
Vetting Lessons for the 2009-10 Elections in Afghanistan

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About ICTJ

The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

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Executive Summary and Recommendations

Overview

This year marks the second round of elections in Afghanistan since the fall of the Taliban. This fall it is expected that voters will choose a president and provincial councils, followed by parliamentary elections in 2010. Unlike the last election cycle of 2004 and 2005, Afghanistan's international partners will only provide financial and technical support.

Ensuring the security and integrity of the elections is a major concern. Moreover, Afghanistan's leaders must have a strategy — and a clear willingness — to uphold international principles and relevant Afghan legislation in order to guarantee the legitimacy of the electoral process. The legal framework used in the 2004-05 cycle is still applicable, and this includes criteria for verifying a candidate's eligibility, otherwise known as vetting. If properly done, vetting helps validate the electoral process. However, a badly administered and compromised vetting process could fail to achieve its stated objectives, undermine the credibility of the elections, and further weaken public trust in Afghan institutions.

This report strives to:

- Analyze the legal and operational framework for vetting candidates in the upcoming elections;
- Describe and assess the challenges to the vetting process in the previous elections;
- Map out possibilities and challenges for vetting in the upcoming elections;
- Make vetting recommendations to key Afghan and international stakeholders.

The Canadian government commissioned this report to help the international community's plans for financial and technical support of the 2009-10 Afghan elections. Two external consultants prepared this report in cooperation with ICTJ's Afghanistan and Security Sector Reform programs. They gathered the information through research, three missions to Afghanistan, and interviews with many international and Afghan interlocutors. ICTJ staff members and independent experts then assessed the material. The report represents the views of ICTJ and not those of the Canadian government.

This report has sought to emphasize the entrenched legal, operational and political challenges to electoral vetting in Afghanistan. In advance of the 2005 elections, ICTJ recommended against vetting because of the challenges to and the cost of a failed vetting process. This report echoes that informal recommendation. Ensuring free and fair elections and ending impunity is of crucial importance for the future of Afghanistan, but given the lack of political will, the shortcomings in the legal framework and the operational challenges, electoral vetting by itself cannot achieve these goals.

Legal, Operational and Political Challenges: Lessons Learned from 2005

The administration of the 2005 elections in Afghanistan entailed an anomaly in the conduct of elections anywhere in the world. In response to popular and international pressure, the election organizers instituted a system to screen potential candidates for links to illegal armed groups (IAGs) and other criteria constituting violations of the electoral law and the Afghan Constitution. The country's electoral law listed several exclusions for potential candidates, the most challenging of which aimed to disqualify people who retained their ties to IAGs. Anyone who violated the rules would be disqualified and removed from the official list of candidates.

Shortly after the Taliban government fell, political leaders and commanders suspected of war crimes entrenched themselves in the new government. Since governance and justice reforms made little appreciable progress, an extrajudicial vetting process seemed like a legitimate, timely way to diminish the influence of armed warlords who had a history of violent activity and human rights violations.

The vetting process was based on data collected through the Disbandment of Illegal Armed Groups, a project of the United Nations' Afghanistan New Beginnings Program. The Joint Secretariat of the Disarmament and Reintegration Commission identified "high-threat" groups and targeted them for disarmament. After candidates were nominated for the parliamentary elections, people had the right to bring challenges to the Electoral Complaints Commission (ECC), the agency charged with investigating eligibility claims.

Although the secretariat identified 1,100 candidates with links to IAGs, many people were not disqualified because of insufficient evidence or fears that they would pose a security threat to the fledgling government of Afghanistan if they were disqualified. These problems, combined with a shortage of accurate information and institutional procedures, deeply flawed the vetting process.

Vetting candidates in 2005 failed for three main reasons. First, the legal framework established to disqualify candidates on the basis of links to armed groups was incomplete and poorly defined. Second, the institutions charged with running the process did not have the resources or the capacity. Third, the Afghan government and the international community lacked the political will to make sure that people were vetted fairly. These weaknesses resulted in a highly selective process that left many armed commanders to run for office.

Looking Forward: Assessing Current Challenges and Capacities

Many of the shortcomings from 2005 remain. For example, Disbandment of Illegal Armed Groups' (DIAG) criteria and regulations remain unclear. The program's definitions of "unofficial military forces" and "illegal armed groups" are not well defined, nor are the standards for what constitutes a member or commander of such groups. These ambiguities have opened the process to arbitrary decision-making and political manipulation. The track record of the Afghan government and international stakeholders to date suggests that fewer resources exist now to collect, organize and verify information than there were in 2005. Similarly, the capacity of the institutions that oversee vetting is limited because they will no longer have any international staff members. (It should be noted, however, that international staff does not ensure capacity.)

Only a few months before the candidate nomination process is scheduled to start, no consensus exists as to how or whether to support a new vetting effort during the electoral process, even though the electoral law mandates it. Without political will and a clear division of responsibility and action among those involved, vetting will only produce more public disillusionment. The political risks of instituting vetting without focusing on how it is carried out are very high. Concerns about holding free and fair elections are

surfacing in the voter registration process. Most significantly, the dramatic decline in security throughout Afghanistan can make a politically sensitive process even more difficult to do. These challenges must be taken into serious consideration.

Recommendations

Existing political, legal and operational constraints represent significant limitations for establishing an effective, credible vetting process during the 2009-10 electoral cycle. ICTJ proposes three options to make the elections as fair as possible within these constraints.

OPTION ONE:

Move now to effectively address the legal, operational and political challenges to enable a practical and fair vetting process during the 2009-10 electoral cycle.

If the Afghan government and its international partners are serious about replacing the fundamentally flawed vetting process used in 2005 with a substantial one, the government and donors should ensure that:

- Political commitment for an effective, credible and fair vetting process exists among both the Afghan government and donors;
- Vetting is done with equal attention to legal and procedural standards for the 2009 presidential and provincial council elections, as well as those for the legislature in 2010. This means that preparations for vetting must be in place in time for the 2009 elections, and these should not be used merely as a “test-run” for the Wolesi Jirga elections. Different forms of vetting can be used in the different electoral processes, however. For example, “soft” vetting may be an option for the presidential elections (see Option Two);
- The vetting criteria are clearly defined and applicable. Of particular concern is the legal definition of an IAG and what constitutes both membership and participation in an IAG; these should be clarified either through legislation or by presidential decree;
- Institutional and operational shortcomings are addressed well in advance. This involves designing an impartial, effective mechanism to coordinate and implement the vetting process, and ensuring that the resources exist to sustain it properly.

Option One requires immediate attention from the Independent Electoral Commission (IEC), Disarmament and Reintegration Commission (D&RC) and UNDP Elect to ensure that:

- Preparations for vetting are initiated immediately through joint high-level consultations between the three offices;
- A joint secretariat is established to regulate the procedures and sharing of information between the IEC and the D&RC, with the technical support of UNDP Elect;
- The agency or office that compiles the DIAG list is separate from the IEC, which is charged with disqualifying candidates based on that list;
- Close consideration is paid to the role, function and independence of the ECC in the electoral cycle. Serious differences of opinion exist between those who now are working to institutionalize the vetting process.¹ At the very least, the ECC should be functioning before the candidate nomination period begins. Its members should be appointed by the most transparent legitimate means possible, perhaps by a vote of confirmation from the National Assembly;
- A clear code of procedures and institutional responsibility is established. Some of the major procedural questions that need to be asked are:

1. According to the IEC, the main body responsible for announcing the disqualification of candidates with links to IAGs should be the ECC. Others argue that the IEC only has the authority to disqualify candidates.

- What will happen to the list of people with links to IAGs? Will the list be publicized before nominations? If not, what entity will be responsible for reviewing the information and announcing disqualified candidates? If the list is not publicized, how will transparency and legitimacy of the process be ensured?
- What measures can be put in place to ensure that the body acting to disqualify candidates is secure enough to make decisions not favorable to armed and influential figures and groups?
- Can the D&RC and DIAG institute verification measures to assess whether candidates who want to be reinstated have truly disarmed and disassociated themselves from IAGs? How will they monitor ongoing compliance? What happens if a candidate gets arms again or renews his or her association with an IAG?
- What will the appeals process entail? A provision for appeals and due process must exist for candidates to get their names removed from the disqualification list, according to set criteria and a stringent verification procedure.

OPTION TWO:

Design and implement a “soft” vetting process

Given that the legal, operational and political challenges confronted in 2005 have only increased, a “soft” vetting process may be an alternative. This means that electoral candidates with links to IAGs would have the opportunity to withdraw from the race before the information about their association was broadly publicized to voters. Soft vetting lets voters decide whether such a candidate should be elected or not. It does not require as much organisation or resources from official Afghan and international stakeholders, whose capacity and willingness to enact a vetting process are limited.

In Option Two, the Afghan government, donors and other key stakeholders should ensure that:

- Prospective candidates can see the information obtained about their links to IAGs so they then can decide if they want to withdraw;
- The media and civic education informs voters about candidates linked to IAGs;
- Candidates take a public oath declaring that they are not affiliated with an IAG and will not be in the future. This is meaningful only if the activities and membership of armed groups are monitored after the elections;
- After taking all possible measures to inform the electorate, allow the voices of voters to reflect political choices. International and national security forces should be given the mandate and resources to protect communities who speak out or vote against entrenched warlords.

While Option Two is less demanding, it requires some political commitment, particularly to broadly disseminate information about candidates and to guarantee the media’s freedom during the electoral process. This option would also involve changes to the existing legal framework to adapt the conditions for candidate eligibility.

OPTION THREE:

Downplay the vetting process and focus support on other mechanisms that are more likely to yield positive results and contribute to free, fair elections. (Due consideration should also be given to the recommendations of this option even if the first and second are selected.)

In case the Afghan government and donors do not think it is possible to overcome the legal, operational and political shortcomings of the 2005 vetting process, focus and resources should be redirected to other processes and mechanisms. It is critical to recognize that such a step would contravene Afghan law, and at minimum the National Assembly would need to repeal the vetting provision in the electoral law.

The Afghan government, donors and other key stakeholders should ensure that:

- They take all steps necessary to limit fraud during voter registration;
- International and Afghan organizations can observe all phases of the electoral process, from registration to counting. Organizations such as the Free and Fair Elections Foundation of Afghanistan should be allowed to continue expanding their monitoring processes and build coalitions with local organizations in the various regions. International election monitors should be placed extensively throughout the country, including in sparsely populated and insecure areas;
- Human rights and monitoring organizations are encouraged to play an important role in voter education and outreach. This would involve managing access to rural populations, supplying information to a largely illiterate electorate, and ensuring that voters have accurate, complete information on both the electoral process and the candidates;
- Members of the Afghan and international media can report freely about the electoral process and contribute to civic awareness and outreach in an electoral cycle;
- The best possible security arrangements are in place to make sure voters are able to exercise their rights, including the provision of a mandate to international security forces to protect the integrity of the elections directly, rather than as a backup to Afghan security forces.

List of Abbreviations

AIHRC	Afghanistan Independent Human Rights Commission
ANBP	Afghanistan New Beginnings Program
ASOP	Afghanistan Social Outreach Program
CFC-A	Combined Forces Command - Afghanistan
CoA	Constitution of Afghanistan
D&RC	Disarmament and Reintegration Commission
DDR	Disarmament, Demobilization and Reintegration
DIAG	Disbandment of Illegal Armed Groups
ECC	Electoral Complaints Commission
EU	European Union
IAG	Illegal Armed Groups
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IDLG	Independent Directorate for Local Governance
ICTY	International Criminal Tribunal for the Former Yugoslavia
IEC	Independent Electoral Commission
IFES	International Foundation for Electoral Systems
ISAF	International Security Assistance Force
JEMB/JEMBS	Joint Electoral Management Body/JEMB Secretariat
JS	Joint Secretariat of the Disarmament and Reintegration Commission
NATO	North Atlantic Treaty Alliance
NSD	National Security Directorate
OSCE	Organization for Security and Cooperation in Europe
PEC	Provincial Electoral Commission
PRT	Provincial Reconstruction Team
PSC	Private Security Company
UDHR	Universal Declaration of Human Rights
UEC	UNAMA Electoral Component
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP ELECT	United Nations Development Program Elections Project

I. Introduction

1.1 Aim

Afghanistan is moving toward a second cycle of elections. Presidential and provincial council elections are expected in autumn 2009 and parliamentary elections in 2010. As opposed to the elections held in 2004 and 2005, these elections will be Afghan-led with the international community's support being limited to financial and technical assistance. Major concerns in the upcoming elections will be ensuring the integrity and legitimacy of the electoral process: This will require a clear willingness and strategy for upholding international principles and relevant Afghan legislation throughout the electoral process. Given that the same legal framework will apply as in the previous elections, a process for the verification of candidate eligibility, otherwise known as vetting, will need to be established.

This report strives to:

- Analyze the legal and operational framework for vetting candidates in the upcoming elections;
- Describe and assess the challenges to the vetting process in the previous elections;
- Map out possibilities and challenges for vetting in the upcoming elections;
- Make recommendations on vetting to key Afghan and international stakeholders.

The Canadian government commissioned this report with a view that it could contribute to the planning of the international community's financial and technical support for the upcoming elections. The report represents the views of ICTJ and not those of the Canadian government.

1.2 Background

On Sept. 18, 2005, Afghanistan held elections to the lower house of its 249-member legislative national assembly called the Wolesi Jirga² and for 34 provincial councils. The elections were the first in more than 30 years for a national legislature. An estimated six million Afghans went to the polls, out of an electorate of about 12.4 million. The previous year, some eight million Afghans voted in the presidential elections on Oct. 9, 2004. It was no mean feat to hold elections in a country still recovering from a quarter-century of war, where a very large proportion of the population is illiterate, where communications between rural areas and the capital are poor, where significant swaths of the country remain vulnerable to insurgent attacks and organized crime, where disarmament, rule of law and security sector reform has been compromised, and where the majority of the population has no experience with elections.

2. House of People, or Lower House. Its members are elected by direct and universal elections every five years.

Many Afghans retained a “widespread perception that the [Wolesi Jirga] elections were marred by weak candidate vetting, fraud and intimidation,” and that the international community tacitly condoned these abuses.³ Many people alleged to have committed war crimes and to have continuing links with illegal armed groups (LAGs) were elected to the National Assembly.⁴ The former militia commanders, now parliamentarians, have made use of their positions as legislators to consolidate their power and influence. For example, in 2007 the Wolesi Jirga forced a bill through parliament on “national reconciliation” that included a provision to grant immunity to all sides that fought during the country’s long wars. As of this writing, the bill has not yet been invoked, yet its passage demonstrates the clout that armed leaders continue to wield.

