review and competing interpretations of the Supreme Court's mandate seriously complicated the resolution of disputes. The controversy surrounding the establishment of the Special Tribunal on Elections after the 2010 polls all but destroyed the credibility of the Supreme Court and exposed glaring defects in the legislative framework governing the Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC). Unless the laws governing both bodies are modified and incorporated into the constitution through an amendment process, their institutional rivalries will probably bedevil the political system for years to come.

The rivalry between the Supreme Court and the ICSIC dates back to 2003, when splits emerged in the Constitutional Drafting Commission over the establishment of a high court empowered to interpret the constitution.<sup>80</sup> There has been much wrangling since the 2004 constitution was adopted over the meaning of articles that appear to give judicial review powers to both bodies. The debate has focused primarily around two articles of the constitution. Article 121 states that "the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law". Article 157 merely establishes the ICSIC as a constitutional body and describes appointment procedures for commissioners.<sup>81</sup>

Neither expressly empowers one institution or the other to rule on whether actions by a branch of government violate the constitution. The constitution's silence on that crucial element of judicial review has left both institutions vulnerable to interference by the president and parliament and has greatly distorted the balance of power. In the absence

of a clear mandate for the Supreme Court or the commission to independently conduct comprehensive judicial review, few avenues have been available for individual citizens or entities to challenge government actions or legislation. During the first four years following adoption of the constitution, the Supreme Court attempted to fill the vacuum by issuing several advisory opinions.<sup>82</sup> These appeared for a time to establish it as the preeminent arbiter of the law. However, legislation in 2008 that established the structure, authority and responsibilities of the ICSIC and the appointment of five of seven commissioners in 2010 have challenged that authority.

The judicial review mandate of the ICSIC, nonetheless, is far from firm or uncontested. Since only five of the commission's seven seats have been filled, a question remains as to whether it is in fact legally constituted. The imposition of four-year terms and dubious procedures included in the 2008 legislation for the dismissal of members raise serious concerns about its independence.<sup>83</sup> Moreover, despite claims to the contrary by members of parliament who have championed the ICSIC as the constitutional arbiter, it has done little to distinguish itself from the Supreme Court as a constitutional guardian. Only two of its advisory opinions – one pertaining to the U.S.-run prison at Bagram and a short statement condemning the burning of copies of the Quran at the prison – have been published, a far from impressive record.

The tug of war between the two institutions has spread to the appointment process for the Supreme Court, where five of the nine seats on the bench will need to be filled by August 2013.<sup>84</sup> The four-year terms of acting Chief Justice Abdul Salaam Azimi, Justice Zamin Ali Behsudi and Jus-

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<sup>80</sup> Crisis Group interview, Sarwar Danesh, former justice minister and member of the constitutional commission, Kabul, 24 April 2012.

<sup>81</sup> The president is empowered to appoint members to the ICSIC with parliamentary approval.

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<sup>82</sup> See Crisis Group Asia Report N°195, *Reforming Afghanistan's Broken Judiciary*, 17 November 2010. For comprehensive analysis of the divide over constitutional interpretation see: Scott Worden and Sylvia Q. Sinha, "Constitutional Interpretation and the Continuing Crisis in Afghanistan", United States Institute for Peace (USIP), 7 November 2011; and J. Alexander Thier and John Dempsey, "Resolving the Crisis over Constitutional Interpretation in Afghanistan", USIP, March 2009.

<sup>83</sup> Articles 4-7 (Chapter 4) of the Law on the Independent Commission for the Supervision of the Implementation of the Constitution outline terms and procedures for appointments, membership and dismissal of commission members.

<sup>84</sup> President Karzai appointed nine new members to multi-year terms on the Supreme Court High Council after the resignation of Chief Justice Fazl Hadi Shinwari in 2006. Per the constitution, three judges are appointed for ten years, three judges are appointed for seven years and three are appointed for four years. The following is a breakdown of each judge's term: Bahaudin Baha, Mohammad Alim Nasimi and Abdul Rasheed Rashid, August 2006-July 2016; Ghulam Nabi Nawayee, Mohammad Omar Babrakzai and Abdul Aziz Aziz, August 2006-July 2013; Abdul Salaam Azimi, Zamin Ali Behsudi and Mohammad Qasim Dost, May 2006-April 2010.

tice Mohammad Qasim Dost all expired in July 2010. The president extended their three terms through a legally dubious decree and only initiated a nominating process for their replacements in May 2012. The seat of only one of the three judges with expired terms has now been filled, which means that two judges whose terms have already expired must still be replaced, in addition to the three whose terms expire in 2013.

