

## Afghanistan's Elections Stalemate

### I. OVERVIEW

The prolonged crisis over Afghanistan's parliamentary elections has further undermined President Hamid Karzai's credibility. He is now even more isolated politically than he was after his dubious re-election in 2009. The Wolesi Jirga was inaugurated on 26 January 2011, following a lengthy standoff that exposed sharp political fault lines, which could plunge the country deeper into not just political but armed conflict. Clashes between the executive, legislature and judiciary over the results of the polls are paralysing government and weakening already fragile institutions. Constitutional review is long overdue, and failure to implement changes that reinforce the separation of powers will only further weaken the state's ability to provide security or good governance. If public confidence is to be restored, the president and Supreme Court must disband a special tribunal that was created to adjudicate elections complaints but lacks a clear legal mandate. The new parliament must also immediately place electoral and constitutional reform at the top of its agenda. If left unaddressed, the current political crisis will stoke ethnic tensions and could drive disenfranchised Afghans into the arms of the Taliban.

By the time Karzai returned to office on 19 November 2009, the destabilising effect of the flaws in the electoral system was readily apparent. Nonetheless, in the haste to push ahead with an ill-conceived agenda of putting an "Afghan face" on the transition process, international stakeholders, in particular the leadership of the International Security Assistance Force (ISAF), allowed Karzai to hijack the debate inside and outside parliament over electoral reform and to manipulate the political process. By insisting that the 18 September 2010 Wolesi Jirga (the lower house of the National Assembly) elections go forward, they backed Karzai's ill-considered wager that an irrational system could somehow produce rational results.

The president's 18 February 2010 decree on the electoral law was one of many unheeded signs that the parliamentary polls would likely end in disaster if not postponed. The decree sharply limited the authority of the Electoral Complaints Commission (ECC), increased ambiguity over the role of the Independent Election Commission (IEC) and created confusion over candidates' right of appeal in the event of disqualification. In a rare show of unity,

the Wolesi Jirga rejected the decree on 31 March. Karzai, however, bypassed the lower house, ensuring that the Meshrano Jirga (the upper house) essentially endorse the decree by voting to take no action on the issue on 3 April. Meanwhile, vetting processes designed to keep known criminals and members of armed groups off the ballot broke down, raising the risk of candidate rivalries turning violent. The Wolesi Jirga elections were thus held against a backdrop of heightened political tensions and deteriorating security.

Absent electoral reform, the result was unsurprisingly a repeat of previous election debacles. As in the August 2009 presidential and provincial council polls, violence and insecurity created tremendous obstacles for both candidates and voters. Election day violence hit record highs, leaving at least 24 dead. Insecurity left wide swathes of the population unable or unwilling to vote, particularly in regions where the insurgency has spiked, with many disenfranchised after the last minute closure of hundreds of polling stations. Systemic fraud, including intimidation and ballot stuffing, was witnessed countrywide, resulting in the IEC ultimately throwing out 1.3 million ballots, an estimated quarter of total votes cast. The ECC subsequently disqualified 21 winning candidates for electoral fraud, prompting losing candidates – many from Karzai's Pashtun political base – to hold street protests and to press their case through back channels at the presidential palace.

Karzai's politically calculated capitulation to the demands of losing candidates prompted a criminal inquiry into the conduct of the polls. Days after the preliminary results were announced on 20 October, the attorney general filed a broad indictment against more than a dozen senior elections officials and also against dozens of parliamentary candidates, after receiving information from the ECC about suspected fraud involving hundreds of candidates. The Supreme Court appointed a special tribunal on elections in late December. Tasked with investigating electoral fraud and corruption, the tribunal claimed it was empowered to annul the elections. The newly established Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC), reportedly in correspondence with the president, rejected this presumption but never publicly announced its position. With the commission's role as an arbiter of constitutional disputes still unclear, the president was free to seek other, more favourable interpretations of the special tribunal's authority.

On 19 January 2011, at the tribunal's request, Karzai announced that he would delay parliament's inauguration by a little more than a month. The tribunal said it needed time to adjudicate electoral fraud complaints. Angered by the delay, more than 200 newly elected parliamentarians announced the next day that they would defy the president's order and inaugurate parliament with or without him. Ultimately caving to strong international pressure, Karzai inaugurated the parliament on 26 January, but continues to abuse his authority by retaining the special tribunal. Although the tribunal has initiated recounts in several provinces, IEC officials announced on 21 February that they would not cooperate with the process. The dispute between the executive and the electoral institutions runs the risk of escalating violence at the local level at a time when ethnic tensions have never been higher.

The outlook for resolving the crisis, absent meaningful electoral and constitutional reform, does not look promising. It is unlikely that Karzai's opposition will accept the special tribunal's judgments. Nor will the dubiously elected parliament be viewed as legitimate. Karzai could be tempted to use the tribunal against his opponents, in a bid to bend the National Assembly to his will. As this briefing was published, fourteen election officials had been indicted along with dozens of sitting members of parliament. With the lower house also deeply divided over the selection of the speaker, Afghanistan's government is in a state of near paralysis. The Wolesi Jirga's call, in a resolution passed on 12 February, for the president and Supreme Court to dissolve the special tribunal, has increased the risk of an escalated clash between the three branches of government.

The international community and Afghan leaders must recognise the gravity of the current impasse. Karzai must heed parliament's call to disband the special tribunal. The Afghan government as a whole must move swiftly to mend fragile institutions, to initiate substantial electoral reform and to adopt constitutional amendments to strengthen the checks and balances between the executive, legislature and judiciary. Provincial and district-level government institutions must be empowered to deliver services to the Afghan people. The president and parliament, with the support of the international community, should:

- ❑ dissolve the special elections tribunal immediately and refer election-related criminal charges to the primary courts in the original jurisdictions in which they were allegedly committed;
- ❑ convene a *loya jirga* for constitutional reform that reinforces the separation of powers by enhancing the independence of the judiciary and legislature; reducing the executive's ability to resort to rule by decree; and strengthening provincial and district level governance through greater devolution of administrative and political authority;

- ❑ pass legislation clarifying the role of the Independent Commission for the Supervision of the Implementation of the Constitution and fully defining its competence and authority in relation to the Supreme Court; and
- ❑ repeal the 18 February 2010 presidential decree on the electoral law and enact wide-reaching electoral reforms to broaden political participation, including by rationalising the elections calendar; removing barriers to political party participation; reducing opportunities for fraud by implementing district delimitation and cleaning up the voter registry; clarifying the authorities of the electoral commissions; and standing up a permanent electoral complaints commission.

## II. SYSTEMIC FAILURES

The acrimonious 20 August 2009 presidential and provincial council elections clouded plans for the 18 September 2010 parliamentary elections. The polls highlighted numerous systemic deficiencies and underscored the weakness of the state institutions that were to ensure fairness and transparency.<sup>1</sup>

After nearly two years of debate, parliamentarians voted into office in 2005 were unable to compromise on crucial revisions to the body of laws governing the conduct of the polls.<sup>2</sup> The international community repeatedly failed, meanwhile, to use its financial leverage to push for meaningful reform, in particular to replace the unwieldy Single Non-Transferable Vote (SNTV) system with a more appropriate party-based electoral system. Without a robust voter registry, the potential for fraud increased. As Afghanistan entered its second cycle of national elections since the fall of the Taliban, the president, the parliament and the international community – the U.S. and the UN in particular – had done little to advance electoral reform. By nearly every measure, the 2009 polls were deeply flawed. The vote was marred by widespread fraud, low turnout and violence, the incompetence of presidentially-appointed

<sup>1</sup> For analysis of the August 2009 elections see Crisis Group Asia Briefing N°96, *Afghanistan: Elections and the Crisis of Governance*, 25 November 2009; and Crisis Group Asia Report N°171, *Afghanistan's Election Challenges*, 24 June 2009. For Crisis Group analysis of the systemic flaws of Afghanistan's electoral system and institutions, see also Asia Reports N°101 *Afghanistan Elections: Endgame or New Beginning?*, 21 July 2005; and Asia Briefing N°31, *Elections and Security in Afghanistan*, 30 March 2004.

<sup>2</sup> Three laws govern administration and conduct of the polls: the 2005 Electoral Law, the 2004 Political Parties Law and the 2003 Law on Assemblies, Strikes and Demonstrations.

IEC officials and the blatant abuse of power.<sup>3</sup> Political infighting over elections issues further compounded problems.

Although Karzai prevailed over his electoral adversaries, because that victory was the result of a fraudulent election, the legitimacy of his presidency was deeply eroded. After nearly a decade in the highest office, Karzai had achieved little in terms of governance or security. On the contrary, the insurgency had spiked, with civilian casualties increasing by 14 per cent by the end of 2009, with 2,412 deaths recorded between 1 January 2009 and 31 December 2009.<sup>4</sup> U.S. President Barack Obama's 1 December 2009 announcement of plans to start withdrawing American combat troops by mid-2011 also heightened concerns within Afghanistan that the foreign forces intended to quit and run.<sup>5</sup> While many international stakeholders were increasingly frustrated with the slow progress, the Afghan parliament too was in no mood to give the president quarter as he entered his second five-year term.