As Afghanistan enters its next election cycle, it faces a critical security situation coupled with a growing crisis of legitimacy in the government. Since 2006, the Taliban insurgency has grown stronger, with some estimates indicating that President Hamid Karzai’s administration and the international forces supporting it effectively control only three-tenths of the country as of mid-2008 and insurgency-related violence is at record levels. The ongoing conflict is likely to intensify if, as expected, the Taliban and its allies attempt to disrupt the electoral process through violence. Suicide bombings, a virtually unknown phenomenon in Afghanistan before 2005, have caused hundreds of fatalities. Among the deadliest attacks was one at the opening of a sugar factory in Baghlan, a province north of Kabul, in November 2007 that killed more than 70 people, including members of a parliamentary delegation and scores of schoolchildren. At least 100 people attending a dogfight outside Kandahar were killed in a massive suicide attack in February 2008 that killed the chief of the district auxiliary police who was believed to be the principal target. Terrorist attacks have also reached Kabul, with the January 2008 attack at the Serena Hotel, a presidential assassination attempt in April and the July suicide attack on the Indian embassy that caused 58 deaths and left 140 injured.

Counterinsurgency measures, particularly aerial bombardments, continue to cause many civilian casualties and erode public support for both the international military presence and the Karzai government. According to Human Rights Watch, civilian deaths from U.S. and NATO air strikes nearly tripled from 2006 to 2007, and 2008 continues to see a high civilian death toll.⁵ Opium poppy cultivation and production, which represents as much as one third of the country’s gross domestic product, feeds institutional corruption and also finances the Taliban, which draws lucrative benefits from taxing farmers and coercing producers and transporters to pay for protection.

UN officials have also warned of a possibly catastrophic food crisis for the 2008-09 winter in Afghanistan, brought on by the harsh conditions of the previous winter, the summer drought that followed, rising food and commodity prices globally and the global financial crisis.⁶ NGOs and government officials warn that the food crisis could add to the worsening security situation. In the current context it is obvious that much of the national and international effort preparing for the elections will focus on establishing the electoral apparatus and ensuring security. However, the elections’ ultimate success depends on whether the contenders and their constituents respect the process as a legitimate power-sharing exercise.

3. Andrew Wilder, “A House Divided: Analysing the 2005 Elections,” Kabul: Afghanistan Research and Evaluation Unit, 2005, 35.
4. Human Rights Watch, “Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity,” July 2005, www.hrw.org/en/reports/2005/07/06/blood-stained-hands-0, last accessed Dec. 15, 2008.
5. Human Rights Watch, “Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan,” Sept. 8, 2008, www.hrw.org/en/reports/2008/09/08/troops-contact-0, last accessed Dec. 15, 2008.
6. UNAMA News, “Current crises threaten to plunge more Afghans into poverty, warns UN official,” Oct. 29, 2008, www.unama-afg.org/_latestnews/2008/08oct20-undp.html, last accessed Dec. 15, 2008.

1.3 Method and Outline

The report is centered around a case study on vetting in the lead up to the 2005 Wolesi Jirga elections in Afghanistan. Two external consultants prepared this report in cooperation with ICTJ's Afghanistan and Security Sector Reform programs. Fact-finding for this report has been conducted through desk research and three missions to Afghanistan. The report has benefited from discussions with a large number of international and Afghan interlocutors. The information received has been jointly assessed by ICTJ and the independent experts.

This report is divided into four chapters following this introductory chapter. Chapter Two analyzes candidate vetting from a legal and comparative perspective; Chapter Three describes and analyzes the electoral vetting process during the previous electoral cycle; Chapter Four provides a background to the next elections and discusses how accountability can be enhanced; and Chapter Five concludes the report and outlines recommendations to different stakeholders.

2. Legal Considerations for Electoral Vetting

2.1 International Framework

A country's constitution and laws regulate its national elections, but international law sets a number of standards that national legislations are expected to meet. The first of those standards was issued by the 1948 Universal Declaration of Human Rights (UDHR) that stipulates that “the will of the people shall be the basis of the authority of government.”⁷ Since then, the derived principle of representative democracy has increasingly been seen as an essential element of legitimacy of governments among the community of nations.⁸ The same article provides for “periodic and genuine elections that shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” A number of other UDHR provisions are also relevant to elections, in particular to ensure a conducive environment for free expression including the principle of non-discrimination,⁹ and the rights to freedom and security;¹⁰ freedom of thought;¹¹ freedom of opinion and expression;¹² and freedom of assembly and association.¹³

Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR) establishes the electoral rights that its state parties are obligated to ensure their citizens.¹⁴ The covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, to vote and to be elected.¹⁵

Article 25 of the ICCPR also introduces the possibility of restrictions to political rights, but it clarifies that they cannot be “unreasonable.” According to the General Comment 25, any restriction applied to the exercise of those rights should be based on objective, reasonable criteria, and the states should regulate all exclusions of groups or individuals from them.¹⁶ A minimum age limit and mental incapacity are considered reasonable restrictions of electoral rights in the General Comment. Restricting the right to vote on

7. UDHR, art. 21 (3). The Constitution of Afghanistan, art. 7 (1) (hereafter CoA), pledges compliance with the UDHR.

8. Guy S. Goodwin-Gill, *Free and Fair Elections*, 2nd ed.; Geneva, Inter-Parliamentary Union, 2006, 93.

9. UDHR, art. 2.

10. *Ibid.*, art. 3.

11. *Ibid.*, art. 18.

12. *Ibid.*, art. 19.

13. *Ibid.*, art. 20.

14. ICCPR, art. 25, states that “Every citizen shall have the right and the opportunity without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” Afghanistan became party to ICCPR by accession on Jan. 24, 1983, without reservations or declarations that are relevant to this paper. Afghanistan is not party to the Optional Protocol to the ICCPR. .

15. The right to vote is discussed in this section because registering as a voter in many countries, including Afghanistan, is one of the requisites to run for office. Therefore, the deprivation of the right to vote becomes a deprivation of the right to be elected.

16. The Human Rights Committee adopted the General Comment at its 1,510th meeting (57th session) on July 12, 1996.

the grounds of physical disability or by imposing literacy, educational or property requirements is deemed unreasonable, however, and so is restricting the right to stand for elections on the grounds of education, residence, descent, or by reason of political affiliation. The conviction for an offense is only mentioned as a basis for suspending the right to vote, and it is clarified that the period of suspension must be proportionate to the offense and the sentence. Deprivation of liberty without a conviction should not represent a cause of exclusion from the exercise of the right to vote, with an implicit reference to the principle of presumption of innocence. Additionally the issue of incompatibility, or conflict of interest, between elected offices and the tenure of specific positions (e.g., the judiciary, high-ranking military office, or public service) should be regulated in a way that does not limit electoral rights. Similarly, conditions on nomination dates, fees, or minimum number of supporters should be reasonable, nondiscriminatory and not act as barrier to candidacy.

General Comment 25 also indicates that an independent electoral authority should be established to supervise the electoral process and ensure that it is conducted in a free, fair manner, in accordance with the national laws and the ICCPR. It also stipulates that:

[I]n order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.¹⁷

Several regional instruments reaffirmed those principles,¹⁸ which were further developed thanks to the growing involvement of the UN and other institutions in electoral observation.¹⁹

Countries have regulated the restrictions on the right to be a candidate and to be elected through their constitutions and laws. The most common restrictions, which may be divided into three categories, are the following: (1) requirements based on age, citizenship, residence, registration as voter, or in some cases literacy or a minimum level of education; (2) disqualification criteria based on criminal conviction, mental incapacity, or in some cases bankruptcy; and (3) conflict of interest criteria based on holding a military or government office. Disqualifying candidates on the grounds of criminal conviction for serious offense is widely accepted. In fact, in many countries people convicted of serious crimes lose the right to vote and consequently to be elected. However, according to the prevalent doctrine this criterion finds a limit, although not an absolute one, in the principle of the presumption of innocence, as defined by a number of international instruments,²⁰ as well as in the principle of proportionality, according to which the period of suspension from electoral rights must be proportionate to the offense and the sentence. The presumption of innocence, however, only extends to criminal proceedings, not administrative ones.

17. HRC General Comment 25, § 26.

18. African Charter on Human and Peoples' Rights, art. 13; American Convention on Human Rights, art. 23; and European Convention on Human Rights, in particular its First Protocol, art. 3. None of the regional instruments are directly applicable in Afghanistan, but they will inform the conduct of international electoral support missions.

19. For example, the Conference on Security and Cooperation in Europe (CSCE) adopted an extensive set of electoral standards during its Meeting on Human Dimension, held in Copenhagen in 1990. An even more detailed and inclusive instrument is the Declaration on Criteria for Free and Fair Elections, unanimously adopted by the Inter-parliamentary Council at its 154th session in Paris on March 26, 1994. The declaration looks at the protection of electoral rights by developing the concept of "reasonable restriction." It also stresses the need for a free media. Such standards are further defined by the Code of Good Practice in Electoral Matters, adopted by the Venice Commission of the Council of Europe at its 52nd session held in Venice between Oct. 18 and 19, 2002.

20. UDHR, art. 11; ICCPR, art. 14; and Rome Statute on the ICC, art. 66. The conviction must respect the due process rights of the defendant, including the right to appeal to a higher court, according to the law.

2.2 Elections in Post-Conflict or Transitional Contexts

Elections in post-conflict contexts or emerging democracies pose different challenges from those established democracies face. In the former contexts, where human rights are not always fully respected, elections represent an important step toward building a state based on the rule of law. Especially after long periods of conflicts, the design of, preparations for and implementation of elections need to take into consideration that the people have little experience with elections, there is limited or no trust in state institutions, and security often remains a problem. Moreover, post-conflict countries frequently face legacies of gross human rights abuses but cannot rely on functioning judicial systems. In such contexts, the rights and restrictions to candidate eligibility may have to be addressed differently than in established democracies, where civil society, an independent judiciary and a free media are in place.

Elections can help consolidate a transition by improving political and institutional accountability and by promoting trust of the citizens in the legislative and executive branches. However, strong political leadership is necessary to overcome resistance by spoilers. Several processes must be put to work in coordination with elections. They include the disarmament of former combatants,²¹ re-establishment of the security sector, a functioning criminal justice system, civil service reform, and vetting²² to exclude officials who committed serious abuses from public office, as well as other efforts to address legacies of war crimes and crimes against humanity. Without such mechanisms in place, elections risk being counterproductive by generating expectations that are unlikely to be met. “The rule of law is central to democratic civility, and without it there can be little in the way of meaningful democratic choice. Meaningful choice is free choice, and without a framework that protects citizens’ freedoms, the ‘choices’ citizens make should be seen as a form of theater rather than as an exercise in popular decision-making.”²³ Moreover, “the right to an effective remedy for violations of human rights is itself a human right,”²⁴ and states do have an obligation to address past abuses. This may include the exclusion of serious criminals from running in elections in order to prevent the further abuses of power and authority during transitions.

Although Afghanistan represents a unique case, the issue of whether more intrusive candidate verification can be used in elections in post-conflict or post-authoritarian societies has received increasing attention. In the recent past vetting processes have been established in several post-conflict countries with the aim of barring people who were involved in serious human rights violations from being elected in order to prevent future abuses. While international law has little to say about this matter, the experiences gained in a number of post-conflict countries can help to establish such processes.

Operational guidelines on vetting can be found in several recent publications.²⁵ The aim is to provide guidance on how to exclude people who committed serious human rights violations from public office, in line with international human rights standards and best practices. Although the publications refer mainly to vetting public servants, they also provide useful information for vetting candidates in elections — on the premise that no “one-size-fits-all” for vetting in transitional contexts exists. For example, the category

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21. Experiences in other post-conflict countries show that elections are not likely to consolidate peace unless they are preceded by successful disarmament of combatants. Angola (1992), Sierra Leone (1996) and Liberia (1997) held elections without disarming with disastrous results. By contrast, elections in Mozambique and El Salvador occurred after disarmament, which contributed to the consolidation of peace. See Jimmy D. Kandeh, “Sierra Leone’s post conflict elections of 2002,” *The Journal of Modern African Studies* 41, no.2, 2003, 193.
 22. The term vetting refers to the procedures used for assessing a person’s integrity and suitability for public offices. See Roger Duthie, “Introduction,” in Alexander Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, New York: Social Science Research Council, 2007, 17.
 23. William Maley, “Democratic governance and post-conflict transitions,” *The Chicago Journal of International Law* 6, no. 2, 2006, pp. 683-701.
 24. Goodwin-Gill, *Free and Fair Elections*, 158. The right is asserted in ICCPR, art. 2(3).
 25. See in particular OHCHR, *Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework* New York: United Nations, 2006; Alexander Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, New York: Social Science Research Council, 2007; and Sean McFate, “The art and aggravation of vetting in post- conflict environments,” *Military Review* 87, no.4, 2007.

of people who should be disqualified is defined as individuals who committed “gross violations of human rights or serious crimes under international law. These include in particular genocide, war crimes, crimes against humanity, extrajudicial execution, torture and similar cruel, inhuman and degrading treatment, enforced disappearance and slavery. These are serious crimes that indicate a lack of integrity at a level that fundamentally affects a person’s credibility to hold public service. If a person were convicted and punished for such crimes — and, in fact, States have an obligation to prosecute these crimes — exclusion from public service would be a normal consequence.” The presence of “such [a] person is likely to undermine the trustworthiness of the entire public institution.”²⁶

If it is the state’s duty to bar from public office people who committed serious human rights abuses in order to prevent their recurrence, it is equally important to respect fundamental due process standards in order to ensure the credibility of the process and prevent its manipulation. These include “certain basic elements: initiation of proceedings within a reasonable time and generally in public; notification of the parties under investigation of the proceedings and the case against them; an opportunity for those parties to prepare a defense, including access to relevant data; an opportunity for them to present arguments and evidence, and to respond to opposing arguments and evidence, before a body administering the vetting process; the opportunity of being represented by counsel; and notification of the parties of the decision and the reasons for the decision; as well as the right to appeal.”²⁷ Such guarantees protect the rights of the people who are subject to vetting and prevent purges or witch-hunts.²⁸ The balance between the responsibility to exclude serious perpetrators and the right to due process of those subjected to vetting is a “question of crucial importance for strengthening the legitimacy of official bodies, the restoration of the public’s confidence, and the consolidation of the rule of law.”²⁹ Moreover, failing to respect basic due process standards exposes an electoral process to a high risk of political manipulation.

Thus in post-conflict countries, which often lack a functioning and independent judiciary, different mechanisms have been adopted in order to weed out candidates who committed serious human rights violations, undermine the legitimacy of public institutions, and may represent a threat to the transition. The electoral law of Bosnia and Herzegovina, for example, contains provisions aimed at disqualifying people serving a sentence or indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) or who did not comply with an order to appear before it from registering to voters, running in an election, or holding a public office.³⁰ The same restrictions apply to people serving sentences imposed by national³¹ or foreign³² courts, or who have failed to comply with an order to appear before them, for serious violations of humanitarian law whose files have been reviewed by the ICTY and found consistent with international legal standards. Furthermore, in Kosovo, no one was eligible to run as a candidate in the 2004 national assembly elections if they were serving a sentence, under indictment, or failed to comply with an order to appear before the tribunal.³³

In order to ensure compliance with such vetting provisions, potential electoral candidates are often required to sign an affidavit or a statement, pledging adherence to a peace deal or disclosing qualification requirements. The electoral law of Bosnia and Herzegovina foresees that the candidate, or political party, must sign a statement pledging compliance with the General Framework Agreement for Peace in Bosnia

26. OHCHR, Rule of Law Tools, 21.

27. *Ibid.*, 26.