With the Supreme Court's reputation already sullied by its performance during the 2010 elections, further uncertainty around the justices' terms will only exacerbate tensions should it have to rule on issues pertaining to the 2014 election. Appointing new judges to the Supreme Court and two commissioners to the ICSIC by early 2013 would be an important first step toward resolving this problem. In the end, however, the growing institutional rivalry between the high court and the commission can no more be resolved by presidential decree than it can by a simple parliamentary vote. In addition to electoral reforms, constitutional change will ultimately be necessary to restore the independence of the Supreme Court and to establish clear lines of authority between it and the ICSIC.

While the mere suggestion of constitutional change has bred fears of a reversal in political gains made by women and minorities, there is strong agreement among members of the opposition – armed and unarmed – that the 2004 constitution does not adequately address current needs. When a constitution is too inflexible, government easily falls victim to dysfunction, which can result in state collapse. None of Afghanistan's attempts to form a foundational law have proved strong enough to accommodate insurgent demands while protecting the rights of minorities and women and assuring a means for all citizens to peacefully challenge abuse of state authority.

In any national context, the path to protection against state abuse is fraught, but development of a consistent approach to these problems in Afghanistan has been complicated by a legal tradition that frowns on innovation and flexibility. Neither the government nor the international community has sufficiently addressed the political tensions and uncertainty caused by the role of Islamic jurisprudence in the constitution, not to mention its potential impact on the security transition and the integrity of the Afghan state. President Karzai's government has frequently cited respect for the constitution as a paramount condition of reconciliation with the Taliban and other insurgent groups; the executive branch, however, has time and again demonstrated a belief that it is above the law, accountable only to the small circle of political elites that make up the core of Karzai's constituency.

Executive abuse of power against a backdrop of high violence and insecurity has set the stage for deep national debate over the need to strengthen the constitutional order

and reinforce rule of law. To survive, political elites will need to strike an accord that gives as much freedom to Islamist factions to operate within the political system as it does to others. Protections for minorities and women must likewise be built into the political architecture and move beyond quotas to a system that incentivises broad participation over tokenism. It is highly unlikely that the current dispensation, which privileges presidential power over the other branches, can accommodate the varied needs of Islamist factions, women and minorities. A move to a parliamentary system is required to ensure the broadest possible access to government and enfranchisement of Afghan citizens. Constitutional change is an inevitable step toward negotiating a lasting peace with all elements of the opposition. The sooner the government and its international backers acknowledge this, the closer the country will be to a path toward sustainable stability.

### III. TECHNICAL DIFFICULTIES

Multiple technical glitches marred conduct of the 2009 and 2010 polls, leading to widespread fraud. Several of these problems could have been prevented by early action on the part of the government and international community. The key technical tasks and challenges that must be addressed ahead of the 2014 and 2015 elections remain the same, including creation of a viable voter registry; a comprehensive practical evaluation of the geographic distribution of polling centres; allocation of ballot materials; ensuring security; and voter education.

The flawed voter registry has been a problem for years. Tight timelines for the first presidential election set by the 2001 Bonn Agreement left little opportunity to conduct a census or negotiate electoral districts.<sup>85</sup> An estimated 10.6 million citizens were, nonetheless, registered inside the country and another 740,000 outside it (primarily in Pakistan and Iran) before the 2004 election. In 2005, the registry was updated and another 1.7 million voter cards were distributed. Subsequent additions and updates ultimately resulted in the distribution of roughly seventeen million voter cards ahead of the 2009 polls, a figure that probably exceeds the number of eligible voters by about six million.<sup>86</sup>