## A. RELATIONS RUPTURE

Karzai at the beginning of his second elected term faced a critical test of his willingness to end his dependence on warlords for political support and the misuse of his presidential authority against other state institutions – a test he ultimately failed. On the contrary, the president's reliance on warlords and ethnic powerbrokers was more than evident. Only a month after vowing in his inaugural speech to install ministers with "public integrity",<sup>6</sup> Karzai sent parliament a list of cabinet nominees composed largely of warlords as well as individuals with criminal links.<sup>7</sup> After presentations by nominees and a review of their qualifications, the Wolesi Jirga rejected seventeen on Karzai's list in the first round, accepting only seven.<sup>8</sup> In a second round

of voting in January 2010, parliament rejected all but seven out of seventeen nominees. It was clear that Karzai's once confident grip on parliament had slipped.<sup>9</sup>

The deepening ethnic divide among Afghan political elites was also apparent. The number of Pashtuns nominated in the first round outnumbered other ethnicities by a substantial margin.<sup>10</sup> The increasing Pashtun tilt in key appointments reflects a four-year long trend in which Karzai has sought to shore up his traditional ethnic base with the perks of patronage even as much of the Pashtun belt sinks deeper into revolt against the Karzai government.

The president's decided bias rankled his non-Pashtun allies, including General Abdul Rashid Dostum, chief of staff to the commander in chief of the Afghan National Army (ANA)<sup>11</sup> and head of the Uzbek-dominated Junbesh-e Milli party. Dostum accused Karzai of manoeuvring for the rejection of three nominees, affiliated with his party, in the first round, claiming that this violated an agreement that the president had made ahead of the polls with Junbesh-e Milli.<sup>12</sup> Hazara leaders made similar complaints, including Mohammad Mohaqeq, who claimed that two nominees affiliated with his Hizb-e Wahdat-e Mardumi Afghanistan party were rejected on political grounds.<sup>13</sup> By the third round of voting in late June, not a single Hazara had been confirmed to the cabinet. Seven cabinet

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<sup>3</sup> The composition and the role of the IEC in administering elections are outlined in Chapter 2 of presidential decree No. 28 on the 2004 Electoral Law.

<sup>4</sup> The average number of security incidents per month was 960 in 2009, a 29.6 per cent increase over the number reported in 2008. See "Annual Report on Protection of Civilians in Armed Conflict, 2009", UNAMA Human Rights, January 2010.

<sup>5</sup> See Crisis Group Asia Briefing N°115, *Afghanistan: Exit vs Engagement*, 28 November 2010.

<sup>6</sup> Julian Glover, "Hamid Karzai inaugurated amid western hopes of end to corruption", *The Guardian*, 19 November 2010.

<sup>7</sup> Karzai only presented the full list of nominees after the lower house rejected his proposal to submit a partial list ahead of the first round of voting.

<sup>8</sup> Six of the seven ministers approved by parliament in the first round on 2 January 2010 were already sitting ministers. Those approved in the first round included: Rahim Wardak (Defence); Hanif Atmar (Interior); Hazrat Omar Zakhilwal (Finance); Asif Rahimi (Agriculture); Wahid Shahrani (Mining); Sayed Makhdum Raheen (Culture); Farouk Wardak (Education). Those rejected in the first round included: Enyatullah Baleegh (Hajj and Religious

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Affairs); Sayed Mohammad Amin Fatemi (Public Health); Anwar ul-Haq Ahadi (Economy); Amirzai Sangin (Communications); Hamid Gailani (Tribal Affairs); Obaidullah Obaid (Higher Education); Ismail Khan (Energy and Water); Wais Barmak (Rehabilitation and Rural Development); Enyatullah Nazari (Refugees); Mohammad Sarwar Danesh (Justice); Mirza Hussain Abdullahi (Public Welfare); Ghulam Mohammad Ailaqi (Commerce); Khodadad Khodadad (Counter-Narcotics); Mohammadullah Batash (Transport and Civil Aviation); Husn Banu Ghazanfar (Women's Affairs); Mohammad Ismail Munshi (Labour and Social Affairs); Mohammad Yousuf Pashtun (Urban Development).

<sup>9</sup> The following nominees were elevated to cabinet posts in the second round of voting: Zarar Ahmad Moqbel (Counter Narcotics); Abdul Hadi Arghandiwal (Economy); Zalmay Rassoul (Foreign Affairs); Habibullah Ghalib (Justice); Jarullah Mansouri (Rehabilitation and Rural Development); Amina Afzali (Labour and Social Affairs); Yousuf Niazi (Haj and Religious Affairs).

<sup>10</sup> Eleven out of 24 posts were offered to Pashtuns.

<sup>11</sup> Dostum was appointed to this largely ceremonial post in March 2008.

<sup>12</sup> Hamid Shalizi, "New cabinet snubs warlords", Reuters, 9 January 2010.

<sup>13</sup> "Statement of political committee of Hizb-e Wahdat-e Islam regarding lack of votes of confidence of parliament to candidate ministers", press statement, Hizb-e Wahdat-e Islami Afghanistan, 28 June 2010.

positions remain vacant and three Hazaras hold acting positions in the cabinet.<sup>14</sup>

The president's growing insecurity and hence reliance on his Pashtun base was also reflected in other crucial appointments, particularly within the national security apparatus.<sup>15</sup> In June and July 2010, a shakeup of security posts resulted in the removal and reshuffling of several prominent officials, including the forced resignation of National Directorate of Security (NDS) chief Amrullah Saleh, an ethnic Tajik. Almost simultaneously, Lt. General Sher Mohammad Karimi, a Pashtun, was appointed chief of army staff, replacing General Bismillah Khan Mohammadi, a Tajik, who was appointed interior minister in July 2010.<sup>16</sup>

These appointments signalled a troubling tactical shift in Karzai's thinking about the role of Afghan security officials with regard to his policy on reconciliation with the Taliban. Pressured by Pakistan's military to remove officials antagonistic towards Pakistan and opposed to reconciling with the Taliban, Karzai sought over much of 2009 to distance himself from Saleh. A close confidant of the late Northern Alliance leader Ahmad Shah Massoud, Saleh was a strong critic of Pakistan's Inter-Services Intelligence Directorate (ISI) and a vocal opponent of making deals with insurgent leaders.<sup>17</sup> The president's increasingly close alliance with Saleh's Pashtun deputy, Abdullah Laghmani, ahead of the 2009 presidential polls was viewed by many as one of several signs that Saleh would likely be replaced once Karzai was re-elected.<sup>18</sup>

Even so, Saleh's resignation and that of interior minister Hanif Atmar – another opponent of peace deals with the Taliban – days after an insurgent attack on the National Consultative Peace Jirga on 1 June 2010, came as a shock not only to the wider public but also to U.S. military offi-

cial.<sup>19</sup> In the run-up to, during and after the chaotic parliamentary polls, various blocks of candidates loosely aligned with Northern Alliance figures such as Saleh and Karzai's main political opponents Dr. Abdullah Abdullah and Wolesi Jirga speaker Younus Qanooni jockeyed for power.

Around the same time, the National Assembly had entered its second week of symbolic protests against the government. In May, Wolesi Jirga members sat in silence after Karzai failed to deliver a new list of cabinet nominees to the lower house as he had promised before his high-profile visit to Washington. Compounding the rift between the executive and legislature was second vice president Karim Khalili's apparent refusal to appear before the National Assembly to answer questions about the government's Emergency Response Committee, of which he was chairman.<sup>20</sup> Earlier that month, one third of the lower house had staged a walkout, following violent clashes between Pashtun Kuchi nomads and Hazara residents of Behsud district in the central province of Wardak.<sup>21</sup> Although the walkout was short lived, the acrimony between the president and parliament persisted throughout much of the campaign season.

These symbolic protests were harbingers of the deepening confrontation between the executive and legislature and the rapidly shifting political alignments that gave Karzai little room to manoeuvre and left him and his allies more vulnerable just ahead of the September 2010 polls.

## B. A GAME WITH NO WINNERS

The ambiguous status of the electoral law was one of several contentious issues behind the growing discord between the executive and parliament.<sup>22</sup> Several efforts have been made to change the law since the first post-Taliban parliament was inaugurated in December 2005 but to little avail. The impasse over the electoral reform stems largely from a longstanding and unresolved debate over the interpretation of both the constitution and the electoral law. Elections have thus emerged as a high-stakes game in which neither the players nor the referees agree on all the rules.