28. Federico Andreu-Guzman, “Due process and vetting,” in Alexander Mayer-Rieckh and Pablo de Greiff, eds. *Justice as Prevention: Vetting Public Employees in Transitional Societies*, New York: Social Science Research Council, 2007, 449.

29. United Nations Security Council, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, para. 53.

30. Election Law of Bosnia Herzegovina, art. 1 (6).

31. *Ibid.*, art. 1 (7).

32. *Ibid.*, art. 1 (7) (a).

33. UNMIK Regulation 2004/12, On Elections for the Assembly of Kosovo, May 2004.

and Herzegovina.³⁴ In India, candidates are required to declare their criminal records in the form of affidavits. False statements normally lead to exclusion.

An established code of conduct may also contribute to preventing unethical behavior; if binding, a code can hold individuals and entities legally accountable for their actions. A code of conduct is usually a set of written rules that govern the conduct of public officials, such as election officers, or political parties and individual candidates. Codes of conduct that are entrenched in legislation may set sanctions and penalties for violations, such as fines or disqualification of a candidate. Violations of the code that involve criminal acts are referred to the criminal justice system.

2.3 The Afghan Legal Context

The 2004 Constitution of Afghanistan (CoA) is in line with the international instruments of human rights particularly with election-related standards in the UDHR and the ICCPR. Article 33 of the CoA states the right of every Afghan citizen to vote and to be elected, under the conditions stipulated by law. Criteria for becoming a presidential or parliamentary candidate are established in articles 62 and 85 of the CoA respectively. Article 85 lists criteria for both parliamentary candidates elected to the Wolesi Jirga or appointed to the Meshrano Jirga.³⁵ To become a candidate in either presidential or parliamentary elections the following qualifications are required:

- Presidential candidates must be Muslim, hold Afghan citizenship, and be born to Afghan parents, while parliamentary candidates must have obtained Afghan citizenship at least 10 years prior
- Candidates must not have been convicted for crimes against humanity
- Candidates must not have been convicted of any criminal act
- Candidates must not have been deprived of civil rights by a court

Some other qualifications are required to run for presidential office, namely candidates must not hold dual citizenship. The minimum age requirement varies for different offices: for presidential candidates it is 40 years of age; for Wolesi Jirga members it is 25; and for members of the Meshrano Jirga members it is 35.

Other candidate criteria are identified in Afghanistan's electoral law, adopted by a presidential decree³⁶ in May 2005; this was the framework that governed the parliamentary and provincial council elections of Sept. 18, 2005. Article 14 of the electoral law refers to CoA articles 62 and 85 and extends the criteria listed in article 85 to provincial and district council electoral candidates as well. As of this writing, Afghanistan has not had district council elections.

The most significant vetting provision of the electoral law is in article 15 (3), which established that people "who practically command or are members of unofficial military forces or armed groups" cannot run for office. This reflected concerns in the Afghan public and the international community about a number of potential candidates who were known to have committed serious human rights abuses, remained in charge of illegal militias, and continued to engage in violence. Due to the lack of a functioning and independent judiciary it was (and still is) impossible to bring these warlords to justice, or even ascertain their criminal records. The vetting criterion established by article 15 (3) of the electoral law provided space for an extra-judicial administrative procedure to exclude such members of unofficial armed groups. The electoral law does not clarify, however, what unofficial military forces or armed groups are nor does it

34. Election Law of Bosnia Herzegovina, art. 1 (13).

35. House of Elders or Upper House. One third of its members are elected by the provincial councils, one-third by the district council, and one-third are appointed by the president. Pending the elections of the district council, the provincial council elects two-third of the members.

36. During the transitional period, the power to issue legislation on electoral matters is entrusted to the Transitional State (Art. 159 CoA).

provide a clear definition of what it means to “practically command” or to be a “member,” both of which undermine the applicability of the criterion in practice and open it up to political manipulation.³⁷

In article 15 (1), the electoral law lists a number of positions whose tenure is incompatible with candidate status in presidential, parliamentary, provincial and district elections and that must be relinquished before running for office. These positions include: chief justice, members of the Supreme Court and other judges; the attorney general and public prosecutors; ministers, governors, their respective deputies and district administrators; mayors and district administrators; members of the Ministries of Defense and Interior, and the General Directorate for National Security; general directors, directors of ministerial departments, and government offices at the central and provincial level; and electoral officials. Anyone in these posts has to present a signed statement attesting to their resignation at the time of filing nomination papers.

Article 35 of the electoral law lists the additional items each prospective candidate has to submit. This includes the following:

- A voter registration card
- The requisite number of signatures of the prospective candidate’s supporters, which depends on the office sought (10,000 signatures for presidential candidates, 300 for parliamentary candidates, 200 for provincial council candidates, and 100 for district council candidates)
- A sworn statement attesting to the candidate’s eligibility and qualifications, including commitment to uphold the Code of Conduct and confirmation of their resignation from any incompatible position; that they do not command or belong to unofficial military forces or armed groups; and that they have not been convicted or deprived of civil rights
- A filing fee (50,000 Afghani for the presidential election, 10,000 for the parliamentary election, 4,000 for the provincial council election, and 2,000 for the district council election)

Finally, article 53 of the electoral law lists a number of electoral offenses. These include providing false information; threatening, intimidating or attacking a voter, a candidate or a journalist; committing fraud in voting or vote counting; offering or receiving a payment or other benefit for the purpose of influencing the electoral process; possessing more than one voter registration card; interfering with election materials or procedures; violating the Code of Conduct; and using funds originating from illegal activities or of foreign origin. Committing such offenses results in a range of sanctions, including warnings, fines, recounting of ballots and removing candidates from the ballot list. The law mandates the Electoral Complaints Commission (ECC)³⁸ to determine the sanction of a given electoral offense in such circumstances, thus giving it a great deal of discretionary power. Allegations concerning a number of these offenses became the basis for complaints against candidates and electoral officials submitted to the ECC in 2005. Article 156 of the CoA foresees the establishment of the Independent Electoral Commission (IEC) for the organization and supervision of the elections.

According to article 161 of the CoA, the National Assembly is mandated to review all decrees that the president adopted in the transitional period and should therefore either confirm the old 2005 electoral law or adopt a new one. In autumn 2008, the National Assembly reviewed a draft of a new electoral law, but failed to approve it in time for the 2009 elections.³⁹ Therefore the 2005 electoral law will regulate the 2009 presidential elections.

The fact that the 2005 electoral law will be applied to the next election cycle means that the requirements,

37. For a more detailed explanation of the legal and definitional issues of vetting in 2005, see Chapter 3.

38. The ECC is composed of one member appointed by the Supreme Court, one member appointed by the Afghan Independent Human Rights Commission, and three members appointed by the Special Representative of the Secretary-General (Art. 52 of the electoral law).

39. CoA, art. 109, stipulates that the electoral law cannot be modified during the last year of the legislative period. By analogy, the one-year suspension period has also been applied to the forthcoming presidential elections.

qualification and disqualification criteria for the 2009 presidential and provincial elections will be the same as in the 2005 elections, including the vetting of candidates for links with IAGs. To this end, the Disbandment of Illegal Armed Groups (DIAG) has undertaken a re-mapping exercise of IAGs, to be completed by February 2009. The timing of this exercise is crucial, as the availability of solid information prior to candidate registration represents a condition for early exclusion of candidates who do not meet the criteria. More importantly, principles of legality must be strengthened and upheld, which demand that laws be clear and precise in order to avoid abuses of power.

The legal framework governing the disarmament process presents a number of challenges and questions. The DIAG process was authorized by a series of presidential decrees from 2004 onward and was incorporated into the development strategy embraced by international donors under the Afghanistan conference in London in 2005.⁴⁰ However, the language of the decrees that regulate DIAG and the definitions the program uses are unclear and ambiguous in ways that have serious implications for a vetting process premised on excluding candidates with links to IAGs. In the first instance, though DIAG has established a working definition of an IAG (see section 3.4), it has been modified at least once and is not codified in any part of Afghan law. A similar confusion exists in attempting to define or identify a commander, leader or member of an IAG. The legal standards for how a member of an armed group can prove he or she has terminated their involvement with an IAG are unclear. The legal standing and classification of what constitutes an IAG also has implications for the regulation of private security companies in Afghanistan.

A process of legalizing private security companies (PSCs) has begun in Afghanistan. Although the draft bill — adopted by the Council of Ministers on Jan. 7, 2008 — is still under scrutiny in the National Assembly, the government enacted the relevant regulations in February 2008 so the process could start.⁴¹ The goal is to ensure “transparency, accountability and quality services by private security companies” in order to provide security to international military bases, embassies and economic projects, thus preventing the disruption of Afghanistan’s reconstruction process. The intention of reassuring the public that “illegally armed groups will not re-emerge in the form of such companies” is also stressed. However, despite these reassurances, many are concerned about the institutional capabilities of reaching these goals and about the risk that legalizing PSCs could further complicate the vetting of candidates based on their links to IAGs.

Finally a joint committee of the two houses in the National Assembly passed a new mass media law in September, overriding a presidential veto.⁴² The law contains provisions aimed at promoting a free, independent and pluralistic mass media. It increases the independence of the public media, curtails government control, and attributes the competence of developing a media policy to a transparently selected high council. The law also established a Mass Media Commission of professional journalists to oversee licensing the media and monitoring their activities, including referring any violations to judicial institutions. In addition to the law’s general aim of asserting journalistic standards of impartiality and balance, it obliges private media organizations to “maintain balance relating to the adversary positions taken by political groups and personalities, and broadcast their views impartially.”⁴³ If enforced correctly, the law could have a positive impact on the forthcoming elections.

40. Presidential Decree No. 50 (July 2004) declared all groups and remnants that did not integrate into the Afghan security forces illegal. Presidential Decree No. 49 (March 2005) established the Disarmament and Reconciliation Commission, and a subsequent vice presidential directive established the structure and partners of the DIAG program.

41. Art. 1 states that the procedure has the purpose of “regulating the activities of security companies in the country in order to fill the legal vacuum until the enactment of the relevant law.”

42. The National Assembly initiated the draft Mass Media Law and approved it in December 2007. On Dec. 26, the Office of the President sent the bill back, recommending that it be rejected because of inconsistencies with the legislation in force.

43. Mass Media Law, art. 22.

3. The Vetting Process in the Parliamentary and Provincial Council Elections in 2005

3.1 The Parliamentary and Provincial Council Elections of 2005

The 2005 elections in Afghanistan attempted something different, an anomaly in the conduct of elections anywhere in the world. In response to popular and international pressure, the election organizers created a system to screen potential candidates for links to IAGs and other criteria constituting violations of the electoral law and the CoA. Those who failed the vetting would be disqualified and removed from the official candidate list.

This process faced many challenges. Although electoral officials had a significant amount of data available to review, those responsible for overseeing the vetting procedure had to weigh carefully the standard of evidence applied and other due process considerations, as well as possible infringements on the right to political participation. One of the key dilemmas the process faced was whether electoral bodies would be willing to use evidence to disqualify politically powerful candidates, given that much of the collected information was classified.

The impetus for instituting a vetting procedure for Afghanistan's parliamentary elections was the concern among Afghan and international officials involved in the security sector and in the disarmament process, as well as Afghan and international human rights organizations, that commanders of armed groups could undermine the electoral process. Concern about security ran high long before the elections were under way and in fact was one reason for their delay. It was well known within the international community as well as in the Afghan government that many potential candidates could command sufficient military resources to undermine the elections through the threat or use of force.

Afghan organizations, international human rights organizations and a number of donor governments had also pressured the government not to allow anyone responsible for commanding IAGs, or engaging in criminal behavior and human rights abuses to hold public office.⁴⁴ While the CoA establishes that those convicted of a crime against humanity or other crime are ineligible for candidacy, this legal bar is set far too high given the weakness of the Afghan judiciary and the fact that no one has faced charges for such crimes to date. Unlike Kosovo, there has been no formal international indictment and trial mechanism established in Afghanistan, and no domestic capacity for such judicial proceedings against human rights offenders or war criminals. Thus, there were no judicial grounds for vetting candidates on charges of human rights abuse or other crimes.

44. See for example Human Rights Watch, *Bring War Criminals to Justice*, New York: Human Rights Watch, 2005.

3.2 The Electoral Bodies: Staffing and Roles of the Election Administrative Bodies

The Joint Electoral Management Body (JEMB) was the official body overseeing the 2005 parliamentary elections. It also had full responsibility for managing the 2004 presidential elections. In light of capacity constraints within Afghan institutions, the JEMB was a temporary merger of the IEC and the UNAMA Electoral Component (UEC) that during the transitional period took over the functions the CoA gave the IEC. The JEMB had 13 voting members: nine Afghan IEC members appointed by the president and four international UEC members from UNAMA. The JEMB also had three non-voting members: the chief electoral officer of the JEMB Secretariat (JEMBS), the director of the electoral secretariat and the UNAMA electoral advisor. The JEMB's job was to issue and publish regulations, procedures, instructions, notifications and guidelines for the registration process. It disbanded upon the inauguration of the National Assembly.

The JEMBS then took over the task of carrying out decisions and overseeing the administration of the electoral process across the country. Based in Kabul, the JEMBS had eight regional offices and 34 provincial offices. The 2004 presidential election underscored the need for an impartial body to handle complaints. Following that election, allegations of voting irregularities compelled the JEMB to quickly assemble a review panel, the Impartial Panel of Election Experts. That panel investigated a number of voting fraud allegations and determined that none were significant enough to have changed the election results. However, the failure to establish such a panel well before the actual vote led a number of observers to recommend that the Afghan government create an independent body to address complaints in future elections early in the process.

The Election Complaints Commission (ECC), established under the electoral law for the 2005 parliamentary elections, had three international and two national members (one appointee each from the Supreme Court and the Afghanistan Independent Human Rights Commission), in addition to a staff of legal advisors, investigators and administrative personnel. It was the final body to adjudicate challenges and complaints. Designed to be temporary, the ECC was based in Kabul and had eight regional offices. It disbanded 30 days after the results were certified.

The presidential elections in 2004 were also the impetus for the creation of Provincial Election Commissions (PEC), because observers had strongly recommended a provincial presence.⁴⁵ The PEC's staff consisted of three Afghans in each province, one nominated by the government, one by the Afghan Independent Human Rights Commission, and one by UNAMA; one had to be a woman. The PECs reported to the JEMB and the ECC. The commissions had several duties. They received, investigated and adjudicated complaints according to ECC Rules of Procedure; reviewed candidates' nomination application packages submitted to the Candidate Nomination Office;⁴⁶ informed the ECC about the eligibility of the candidates; and monitored the elections during the actual polling.