Rationalising and updating the voter registry has posed considerable challenges, given the lack of systematised geographical information and standard personal identification documents, as well as longstanding disagreements over district boundaries. In 2010, the communication and information technology ministry announced a plan designed in part to address these problems with the launch of a \$100 million electronic national identification system.<sup>87</sup> It was intended to distribute fifteen million national identification cards by 2013, but progress has stalled, reportedly due to a political tussle between senior members of that ministry and the interior ministry over the lucrative contracts asso-

ciated with the project.<sup>88</sup> Several Afghan officials assert that presidential support for the program has been eroded by fears it will challenge the long-held assumption that Pashtuns are a numerical majority in the population. A senior elections official noted:

This process needs real cooperation from all sides, but it seems that someone in the palace believes that it could upset our ideas about ethnicity in the country. Maybe they believe that this exercise would change the way we understand ethnic balance, and that's why they are not so keen to pursue this process to the end. From our point of view, we don't see any technical problems with the [national ID distribution] process. It's problematic, but it's not impossible. It's just a matter of political will.<sup>89</sup>

In any case, it seems highly unlikely that the national ID process will be completed in time for the 2014 elections, leaving few options to correct the current voter list. An August 2012 feasibility study conducted by UNDP concluded that mere update efforts would essentially duplicate previous attempts, and inconsistencies with data on record would confuse matters further. It recommended that an entirely new voter registry be compiled using a phased approach in which voters would register at specified polling centres across the country over six months. In insecure and remote areas, they would be allowed to register at a polling centre one or two days before the election. Some 16,000 teams would use optical mark technology to match voter cards to the list, at an estimated cost of \$79.1 million.<sup>90</sup> Experts familiar with the proposal are optimistic about its viability but warn that procurement and logistical hurdles will increase as the campaign season approaches. The IEC will need to launch the new registration process no later than November 2012 if the effort is to succeed.<sup>91</sup>

<sup>85</sup> The last census, in 1979 under the Soviet-backed PDPA regime, was never completed. Most population statistics rely on a combination of datasets culled from, among others, this incomplete census, refugee/returnee monitoring programs and programs to track household listings undertaken from 2003 to 2005. In 2008, the government suspended plans to carry out a full census, citing security concerns.

<sup>86</sup> "Islamic Republic of Afghanistan Parliamentary Elections 18 September 2010; OSCE/ODIHR Election Support Team Report", Organisation for Security and Cooperation in Europe (OSCE), Office for Democratic Institutions and Human Rights (ODIHR), 26 November 2010, p. 12.

<sup>87</sup> Michelle Nichols, "Afghanistan plans national electronic ID", Reuters, 12 December 2010.

<sup>88</sup> Press release, communication and information technology ministry, 23 November 2010; Crisis Group interview, senior international military adviser, Kabul, 28 April 2012.

<sup>89</sup> Crisis Group interview, senior IEC official, Kabul, 25 April 2012.

<sup>90</sup> "Afghanistan Voter Registration Feasibility Study", op. cit.

<sup>91</sup> Crisis Group interviews, international election experts, Brussels, 14-17 August 2012.

#### IV. SECURITY CHALLENGES

The completion of a new voter registry exercise will, of course, depend heavily on security conditions on the ground ahead of and during the 2014 polls. Security has progressively worsened since the first elections were held in 2004, despite a massive injection of international aid and military resources. Even as NATO has invested heavily in building the ANSF in recent years, insurgents have demonstrated determination to capture the strategic narrative and expose the government's weaknesses, including by several spectacular attacks in and around the capital, Kabul, and in strategically critical cities such as Kandahar and Jalalabad.<sup>92</sup>

The situation worsened considerably in the wake of the September 2010 polls, which saw violence hit an all-time high on election day. Security further deteriorated shortly after President Karzai announced plans to begin transferring responsibility for it in several parts of the country from NATO to the government by July 2011.<sup>93</sup> The downward trend continued almost unabated through much of 2011 and early 2012. Following an unusually severe winter that saw record snowfalls and lasted well into late March 2012, civilian casualties dropped by nearly 15 per cent to 1,154 killed and 1,954 injured in the first half of the year. This trend saw a marked reverse over the summer months, with UNAMA noting that August 2012 was the second deadliest month on record: 374 civilians killed and 581 injured.<sup>94</sup>