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 2005 Electoral Law is

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<sup>14</sup> Acting ministers include: Sarwar Danesh (Higher Education); Daoud Ali Najafi (Transportation); Sultan Hussein Hesari (Urban Development); Ismail Khan (Energy & Water); Souraya Dalil (Public Health); Amirzai Sangin (Communications); Husn Banu Ghazanfar (Women's Affairs). Danesh, Najafi and Hesari are the only Hazara ministers in the 25-member cabinet.

<sup>15</sup> See Crisis Group Asia Report N°190, *A Force in Fragments: Reconstituting the Afghan National Army*, 12 May 2010. See also Pamela Brown, "Analysis of the Afghan Defence Appointments", Institute for the Study of War, 20 July 2010.

<sup>16</sup> Bismillah Khan Mohammadi was one of five out of seven cabinet nominees approved in a third round of voting in the Wolesi Jirga on 28 June 2010.

<sup>17</sup> Crisis Group interviews, Kabul, 7 June 2010.

<sup>18</sup> Shortly before he was assassinated in September 2009 in a suicide bomb attack at a mosque in Laghman province, Laghmani allowed Karzai supporters to set up campaign operations in the NDS provincial headquarters in Laghman. "Joint Monitoring of Political Rights: Presidential and Provincial Council Elections, First Report", Afghanistan Independent Human Rights Commission-UNAMA, 25 April, 12 June 2009, p. 9.

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<sup>19</sup> Crisis Group interview, U.S. military officials, Kabul, 8 June 2010.

<sup>20</sup> Khalili, an ethnic Hazara, is a leader of the Hazara-dominated Wahdat party. USAID/APAP (Afghanistan Parliamentary Assistance Project), Legislative Newsletter, Vol. 3, No. 13, 24 May 2010.

<sup>21</sup> Ibid.

<sup>22</sup> Crisis Group Report, *Afghanistan's Election Challenges*, op. cit., pp. 7-9.

based on several presidential decrees, including a 62-article document outlining provisions for conduct of the polls issued in 2004.<sup>23</sup> This decree has long been a matter of dispute and debate within parliament, along with the legislature's differences with the executive over constitutional provisions pertaining to elections. Contentious issues include the organisation and administration of constituencies, the range of regulatory powers of electoral institutions and processes for dealing with complaints and irregularities.

The Single Non-Transferable Vote (SNTV) system remains the most pressing issue to be tackled in a revised electoral law, as evidenced by the 2005 provincial council and National Assembly elections. SNTV appears simple: each voter indicates one favoured candidate. In many single-seat constituency, Westminster-based systems, each voter also casts a ballot for one candidate. However, distortions arise in multi-seat constituencies. If a large proportion of citizens votes for one candidate, this large group will elect a single representative, while a much smaller number of voters will disproportionately elect favoured candidates.<sup>24</sup> In Afghanistan, multi-member constituencies see representatives elected with wildly varying mandates since seats can be won in large provinces with even small numbers and small margins of votes.

SNTV is particularly unsuited to Afghanistan because political parties lack capacity and discipline. The absence of disciplined political parties to carefully analyse prospects and to ensure that their votes are evenly distributed among candidates results more often than not in inequitable political representation. There can either be large numbers of "surplus" votes for individual candidates or political groups can split their votes between multiple candidates and get far fewer seats than their power base represents. Individual, as opposed to party-based candidates in Afghanistan is problematic. Large, unwieldy ballot papers are difficult both for voters and electoral administrators. The system also creates a number of barriers to broad political participation while blunting the potential power of political parties. Candidates stand as individuals with either nominal or substantial backing from political parties but cannot later be held accountable for party positions.<sup>25</sup>

In an effort to correct these inequities in the electoral system, a number of experts and entities recommended that

SNTV be scrapped in favour of proportional representation with closed voter lists or combining the two voting systems.<sup>26</sup> In the end, the revised version of the electoral law sent to the Wolesi Jirga for consideration contained only minor changes and SNTV was retained. The revised law sat in limbo for months after a large block of Hazara parliamentarians staged a walkout in 2008 over provisions in the law that preserved ten seats in the National Assembly for Pashtun Kuchis.<sup>27</sup> Parliament members then debated how to interpret a constitutional prohibition against changing the electoral law one year before polls are held.<sup>28</sup> By late 2008, with only months left before presidential and provincial polls were to be held; the constitutional bar against changing the law clashed with the electoral calendar.<sup>29</sup> There was no time left to implement reforms. As discussed in more detail below, in the end SNTV was retained and myriad other flaws were left uncorrected.

Among the most crucial reforms left unimplemented was the creation and updating of a reliable, accurate and detailed voter registry, a vital tool for poll planning and to prevent fraud. The 2004 voter registration exercise had registered 10.6 million in country and 740,000 out of country. In the 2005 update, an additional 1.7 million voter cards were issued. Neither exercise linked voters to specific districts or polling centres nor did they provide voter lists. In 2009, the voter registry was updated, with an additional 4.4 million voter cards issued to those supposedly not registered. There was little, if any, protection against multiple registrations in this and the two previous exercises. This brought the number of voters on the registry to nearly 17 million though the Central Statistics Office (CSO) estimated that only 11 million were eligible to vote in 2009.<sup>30</sup> Yet the IEC, in an additional update, added more than 376,000 new voters. In some provinces, successive registration exercises have seen more cards distributed than the estimated population, underscoring the

<sup>23</sup> Presidential Decree No. 28 on "The Adoption of Electoral Law" was signed by Karzai on 12 May 2004 and published on 27 May 2004.

<sup>24</sup> Crisis Group Report, *Afghanistan Elections: Endgame or New Beginning*, op. cit., p. 10.

<sup>25</sup> Ibid. See also "Islamic Republic of Afghanistan Parliamentary Elections 18 September 2010; OSCE/ODIHR Election Support Team Report", Organisation for Security and Co-operation in Europe (OSCE), Office for Democratic Institutions and Human Rights (ODIHR), 26 November 2010, p. 12.

<sup>26</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 Joint Coordination and Monitoring Board (JCMB), April 2007.

<sup>27</sup> See Crisis Group Asia Report N°116, *Afghanistan's New Legislature: Making Democracy Work*, 16 May 2006.

<sup>28</sup> Article 109 of the 2004 constitution states that: "proposals for amendments of the Electoral Law cannot be included in the working agenda of the assembly during the last year of the legislative period".

<sup>29</sup> The IEC announced its timeline for the Wolesi Jirga elections on 25 March 2010, setting 13 April 2010 as the start of the candidate nomination period, and polling day on 18 September 2010. "IEC press release on 2010 Wolesi Jirga Election", 25 March 2010.

<sup>30</sup> OSCE/ODIHR, op. cit., p. 12. See also, "2010 Elections: Facts and Figures", The Afghanistan Analysts Network, 2 August 2010.

need for a census, basic population data and a reliable national identity system.<sup>31</sup>

Additionally, an unsustainable electoral calendar has yet to be rationalised. With presidential and provincial council polls on a separate cycle from parliamentary ones, elections will be held almost every year for the next two decades, creating political, fiscal and logistical challenges for all stakeholders, but particularly for the electoral institutions tasked with overseeing the process.<sup>32</sup> Moreover, because the ECC is an ad hoc body, meant to exist only over a particular electoral period, there is no permanent neutral electoral body charged with reviewing election related complaints.<sup>33</sup> Any institutional knowledge gained from lessons learned in prior polls disappears after results are certified and the ECC disbanded.

As one senior Afghan election official put it, fraud and failure are inevitable under the current system:

If we establish the ECC every election, then we have to, in a very short period of time, get new offices, then identify people for these positions, then train them and get everything in working order. It is possible to do all these things, of course, but it will be done very poorly and that will impact the overall character of the elections.<sup>34</sup>

More support must be given to electoral institutions so they can operate more efficiently and transparently. The ECC's inability to prepare in time for elections had grave implications for the August 2009 and September 2010 polls since candidates, candidate agents or elections officials were not properly equipped to deal with massive fraud. The ECC must be stood up as a permanent institution with well-defined powers and terms of reference. Parliament should grant final approval of senior appointments to the ECC and IEC. Along with the urgent need to revise the legal framework for elections and to correct technical deficiencies that impede efficient, accurate, transparent and fair administration of polls, timelines must be re-evaluated before the next election to ensure the ECC and other institutions have sufficient time to prepare.

Much work is also needed to ensure that the IEC can resist outside interference in the electoral process and operate more transparently. The IEC's failure to publicise its quar-

antining procedures and the absence of observers during the disqualification process, for instance, created suspicion among losing candidates, and raised serious questions about transparency. Procedural mechanisms for evaluating fraud should be well-defined and well-advertised months before elections. Instead, in the 2010 elections, the disqualification of more than a million ballots was conducted behind closed doors, fuelling fears that IEC officials were acting out an unseen political agenda in which losing candidates were players in a game without rules. If faith in the electoral process is to be restored, transparency must be viewed not only as a means to ensure fairness but also as a way of mitigating the risk of polls becoming catalysts of conflict.