3.3 Rationale for the Vetting Criteria

This section examines the rationale for two important vetting criteria used in the Afghan elections, along with the rationale for not vetting on the basis of human rights violations or war crimes. The requirement

45. Observation teams from the Organization for Security and Cooperation in Europe (OSCE) and European Union (EU) recommended this following the presidential elections. The OSCE promoted an additional layer of regional commissions. See "International Crisis Group, Afghanistan Elections: Endgame or New Beginning?" Asia Report no. 101, Brussels: International Crisis Group, 2005.

46. According to the JEMB, Candidate Nomination Offices were established in Afghanistan's 34 provinces to administer the nomination process. Most of these were based in the JEMBS Provincial Offices in the provincial capitals. Prospective candidates were to go to the Candidate Nomination Office in the province in which they were standing in order to submit their application, check the status of their candidacy during specified periods, and find out more about the candidate nomination process. JEMB Candidate Nomination Process-Eng JEMB/05 FS08, at www.jemb.org/eng/bg&factsheets.html.

that candidates resign from government positions stems from concerns that people in political jobs could use their position and patronage to influence or intimidate voters. Imposing this criterion in Afghanistan's election law elicited little criticism from Afghan officials and international observers; 11 people were disqualified because of it.⁴⁷

Justice reform made little appreciable progress during the early years of the state-building process. Because of the influence of powerful commanders, endemic corruption and a lack of political will from donors and international forces, the Afghan judiciary is not capable of handling complex and politically sensitive cases. As one analyst has noted, "The Afghan judiciary is in a deep crisis of public confidence. During the public consultations over the constitution, people frequently cited judicial corruption as a concern."⁴⁸ Police reform has progressed somewhat more, but the capacity to carry out investigations remains extremely limited. So there was no progress on prosecutions of war crimes or crimes against humanity during the transition period, and the prospect for competent prosecutions remains dim for the foreseeable future.

Thus, for the 2005 elections, nobody was disqualified from running for office because of their human rights records or involvement in other criminal activity. Instead, the government decided to base disqualification on compliance with disarmament and disbanding IAGs with the understanding that success in this area had some bearing on human rights protection. In June 2005, Afghan officials, the United Nations and principal stakeholders (mainly the United States) met to discuss the first phase of DIAG process; these talks focused on the threat that IAGs posed to the country's security and to the prospect for free, fair elections. In addition, DIAG stakeholders indicated that a number of concerns overlapped in the targeting of IAGs, and that multiple goals could be achieved if the process went well. For example, many IAGs were involved in other criminal activities, such as narcotics trafficking and human rights abuses. While a restriction on human rights or past war crimes as part of the explicit vetting process had been ruled out, some stakeholders hoped that using disarmament as a criterion would manage to eliminate some candidates who were responsible for serious human rights abuses.

Perhaps typical for any transitional state emerging from a period of sustained armed conflict or repression (or in Afghanistan's case, both), the combined national and international efforts to establish security and build legitimacy for the Afghan government have been preoccupied with decommissioning large numbers of former fighters and commanders. As of December 2001, most of these remained armed and organized in faction-based or unofficial militias around the country. A good number of these militias were responsible for war crimes, and many were also involved in illegal activities including the narcotics trade. In the immediate aftermath of the Bonn Agreement at the end of 2001, the paramount concern among key international actors, principally the United States and the UN, was to stabilize the country and avert a power struggle among former fighting factions that could push the country back into civil war. Thus, in the first years after the Bonn Agreement, stakeholders made the disarmament, demobilization and reintegration — or DDR — of Afghanistan's militias a priority, recognizing that failure in this area would undermine all other efforts to reform the country's institutions, extend the government's control and ensure genuine security. However, the political clout of many of the militias, their protection and patronage by political interests within the government, and fear of their perceived ability to destabilize vulnerable areas has led to slow progress on disarmament.

Many of these militias have continued to engage in criminal activity, violence — including armed clashes

47. The law also stipulated that candidates resign from government positions before standing for office, a common practice in elections worldwide that has its roots in the concern for a potential conflict of interest; a person holding political office could use their position and patronage to influence or intimidate voters. Imposing this criterion in Afghanistan's election law elicited little criticism from Afghan officials and international observers; 12 people were disqualified because of it.

48. Barnett R. Rubin, Humayun Hamidzada and Abby Stoddard, "Afghanistan 2005 and Beyond: Prospects for Improved Stability Reference Document," The Hague: Netherlands Institute for International Relations, "Clingendael," Conflict Research Unit, 2005, 41.

— and human rights abuses that have increased insecurity in the areas in which they operate.⁴⁹ Despite this, the disarmament effort was not tied to efforts to pursue transitional justice or to combat narcotics trafficking on the grounds that such issues could not be addressed until the disarmament was completed; some officials were concerned that doing so too soon risked derailing the fundamental task of disarmament. As one observer involved in the disarmament discussions noted:

The top priority for both the government and the UN . . . is the demobilization and disarmament of militias . . . Demobilizing these militias (and other groups that do not even deserve the name of militia) is the absolute prerequisite for the protection of human rights in Afghanistan, even if no one mentions the term when doing it. It is the key to ending impunity, reconstruction, independence of the judiciary, women's participation in the public sphere, the fiscal basis of the government, and many more things.⁵⁰

By late 2004, aspects of the disarmament program were beginning to make progress. Although the development of the Afghanistan National Army and the reform of the Ministry of Defense had suffered many delays, both were further along than other areas of security sector reform. The presidential elections of October 2004 also created greater momentum for demobilization, particularly in the north. As of early 2005, the program had decommissioned or reduced many of the officially recognized militia and collected much of the heavy weaponry, but had not yet dealt effectively with the serious threat that unofficial militias posed.⁵¹

3.4 Disarmament and the Election Timetable

Early in 2005, DDR was preparing to move into its next phase: the disbanding of IAGs. It is important to note that there has never been a precise definition of what constitutes an “illegal” or “unofficial” armed group, other than it should apply to any armed group outside of those designated as the Afghan Militia Forces.⁵² Though no clear legal definition of IAGs exists, DIAG defines an IAG as something that consists of at least five people that is organized under a leader to whom its followers pledge full allegiance, out of fear or devotion; an IAG operates in full impunity outside the Afghan government framework and authority, and prevents the government from extending its authority.⁵³ While there had been intimidation and violence by some former commanders and their forces before the presidential elections in October 2004, the threat of violence was much higher for the national assembly elections and its field of some 6,000 candidates. The Afghan people were widely supportive of disarmament, particularly of these unofficial groups, and for a strong centralized state to protect the public from decentralized armed groups. In a 2004 survey, some 88 percent of those interviewed called for the central government to end “the rule of the gun.”⁵⁴

The timing of the disarmament process coincided with the election; one electoral official noted, “There was agreement by both the national authorities and the international community that the issue of candidates having links to illegal armed groups had to be addressed in the elections to the Wolesi Jirga and provincial councils. If this issue wasn't addressed, then questions would inevitably be raised about the legitimacy of the electoral process itself.”⁵⁵

49. For further reference, see International Crisis Group, “Afghanistan: Getting Disarmament Back on Track.” Feb. 23, 2005, www.crisisgroup.org/home/index.cfm?id=3290&l=1, last accessed Dec. 10, 2008.

50. The quotation dates from 2004; the author of the quotation was referring to the situation achieved before the Afghan Military Forces had completely demobilized; these various armed factions fought in the country's conflicts before November 2001. By “groups that do not even deserve the name of militia,” the author was referring to what are now called illegal armed groups. Information obtained through correspondence with prominent analyst on Afghanistan.

51. See International Crisis Group, “Afghanistan: Getting Disarmament Back on Track,” Asia Briefing no. 35, Brussels: 2005, 1.

52. DDR targeted commanders from the major anti-Taliban forces—the Afghan Militia Forces. Some were incorporated into the new Afghan National Army (the majority from a single faction). Militias that fell outside the main anti-Taliban forces were not subject to DDR. These IAGs came under the later program, Disbandment of Illegal Armed Groups (DIAG).

53. Disbandment of Illegal Armed Groups. “DIAG Fact Sheet,” www.diag.gov.af/faq/, last accessed Dec. 9, 2008.

54. Human Rights Research and Advocacy Consortium, “Take the Guns Away: Afghan Voices on Security and Elections,” Kabul, 2004.

55. E-mail correspondence with a former electoral official, February 2006.

The Afghan government and international agencies involved had considerable information available to help them decide who should be disqualified based on disarmament issues, a marked contrast to the scant information on hand about war crimes and human rights violations. The continued presence of these groups was widely seen as a serious factor that could undermine the entire process.

Those within the UN and other agencies involved in DDR saw the DIAG program as a long-term project that would work to achieve some progress before the elections; to that end it was implemented on an emergency footing in order to provide information to electoral bodies by 2005. Indeed, both the U.S.-led Combined Forces Command-Afghanistan (CFC-A) and the International Security Assistance Force (ISAF) wanted as many groups identified and disarmed as possible before the elections. One of the initial goals was to remove groups posing the greatest threat to the elections themselves. Electoral officials also justified the program on the grounds that “such individuals would also often be involved in other illegal behavior.”⁵⁶

The strategy that evolved was to use the elections as an incentive to press prospective candidates to voluntarily disarm and disband their militias, with UNAMA developing the criteria and modalities for determining whether a candidate actually had links to IAGs and what would constitute sufficient disarmament. To this end, article 15 (3) of the electoral law states that people who practically command or are members of IAGs are not qualified to run for office. According to a report by the International Crisis Group, elections have proved “pressure points” for disarmament in Afghanistan; “The September elections were used to gain momentum for DIAG, although delays at the Joint Secretariat [of the Disarmament Commission] meant that the focus was narrowed to the candidates ... Offering targeted candidates a final chance to hand over weapons or lose their place on the ballot was used to kick-start [the] DIAG program.”⁵⁷ The idea of a second chance was critical to this process because candidates would, in effect, be warned and have a chance to disarm before they were finally disqualified.

3.5 Carrying Out the Vetting Process

3.5.1 The Process

The vetting process officially began with candidate nominations. The nomination period was originally meant to last from April 30 to May 19, 2005, but was extended by three days in all provinces after a number of offices closed for security concerns. The province of Nangarhar was the exception; the nomination period there was extended for six days. However, in the months before the nominations period, the Joint Secretariat of the Disarmament and Reintegration Commission (JS) began to review its own data on IAGs with the intention of matching that data to the candidate list. Once the nominations period ended, the JS compiled a list of all those who violated the electoral law for the ECC. The voting members of the JS were the chair of the Disarmament and Reconciliation Commission, representatives from the ministries of Defense and Interior, UNAMA/the Afghanistan New Beginnings Program (ANBP),⁵⁸ the National Security Directorate (NSD), the Coalition CFC-A and ISAF.

As of mid-May 2005, the JS had identified 395 “high threat” groups that might either try to violently disrupt the elections through intimidating voters or rival candidates, harass government and electoral institutions, or pose problems to “good governance” even after elected through their involvement in violent criminal activities.⁵⁹

56. International Crisis Group, “Endgame or New Beginning?” 7.

57. *Ibid.*, 20.

58. The Afghanistan New Beginnings Program is the disarmament program under the UNDP.

59. Interview with a former electoral official in Kabul, January 2006.

After identifying high-threat groups, the JS launched the actual compliance verification process in the provinces, with the caveat that they not appear to target any one ethnic group over another. Before the verification process began, officials discussed a number of ways to do this; one option required that candidates submit forms attesting that they complied with all the legal requirements of the electoral law, including full disarmament, no affiliation with IAGs, and no criminal records. Ultimately, the candidates were required to sign a Code of Conduct.

Once illegal groups were identified, the information was passed on to the UNAMA field offices, the ANBP regional offices and the ministries. The Ministry of Defense passed instructions to its military liaison for each province, while the Ministry of the Interior informed the governors and police chiefs in each province. The NDS alerted its provincial offices, and ISAF and Coalition alerted the Provincial Reconstruction Teams (PRT).⁶⁰ All disarmament agencies were involved in the process of identifying candidates for exclusion, although there was a perception that security agencies had more say than others.⁶¹

The JS decided who should be included on the list of candidates with links to IAGs. The commission's member agencies circulated a list of candidates suspected of such links in each province. The assessment they then carried out was based on each member institution's information sources, which they did not have to disclose even to each other. Creating the list without disclosing sensitive sources helped ensure maximum participation from all the agencies involved,⁶² though it rendered the process opaque. The JS met to discuss the findings on a province-by-province basis and circulated the collated list. Any member objecting to the inclusion of a particular candidate on the list had to make a case for his objection. As a safeguard, two members had to vote to disqualify a candidate; but at least in the planning stage, this was not required.

The information was then consolidated with a pre-existing database of IAGs. By early June, a list of 1,100 names of candidates with links had been compiled.⁶³ Further deliberations took place within the JS — during which voting members weighed in against including many of the names on the list. Members of the JS apparently said they lacked sufficient evidence to exclude nearly 900 other candidates, even provisionally, or that it was unwise to do so because their removal posed a security risk. Apparently, a single opposition was sufficient to cut a name from the list.⁶⁴

The ECC was established in May 2005 after the candidate nomination process and other aspects of the electoral process had already begun. Its role was to handle challenges and complaints related to the process, including candidate eligibility and procedure. Complaints were claims of legal violations regarding the conduct of the electoral process, including candidate nomination, voter registration, campaigning, polling and ballot counting; challenges were complaints about prospective candidates' eligibility to run for office. The ECC was an independent body that depended on the JS for information and investigative capacity with respect to disarmament.

60. "The PRT concept was formally announced in November 2002. [As of 2004] . . . 16 PRTs had been established, mostly in the East, Southeast and South, but also in the major regional centers in the West, Central and Northern regions." The PRT concept has become the central focus for much of the security sector debate within and between the military, NGOs, policymakers and academics. "This debate has centered on a conflation of security and assistance in the PRT mandate that threatens the neutrality of humanitarian space, and the potential for the PRTs to strengthen factional commanders in their effort to achieve stability." Ideally the PRTs should "help guarantee a space within which the central government, the rule of law, national reformed security institutions and democratic participation can all emerge." Michael Bhatia, Kevin Lanigan and Philip Wilkinson, "Minimal Investments, Minimal Results: The Failure of Security Policy in Afghanistan," Briefing Paper, Kabul: Afghanistan Research and Evaluation Unit, 2004, 12.

61. Interview with a diplomat in Kabul, July 2006.

62. Afghan government officials, in particular, had insisted on "buy-in" from all agencies involved. Interview with a former electoral official outside Kabul, February 2006.

63. Interviews with former electoral officials in Kabul and by e-mail, January-February 2006.

64. Several former electoral officials as well as other individuals in Kabul who worked closely with the election teams have confirmed this.

3.5.2 The Challenge Process

As stated above, a challenge was a formal claim that a prospective candidate did not meet the eligibility and qualifications criteria for candidacy as set out in the electoral law. The ECC's responsibility was to review, investigate and adjudicate challenges from June 4 to June 9, 2005.