Statistics demonstrate a notable increase overall in targeted killings of civilians and government officials, from 94 during January-June 2009 to 255 for the same six-month period in 2012.<sup>95</sup> More than a dozen members of parliament have been killed since the first elections in 2005, and eleven candidates were killed during the 2010 campaign.<sup>96</sup> Scores of mid-level government officials have recently been assassinated, as insurgents have ramped up such opera-

tions.<sup>97</sup> Likewise, Afghans who work for non-governmental organisations and development agencies are regularly targeted, and intimidation campaigns frequently force them to live outside their home villages. The Taliban's use of targeted killings and threats has been especially effective most recently in the north-eastern provinces of Nuristan and Kunar, where cross-border shelling between Pakistan and Afghanistan has additionally plagued an already exposed population.<sup>98</sup> As the 2014 campaign approaches and political competition heats up, targeted killings are likely to increase, a phenomenon witnessed repeatedly since 2003.<sup>99</sup>

It has become increasingly clear that ISAF is unable to dislodge the Taliban from its strongholds in the south and east. A widening trust deficit between NATO and Afghan forces has also put ISAF further on the defensive. The Taliban, the Haqqani network and other affiliated insurgent actors have exploited these weaknesses by sending fighters into particularly vulnerable areas such as Kunar, Nuristan, Paktika, Paktia, Ghazni, Wardak and Logar.<sup>100</sup>

ISAF and Western officials have repeatedly stated that conditions on the ground will dictate the pace of NATO's withdrawal, emphasising that Afghan forces will reach their peak of 352,000 as the international drawdown accelerates in late 2012. Planning for the massive logistical challenge of withdrawing more than 100,000 troops is well underway, however, and the exercise is likely to absorb a considerable portion of deployed international military resources. By September, U.S. troops in country were down from about 100,000 to 68,000, returning their strength to the pre-2009 surge level. Already by April, security in 138 districts across twenty provinces and with half the country's population had been placed under the control of Afghan forces. ISAF commander General John Allen has said that he will require "significant combat power in 2013", but few additional specifics on the pace of the U.S. drawdown have been offered.<sup>101</sup>

A little more than 39,000 troops from 50 other NATO troop-contributing nations were operating in summer 2012, but reductions in these non-U.S. NATO forces have

<sup>92</sup> See Crisis Group Asia Reports N°158, *Taliban Propaganda: Winning the War of Words?*, 24 July 2008; and N°207, *The Insurgency in Afghanistan's Heartland*, 27 June 2011.

<sup>93</sup> Ernesto Londono, "Karzai: Afghan troops to assume more control over security", *The Washington Post*, 22 March 2011.

<sup>94</sup> "Briefing to the Security Council", Jan Kubis, Special Representative of the UN Secretary-General for Afghanistan, 20 September 2012.

<sup>95</sup> "Afghanistan: Mid-Year Report 2012, Protection of Civilians in Armed Conflict", UNAMA, July 2012.

<sup>96</sup> Members killed since the first parliamentary polls in 2005 include: Esmatullah Mohabat (Laghman); Mohammad Islam Mohammadi (Samangan); Sayed Mustafa Kazimi (Parwan); Sahib Rahman Hemat (Kunar); Sebghatullah Zaki (Takhar); Engineer Abdul Mateen (Helmand); Mohammad Arif Zarif (Kabul); Nauk Mir Sarfraz (Kunduz); Fazl Rahman Chamkanai (Paktia); Haji Habibullah (Kandahar); Din Mohammad Khan (Helmand); Mohammad Hashim Watanwal (Uruzgan); Abdul Motalib Beg (Takhar); and Ahmed Khan Samangani (Samangan).

<sup>97</sup> Laura King and Hashmat Baktash, "Afghan district governor killed amidst wave of assassinations", *The Los Angeles Times*, 12 August 2012.

<sup>98</sup> For more detailed analysis, see Gilles Dorronsoro, "Afghanistan: The Impossible Transition", Carnegie Endowment for International Peace, June 2011.