### C. ELECTIONS BY FIAT

During the 2010 elections, deficiencies in the 2005 electoral law were exacerbated by the president's 18 February 2010 electoral decree. Using his constitutional powers to promulgate legislative decrees when the parliament is in recess, Karzai's decree removed UN oversight over the appointment of ECC officials.<sup>35</sup> Under the 2005 electoral law, the ECC board was composed of two Afghans, appointed by the chief justice of the Supreme Court and Afghanistan's Independent Human Rights Commission, and three international experts appointed by the UN Secretary-General's Special Representative for Afghanistan.<sup>36</sup> Under the new decree, Afghan appointees would replace the UN-approved international experts, with the president appointing all five ECC members, in consultation with parliament.

While the international community refrained from publicly criticising Karzai's power grab,<sup>37</sup> behind the scenes, a number of international stakeholders pressured Karzai to rescind the decree or compromise by including at least

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<sup>31</sup> A full census has yet to be held in Afghanistan, with the last partial exercise in 1979 disrupted by conflict. In the 2001 Bonn agreement, the UN was requested to assist with conducting a census and establishing a voter registry, both of which it has failed to deliver.

<sup>32</sup> Crisis Group Report, *Afghanistan's Electoral Challenges*, op. cit.

<sup>33</sup> Article 62, Section 7 of the Electoral Law calls for the ECC to be disbanded 60 days after the certification of the final election results.

<sup>34</sup> Crisis Group interview, ECC official, Kabul, 25 January 2011.

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<sup>35</sup> Article 61, Chapter 8, Electoral Law, amended by the 18 February 2010 presidential decree on the Electoral Law.

<sup>36</sup> Article 79, Chapter 4 of the constitution states that emergency legislation by decree can be adopted "in cases of recess of the House of Representatives [Wolesi Jirga] ... on matters other than those related to budget and financial affairs". Section 2 states that "decrees become laws after they are signed by the President" but the article also calls for such decrees to be "submitted to the National Assembly in the course of thirty days beginning from the first session of the National Assembly". Although the constitution further stipulates that such decrees become void upon rejection of the National Assembly, no quorum for rejection is specified and there is no guidance as to what should be done if the two houses disagree or for procedures to evaluate presidential decrees.

<sup>37</sup> "We hope that this decree is in line with the constitution and with what parliament and civil society has called for regarding reforms of the electoral system", said a UN spokesperson. "UN studying proposed Afghan electoral decree", UN News Centre, 24 February 2010.

two internationals on the ECC.<sup>38</sup> This compromise was ultimately accepted in another presidential decree passed on 18 April. The wrangling cost the newly appointed commissioners much needed time for preparations.

Lower house members pointed to a number of other problems with the decree, including a revision of the law that left unclear whether 68 seats would still be reserved for women in the Wolesi Jirga, as set out in the constitution.<sup>39</sup> Yet, the most significant of the dozens of changes included in the presidential decree went largely unremarked. Article 57, Part 2 of the amended law, pertaining to the quarantine of ballot boxes, stated that the IEC “can include or permanently exclude the quarantined ballot boxes ... in presence of representatives of political parties and candidates for their contentment”.

This meant that quarantined ballot boxes could not be excluded unless all concerned candidates or their representatives were satisfied with the exclusion procedure and agreed that ballots should be thrown out. Essentially, the authority to finalise results and determine the validity of ballots had been transferred from electoral institutions to candidates, in effect nullifying the adjudicatory authority of electoral institutions. This loophole would have major consequences during the post-election day counting and complaints period, allowing losing and disqualified candidates a convenient if flawed legal wedge to bolster their calls for the elections to be annulled. As a senior Afghan elections official explained:

The decree calls for agents and candidates to be present during quarantining and states that the final outcome of the process will be based on the satisfaction of agents and candidates, which makes it impossible for the IEC to invalidate ballots. Which candidate is going to say that he is “satisfied” to see his votes thrown out? If the IEC invalidates and the candidates or agents say no, then the IEC can't take any action.<sup>40</sup>

Although Karzai's office claimed the goal was to “Afghanise” the electoral process and to ensure greater transparency, the Wolesi Jirga, by a near-unanimous vote, rejected

the decree in late March.<sup>41</sup> “After the disputed presidential election the people were expecting a transparent parliamentary election”, said Fauzi Kofi, MP from Badakhshan, during a debate in chambers on the decree. “[B]ut unfortunately the amendments made by the president to the Electoral Law cannot guarantee the transparency of the election. Therefore, the law should be rejected”.<sup>42</sup>

The lower house's rejection of the decree marked yet another rupture in relations between the legislature and executive, with Karzai claiming that parliament had acted under the influence of the West.<sup>43</sup> However, when the decree reached the Meshrano Jirga, where Karzai exercised considerable control,<sup>44</sup> senators, led by Fazl Hadi Muslimyar, then deputy speaker of the upper house,<sup>45</sup> generally agreed that the constitution prohibited parliament from amending, or even discussing, electoral laws in the last year of its term. The decree was thus adopted by default.<sup>46</sup> Muslimyar, a member of the Dawat-e Islami party led by the Islamist warlord Abd ul-Rabb Rasul Sayyaf, accused the Wolesi Jirga of trying to drag the Meshrano Jirga into a fight with the president while other senators characterised the lower house's rejection of the decree as an affront to the executive.<sup>47</sup>

With legislative deliberations at an impasse, the executive ordered the ministry of justice to rule on the implementation of the electoral decree. Although members of parliament appeared increasingly of the view that the dispute should be referred to the courts, the IEC in the end announced

<sup>38</sup> Crisis Group interview, senior Western adviser, Kabul, 11 July 2010.

<sup>39</sup> Chapter 5, Article 23 of the 18 February 2010 presidential decree on the electoral law outlines seat allocations for female candidates, mandating that the IEC develop a “procedure to include, averagely at least two women from each province”. During the debate over the decree, several MPs objected to this language, saying the use of the term “averagely” confused the distribution of female seats per province. For more details see: USAID/APAP Legislative Newsletter, Vol. 3, No. 6, 5 April 2010.

<sup>40</sup> Crisis Group interview, IEC official, Kabul, 25 January 2011.

<sup>41</sup> Richard A. Oppel Jr. and Taimoor Shah, “Lawmakers resist Karzai's move on election panel”, *The New York Times*, 31 March 2010.

<sup>42</sup> USAID/APAP Legislative Newsletter, op. cit., 5 April 2010.

<sup>43</sup> Golnar Motevalli, “Karzai lashes out at west over Afghan elections”, Reuters, 1 April 2010.

<sup>44</sup> Under Article 84 of the constitution, the Meshrano Jirga consists of 102 members. 34 members are appointed to the upper house for a four-year term upon election by the provincial councils; another 34 members are appointed to the upper house from among the district councils in each province for a three-year term; the last 34 members are appointed by the president “from among experts and experienced personalities – including two representatives from the disabled and impaired communities and two Kuchi representatives” for a five-year term. However, because district council elections have yet to be held, two thirds of the standing upper house are presidential appointees. The terms of the 34 senators appointed by the president expired in December 2010. After a delay of nearly two months, Karzai appointed 34 senators to replace those whose terms had expired in February 2011.

<sup>45</sup> Muslimyar was voted speaker of the Meshrano Jirga on 29 January 2011.

<sup>46</sup> Article 109 states that “proposals for amending elections laws shall not be included in the work agenda of the National Assembly during the last year of the legislative term”.

<sup>47</sup> USAID/APAP Legislative Newsletter, Vol. 3, No. 7, 12 April 2010.

that the ministry of justice had directed the commission to conduct the September 2010 parliamentary polls in accordance with the presidential decree. Several senior Afghan election officials and cabinet officials warned the president that the country was not ready for the polls only to be rebuked by Karzai. Said a senior Afghan official:

We shared our concerns with the president and we told him that the elections should not take place but he said, 'I want to get rid of these MPs no matter what happens. I can't work with this parliament' .... He knew all the implications but he insisted that the elections go ahead.<sup>48</sup>

The decision to hold the September polls absent tangible electoral reform and adequate security resulted in widespread disenfranchisement and fraud. The international community, in its haste to check off the elections box, tacitly colluded in the deeply flawed exercise. Both winning and losing candidates now appear to agree that polls should have been postponed and the price of the fraudulent contest was more than Afghanistan could afford. As one of the losing candidates, and former Ghazni MP, said:

We treated this election as an exercise to meet the calendar requirements of other countries. We were not ready for this election and neither was the international community. Normally, an election galvanises people but that's not what happened in this case. Instead, because of security threats on polling stations, hundreds of stations were closed and people were shut out of the election.<sup>49</sup>

Given the abysmal performance of Afghan electoral institutions during the August 2009 presidential and provincial council polls, few had expected miracles in 2010 – least of all the international community whose various representatives cynically and repeatedly declared, "Afghanistan is not Switzerland".<sup>50</sup> Although Karzai had, as he often does, refused to consult parliament, key international stakeholders – the U.S., NATO and UNAMA in particular – did not acknowledge the damage done by the president's decision to bypass parliament in revising the electoral law. If the president is to become an effective partner as the international transition begins, Karzai must be encouraged to consult with other branches of government and more specifically to develop a constructive working relationship with the National Assembly.