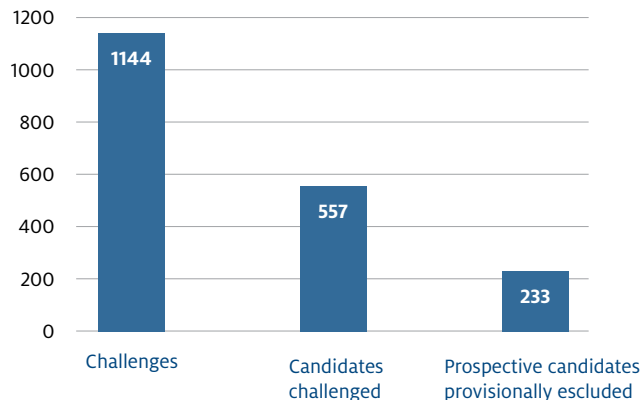
On June 4 the ECC issued a preliminary list of those standing for election and announced a six-day period during which it would accept challenges. The ECC also formally requested a review of the JS list to identify any links to armed groups within the meaning of article 15 (3) of the electoral law. During the challenge period, people and organizations could file challenges confidentially through their local PEC or directly to the ECC in Kabul. Challenges and complaints had to be submitted in writing; forms were available at JEMB regional offices. Those submitting challenges deposited them in boxes available in the offices.⁶⁵ A total of 1,144 challenges were filed against 557 candidates from all 34 provinces of the country.⁶⁶

In reviewing the challenges, the ECC applied criteria set out in the electoral law regarding the qualifications that candidates for the Wolesi Jirga and Provincial Council elections must meet. For several criteria, the ECC relied on the Afghan government to determine a candidate's status. For instance, the ECC used information from the Supreme Court, the Attorney General's Office and the Ministry of Interior to determine whether candidates had been convicted of any crimes. Various ministries including Women's Affairs and Information and Culture provided official resignation letters for their employees who wished to run for office. The ECC also relied on the advice of the Joint Secretariat of the Disarmament and Reintegration Commission regarding people who allegedly had links to IAGs.⁶⁷

CHALLENGES AND PROVISIONAL EXCLUSIONS



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Electoral Complaints Commission



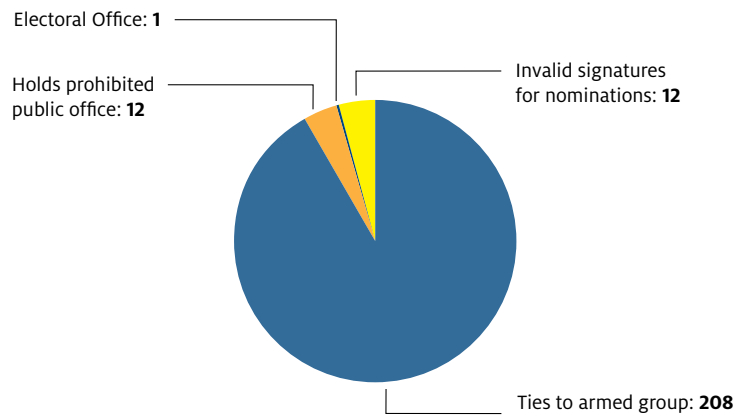
65. Ibid.

66. Ibid.

67. Human Rights Watch, "The Rule of the Gun: Human Rights Abuses and Political Repression in the Run-up to Afghanistan's Presidential Election," A Human Rights Watch Briefing Paper, September 2004. See also Andrew Wilder, "A House Divided? Analysing the 2005 Afghan Elections," Kabul: Afghanistan Research and Evaluation Unit, December 2005, 14.

On July 2, the JEMB issued a Provisional Candidate List, and the ECC, in consultation with UNAMA and the JS, notified 233 candidates that they had been provisionally excluded, indicating the nature of the challenge and advising them of their right to file an official response; they in turn had five days to file formal responses. Of the 233, 208 were excluded for links to IAGs, 12 for holding public office, 12 for having invalid signatures for nomination, and one for being an electoral official at the time.⁶⁸

GROUNDS FOR PROVISIONAL EXCLUSIONS



According to the ECC website, provisionally excluded candidates generally “supplied detailed responses — frequently more than once — to ensure that all relevant organizations were properly notified. In reviewing these responses, the ECC found that many candidates actually did meet the criteria to qualify to run for office, or had taken the necessary measures in order to do so.”⁶⁹

The candidates excluded for links to IAGs had the opportunity to disarm and disband any illegal groups by contacting the PEC. The Secretariat of the Commission of Collection of Weapons was responsible for overseeing the delivery of weapons and ammunition. According to one report on the elections, “There were reportedly some problems with informing the correct candidates, and in some locations . . . facilities were not available for candidates to disarm. (In these cases, some candidates have been allowed to stay on the final list with the provision that they will disarm prior to September.)”⁷⁰

When the final list of candidates was announced on July 12, a total of only 17 names out of the 233 had been dropped: five for invalid or insufficient numbers of signatures to support their nomination; one for failing to resign from a government position; and 11 — all low-level district commanders — for links with armed groups.⁷¹ Of the 208 originally excluded for links to IAGs, some 150 ultimately demonstrated sufficient compliance with disarmament to be reinstated, although officials involved in the process acknowledged that in many cases the weapons turned in represented only part of the weapons the candidate

68. From the ECC website, www.ecc.org.af/challenge_process.html.

69. *Ibid.*

70. Andrew Reynolds, Lucy Jones and Andrew Wilder, “A Guide to Parliamentary Elections in Afghanistan,” Briefing Paper, Kabul: Afghanistan Research and Evaluation Unit, 2005, 16.

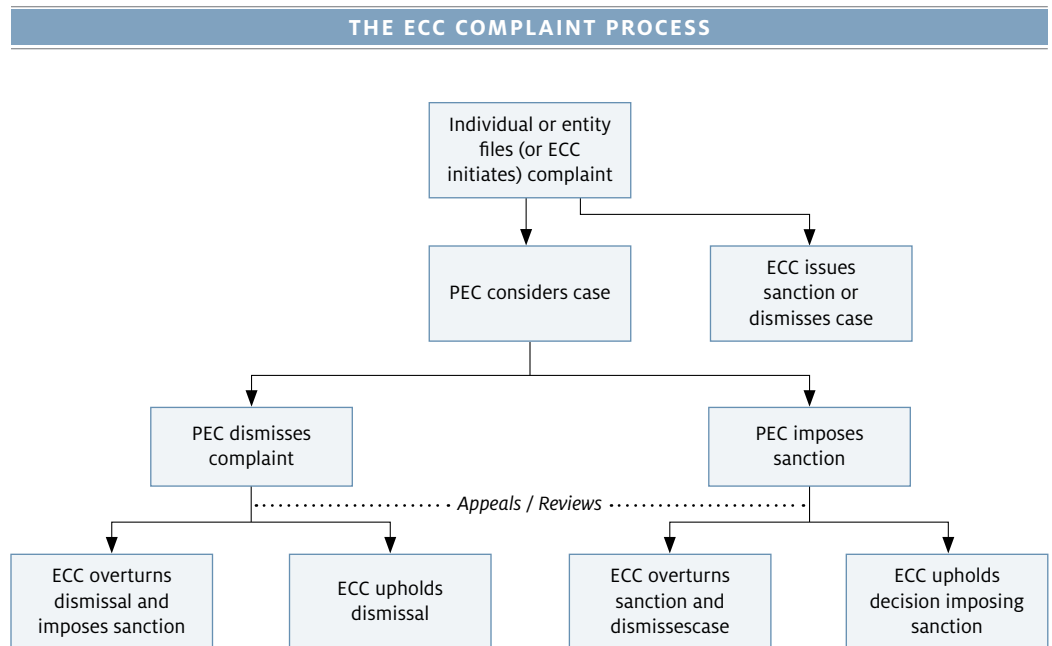
71. Wilder, “A House Divided?” 16.

possessed.⁷² In other cases candidates were reinstated on promises of future compliance.⁷³

3.5.3 The Complaint Process

The complaint process officially began after the challenge process was over, and the list of candidates was finalized on July 12. According to the ECC, an electoral complaint was a claim that electoral laws had been violated. Any registered voter, candidate, observer or party official could file a complaint with the ECC at any point during the process. The ECC also could initiate complaints. People could file complaints against candidates as well as electoral officials. Valid complaints pertained to any of the following issues:

- The registration of or refusal to register specific people as voters
- The nomination of candidates and their qualifications and eligibility
- Financial disclosures by political entities, their candidates and independent candidates
- Alleged violations of the Code of Conduct for Political Parties, Candidates and their Agents
- Errors or dishonesty in polling or the counting of votes
- Any other matter concerning the right to vote and to participate in the election⁷⁴



The PEC was meant to be the first point of contact for anyone filing a complaint.⁷⁵ The ECC trained PEC staff members during a five-day program developed by the ECC, JEMBS and the International Foundation for Electoral Systems (IFES).⁷⁶ After training, the PEC began work.

72. Interview with a former electoral official outside Kabul, February 2006.

73. Ibid.

74. From the ECC website, www.ecc.org.af.

75. During the challenge process the PECs were not yet operational and only began functioning after the final list of candidates was made public in mid-July, in time for the start of the complaint period.

76. IFES is an international nonprofit organization that monitors elections and participates in other governance programs. Its headquarters are in Washington, D.C.

The PEC's mandate was to investigate complaints by contacting knowledgeable sources in the district and province, including but not limited to JEMB staff in the provinces, judicial officials and other government sources. After the commission completed an initial inquiry, the PEC then was to make a decision on the validity of a challenge complaint and forward that decision to the ECC for review. If the PEC was unable to investigate the charge itself, it would forward the claim to the ECC. All the ECC's decisions were final, except for cases where new evidence came to light. The sanctions available to the ECC included:

- Issuing a warning to an offending person or organization to take remedial action
- Ordering an offending person or organization to take remedial action
- Imposing a fine of up to 100,000 Afghanis
- Ordering a recount of ballots or a repeat of polling
- Removing a candidate from the list
- Prohibiting the offending person from serving in the JEMB or its secretariat for a period not to exceed 10 years from the beginning of the ECC sanction

The ECC ultimately received some 5,400 complaints and adjudicated about 3,300. It imposed fines in 22 cases and banned nine officials from serving in future electoral administrations, among other sanctions. Combining the challenge and complaint processes, 54 candidates were excluded: 34 for links to IAGs, 12 for failing to resign from public office, five for not submitting enough valid signatures, and three for fraud or intimidation.⁷⁷

3.6 Lessons Learned from the 2005 Vetting Process

3.6.1 Issues Arising from the Legal Framework

This section discusses three areas in which issues arising from the legal basis for the vetting criteria, institutional or programmatic weaknesses, and other obstacles made implementation of the vetting process difficult or raised serious questions about its credibility. Some people interviewed for this report argued that in a post-conflict situation such as Afghanistan, requiring a court conviction of crimes against humanity for disqualification on human rights grounds was not appropriate because it was impossible to achieve under the prevailing circumstances. Some suggested that a lower standard, such as a “preponderance of evidence,” could be written into an election law and remain well within the intent of the constitutional provision.⁷⁸ However, even a lower standard would face evidentiary obstacles. Little human rights documentation has been carried out in Afghanistan, and the capacity even for ordinary criminal investigations is limited. Without good evidence it would be impossible to meet even a lower standard.

In addition, an institution capable of making decisions based on evidence would be necessary even to impose a lower standard; that institution would have to be accepted as a legitimate adjudicator because the task would still entail a quasi-legal ruling. To reach a determination based on a “preponderance of evidence” or any other formula short of conviction would also require a significant investment in resources that was not available for the 2005 elections. If such a restriction were to be implemented before the next elections in Afghanistan, it would depend on a much improved capacity for collecting and analyzing data, perhaps under the auspices of a transitional justice mechanism on truth-seeking and documentation.

Imposing a restriction on political participation based on a criterion other than that provided in the CoA had its perils. As one respondent noted, the question was one of what should take precedence: the constitutionally protected right to run for office or a perceived common good that would result in disqualifying

77. United Nations Security Council, “The Situation in Afghanistan and its Implications for International Peace and Security,” UN Doc. A/60/712–S/2006/145, 2.

78. Interview with a diplomat in Kabul, January 2006.

known offenders?⁷⁹ While there was a strong desire, particularly among many Afghans, to prevent suspected criminals from running, sidestepping a constitution that was barely nine months old was risky.⁸⁰ At the same time, since well-known human rights violators had already assumed powerful positions in Afghanistan since the Bonn Agreement, some Afghan and international actors involved in the electoral process were concerned that failing to impose some kind of restriction based on a candidate's human rights record could undermine the elections' credibility.

Given the impossibility of obtaining convictions against any candidate who had committed a crime against humanity or other crime, the Afghanistan Independent Human Rights Commission (AIHRC) and a number of European organizations in Afghanistan argued for an approach that would provide the Afghan government with the means to expel members of the National Assembly if evidence of their involvement in criminal activity was discovered after the elections. They pushed for candidates to sign a legal affidavit attesting that they had not been involved in criminal activities, war crimes or other serious human rights violations, or narcotics trafficking. According to a commissioner, the organization drafted a statement that was initially well received but subsequently ignored.⁸¹

The JEMB chairman said such affidavits could have resulted in "mock trials," taken up too much time, and that "[a] flood of complaints would have clogged the system."⁸² Another election official pointed out that forcing candidates to sign such a pledge might push them toward granting themselves an amnesty after parliament convened. He also questioned the utility of a measure that was not likely to be enforced, or at most might result in disqualifications based on perjury rather than war crimes; either scenario, he added, would cast doubt on the credibility of the entire process.⁸³

Instead, the JEMB required candidates to sign a declaration when filing their nomination papers, swearing an oath that they had not been involved in any criminal activities that would disqualify them from standing, presumably including war crimes and human rights abuses, narcotics trafficking, and/or maintaining IAGs.⁸⁴

One could argue that it would be best to let the people do their own "vetting" by not voting for candidates known to be war criminals. There is no guarantee that this would keep war criminals out of office: some voters might believe that accusations of war crimes were being used to malign an ethnic or political group, and that could lead instead to a sympathy vote. Furthermore, in a transitional political culture such as Afghanistan's where the public has little faith in the secrecy of the ballot and where candidates wield enormous power — and threaten violence — in much of the country, one cannot expect the electorate to vote out the worst.

Trafficking in narcotics is a criminal offense in Afghanistan. However, as the International Crisis Group notes, "Not only has the political will to go after powerful drug lords been lacking, those opposed to taking action could also argue that without any criminal investigations of these illegal activities, the evidence to exclude any candidate was not available."⁸⁵ So while article 53 (o) of the electoral law banned "making use of funds originating from illegal activities" — thereby providing the means to exclude candidates on the basis of funds received from their involvement in the narcotics trade — the law was not invoked.

79. Interview with a political analyst in Kabul, January 2005.

80. According to one member of the constitutional drafting process, there had been an effort to push for wording other than "convicted of a crime." While that might have made it possible to disqualify candidates on a lower standard of evidence, the process still would have been hampered by a lack of good documentation. Interview with a political analyst in Kabul, January 2005.