<sup>99</sup> "Afghanistan Voter Registration Feasibility Study", op. cit., p. 28.

<sup>100</sup> Dorronsoro, op. cit., pp. 13-16.

<sup>101</sup> "Report on Progress Toward Security and Stability in Afghanistan: United States Plan for Sustaining the Afghanistan National Security Forces", U.S. Department of Defense, April 2012, p. 59. Allen testimony, U.S. Senate Armed Services Committee, 12 March 2012.

also already begun. Canada ended its combat mission in 2011, and France's estimated 3,200 will probably have left by the end of 2012. By the end of 2012, 500 of 9,000 UK troops are expected to exit, and London has indicated it is considering accelerating withdrawals. In April 2012, Prime Minister Julia Gillard announced that Australia planned to withdraw its 1,550 by the end of 2013. Although many individual NATO missions have emphasised the intention to maintain a phased withdrawal through the end of 2014, significant troop reductions starting in 2013 are also anticipated from Germany, Spain, Italy and several other contributing nations.<sup>102</sup>

Although the ANSF continues to make progress in meeting growth benchmarks, there are serious concerns about operational capabilities. Attrition rates have remained consistently high, and the NATO Training Mission-Afghanistan (NTM-A) has been unable to increase recruitment among Pashtuns in the south. Literacy levels among Afghan soldiers and police are exceptionally low, despite encouraging NTM-A efforts to provide literacy training for roughly 198,000 soldiers and police. Afghan forces still lag behind, meanwhile, in critical areas such as logistics, supply and air power. All these factors will impact the success of a transition strategy that calls for their reduction from the 352,000 anticipated in October 2012 to 228,500 by 2017.<sup>103</sup>

Little thought, meanwhile, appears to have been given to the economic implications of ISAF proposals to close hundreds of military installations. With a proposed rate of twenty base closures per month, including those of Provincial Reconstruction Teams (PRT), the impact on local economies will be tremendous and could lead to rapid deterioration of security.<sup>104</sup> Factional competition over dwindling resources across the security services could sharply undermine unit cohesion and impede operational capacity. Analyses of the defence and interior ministries indicate that neither meets the standard of independence or competence in any category and that in several key areas they have not progressed at all. Low operational capacity has been a perennial problem and is not likely to substantially im-

prove in the near term. Only 7 per cent of army (ANA) and 9 per cent of national police (ANP) units are considered capable of independent action even with advisers.<sup>105</sup>

The majority of officials in the upper echelons of the two ministries are at retirement age or older and have retained their posts through well-established patronage networks that have hindered leadership development in the ministries as in the officer corps. This in turn impacts rank-and-file morale, particularly among non-commissioned officers (NCOs), who often must bear the brunt of poor senior leadership while managing resentments and rivalries among those under their command. As a veteran Afghan security official recently put it:

Today in Afghanistan you do not have a national army. You do not have a national police. A factionalised government can only create a factionalised army and police. It is not a question of ethnic balance; it is a question of factional balance. People in the army and police are fighting for their factions, not the country.<sup>106</sup>

It is difficult to overestimate the corrosive effect of factionalism in the ANSF officer corps and the risks it poses to continued NATO support for a long-term training and advisory mission. Pervasive fears of Taliban infiltration of Afghan forces may be well founded, but analysis suggests that lack of cohesion between officers and rank and file in both police and army has expanded opportunities for infiltration, as well as increased internal friction between rival factions in the armed forces. The killings of NATO officers in Kabul at the interior ministry and in Kandahar in February 2012 and the sharp rise of "green-on-blue" attacks that followed are strong examples of the widening trust deficit between the heavily factionalised ANSF and the Balkanised ISAF command.<sup>107</sup> Such insider attacks account for 13 per cent of ISAF deaths in 2012. The astounding increase in such attacks and fears over weakness in vetting procedures led the U.S. to temporarily halt recruitment for the controversial local police program in September. In August 2012 alone, fifteen of 53 ISAF soldiers killed (28 per cent) were victims of fratricidal attacks.<sup>108</sup>

<sup>102</sup> Louisa Brooke-Holland and Claire Taylor, "Afghanistan: The Timetable for Security Transition", International Affairs and Defence Section, UK House of Commons, 9 July 2012. Nick Hopkins, "Military plans possible early Afghan withdrawal", *The Guardian*, 14 September 2012. Matt Siegel, "Australia to withdraw from Afghanistan earlier than planned", *The New York Times*, 17 April 2012. Graham Bowley, "U.S. begins packing its Afghan war gear for the movers", *The New York Times*, 3 August 2012.