### III. ELECTIONS AND THE AFTERMATH

#### A. CAMPAIGN AND COMPETITION

Winning an election in Afghanistan can be far less a matter of carefully cultivating constituencies than eliminating competition by any means necessary, with candidates and their supporters bribing, intimidating, kidnapping and, in some cases, even killing their way to victory. During the Wolesi Jirga elections, in which 2,506 candidates competed across 34 provinces for 249 seats, deteriorating security, weak institutions stymied by numerous operational hitches and a poorly articulated legal and administrative framework undermined the prospects of a free, fair and transparent poll.

Although the IEC made some marked improvements – notably firing some 6,000 commission staff implicated in fraud the previous year and introducing a new staff recruitment system – other institutional flaws remained unaddressed. As with the August 2009 elections, despite numerous complaints against candidate nominees linked to illegal armed groups, they and others with known criminal backgrounds remained on the ballot.<sup>51</sup> Initially more than 300 nominees were accused of connections to armed groups.<sup>52</sup> This list was whittled down considerably before the challenge period officially ended on 23 June.<sup>53</sup> Publicly, the ECC said that 226 candidates were initially eliminated from the preliminary list because of documentation flaws; a corrections and appeals process resulted in all but 38 questionable candidates being included in the final list.<sup>54</sup>

According to the ECC, the complaints commission received 44 claims that candidate nominees were involved with illegal armed groups; the vetting commission validated 42 of those claims. After prolonged negotiations between electoral institutions and several emergency meetings with international stakeholders, only 36 candidates, a little more than 1 percent of candidates, were excluded on the basis of their links to armed groups.<sup>55</sup>

The campaign period from 23 June to 16 September was marred by violence and widespread reports of electoral violations. Instability prevented many candidates from

<sup>48</sup> Crisis Group interview, senior Afghan official, Kabul, 25 January 2011.

<sup>49</sup> Crisis Group interview, Daoud Sultanzoi, former Ghazni MP, Kabul, 23 January 2011.

<sup>50</sup> Alisa J. Rubin, "Unrest is undermining hopes for Afghan vote", *The New York Times*, 11 August 2010.

<sup>51</sup> Article 15, Sec. 3 of the Electoral Law bars candidates with proven ties to illegal armed groups or with known criminal backgrounds from participating in the polls.

<sup>52</sup> Crisis Group interview, U.S. adviser, Kabul, 24 June 2010.

<sup>53</sup> Crisis Group interview, international adviser, Kabul, 22 June 2010.

<sup>54</sup> "Close-down", ECC press release, 30 January 2011.

<sup>55</sup> "2010 Election Observation Mission Special Report: Vetting of Candidates with Alleged Ties to Illegal Armed Groups", Free and Fair Election Foundation of Afghanistan (FEFA), 3 August 2010.

campaigning openly. The threat was most keenly felt in the insurgency-hit Pashtun-majority provinces including Kunar, Wardak and Uruzgan where candidates were warned not to campaign outside their home districts and voters warned against casting their ballots. Electoral violence also stemmed from aggressive candidate rivalries in local constituencies. At least thirteen campaign workers and three candidates were killed during the campaign.

Violence and instability adversely affected operational aspects of the polls. As in the 2009 elections, IEC officials first decided to set up 6,835 polling centres and 19,942 polling stations, with hundreds of polling stations in insecure areas.<sup>56</sup> When the IEC announced the final list of polling centres on 18 August, the number of polling centres was reduced to 5,897 because of insecurity. Although this number was still very high, given the scale of the insurgency, on 1 September the ministry of defence announced that 91 additional polling centres would be opened, a move that the IEC opposed on the grounds of insecurity.<sup>57</sup> While the disagreement was resolved four days later when the IEC announced that the 18 August list would stand, many voters were unaware of the final list less than two weeks before election day.

## B. ELECTION DAY AND RESULTS

Violence hit unprecedented peaks on election day, with some 443 attacks, killing 24 people; according to ISAF, it was the most violent day since the fall of the Taliban.<sup>58</sup> The high level of violence resulted in only 14,424 polling stations open on election day, representing the closure of about 23 per cent of planned stations.<sup>59</sup> Other assessments put the number of polling stations closed due to insecurity at an estimated 1,115.<sup>60</sup> Violence had posed insurmountable challenges for voters and candidates alike in a number of provinces. Voter turnout was low, with the IEC initially reporting that some 3.6 million votes had been cast out of 9.2 million votes expected. With 5.6 million votes initially estimated for the August 2009 elections this represented a drop of nearly 2 million in turnout over the previous year. While estimates later were amended to reflect a higher turnout, given the flaws in the system, ballot box stuffing

and “ghost” polling stations, it is next to impossible to determine the exact number of votes cast.<sup>61</sup>

Missteps by both the IEC and ECC only deepened growing public distrust in democratic processes. Shortly after election day, it became clear that thousands of tainted ballots had been cast and that the tallying data was inconsistent.<sup>62</sup> On 20 October, even as it announced preliminary results, the IEC also disclosed that it had ordered a recount at 121 polling stations, the audit of 81 polling stations and both audit and recount of 3,143 polling stations.<sup>63</sup> In its preliminary results, the IEC excluded ballots from 587 polling centres; 1.3 million fraudulent votes were ultimately thrown out but without any explanation of the criteria for annulment, leading many candidates who had gone from winners to losers to protest the outcome.<sup>64</sup>

The ECC, meanwhile, received 5,856 complaints about the polling process, a little more than double the number of complaints received for the August 2009 elections.<sup>65</sup> About half, or 2,495, were categorised as high priority. As in the previous year, the ECC struggled to explain and publicise the handling of polling complaints, with its Kabul and provincial offices often failing to post their decisions on complaints.<sup>66</sup> The ECC disqualified votes from 334 polling stations during its review process in November with large numbers of stations disqualified in predominantly Pashtun provinces where insecurity was highest.<sup>67</sup> ECC officials acknowledged the disconnect between the commission, candidates and voters as well as other mistakes, but blamed them on the short time it had been allotted to establish a new office. As one senior ECC official explained:

During the elections, we found that public awareness and candidate awareness of the process was very weak.

<sup>56</sup> “With reference to correcting the presented information on the subject of number of polling centres”, IEC press release, 30 May 2010.

<sup>57</sup> “Afghanistan Elections Update”, National Democratic Institute, 4 September 2010.

<sup>58</sup> OSCE/ODIHR, op. cit., p. 3.

<sup>59</sup> “Afghanistan Elections Update”, National Democratic Institute, 30 October 2010.

<sup>60</sup> For detailed analysis of count and audit procedures see Martine van Bijlert, “Untangling Afghanistan’s 2010: Analysing the Electoral Data”, The Afghanistan Analysts Network, February 2011.

<sup>61</sup> Given the lack of a voter registry, the large number of invalid or fake voter registry cards in circulation on election day, and the likelihood that thousands of ballots cast at “ghost polling stations” that never opened, exact turnout estimates are near impossible. The IEC issued several different estimates during the course of the results reporting process and suggested in an initial statement, published on 20 September 2010, that 3.6 million votes had been cast overall. The final figure of 5.6 million votes cast was announced at an IEC press conference on 20 October, but no written statement with this number was ever published.

<sup>62</sup> “On announcement of partial results of the WJ elections”, IEC press release, 3 October 2010.

<sup>63</sup> “On announcement of preliminary results for the 18 September 2010 Wolesi Jirga Elections”, IEC press release, 20 October 2010.

<sup>64</sup> Jonathan Burch, “Almost a quarter of votes in Afghan election invalid-officials”, Reuters, 20 October 2010.

<sup>65</sup> The ECC had received a total of 2,584 complaints during the presidential and provincial council elections.

<sup>66</sup> “Afghanistan Elections Update”, National Democratic Institute, 6 October 2010.

<sup>67</sup> Bijlert, op. cit., p. 11.