81. International Crisis Group, "Endgame or New Beginning?" 17.

82. As quoted in *ibid.*

83. E-mail communication with a former electoral official outside Kabul.

84. Wilder, "A House Divided?" 16.

85. International Crisis Group, "Endgame or New Beginning?" 18.

3.6.2 Issues Arising from the Applicability of Criteria

a. The Requirement that Candidates Relinquish Public Office

Monitoring compliance with the requirement that any candidate holding a designated government position must first resign from his or her post was difficult. As of June 2005, 212 government officials had opted to run without resigning their government positions.⁸⁶ In some cases, candidates deliberately misled JEMB officials by providing falsified documentation of their resignations with their nomination papers.⁸⁷ After investigation, most of these candidates were discovered and disqualified (although in some cases the disqualification took place after the publication of the final list or even after the election itself).⁸⁸

While candidates were required to provide statements from their supervisors attesting to their resignations, they didn't always do so. Indeed, in a number of cases senior government officials in Kabul and at the provincial and district levels reportedly had no idea that an employee of their institution was running until the ECC contacted them.⁸⁹ An International Crisis Group report notes that at least in the initial stages of the nomination process, electoral offices appeared confused about implementation. The report describes witnessing one "potential candidate being asked for an attested letter of resignation from her employer in one office but [being] told in another city this was not necessary until the formal campaign period."⁹⁰ As a further complication, in Afghanistan an official resignation might mean little in terms of a candidate's perceived power in the community. One report noted, "In some cases officials have resigned, but continued to hold de facto power given their position in the local community, something that is hard to counteract given the nature of Afghan politics."⁹¹

In other cases, ascertaining whether a candidate complied with the law became controversial, and senior government officials interfered on behalf of candidates, thereby tainting the credibility of the process.⁹² In one well-known case, a candidate who had not resigned from public office was disqualified after a complaint was lodged and the case was investigated. Pressure from the president's office prompted a second investigation that confirmed the results of the first. The candidate threatened to take the case to the Supreme Court, raising the possibility of other such appeals on the eve of the election. Despite well-founded evidence that the law was breached, the candidate was reinstated.⁹³

The process suffered from inadequate communication and training for government officials running the elections. "Only a very small percentage of them had any real understanding of their role and responsibilities during the candidate nomination period and throughout the electoral process."⁹⁴ Most candidates had a limited understanding of the election rules. If there had been enough time before the nomination process to educate candidates about what was expected of them, there would have been fewer instances of noncompliance. One former electoral official noted that a pro-active approach by senior government officials to ensure that their employees resigned before submitting their nomination papers also could have eliminated the need for ECC intervention in many cases.⁹⁵ Although a number of government officials still might not have cooperated, others possibly might have in the interest of shielding their staffs if they had been informed early enough about their obligations.

86. Afghanistan Independent Human Rights Commission and UNAMA, "Joint Verification of Political Rights," First Report, cited in *ibid.*, 14.

87. E-mail correspondence with a non-Afghan former electoral official outside Kabul, February 2006.

88. *Ibid.* See also the official website of the Electoral Complaints Commission, www.ecc.org.af.

89. E-mail correspondence and interviews with a former electoral official outside Kabul, February 2006.

90. International Crisis Group, "Endgame or New Beginning?" 14.

91. Wilder, "A House Divided?" 16.

92. Interviews with former electoral officials, diplomats and NGO staff in Kabul, January 2006; e-mail correspondence with former electoral officials and advisors, February 2006.

93. One ECC commissioner resigned in protest over the candidate's reinstatement. Interviews with former electoral officials and a diplomat, January- February 2006.

94. E-mail correspondence with a former electoral official outside Kabul, February 2006.

95. *Ibid.*

b. The Disarmament Criterion

Controlling information was vital to the vetting process, particularly with respect to disbanding and disarming illegal armed groups. As the International Crisis Group report has noted, the exchange of information about people implicated in such activities went on “behind closed doors.”⁹⁶ The process was highly politicized; if any of the JS member agencies wanted to make sure that a candidate was not disqualified, that agency would either not give information about the candidate’s links to illegal groups, or would cite security reasons for not disqualifying the candidate despite evidence of links to IAGs.⁹⁷ Thus, the objective assessment of the candidates’ compliance with the disarmament process was not the deciding factor. Even candidates listed for disqualification could be reinstated if one of the JS member agencies identified them as posing a security risk if they were excluded. This became a highly selective vetting process.

Each institution on the steering committee — from Afghan ministry officials or their provincial counterparts, to the international components ISAF and CFC-A — potentially had its reasons to see that certain candidates were or were not disqualified. No one involved in the electoral process who was interviewed for the report denied that there was political interference in the vetting process. One respondent described it as “filtering” and said it invited candidates to lobby a great deal to get off the disqualification lists, resulting in “a moth-eaten list”⁹⁸ of candidates identified for disqualification that included a number of “seriously armed war criminals.”⁹⁹ According to sources cited by the Afghanistan Research and Evaluation Unit, the newly elected parliamentarians included “40 commanders still associated with armed groups, 24 members who belong to criminal gangs, 17 drug traffickers, and 19 members who face serious allegations of war crimes and human rights violations.”¹⁰⁰

The threat that some candidates might respond violently to disqualification was taken seriously, and none of the agencies that made up the JS wanted to be left holding the bag in such an event. However, whether or not some candidates genuinely posed a serious risk if they were disqualified is a matter of contention; in some cases, arguing that the disqualified candidate could cause trouble was a way of protecting favored clients. One observer stated that the process “was more about client relations than actual security concerns.”¹⁰¹ According to one former electoral official, the security argument “was a significant but not determinative concern. The more important concern seemed to have been the political fallout from having a candidate disqualified, including what it might mean for the Karzai government, which relies on a delicate balance of coalitions with or without the elections.”¹⁰²

It was also understood that any disqualification needed national and international support, in part because of the threat of violence from a disqualified candidate and the need for all forces to cooperate in containing it. If an international member of the JS wanted a candidate disqualified, but faced opposition from the Ministry of Defense, the candidate stayed in; the same held true if a non-Afghan JS member objected to a disqualification that one of the government ministries recommended. Sometimes these inclinations were at odds with one another; at other times they were complementary. But because the steering committee reached decisions by consensus, any opposition could block a candidate’s exclusion.¹⁰³

96. International Crisis Group, “Endgame or New Beginning?” 17.

97. Interview with a former electoral official in Kabul, January 2006.

98. Interview with a diplomat in Kabul, January 2006.

99. Ibid.

100. Wilder, “A House Divided?” 14.

101. Ibid.

102. Interview with a former electoral official outside Afghanistan, February 2006.

103. Interviews with staff and officers of electoral process, both in Kabul and outside Afghanistan, January-February 2006.

A number of observers objected to the fact that the vetting seemed to have been used more as a disarmament tool than for the sake of the credible elections.¹⁰⁴ Others questioned it on the grounds that it would still represent a quasi-legal process that required verification and adjudication that exceeded the mandate of electoral officials. Some observers questioned linking disarmament to the vetting exercise and were particularly unhappy about the “second-chance” aspect that allowed “provisional” disqualification, using the carrot of candidacy until sufficient disarmament was achieved. The idea of a second chance — that candidates would be given an opportunity to disarm before they were finally disqualified — raised questions about the elections’ integrity as the verification process stretched close to Election Day and many candidates were reinstated on slim evidence of compliance or promises of future compliance.

The European Observer Mission issued a report after the elections that urged caution in using similar criteria in the future on the grounds that the allegations in Afghanistan had been impossible to prove in court and because the criterion had been applied selectively and would likely be applied selectively in the future:

The illegal armed group (IAG) basis for exclusion compelled the bodies responsible for candidate certification to function as quasi-judicial organs imposing a serious penalty — deprivation of candidacy — in respect of allegations that had not been proved in courts of law, due to the effective absence of a functional judiciary at this stage. Further, where it was concluded that the IAG ground of exclusion from candidacy was acceptable, then it should have been applied rigorously and impartially. Worryingly, the application of IAG grounds of exclusion was one of the most controversial aspects of the current electoral process.¹⁰⁵

Unlike the criterion that candidates not be convicted criminals as stated in article 85 of the CoA, the criterion on disarmament was not based on a constitutional protection. The source for the disarmament criterion was the electoral law alone, and it did not require that candidates be convicted of links to IAGs. If there was any criterion about which the international community and the government had considerable information, it was disarmament; that was precisely why that criterion was deemed implementable, whereas vetting on other human right grounds was not. “We had a body of information that we could use to justify exclusion beyond a reasonable doubt,” said one former official.¹⁰⁶ Most officials — both Afghan and international — appeared to accept the linkage as a given on the grounds that certain candidates who posed a risk to the actual conduct of the election warranted the use of disarmament as a vetting criterion, even though they were not necessarily disqualified in the end.

Many respondents to this report say their main criticism of the process has been the failure to enforce the disarmament criterion against known violators. Former officials said they had foreseen that using the disarmament criterion would be a problem because ultimately it would be used only against smaller or weaker candidates and not against the most powerful offenders; they also saw that going ahead under those circumstances ran the risk of discrediting the entire process. However, a former electoral official who acknowledged as much still justified it as “transitional vetting,” observing that while it did not fulfill its stated objectives, i.e., compelling candidates to disarm or removing them from the ballot, it may have acted as a deterrent to intimidation.¹⁰⁷

The ECC’s inability to gather its own information or independently verify information relating to disarmament compliance impeded the government’s ability to address complaints that a candidate had links

104. E-mail correspondence with a former electoral official outside Kabul, February 2006. The European Observer Mission made this point in its report: “Important as the goal of disarmament is, it is the EU EOM’s [European Union European Observer Mission’s] view that the authorities should be cautious in using the electoral system for the pursuit of aims — however meritorious — that are not exclusively connected with the electoral process.” EU Election Observation Mission Afghanistan, “Final Report on the Parliamentary and Provincial Council Elections,” Kabul: EU Election Observation Mission, 2005, 11.

105. *Ibid.*

106. Interview with a former electoral official outside Afghanistan, February 2006.

107. *Ibid.*

to IAGs. The ECC did not have the evidence the JS used to make decisions. In general, the ECC applied the electoral law conservatively, favoring non-exclusion in the absence of conclusive evidence.¹⁰⁸ Thus, potentially serious complaints of noncompliance on disarmament had to be dismissed for lack of credible information if the JS did not provide it.¹⁰⁹ The system also allowed for last-minute decisions based on new information, which lent itself to political manipulation. One official suggested that the process required clearer criteria for defining a member of an IAG and what constituted valid evidence, as well as firm deadlines for hearings and decisions on disqualifications.¹¹⁰ The process was further complicated by political pressure to continue working with noncompliant candidates to achieve some modicum of cooperation. “The process dragged on to the last minute.”¹¹¹

Weak provincial links compounded the problem. To verify allegations, provincial election authorities had to “piggyback” on existing institutions and thus were subject to those institutional compunctions, with the result that “the process was hostage to the whims of governors.”¹¹² The result was, in some cases, selectivity in verifying accusations. For example, a provincial head of police could submit a report about an IAG and ask for it to be checked. The PEC would assign someone who would ultimately go back to the chief of police — a circular information flow. While most concerns about the process’s lack of transparency related to the failure to exclude known offenders, in at least one case it was alleged that accusations against a candidate were false but that candidate was ultimately disqualified anyway.¹¹³

Officials cited four candidates who were universally recognized as armed and in command of IAGs.¹¹⁴ Nevertheless, in each case, one or more of the JS agencies opposed disqualification on the grounds that the candidates posed a grave security risk if they were not permitted to run in the elections. In some cases, government agencies making that claim asked for international support if disqualifying the candidate created problems, including violence. Yet even in cases the ISAF and CFC-A fully backed for disqualification, the candidates escaped because they were protected by powerful people in the government. Examples such as these prompted many to criticize the process for being too accommodating.¹¹⁵ The effort also contributed to unrealistic public expectations that many candidates known to maintain illegal militias could be disqualified. When that did not happen, disillusionment with the process was inevitable. In the words of these officials, it would have been better not to attempt this kind of vetting if it could not be done well.

3.6.3 Other Weaknesses in the Process

Virtually every respondent interviewed for this report commented that the complaints process severely lacked resources, thereby handicapping the ECC’s ability to carry out independent and thorough investigations. The ECC had relatively few staff members to carry out an enormous task, which resulted in delays of decisions going out and a backlog of cases going into Election Day.¹¹⁶ More importantly, the ECC did not have the resources to verify allegations or investigate complaints independently of other electoral bodies or institutions involved in the process.

Electoral officials, diplomats, NGO staff and other analysts commented that the entire process should have started much sooner and was compressed into a very short timeframe. As one former official familiar with electoral processes in other countries noted, complaints procedures such as the ECC (which was used in Kosovo and other elections, but without the vetting element) get set up late after resources have already

108. Interview with a former electoral official in Kabul, January 2006.

109. Interview with a diplomat in Kabul, January 2006.

110. E-mail communication from a former electoral official, February 2006.

111. Interview with a diplomat in Kabul, January 2006.

112. *Ibid.*

113. *Ibid.*

114. In addition, all four were known to be involved in other criminal activities, including land seizures, narcotics trafficking and human rights abuses.

115. E-mail communication with a former NGO official outside Afghanistan, January 2006.

116. *Ibid.*

been allocated to other parts of the process; they instead should be in the plans from the beginning.¹¹⁷ The tight timetable made it very difficult to deal with complaints. “The quick work was driven by the larger electoral timeframe, specifically the pressing need to print ballot papers. However this ultimately worked to undermine the credibility and transparency of the entire process.”¹¹⁸

A short timeframe also left too little time for public education. While better outreach would not have eliminated all of the problems, it might have clarified some aspects of the procedures and minimized the confusion that resulted. For example, people bringing complaints did not always understand the procedures. Some brought complaints directly to the ECC, only to be referred to the PEC. If the PEC could not properly investigate or rule on the complaint, it returned the complaint to the ECC. One electoral official said this left some people suspicious that their complaints would not be taken seriously. Communication problems between the ECC and PEC sometimes compounded this problem.¹¹⁹

The majority of the challenges and complaints received were also poorly documented, allegations without evidence. There are several reasons for this. As noted earlier, there is little experience in Afghanistan with documentation of any kind. Given the tight deadline for the elections, there was little time to conduct a comprehensive public education and outreach program that might have better prepared voters for what they had to do to file a complaint. In many cases, people filing complaints feared reprisals and submitted their complaints anonymously, making further investigation impossible. Several officials from the diplomatic community also expressed concern that the complaints procedure put too great a burden of proof on Afghans to provide documentation when they did not have the means to do so. Under its mandate, the ECC could only make decisions based on the information it had; the commission had little capacity to carry out investigations and none at all on disarmament issues.