<sup>103</sup> "Report on Progress Toward Security and Stability in Afghanistan", op. cit., p. 18. Louisa Brooke-Holland and Claire Taylor, "Afghanistan: The Timetable for Security Transition", op. cit.

<sup>104</sup> Crisis Group interview, Western political adviser, Kabul, 3 May 2012.

<sup>105</sup> "Report on Progress Toward Security and Stability in Afghanistan", op. cit., figures 15, 17, 19.

<sup>106</sup> Crisis Group interview, former Afghan security official, Kabul, 28 April 2012.

<sup>107</sup> Graham Bowley and Alissa J. Rubin, "2 U.S. officers slain; advisers to exit Kabul ministries", *The New York Times*, 25 February 2012. "Green-on-blue" is NATO terminology for attacks by Afghan security personnel on ISAF personnel.

<sup>108</sup> Graham Bowley and Richard A. O'Connell Jr., "U.S. halts training for some Afghan recruits", *The New York Times*, 2 September 2012. Anthony H. Cordesman, "Afghanistan: Green on Blue attacks are only part of the problem", Center for Strategic and International Studies, 4 September 2012.

Although the early years of the NATO training mission witnessed a number of green-on-blue incidents, they were little noticed at the time. The numbers have increased, and reports suggest that ISAF officials have sought to suppress details about some.<sup>109</sup> The attempt to spin these attacks as isolated occurrences appears to have blinded ISAF leadership to the risks they might pose to overall perceptions of the mission. Insurgent infiltration only partially explains the recent wave. Attacks on NATO advisers are as much a product of frustration between Afghan soldiers and police and their NATO handlers and of tensions between Afghan security leaders at the regional command level and in Kabul over access to resources and political power.<sup>110</sup> The sooner ISAF leadership acknowledges that obvious fact publicly, the quicker it may find a workable solution to the problem. Otherwise, ISAF may be forced to continue to respond to insider attacks by imposing ad hoc restrictions on the training and partnering mission, as it did in September, to the peril of the overall mission.<sup>111</sup>

These trends have unfolded against a backdrop of deep political uncertainty in the wake of Karzai's move to reshuffle his cabinet after the parliament forced out several veteran security sector heavyweights. A major shake-up in the security ministries and provincial governorships in August and September 2012 signalled that the president is preparing to become the main kingmaker in 2014.<sup>112</sup> The long-time defence minister, Rahim Wardak, the interior minister, Bismillah Khan Mohammadi, and the National Directorate of Security (NDS) chief, Rahmatullah Nabil, resigned, the first two after parliament voted overwhelmingly for their removal in the wake of skirmishes between Afghan and Pakistani forces near the eastern border. Nabil followed, after the president announced he would be taking up an ambassadorship in an as yet unnamed country. Given Wardak's advanced age and poor health and the mixed reviews on his performance as minister, his removal surprised few.<sup>113</sup> Mohammadi's ouster, however, was met with ambivalence that soon gave way to confusion after Karzai nominated him to replace Wardak at defence.

After a few tense weeks of behind-the-scenes horse-trading, parliament approved Mohammadi in his new post in September and backed the Karzai family's long-time associate,

Asadullah Khaled, to replace Nabil at NDS.<sup>114</sup> A Pashtun from Ghazni who served briefly as chief of the provincial directorate of NDS, later as governor of Ghazni and Kandahar and most recently as tribal and border affairs ministers, he has been criticised by human rights groups after investigations by the Canadian government alleged that he may have promoted the use of torture in government interrogations of suspected insurgents while he was in Kandahar. Khaled has publicly refuted these allegations, and he has been vigorously defended by a number of prominent government officials.<sup>115</sup> His appointment to lead the top intelligence agency sends a strong signal that Karzai is increasingly concerned about consolidating security control at the local level in pivotal provinces such as Ghazni and Kandahar, where every ballot counted will undoubtedly be significant for the outcome of the elections.