We needed to have more time to explain the rules. In general, we need to have very close relationships with the candidates. But this time around our relationship with the candidates was very weak. We needed to explain to the candidates and candidate agents how decisions were arrived at and educate them on the entire process but that didn't happen.<sup>68</sup>

Several other anomalies emerged after the announcement of preliminary results that also sparked frictions, especially the apparent widening ethnic divide in voting patterns. According to some independent election observers, a large number of polling stations had been set up in Pashtun-dominated areas where the insurgency is strong.<sup>69</sup> Yet, the number of Pashtun candidates elected in the 2010 parliamentary polls dropped to 98, fifteen fewer than were elected in the 2005 parliamentary poll.<sup>70</sup> This decline was largely the result of insecurity in these regions preventing Pashtuns from voting, but also reflected popular discontent with many Pashtun incumbents, most of whom were longstanding Karzai allies. The shift in ethnic distribution also reflected the growing disconnect between the government and wide swathes of the Pashtun belt.

The steep drop in Pashtun numbers was particularly notable in the volatile south-eastern province of Ghazni, where almost half the 272 polling centres had to be closed due to insecurity at the last minute.<sup>71</sup> Preliminary results indicated that Hazara candidates had won all eleven seats in Ghazni, defeating the 24 Pashtun candidates who ran in the polls.<sup>72</sup> Although the absence of a census and reliable population data makes it impossible to ascertain the demographics in any given province,<sup>73</sup> Pashtuns are generally

believed to be the largest ethnic group in the province, followed closely by Hazaras. The failure of a single Pashtun candidate to win in the province has unsurprisingly spiked ethnic tensions.<sup>74</sup>

Ghazni emerged as the ticking time bomb of ethnic politics in Afghanistan. After the IEC announced the preliminary results, losing candidates held demonstrations and rallies, accusing the IEC and ECC of electoral fraud and manipulating results by throwing out valid votes.<sup>75</sup> On 23 November, after several complaints were filed by losing candidates, Attorney General Mohammad Ishaq Aloko announced he would indict IEC spokesman Noor Mohammad Noor and ECC commissioner and spokesman Ahmad Zia Rafat on charges of corruption and electoral fraud.<sup>76</sup> Repeating the refrain of dozens of losing and disqualified candidates, Aloko claimed that neither commission had sufficiently investigated candidate complaints, prompting a sharp response from election officials who insisted that the attorney general had overstepped his mandate since electoral bodies alone had the authority to adjudicate the polls. On 24 November, the IEC announced the final results for 33 of 34 provinces, with Ghazni's remaining under review. Protests erupted in several provinces as a heated debate ensued over whether elections should be held anew in Ghazni and elsewhere.

### C. NO END IN SIGHT

After Ghazni's results, based on the preliminary results, were announced on 1 December 2010, the Supreme Court established a special tribunal for elections complaints, composed of five judges selected by the court and approved by the president on 26 December.<sup>77</sup> The special tribunal said it would take at least a month to review all the documents and evidence related to the attorney general's indictment.<sup>78</sup> The impartiality of the special tribunal, however, came immediately into question after its chairman, Sediqullah Haqiq, declared the tribunal was empowered to annul some or all of the election results.

<sup>68</sup> Crisis Group interview, Kabul, 25 January 2011.

<sup>69</sup> Crisis Group interview, international elections observer, Kabul, 22 December 2010.

<sup>70</sup> Crisis Group analysis of the distribution of seats shows that Pashtuns won 113 seats in the 2005 election. Analysis of the 18 September 2010 results shows that Pashtuns won 98 of the 244 seats leaving non-Pashtuns in the majority with 151 seats. The following is a breakdown of seat allocation by ethnic group: Pashtun, 98; Tajik, 60; Hazara/Shia, 56; Uzbek, nineteen; Aimaq, six; Arab, two; Turkmen, three; Pashayi, two; Nuristani, two; and Baloch, one.

<sup>71</sup> Warren P. Strobel and Habib Zohori, "Unresolved Afghan election could undercut U.S. efforts", *McClatchy News*, 22 November 2010.

<sup>72</sup> A total of 84 candidates ran for Ghazni's eleven seats. In a telephone interview with Crisis Group on 3 February 2011, a Ghazni provincial election official gave the following ethnic breakdown for Ghazni candidates: 55 Hazaras, 24 Pashtuns and five Tajiks.

<sup>73</sup> As mentioned earlier, the last census conducted in Afghanistan was in 1979. Although most populations figures cited are based on the 1979 census, they are at best only estimates. The CIA Factbook estimates that the country is 42 per cent Pashtun; 27 per cent Tajik; 9 per cent Hazara; 9 per cent Uzbek; 4 per cent Aimaq; 3 per cent Turkmen; 2 per cent Baloch; and 4 per

cent other. It is worth noting, however, that the CIA Factbook has updated overall population figures over the last two years, estimating that the national population stands at 29 million, but has not changed the breakdown of ethnic percentages.

<sup>74</sup> In 2005, six Pashtuns and five Hazaras were elected to the Wolesi Jirga.

<sup>75</sup> Obaid Ali, "2010 Elections: The Post-Election Protest Wave", *The Afghanistan Analysts Network*, 29 November 2010.

<sup>76</sup> Alissa J. Rubin, "Afghanistan may indict voting officials", *The New York Times*, 23 November 2010.

<sup>77</sup> Hamid Shalizi, "Afghanistan announces last set of election results", *Reuters*, 1 December 2010.

<sup>78</sup> Michael Kamber, "Judges set to rule on Afghan elections complaints within two weeks", *The New York Times*, 3 January 2011.

Deadlock over the results in Ghazni and controversy over the status of the special tribunal prompted the president to refer the issue to the Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC) on 15 January 2011.<sup>79</sup> After a closed door session, the commission ruled that there was no constitutional or legal basis for the special tribunal and concluded that since this body had neither established nor publicised its rules of procedure for determining the validity of a given claim, there was no proof that it would operate impartially.

The commission however, refrained from publishing an official ruling. Instead, a letter summarising its conclusions was reportedly sent to the president, and the special tribunal was allowed to proceed.<sup>80</sup> The attorney general laid out the basis of the indictments in a lengthy written complaint submitted to the tribunal in January 2011 only eight days before parliament was expected to be inaugurated. The vast majority of claims were lodged against IEC and ECC officials, including fourteen senior electoral staff.<sup>81</sup>

It remains to be seen whether the court will move for piecemeal annulment of the elections in certain provinces and what effect partial annulment might have on the overall process and sitting members of parliament. The special tribunal has called for investigations into results in 24 provinces, and summoned members of parliament in connection with alleged election fraud, suggesting the possibility of annulment at least in some cases.<sup>82</sup> There is no precedent for the appointment of such ad hoc investigative bodies and it is unclear what authority the tribunal has to summon members of parliament. There is no con-

stitutional provision for special courts and other laws pertaining to the structure and competencies of the courts and criminal procedure appear to undercut the argument that the Supreme Court has the right to establish special courts.<sup>83</sup> Several Afghan legal scholars have questioned the competencies of the tribunal and its jurisdiction or *ratione materiae*.<sup>84</sup>

Under the 2005 Law on the Organisation and Jurisdiction of Courts (Law of the Courts), territorial jurisdiction in criminal matters is accorded to either the district primary court or the primary court of the provincial centre in the district or province where a crime has allegedly taken place.<sup>85</sup> In cases of dispute over jurisdiction, the heads of the tribunals of the appellate court chaired by the president of the court of appeals determine the jurisdiction of a case.<sup>86</sup> Indeed, the jurisdictional competencies elaborated in the Law of the Courts appear to be reinforced by Article 122, Section 1 of the constitution which states that “no law, under any circumstance, can transfer a case from the jurisdiction of the judicial branch to another organ as has been determined in this constitution”.

There appears to be some question as to whether the charges in the indictment lodged by the attorney general fall under civil or criminal codes or both. In the view of at least one senior Afghan judge on the ICSIC, the indictment should be pursued under the civil code in civil courts which operate under a three tiered system: primary, appellate and apex.<sup>87</sup> Since the special tribunal was formed under the authority of the Supreme Court, which has essentially given the tribunal apex authority over the review of electoral cases, there appears to be no provision for the right of appeal. This is in clear violation not only of the constitution but also the Law of the Courts.

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<sup>79</sup> Crisis Group interview, Kabul, 31 January 2011.

<sup>80</sup> Crisis Group interview, Afghan elections official, Kabul, 25 January 2011.

<sup>81</sup> According to an unofficial translation of the indictment, IEC Chairman Fazl Ahmad Manawi, IEC Chief Electoral Officer Abdullah Ahmadzai, IEC Chief of Information Technology Shafiq Ahmad Kohistani, IEC Spokesman Noor Mohammad Noor, IEC Commissioner Abdul Khaliq Hussaini Pashayee, IEC Commissioner Gen. Ayub Asil, IEC Commissioner Mohammad Hussain Gurziwani, IEC Commissioner Suleiman Hamid, IEC Commissioner Mastura Stanekzai, IEC Commissioner Momeena Yari, ECC Chairman Sayed Murad Sharifi, ECC Commissioner Shah Sultan Akifi, ECC Commissioner Ahmad Zia Rafat, and ECC Chief of Legal Affairs Amanullah Tajalli were charged with failing “to conduct their duties properly and should be punished in accordance with the orders of the constitution and other laws in force in the country”.