Other structural problems at the provincial level also impeded investigations. The PECs were first appointed as links between the JEMB’s head office and the provinces; they were charged later with receiving and investigating complaints for the ECC.¹²⁰ According to electoral officials interviewed for this report, most of the PECs were initially not up to the tasks. In many provinces, there had not been enough qualified staff or training to carry out investigations, or staff members were frequently partisan. As a result, these PECs could not make decisions or adjudicate complaints they received, so most of the early complaints went to the ECC in Kabul without being investigated by a PEC. By August, the ECC was overwhelmed with complaints. “Two months before the election,” one official said, “many of the PECs were not really functioning.”¹²¹

At that point, IFES sent the PECs people to assist with tasks from basic office management to investigations. The PECs were then able to make decisions. In addition, a number of PECs were unable to establish or maintain independence from local authorities who had a political interest in seeing a candidate disqualified or not. One source for this report noted, “You can’t have a fair election while people in positions of power try to influence the elections.”¹²² To conduct thorough investigations would have required more time, more people or ideally both. Both, however, were lacking.

3.6.4 Public Expectations about the Process

The establishment of a vetting and complaints mechanism raised great expectations that the process would result in the exclusion of many candidates widely believed to have committed war crimes or human rights violations; engaged in corruption, narcotics trafficking or other crimes; or who maintained an illegal

117. Interview with a former electoral official outside Afghanistan, February 2006.

118. International Crisis Group, “Endgame or New Beginning?” 17.

119. *Ibid.*

120. Interview with a former electoral official in Kabul, January 2006.

121. Interview with a former electoral official outside Afghanistan, February 2006.

122. Interview with a diplomat in Kabul, January 2006.

militia. Even those who knew the first two categories of abuses did not qualify as a basis for exclusion anticipated that far more candidates would be excluded for not disarming than actually were. In some cases, frustration took the form of protests outside ECC offices (although more protests appeared to have been orchestrated by supporters of disqualified candidates). Disillusionment with the vetting process and the presence of so many notorious commanders and political figures on the ballots has been cited as two possible reasons few voters turned out.

One of the major expectations of the voting public, domestic and international NGOs as well as the media was that the ECC would somehow level the playing field among the candidates. The commission made statements at news conferences and in various media outlets reminding the public that it was not a criminal court or a transitional justice body, and that its mandate was limited to investigating and adjudicating allegations of suspected violations or offenses under the electoral law. Still, many thought the ECC would deal with allegations made against various candidates who were said to be criminals or supposedly known within the community to have committed criminal acts or human rights abuses. “We were expected to perform the role of the judicial system in carrying out this responsibility, something we were not prepared to do,” an electoral official said.¹²³

In addition, many ECC workers said they were frustrated because they were not receiving enough good or timely information from the JS about members of armed groups. Failure to disqualify candidates when the evidence did exist also hurt the staff’s morale.¹²⁴

As an indication of this expectation, the majority of the 1,144 challenges the ECC received had to do with human rights violations and war crimes. According to one former electoral official, these challenges cited incidents from all the phases of the war, from the communist coup of 1978 to the Taliban. Most concerned incidents from the mid-1990s, a time when many of the candidates had been in power. Other observers described the impact of public disenchantment with the process: “It is clear that electoral bodies like the ECC should not be expected to take on the role of courts and make decisions on crimes against humanity and links to armed groups. However, the diminished reputation, moral authority and legitimacy of the WJ [Wolesi Jirga] could be one of the many consequences of the inattention to transitional justice issues by the government and the international community for the past four years.”¹²⁵ Afghans also expressed concern that “the prestige that was previously associated with being a member of the NA [National Assembly] would be lost due to the bad reputations of so many of the newly elected members.”¹²⁶

Even candidates who by all accounts should have been disqualified complained about the process. One MP from Ghor, who was provisionally disqualified before being reinstated, protested that his enemies had falsely accused him. He also pointedly noted that until security was improved throughout Afghanistan, it was impossible to carry out an impartial vetting procedure.¹²⁷

Many reports written before and after the elections stressed that civic education — about the National Assembly, the elections and the vetting process — was essential to making the entire exercise credible. While some of this did take place, regrettably late planning and a tight timeframe left little scope for adequate public outreach and education. A better prepared public might not have had unrealistic expectations of what a vetting exercise could accomplish and might have been ready to provide more thoroughly documented complaints, although this would always be subject to the capacity within the population to provide such evidence in written form.

123. E-mail correspondence with a former electoral official outside Afghanistan, February 2006.

124. Interview with a former electoral official outside Afghanistan, February 2006.

125. Wilder, “A House Divided?”

126. *Ibid.*

127. The candidate was one who had been reinstated after some security agencies argued that his removal would be destabilizing.

4. The Vetting Process in the Elections in Afghanistan 2009-10

4.1 Overview: Moving Toward the Next Elections

A second election cycle following a political transition (especially one preceded by violent conflict) is often an important indicator of the health of newly established or reformed democratic institutions. The next presidential election in Afghanistan is scheduled for autumn 2009, with provincial council elections to be held simultaneously. The framework of the CoA and the 2005 electoral law criteria for candidate eligibility applies to these elections. Hence in 2009 and likely in the 2010 elections the question is not whether vetting should be done, but rather how the existing vetting regime will be implemented.

The two most important challenges in the next round of elections in Afghanistan are security and credibility. Currently much international attention is focused on the insurgency and its capacity to sabotage the elections. Credible interlocutors concurred that if elections were held as of this writing (autumn 2008), at least half of the country (virtually all of the Pashtun regions) would be too insecure for polling. If the elections cannot be held freely and fairly in different parts of the country, their legitimacy is affected. Fostering conditions for free, fair elections should be a major preoccupation for Afghan and international security forces.

Equally important as security concerns is the integrity of the electoral process itself and the impartiality and competence of electoral bodies. Whether the Karzai administration and its international supporters will take adequate measures to ensure that the elections are conducted in a credible and fair manner, according to established rules, and by impartial and competent institutions, will obviously affect the legitimacy of the results. The transparency and fairness of the voter registration procedures, the subsequent candidate registration process, and vetting efforts will provide a clear indication as to the credibility of the election outcomes themselves. Though space for free expression and dissent continues to hamper the efforts of the press, the Afghan media will play a critical role in informing the electorate and encouraging debate and dissent. Radio, television and newspapers play a seminal role in shaping public opinion in all parts of Afghanistan. But debate about the elections, the ongoing disagreements on the date of the election between President Karzai and the legislature, and conversation about the political future of the country remains limited.

Consequently, the Afghan government's efforts to verify candidate eligibility criteria and conduct the vetting process will be part of an electoral process that already faces considerable challenges. Although the vetting process may be important for the legitimacy of the elections and the newly elected administration, vetting by itself cannot provide legitimacy, and as is exemplified by the previous vetting process, a failed vetting process can have a considerable impact on whether elections are viewed as legitimate or

not. Bluntly put, the main effect of the previous vetting process was that it left many involved cynical about democratic processes in the future. As one former diplomat put it, the “half-hearted pursuit of a commitment to vet out candidates who failed to disarm meant that the marginal and out-of-favor could be excluded while the dangerous were protected.” Under current circumstances, the government and its international partners cannot afford an equally flawed vetting process. Lessons learned about the shortcomings of that experience provide important warnings for the next effort.

4.2 The Crucial Question of Political Will for Vetting

The cornerstone for a candidate vetting process in Afghanistan is political will. Given that the electoral law already contains an obligation to vet candidates, nominally supporting vetting costs nothing for Afghan government officials and the country’s international partners. However, a considerable difference remains between supporting vetting in general and making decisions to enforce the letter and spirit of the law that may alienate and anger powerful elements in Afghanistan. In 2005, there was political commitment to establish criteria for a vetting process as well as to initiate it, but there was lack of political will with regard to virtually every component of the process. The lack of political commitment from the Afghan government and the international community guaranteed failure.

As it stands, many international stakeholders in Afghanistan remain skeptical of developing enough political will or institutional capacity to ensure a thorough, meaningful vetting process for the upcoming round of elections.¹²⁸ Some others are concerned about the electoral process, and one interlocutor to this report suggested that for many in the Afghan government, the objective is not to conduct fair elections, but rather to obtain a result that is politically acceptable to the most powerful.¹²⁹

Afghans will lead the 2009 elections. As a consequence, the Afghan government and the IEC will establish the priorities for the upcoming elections, and these priorities will be supported technically and financially through the UNDP Elect Project. Although Afghan ownership is critical, the lack of international participation may open the door to abuses of the vetting process for political purposes by the executive branch or by Afghan security agencies.

There are already some concerns about the independence of the IEC and other electoral bodies. In September 2008, Azizullah Lodin, president of the IEC, gave a press conference during which he encouraged voters not to vote for presidential candidates who had lived outside Afghanistan. This was interpreted as a barb against Ali Jalali, the former minister of Interior who is likely to run against Karzai, or others such as former Finance minister Ashraf Ghani. Concerns remain about the status of the seven serving commissioners, who were meant to be serving on an interim basis until the National Assembly approved the IEC structure law; the commissioners have been operating solely as President Karzai’s appointees and have not been subjected to legislative review and consent. As of this writing, the law rests with the Meshrano Jirga for approval, but for the time being the IEC continues its work.

Several interlocutors interviewed for this report stressed that meaningful vetting will be difficult for the presidential elections as most of the candidates are likely to be too powerful to be disqualified because of links to illegal militias. Some noted that vetting potential candidates for the provincial council elections could be used as preparation for vetting in the course of the legislative elections. However, it was also noted that the Afghan electorate is likely to be unsatisfied with a vetting process that only focuses on the “small fish” and lets the big ones off the hook. Hence, when preparing for and improving the vetting process, it is critical to give equal attention to all forthcoming elections.

128. Interview with a diplomat in Kabul, October 2008.

129. Interview with a UN official in Kabul, October, 2008.

4.3 The Institutional Framework and Coordination

As noted previously, the IEC is the lead institution for organizing and executing the elections. Donor funding for the elections goes through the UNDP Elect Project, which in turn channels funds, resources and expertise to the IEC. The voter registration process is under way and is not without challenges. The first is that the voter registration drive is an updating process rather than a complete re-registration of all voters, a decision made largely on financial considerations. This means that the voter registration records from the last election — marred by suspicions that many people registered multiple times with fraudulent records — are still valid. The current registration process is supposed to allow the IEC to filter out multiple registrations through a digital database effort, but this relies on all registrants having their photograph and fingerprint taken at the time of registration. Organizations monitoring the registrations have reported that collecting photographs and fingerprints has not happened uniformly.

Voter registration will be conducted in four month-long phases. The first of these phases concluded in early November and covered the provinces of Badakhshan, Kunar, Nuristan, Panjshir, Wardak, Ghor, Bamyan, Daikundi, Ghazni, Sar-e-Pul, Logar, Kapisa, Parwan and Takhar. The second phase covers Balkh, Samangan, Jawzjan, Faryab, Kabul, Herat, Badghis, Baghlan and Kunduz. Phase three covers Nangrahar, Laghman, Paktia, Khost, Paktika, Zabul and Farah. The most volatile provinces, encompassing Kandahar, Uruzgan, Nimroz and Helmand, are scheduled for phase four.

The PEO will administer the ongoing voter registration process in the provincial capitals and at least one office in every district of the provinces, occasionally more if the population figures demand it. Each district office is supported by 10 to 15 registration centers located throughout the district. Officials say they hope to register four to five million new voters. About 600,000 registered in phase one. The IEC is digitally recording photographs and fingerprints of all new voters that will be compiled in a database in Kabul at the end.

Security is a challenge in a number of districts in Ghazni, Wardak and Logar, and access for female registrants is challenging in many of the more conservative rural areas. Election monitors have reported a number of irregularities in the first phase, such as an unusually large number of women registering in Wardak and Logar; their estimates say 63 percent of those registering are women, a high figure for parts of the country where women do not appear in public without male escorts. Some accuse voting officials of submitting voter registration cards to community elders for distribution to their communities rather than directly to individuals, which increases the likelihood of fraud.¹³⁰

Coordination among all official bodies with responsibility for the elections is critical for vetting. Representatives from the IEC and DIAG have said they are committed to working together to improve the vetting system and on verifying disqualifications. Yet as of October 2008, DIAG and IEC sources said they had little information as to how the IEC planned to run the vetting process. It remains unclear who is going to make the final decision about disqualification.¹³¹ While those responsible for compiling the DIAG list and those in the IEC entrusted to disqualify candidates based on that list should operate independently of each other to avoid politicizing the process, they need to make sure they adhere to the same set of rules and follow the same strategy. A recurrent complaint about the 2005 experience was that the JS made decisions during secret sessions about who to include on the list of candidates with IAG links. If the process is going to have any credibility, there needs to be clear criteria on compliance, and all evidence about compliance, or the lack thereof, should be available to the public.

130. Interviews with officials from the Free and Fair Elections Foundation of Afghanistan, Oct. 19, 2008, in Kabul and Dec. 3, 2008, in Washington, D.C.

131. One IEC official said it would be critical to bring the ECC to life before the beginning of candidate nominations, as the ECC would need to be the body arbitrating and verifying complaints, not the IEC, whose responsibilities are logistical and technical.

Investigating links to IAGs, as well as ascertaining the truth in cases where candidates claim they have been falsely accused, is essential to a credible and fair process. As of October 2008, it was not clear how such an appeals mechanism would operate and under whose authority. The experience from 2005 is instructive in this regard. At that time, the ECC, which had no investigatory capacity, was unable to gather its own information, examine the evidence the JS used to make conclusions, or independently verify information relating to disarmament compliance. Officials involved with the process in 2005 said they needed clearer criteria defining IAGs and their members, consensus on what constituted valid evidence, and firm deadlines for hearings and decisions on such disqualifications. Close observers of the electoral process have also noted that presumptive candidates, including some with known links to IAGs, will be more strategic and better prepared for this round of elections.¹³²

The experience of the 2004 presidential and 2005 legislative elections underscores the need for an impartial body to adjudicate complaints. Article 53 of the electoral law lists a number of electoral offenses that entail sanctions ranging from fines to disqualification. A significant number of the offenses enumerated in the law are of a political nature, including “threatening, intimidating or attacking a voter, a candidate or a journalist” and “offering or receiving a payment or other benefit for the purpose of influencing the electoral process.” How such complaints will be investigated and by whom are critical questions. In 2005, the ECC had enormous discretionary power and was faulted for its lack of transparency.

4.4 The Role of DIAG in the Vetting Process

DIAG’s information on compliance is as essential to the vetting process in the future as it was in 2005. However, the future of DIAG is in question. The mandate of the Afghan New Beginnings Program (ANBP), a UNDP initiative that oversaw disarmament in Afghanistan, expires in March 2009. Discussions are being finalized to extend the mandate of the Disarmament and Reconciliation Commission for a year to help DIAG move from ANBP to the Ministry of the Interior. However, there are serious concerns about the ministry’s capacity and resolve to continue with DIAG’s contribution to the vetting process. Extending DIAG’s mission will be no easy task; it is a question of will as much as of capacity. Sources who have been involved with DIAG expressed concern that the transfer would end DIAG altogether. Until the transfer takes place, ANBP mentors are working with a DIAG cell at Interior to build capacity and ease the transition. Efforts to reform Interior have stalled since 2002, and it remains notoriously corrupt.