As political competition heats up in the approach to the elections, there is a genuine risk that internecine competition between leaders of factions within the ANSF could lead not only to more green-on-blue incidents, but also to an increase in already high attrition rates and, in the worst case, disintegration of command and control soon after U.S. and NATO forces withdraw. Such scenarios do not bode well for long-term ANSF sustainability. In the short-term, ISAF will need to remain on alert to the vulnerabilities created by fragmentation within security institutions. In the longer term, the Afghan government and international forces will need to reassess the type of security assistance given to the Afghan forces and may need to halt altogether programs such as the Afghan Local Police, which are particularly prone to insurgent infiltration.

Assurances from NATO and U.S. military commanders aside, there can be little doubt that levels of insecurity are likely to remain high, if not increase, ahead of the 2014 presidential election.<sup>116</sup> With the majority of Afghan security forces unable to meet even the most basic operational benchmarks, particularly in the crucial areas of supply, logistics and air support, it seems highly improbable that they will be able to fill the gaps left by departing international forces by the time the campaign gets underway in earnest in late 2013.<sup>117</sup> Simply put, security conditions will likely be far from ideal for the 2014 elections.

<sup>109</sup> "U.S. keeps mum on some Afghan attacks", Associated Press, 1 May 2012.

<sup>110</sup> Crisis Group interviews, senior Afghan security officials, senior ISAF advisers, Kabul, March-April 2012.

<sup>111</sup> "ISAF clarifies information on partnering with ANSF", ISAF press release, 18 September 2012.

<sup>112</sup> Javed Hamim Kakar, "Some governors reshuffled, others sacked", Pajhwok Afghan News Service, 19 September 2012.

<sup>113</sup> Alissa J. Rubin, "Afghan defense minister announces resignation", *The New York Times*, 7 August 2012.

<sup>114</sup> Emal Haidary, "Afghan parliament approves top security officials", Agence France-Presse, 15 September 2012.

<sup>115</sup> Richard A. Opiel Jr. and Graham Bowley, "Karzai is said to consider divisive figures for top posts", *The New York Times*, 29 August 2012.

<sup>116</sup> The planned transfer of hundreds of thousands of shipping containers and tens of thousands of military vehicles across the northern and eastern portions of the country alone will undoubtedly have a significant impact on overall security.

<sup>117</sup> "Report on Progress Toward Security and Stability in Afghanistan", op. cit., pp. 13-48.

It is encouraging that ISAF plans to establish a task force to look at security-related contingencies for the presidential and provincial council polls.<sup>118</sup> Particular attention will need to be paid to the impact of election preparations on the demand for more air resources at what is likely to be a highly volatile and kinetic period of the transition process. The greater the number of clashes between Afghan forces and insurgents, the higher the risk of increased casualties among government forces. Afghan military officials have frequently complained about the adverse impact of insufficient air medevac services and their heavy reliance on ISAF for air support.<sup>119</sup> International military officials on the ground must be wary, however, of allowing the planning exercise to become overly politicised and should resist the temptation to bow to any pressure from Washington and other capitals to make promises that ISAF and Afghan forces cannot keep. Close coordination and open channels of communication between the IEC, ISAF and the defence and interior ministries will be vital in that regard.

Violence has remained consistently high in the south and east, and election security has historically proven a challenge in volatile provinces such as Kandahar, Helmand, Paktika, Paktia, Ghazni and Uruzgan. In the fall of 2010, the IEC closed about 23 per cent of the nearly 20,000 polling stations planned for election day due to insecurity.<sup>120</sup> The commission could well conclude in 2014 that the presidential election can only be held in certain parts of the country, or at the least that significant centre closures are necessary, thus again preventing thousands of citizens in the south and the east from voting.<sup>121</sup> Such an outcome would undoubtedly spark accusations of fraud and charges that election results were skewed, likely precipitating a prolonged crisis over the transfer of power from President Karzai to his successor.