<sup>82</sup> Crisis Group interview, Sediqullah Haqiq, chief judge, special tribunal on elections, Kabul, 8 February 2011. Haqiq said that delegations appointed by the special tribunal had been dispatched to review and collect evidence related to elections fraud the following provinces: Balkh, Zabul, Badakhshan, Kunduz, Samangan, Helmand, Nangarhar, Baghlan, Kandahar, Faryab, Herat, Kabul, Takhar, Jawzjan, Paktia, Paktika, Laghman, Parwan, Khost, Logar, Sar-e Pul, Kapisa, Kunar and Nuristan.

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<sup>83</sup> Article 122, Chapter 7 of the constitution outlines court jurisdiction, but with the exception of the establishment of military courts, there is no specific reference to procedures or authority for establishing special courts. Additional references to special judicial bodies are stipulated in Articles 69, 78 and 127 which pertain to presidential impeachment procedures, war crimes and treason allegations linked to government ministers and impeachment proceedings against members of the Supreme Court, respectively. For further discussion on the structure of the court system, see Crisis Group Asia Report N°195, *Reforming Afghanistan's Broken Judiciary*, 17 November 2010.

<sup>84</sup> Crisis Group interviews, Afghan legal scholars, Kabul, January 2011.

<sup>85</sup> Ramin Moschtaghi, “Afghanistan court organisation and its compliance with the constitution and international law”, Max Planck Institute for Comparative Public Law, Amended 3rd Edition (Kabul, 2009), p. 24.

<sup>86</sup> *Ibid.*

<sup>87</sup> Crisis Group interview, commissioner, ICSIC, Kabul, January 2011.

Moreover, the fundamentalist Islamist credentials of the tribunal's five judges, their lack of legal training and close alliance with Karzai and Islamist warlord Sayyaf do not lend the court much credibility. Haqiq, the chairman, is a close relative and long-time ally of Fazl Hadi Shinwari, a Sayyaf ally and fundamentalist Islamist who served as chief justice of the Supreme Court in 2006.<sup>88</sup> Like Haqiq, the four other judges on the tribunal all received their legal education in conservative Islamic law faculties. They have virtually no experience in dealing with the complexities of electoral law. There are also serious questions as to whether the Supreme Court was vested with the authority to make appointments to the tribunal, given that Chief Justice Abdul Salam Azimi's term expired in June 2010.<sup>89</sup>

In fact, none of the actors embroiled in the legal controversy over the polls appears to have much of an understanding of the law, including Attorney General Aloko. This was amply demonstrated when Aloko reportedly announced that the fourteen elections officials indicted on corruption charges could face the death penalty for treason if found guilty.<sup>90</sup> Treason, unlike corruption, is punishable by death, but was never alleged in the attorney general's initial brief to the Supreme Court. Indeed, the Counter Corruption Court found the basis of the attorney general's allegations to be so thin that on 11 January it ordered the chief prosecutor to redraft its indictment before submitting it again.<sup>91</sup>

ICSIC officials raised the special tribunal's legal mandate with the president,<sup>92</sup> but he chose to ignore the advice of the legal scholars involved in examining the case.<sup>93</sup> Instead, as losing candidates continued to call for the election results to be annulled, on 19 January the president announced

that he would delay the inauguration of the new parliament until the special tribunal had completed its review of the cases before it.<sup>94</sup> The announcement set off a political firestorm. More than 200 newly elected members of parliament called for the inauguration to go forward with or without Karzai and the UN and other international stakeholders panicked.<sup>95</sup>

Following several days of negotiations between losing candidates, newly elected candidates and the president and considerable behind-the-scenes diplomatic pressure, including by UN SRSG Staffan di Mistura and the U.S., Karzai relented and agreed to inaugurate the parliament on 26 January. Defiant to the end, however, in a statement released by his office the night before the inauguration, Karzai said he had reluctantly agreed only because "some foreign countries showed concern about our decision and they tried to create disruptions in the country".<sup>96</sup>

The crisis over the September 2010 elections is far from over. As of this writing, the special tribunal was reviewing indictments against dozens of candidates – most of whom are now seated in parliament. The special tribunal had summoned at least three sitting members of parliament for a hearing, one from Paktika and two from Faryab province, on 31 January 2011.<sup>97</sup> While others named in the indictment have yet to be summoned, delegations appointed by the tribunal have been dispatched to several provinces to investigate various claims of fraud, presumably a precursor to further summons. Wolesi Jirga members have denounced the court's actions. In a sharply worded resolution passed on 12 February by an overwhelming majority, the lower house called for the president to dissolve the special tribunal.<sup>98</sup>

The special tribunal has vowed to annul the results in some or all of these cases, a move that will undoubtedly

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<sup>88</sup> The National Assembly voted to remove Shinwari from the bench in 2006 in the wake of an international scandal over an Afghan court's decision to impose the death sentence on Abdul Rahman, an Afghan refugee-returnee who had converted to Christianity while living abroad.

<sup>89</sup> Azimi was appointed to a four-year term in May 2006. Although his term expired in June 2010, he remained on the bench for several weeks before Karzai issued an emergency decree extending his term. The decree extending Azimi's term, however, has never been put to parliament for a vote as required by Afghan law.

<sup>90</sup> Yaroslav Trofimov, "Afghan Supreme Court asked to void election", *The Wall Street Journal*, 12 December 2010.

<sup>91</sup> According to Crisis Group interviews with Afghan election officials, MPs and legal scholars in January 2011 with knowledge of the case, the attorney general's brief was thrown out by the court in mid-December. An unofficial translation of a letter sent by the IEC to the ICSIC on 24 January 2011 asking for clarification on indictment appears to support this description of events.

<sup>92</sup> Crisis Group telephone interviews, senior Afghan election officials and a member of the ICSIC, 13 February 2011.

<sup>93</sup> Crisis Group interview, commissioner, ICSIC, Kabul, 31 January 2011.

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<sup>94</sup> Joshua Partlow, "Karzai delays parliament's inauguration as court investigates", *The Washington Post*, 19 January 2011.

<sup>95</sup> Ray Rivera, "Afghan political crisis grows as legislators vow to defy Karzai and open parliament", *The New York Times*, 20 January 2011.

<sup>96</sup> "President meets with plaintiff candidates", press release, office of the presidential spokesperson, 25 January 2011.

<sup>97</sup> Crisis Group telephone interviews, Sayed Ishaq Gelani, MP Paktika, Haji Fathullah Qaisari, MP Faryab, Shakir Karqar, MP Faryab, 1 February 2011.

<sup>98</sup> In a Crisis Group telephone interview on 13 February 2011, interim lower house speaker Mohammad Sarwar Osmani said that 236 out of 237 MPs present voted in favour of the court's dissolution. The resolution states that the "establishment of this court has been in contradiction with the Constitution and Electoral law; every decision by this court regarding election results remains unacceptable". The resolution also calls for criminal prosecutions related to the elections to be pursued in ordinary courts.

reignite tensions between the president and parliament. Even several losing candidates, who might otherwise benefit from the court's decisions, agree that a court decision to annul results could be destabilising. As one losing candidate from Logar put it:

I know that one of the candidates that ran against me stuffed ballots. But if these votes are cancelled and I win as a result, then there will be enmity between us and I do not want this. In this election, it's not an enmity between two houses or two families; its enmity between the whole nation. If you cancel the elections now, forces will be unleashed that none of the Western forces fighting here today will be able to control.<sup>99</sup>

Beyond the problems with the special tribunal's lack of a clear legal mandate, international and Afghan stakeholders appear to agree that even piecemeal annulment of election results poses insurmountable logistical and political obstacles. With security and stability in sharp decline, there is little appetite for re-elections. After spending \$149 million on yet another failed Afghan election, it seems unlikely that the international community will support a rerun of the polls, financially or politically.<sup>100</sup> Taking all of these factors into consideration, the president and Supreme Court must disband the special tribunal immediately.

Given the poor performance of electoral institutions and the massive amount of fraud uncovered, there is little doubt that a substantial number of election officials either actively participated in fraud for financial or other gain, or tacitly colluded in fraud. Evidence suggests that elections officials manipulated electoral data and selectively applied disqualification measures. Corruption within the IEC and ECC must be taken seriously and the need for corrective action is clear. But the extraordinary steps taken by the special tribunal in the aftermath of the polls can in no way be interpreted as justice at work. Afghan law on corruption and criminal acts clearly stipulates procedural mechanisms for investigating and prosecuting civil servants. Efforts to circumnavigate the law will only exacerbate tensions between the courts and the legislature and will fuel further showdowns with the executive. Criminal charges in connection with the election should be referred to the primary courts in the original jurisdictions in which they were allegedly committed.

#### IV. RESTORING BALANCE

Karzai's interference in the election and his tacit endorsement of the special tribunal has left the National Assembly in a precarious position. Still reeling from the controversy over the inauguration, the Wolesi Jirga is fragmented and directionless.<sup>101</sup> As of this writing, legislators appeared unable to even agree on who should be the speaker of the lower house. Immediately after inauguration, parliament became entangled in a procedural battle over the vote that saw not one but two major contenders – opposition leader Younus Qanooni and Karzai-favourite Sayyaf – knocked out of the race.<sup>102</sup> Several rounds of votes have been cast for alternate candidates, but in a move that appears designed to buy the special tribunal more time, a large block of parliamentarians have consistently cast blank votes, resulting in a stalemate over Wolesi Jirga leadership.

Divisions within the Wolesi Jirga were further magnified after the deadlock prompted parliament to appoint a 61-member committee on 15 February to find a solution to the stalemate over the election of the speaker. The committee suggested three options for ending the impasse. First, the committee suggested that parliament reach consensus on a compromise candidate for speaker.<sup>103</sup> Second, the committee suggested that the crisis over the speaker and procedural obstacles to a clean vote should be resolved by ICSIC. Last, the committee suggested a review and potential changes to parliamentary procedures for the vote. The committee ultimately voted in favour of reaching consensus on a compromise candidate on 19 February. However, in a plenary session held to vote on this option, another group of parliamentarians rejected the approach.<sup>104</sup>

Meanwhile, the special tribunal ordered a raid on IEC headquarters in Kabul on 14 February in a calculated effort to capitalise on divisions within parliament and to further intimidate elections officials. The raid was followed only days later with a move by the special tribunal to initiate

<sup>99</sup> Crisis Group interview, Logar parliamentary candidate, Kabul, 10 January 2011.

<sup>100</sup> Mohammad Jawad Sharifzada, "UN gives \$149 million for polls", *Pajhwok Afghan News*, 11 May 2010.

<sup>101</sup> For an in-depth analysis of political dynamics in the lower house see Anna Larson, "The Wolesi Jirga in Flux, 2010: Elections and Instability I", Afghanistan Research and Evaluation Unit (AREU), September 2010.

<sup>102</sup> Fabrizio Foschini, "Afghanistan's new parliament and yet another election", Afghanistan Analysts Network, 31 January 2011.

<sup>103</sup> Under parliamentary procedures in force as of 15 February, the speaker of the house is to be elected by a vote of 50 per cent of parliamentarians present plus one. Although several rounds of voting were conducted no single candidate was able to obtain a majority vote of 50 per cent plus one.

<sup>104</sup> See Fabrizio Foschini, "MPs unite and split while Special Court raids IEC", Afghanistan Analysts Network, 15 February 2011.

recounts in at least three provinces.<sup>105</sup> IEC officials on 21 February have said that they will allow the special tribunal's provincial delegates access to ballot boxes but would not provide logistical support for planned recounts. In a further escalation of the conflict over the polls, the attorney general on 20 February called for the suspension of IEC chief electoral officer Abdullah Ahmadzai and IEC commissioner Qazi Suleiman Hamid.<sup>106</sup>

Given the limited role of political parties in the lower house and the lack of cohesiveness demonstrated in parliament's inauguration, there is little evidence that the newly elected parliamentarians will be able to initiate much needed electoral and constitutional reforms in the near term. With the political system in flux and the Afghan government under constant pressure from the insurgency, alliances inside the Wolesi Jirga will remain fickle and opaque. There is little that unifies this diverse crowd of warlords, criminal elites, business barons and technocrats except for access to political capital and licit and illicit resources. While the passage of the resolution calling for the special tribunal to be dissolved is encouraging, it remains unclear whether this move represents genuine momentum for change or a one-off rearguard action to protect the power base of certain parliamentarians. If the Wolesi Jirga does not wish to be sidelined by the executive and swept aside by political events, it will need to move swiftly to adopt meaningful electoral and constitutional reforms.

Neither parliament, nor the president, nor the courts enjoy legitimacy in the eyes of most Afghans. Reversing the damage done and restoring balance between the three branches of government is imperative for both Karzai and the international community if plans for international transition are to succeed. The entire political system needs fundamental change. Broad agreement is necessary to repair the broken relationships between the branches of state. Conflict over the roles of the Supreme Court and the Independent Commission for the Supervision of the Implementation of the Constitution must be resolved so that legal disputes can be decided through precedent and practice.<sup>107</sup>

Flaws in the constitution, a poorly articulated balance of power and anaemic government institutions have allowed Karzai to exploit the political system to his advantage. The judiciary, as a result, has been transformed into a bully pulpit for the president, brooking breach after breach of the constitution. The only way to change this perverse political order is to reconstitute the Afghan government under the aegis of a parliamentary system. The alternative is a slide toward authoritarian rule that is likely to result in a return to civil war. As one Afghan legal scholar observed:

This system is intrinsically inclined to move towards dictatorship. Under such a system, the president cherishes the increase of his clout over everything: the election, the legislature, the judiciary and other institutions. These signs are very clear in our country; look at Tunisia and Egypt ... A presidential system centres on the concentration of power in the hands of one single group and one single ethnicity. This promotes an exclusionary approach, which is not suitable for building a nation.<sup>108</sup>

There is urgent need for constitutional change, and this can only be undertaken through a *loya jirga*. The formation of a *loya jirga* to amend the constitution requires the participation of the National Assembly and the district and provincial councils.<sup>109</sup> Given the failure to hold district council elections and the urgent need to introduce electoral and constitutional reforms, the National Assembly, in its current composition, must convene an emergency *loya jirga* to revise the constitution and the electoral law well before the next presidential and provincial council polls in 2014.

## V. CONCLUSION

The warning signs that the September 2010 parliamentary polls could destabilise the country were readily apparent months before the elections were held, but Afghan leaders and the international community chose to turn a blind eye.

<sup>105</sup> According to statements and documents issued by the IEC during a press conference on 21 February and Crisis Group interviews with members of parliament in Badakhshan, Kunduz and Kunar on 21 February, delegations appointed by the special tribunal ordered and initiated recounts in the provinces of Kunduz, Kunar and Badakhshan. An email from a Badakhshan IEC official, released by the IEC on the same day, indicates that recounts were ordered in Badakhshan as ANA soldiers stood guard to ensure the order was executed without interference on 19 February 2011.

<sup>106</sup> IEC press conference, Kabul, 21 February 2011.

<sup>107</sup> For detailed analysis of the role of the Supreme Court and the ICSIC see Alex Thier and John Dempsey, "Resolving the

Crisis over Constitutional Interpretation in Afghanistan", United States Institute for Peace (USIP), March 2009.

<sup>108</sup> Crisis Group interview, ICSIC commissioner, Kabul, 31 January 2011.

<sup>109</sup> Article 110, Section 6 of the constitution states: "Loya Jirga is the highest manifestation of the will of the people of Afghanistan. The Loya Jirga consists of: 1. Members of the National Assembly 2. Presidents of the provincial, as well as, district assemblies. Ministers, the Chief Justice and members of the Supreme Court as well as the attorney general shall participate in the Loya Jirga sessions without voting rights". Article 111, Section 6 further states that a *loya jirga* can be convened to "amend provisions of [the] constitution".

Flaws in the process were ignored in favour of maintaining the false narrative of greater momentum in the battle against the Taliban. NATO military officials, the UN and the EU all insisted that the parliamentary elections be held on time, choosing to ignore the defects in the system, which were used to good cause by Karzai, and motivated by fear that an oppositional parliament might not only undermine but could even unseat him. Rule by decree has consequently become the coin of the day in Afghanistan and the international community appears convinced that passivity in the face of abuse of power will result in stability despite profound evidence to the contrary.

If Karzai is as prudent as he has proven shrewd, he will recognise the precariousness of his position in the current political climate. The president's political opponents could view any interference from the special tribunal as nothing short of a breach of the constitution, giving them grounds to call for presidential censure or impeachment.

Reversing the damage done by this latest crisis will require a concerted effort to increase political representation and address flaws in both the electoral law and the constitution. Fragile relations between the executive and legislature are in urgent need of repair; President Karzai must be encouraged to comply with the constitution. Parliament should, meanwhile, work constructively to increase its influence on political processes. The president's political survival and that of the Afghan government depend on the ability of all stakeholders to reduce the trust deficit between the Afghan people and their government by adopting genuine reforms. There are no shortcuts this time.

**Kabul/Brussels, 23 February 2011**

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