International military officials can ill-afford to make promises they cannot keep at this most delicate time in the mission. ISAF and Afghan security officials would do well to begin planning now for the possibility that elections may only be held in limited areas of the country, if at all. Planning should also begin for the possibility that a run-off will be required between the two candidates receiving the most votes; it is highly improbable that a second round could take place under tight security conditions in the two-week

timetable prescribed by the constitution.<sup>122</sup> This raises the possibility that there could be a need for an interim governmental arrangement while the run-off is organised. At the very least, international and Afghan security officials should begin discussions now about these contingencies and map out potential scenarios and responses to a prolonged period without a presidential election or in which no clear winner emerges from a first round and a run-off is required or a state of emergency is imposed. In such circumstances, failure to have planned for the worst could hasten the Afghan government's implosion.

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<sup>118</sup> "Afghanistan Voter Registration Feasibility Study", *op. cit.*, p. 28.

<sup>119</sup> Crisis Group interviews, senior Afghan defence ministry officials, Kabul, 26 September 2012.

<sup>120</sup> "Afghanistan Elections Update", National Democratic Institute, 30 October 2010.

<sup>121</sup> Crisis Group interviews, international election experts, Brussels, 14-17 August 2012.

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<sup>122</sup> Article 61 of the constitution states that "[i]f in the first round none of the candidates gets more than fifty percent of the votes, elections for the second round shall be held within two weeks from the date election results are proclaimed, and, in this round, only two candidates who have received the highest number of votes in the first round shall participate".



## **V. CONCLUSION**

Afghanistan's political leaders have a maximum of eighteen months to prepare for an election and ensure a smooth transfer of presidential power. Many key tasks must be finished much earlier, particularly regarding electoral oversight. Resolving both the long crisis over electoral administration and related constitutional disputes could well be the key to determining whether the current political system will survive the 2014 NATO drawdown. Failure in either would be a crippling blow to chances to generate popular trust in a regime already regarded as highly corrupt. The international community must realise this is its last best chance to leave a viable state in Afghanistan and mobilise accordingly.

The Afghan government has no alternative: it must move fast to ensure that electoral laws are passed in a timely manner; defects in the constitutional order are addressed; and rule of law is reinforced as the transition unfolds. All stakeholders must understand that rule of law is the most essential ingredient in the recipe for stability. The divide over the timing and administration of the elections and over the authority of rival judicial institutions to intervene in electoral disputes threatens to unravel the system entirely. Failure to set a timetable for elections by December 2012 would exacerbate tensions and increase the likelihood of massive fraud at the polls in 2014.

It is not likely that many in the political elite view the problem in this light. The danger is that President Karzai's top priority is maintaining control, either directly or through a trusted proxy. He and other leading members of the elite may be able to cobble together a broad temporary alliance, but political competition is likely to turn violent on the heels of NATO's withdrawal. There is a genuine risk that security and political developments within the next year could induce the president to invoke a state of emergency. Such a move would not only imperil the state itself but would also undoubtedly encourage the international community's financial and political as well as further military disengagement. This would accelerate state collapse and likely precipitate the next civil war in the country. If that occurs, there would be few opportunities to reverse course in the near term. Securing the peace in Afghanistan would then remain at best a very distant hope.

**Kabul/Brussels, 8 October 2012**

## APPENDIX A

### MAP OF AFGHANISTAN



## **APPENDIX B**

### **GLOSSARY**

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AIHRC	Afghanistan Independent Human Rights Commission
ANA	Afghan National Army
ANP	Afghan National Police
ANSF	Afghan National Security Forces
ECC	Electoral Complaints Commission
HOO	High Office of Oversight
ICSIC	Independent Commission for the Supervision of the Implementation of the Constitution
IEC	Independent Election Commission
ISAF	International Security Assistance Force
LV-PR	Limited Vote-Proportional Representation electoral system
NTM-A	NATO Training Mission-Afghanistan
SNTV	Single Non-Transferable Vote electoral system
UNAMA	United Nations Assistance Mission to Afghanistan