After the 2005 elections, DIAG launched a two-phase program to deal with remaining IAGs, offering development aid to communities and individuals who voluntarily surrendered weapons to DIAG. The intent of this carrot-and-stick approach was to begin with voluntary disarmament and then progress to enforced disarmament after a stipulated period of time. According to DIAG sources, nobody reached the second phase.

So, almost by definition, any enforced disarmament would necessitate the involvement of international forces. As with the vetting process in the 2005 elections, neither ISAF nor coalition forces were willing to risk confrontation with recalcitrant commander-candidates after 2005. It is highly unlikely that the international forces would be willing to risk such confrontations in 2009 and 2010. To the contrary, most will be tied down in the effort to contain the Taliban insurgency sufficiently to let elections take place at all. Voluntary disarmament and disbanding of illegal militias remains the only feasible DIAG strategy, and it has proven ineffective to date.

132. Interviews with officials in Kabul, September 2008.

Generating a reliable, accurate list of potential candidates who have not disbanded their militias or disarmed is essential to avoiding some of the problems that occurred in 2005. DIAG's information is collated alongside the intelligence that Afghan security agencies and UNAMA and ISAF have gathered. As of October 2008, considerable work remained to clean up the DIAG list used in 2005, principally to remove those who have died or complied, and to add new names.

The collection of information on IAGs differs in some ways from the 2005 process. A "re-mapping" effort was launched on Oct. 1, 2008, and was scheduled to end Dec. 1, but according to DIAG sources, it is likely to continue until March. The information collected in the re-mapping will form the basis for vetting. Provincial governors are asking each of the three security agencies at the district level to submit up to five pages of detailed information on all IAGs that they have information about. Agencies at the district level will not have the opportunity to review this information, in contrast to the earlier data collection method DIAG used. Instead, the data will be sent directly back to the provincial governor, who in turn is meant to relay it to the D&RC in Kabul. At this stage, ISAF and UNAMA are to compare it against their own intelligence and information from districts nationwide. The information is then turned over to ANBP headquarters for inclusion in a general database.

According to DIAG officials and others monitoring the process, however, while international intelligence sources track new names as they become known, detailed information is frequently lacking. Many commanders are listed as having five weapons — the legal minimum required by the definition of an IAG — and thus they may "disarm" at will without giving up significant arms caches. Another problem is that DIAG does not verify if a person or group has disbanded and disarmed. Rather, if someone presents himself and hands over weapons, DIAG gives him a certification of compliance without checking to see if he truly has disarmed. This makes the entire process a farce, especially because potential political candidates can use the certification to declare themselves legally fit to run.

The quality of the information that DIAG officials gather is crucial when assessing who is or is not tied to an IAG. Without a credible DIAG list, the entire process becomes much more vulnerable to political manipulation or at least the perception that the process is arbitrary and biased. While DIAG has been working on improving its information with respect to district level disarmament, the consensus is that the list needs much more work before it is reliable enough for definitive vetting decisions. It is not clear how much time or what additional resources are needed to clean up the DIAG list. The political jockeying that accompanies decisions of who is and who is not identified as a member of an IAG, as well as the limited verification measures, do not suggest the creation of accurate and impartial resource.

In principle, the process of identifying IAGs well in advance and giving them the opportunity to comply with disbanding and disarmament requirements should depoliticize the link between elections and disarmament, and would allay concerns about denying voters and candidates their full rights to political participation. Many argue that producing a public list from DIAG ensures a critical aspect of transparency. However, DIAG sources interviewed for this report said that publicizing information about armed groups before elections would not be possible. In principle, DIAG representatives expressed a willingness to vet the lists after the IEC had authorized them without waiting for people to bring complaints. In the previous electoral cycle, DIAG waited for the ECC to request or initiate a complaint about a candidate before providing any information. Any of these efforts, however, would happen after the responsibility of DIAG is transferred to the Ministry of the Interior, with all the corresponding challenges described above.

In terms of the involvement of international military forces, the PRTs are expected to provide support to DIAG in the following areas:¹³³

- Provision of intelligence at the provincial level
- Gathering and assessing community perceptions on DIAG implementation
- Provision of assessments of the Afghan national security forces' capability to deal with DIAG situations
- Providing support for enforcement operations led by the Ministry of the Interior¹³⁴
- Increasing frequency of patrols in targeted districts
- Increasing prioritized reconstruction in districts that comply with DIAG and have made improvements in local security
- Coordinating with other DIAG development projects
- Visible and vocal support to local governments to bolster their commitment to DIAG
- Keeping DIAG progress on the agenda in meetings with local authorities
- Actively negotiating and talking with local IAGs and their commanders

This information should help provide DIAG with data that goes beyond mere weapons counts. The focus on collecting weapons as proof of compliance can obscure the fact that the militias in question have not been disbanded. The threshold for being listed as an IAG is quite low — a minimum of five weapons — meaning that DIAG's net should theoretically catch any illegal group. However, when that number is the criterion for disarming, groups have little compulsion to turn in more than the minimum number of weapons. A reliable, impartial monitoring and verification process over the longer term is essential as is the responsibility of officials to give an objective and unambiguous assessment of who is or is not linked to an armed group.

There is the question of capacity, but even more importantly, the question of political will. Avoiding blatant political manipulation of the process will be the greatest challenge. This was a critical failure in the 2005 elections, as various actors, including officials sympathetic to candidates or worried about the risks of confrontation, manipulated or obscured the results to suit their purposes.

As was the case in 2005, any time an individual or group hands over weapons and signs an affidavit saying they have disarmed and will never arm again, they are considered to be legally disarmed and receive certificates to that effect. There is no verification process conducted to assess whether the prospective candidate had in fact disarmed or disassociated themselves from an armed group. However, the affidavits can be used against them if they are discovered with weapons at any point in the future. Because the impetus for vetting in 2005 was to kick-start the DIAG disarmament phase, there was a built-in incentive to offer provisionally disqualified candidates a second chance. Those who took advantage of that opportunity should have been subject to an especially vigilant verification process through DIAG. This did not happen. In 2005, some candidates were permitted to run only with the promise of future compliance, a concession that essentially discredited the entire process.

4.5 Illegal Armed Groups, Private Security Companies and Tribal Militias

Afghan government regulations prohibit illegal armed groups from transforming into PSCs.¹³⁵ These regulations also state that if any such PSCs are involved in illegal activities, such as smuggling weapons, trafficking narcotics, or other criminal pursuits, their activity shall be stopped. This regulation notwithstanding, the transformation of IAGs into PSCs appeared to be under way by October 2008. Up to

133. "PRT Engagement in DIAG", PRT Executive Committee Policy Note, 19, October 2006.

134. This would be considered only in exceptional cases and as a last resort.

135. Procedure for Regulating Activities of Private Security Companies in Afghanistan, Joint Secretariat of Disarmament and Reintegration Commission for Ministry of Interior, February 2008.

20,000 Afghan “private security contractors” have submitted registration applications for permission to carry weapons; many of these companies are run by former militia commanders who might otherwise be disarmed. Certainly, membership in any of these now legal groups cannot be considered grounds for disqualifying candidates. Some prominent political figures (including serving MPs) have reportedly registered their own militias as PSCs in advance of the next round of elections.¹³⁶

In addition, U.S. forces have begun training Afghan tribal militias as part of the counter-insurgency effort. The Los Angeles Times reported that “the plan is controversial because it could extend the influence of warlords.”¹³⁷ The international military presence does not have the number of troops to tackle the insurgency in combat, and alternatives to foreign forces were being sought from early 2008. U.S. Gen. David McKiernan noted that through the Independent Directorate of Local Governance (IDLG), the international community would pursue initiatives to empower communities to take charge of their own security.¹³⁸ The IDLG was established by presidential decree in late September 2007; it reports directly to President Karzai and holds a far-reaching mandate to “improve governance in order to achieve stability, security and development.”¹³⁹

The Afghanistan Social Outreach Program (ASOP), scheduled to run until district council elections in 2011, is a major IDLG program.¹⁴⁰ For it, IDLG is expanding its presence on the ground by establishing regional offices and “community councils” throughout the country. IDLG’s ASOP strategy is vague as to how it will achieve its goals of ensuring peace and security throughout the country, and its description of activities at the district level are equally unclear.¹⁴¹

Radically different characterizations of ASOP and IDLG are in circulation. ASOP supporters argue that the advantages of having local allies in areas affected by the insurgency outweigh the potential risks. Sources at DIAG and UNAMA have expressed grave concerns about the objective and activities of ASOP, describing it as a thinly veiled effort to organize and arm local groups in villages and districts around the country to provide much-needed security along highway routes and remote regions, activities beyond the capacity of international and Afghan forces. Many in the human rights community have also voiced concerns about IDLG, which some view as part of Karzai’s efforts to manipulate the machinery of local governance to his own advantage as his current term draws to a close.¹⁴² Arming and training forces that lie outside established lines of command and control also vitiate any prospect of democratic accountability.

Engaging the interests and needs of local populations is not problematic in and of itself. Yet dispelling the authority of an already tenuous central government through legitimizing people or groups that may already pose threats through a haphazard process in the name of community defense is unwise. It is hard to see what lasting progress can be achieved by strengthening a select number of local actors operating outside established governmental institutions who impose their authority by force. There are no guaran-

136. Interview with an Afghan human rights activist, Oct. 9, 2008.

137. Julian E. Barnes, “U.S. plans to train Afghanistan tribal militias,” Los Angeles Times, Oct. 10, 2008. See also Ann Scott Tyson, “New Joint Effort Aims to Empower Afghan Tribes to Guard Themselves,” Washington Post, March 31, 2008, and Jessica Leeder, “Kabul Wants Local Militias to Bolster Security,” The Globe and Mail, Oct. 31, 2008.

138. United States Department of Defense, “DoD News Briefing with Gen. McKiernan from the Pentagon,” Oct. 1, 2008, www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4297, last accessed Oct. 27, 2008.

139. The Islamic Republic of Afghanistan, the Independent Directorate of Local Governance. “Afghanistan Social Outreach Programme Document for Khost, Kunar, Laghman, Nangarhar, Nuristan, Paktia & Paktika Provinces,” October 2008.

140. Fact Sheet, Office of the Spokesperson, United States State Department. “United States-Afghanistan Strategic Partnership,” Sept. 25, 2008, www.state.gov/r/pa/prs/ps/2008/sept/110245.htm, last accessed Oct. 29, 2008. IDLG as a whole is scheduled to receive a total of \$90 million in U.S. funding, in addition to the \$9 million earmarked for ASOP.

141. In the area of security, ASOP’s activities are broadly described as “fostering community solidarity to prevent support for anti-government elements and activities in the district, mobilizing the community to support government agencies, the police and the security services for peace and stability, and ensuring liaison and communication with government officials and security services to improve security and enforce the rule of law.” Donors, supporters and observers alike confirm that in fact ASOP will in part be responsible for organizing and building up the capacity of informal militias to support the official military efforts.

142. Interview with human rights officials and activists in Kabul between October 2007 and November 2008.

tees that these armed tribal militias will use their new power and resources to combat the insurgency or other long-standing rivals. Empowering more sources of violence, over which the United States and its allies will have little control, may result in some short-term gains, but is not a recipe for stability. It creates another farcical cycle, where groups that DIAG could target would now be legitimate, state-sanctioned actors. Most significantly, programs such as ASOP relay legitimacy, resources and influence to informal groups with tribal loyalties rather than to official government bodies that are meant to protect all the country's citizenry. Such a system would also serve to undermine the criteria of the current vetting system by arming groups outside of the reach of the government while simultaneously encouraging armed activity in the most unstable areas of the country in the run up to the elections.

5. Lessons Learned and Recommendations

5.1 General Considerations

This report has sought to emphasize the entrenched legal, operational and political challenges to electoral vetting in Afghanistan. In 2005, although there was more support and political will for the process, ICTJ recommended against vetting candidates on the grounds that it would not be able to achieve its stated objectives. This report echoes that informal recommendation. It suggests that a badly administered and compromised vetting process will not only fail to achieve its stated objectives, but is likely to undermine the credibility of the elections and further weaken public trust in the Afghan institutions. A botched process might even contribute to legitimizing the people it aims to exclude from elected office; commanders and other members of illegal armed groups who are allowed to run might be able to claim that they have been vetted and met the criteria.

Afghan law already defines the relevant candidate eligibility or vetting criteria to be applied in the next elections. The legal framework for vetting has been established and will no longer be changed for the upcoming elections. The challenge then is to ensure that the process for verifying candidate eligibility or vetting criteria contributes to ensuring free, fair elections in Afghanistan and that this process does not undermine the public's opinion about the elections. In order to make this possible, the Afghan government and donors must approach vetting in the context of the credibility of the overall electoral process. Serious problems in other areas — government influence over electoral institutions, flawed registration procedures, malpractice during the actual vote and counting process, and lack of public awareness about the election process — compromises the legitimacy of the election even if the vetting process itself is amply resourced, has access to detailed intelligence, and is carried out in a fair, objective manner.

The 2005 candidate vetting process had three key failures. First, the legal framework and process for verifying if candidates were in fact members of IAGs was incomplete and poorly defined. Second, the institutions charged with running the vetting lacked capacity and resources. Third, the Afghan government and the international community lacked the political will to ensure that the vetting process was carried out fairly. These weaknesses resulted in a highly selective process that excluded few candidates and left many armed commanders running for office. However, the fact that the vetting process was developed contributed to public expectations that it would be possible to disqualify many candidates known to maintain illegal militias. When that did not happen, the public was bound to be disillusioned. The experience of vetting for the 2005 elections raises serious questions about how such an exercise can be attempted again in Afghanistan.

Many of the shortcomings of the 2005 candidate vetting process remain. For example, DIAG's criteria and regulations remain ill-defined. The working definitions the program deploys regarding "unofficial

military forces” and “illegal armed groups” are unclear. Standards for distinguishing what constitutes a member or commander of such a group are also not well defined. These legal ambiguities open the process to arbitrary decision-making and political manipulation. The track record to date of the Afghan government and international stakeholders suggests that resources to collect, organize and verify information are more restricted than they were in 2005. Similarly, the capacity of institutions administering and coordinating vetting will be limited as the electoral agencies no longer have any international staff (international staff as such does not ensure capacity). Only a few months before the candidate nomination process is scheduled to start, no consensus exists as to how or indeed whether to support a new vetting effort during the electoral process, even though it is clear that some form of electoral vetting will certainly take place, according to Afghan law.

The critical point to be made is that without political will and a clear division of responsibility and action among involved parties, vetting will produce more public disillusionment. The political risks of attempting to implement a vetting process without giving due care to operational and technical detail are very high. Most significantly, the dramatic decline in security across the nation renders a process as politically sensitive as vetting even more difficult to implement. These challenges must be taken into serious consideration.

5.2 Recommendations

Given the current context in Afghanistan and a realistic assessment, ICTJ cannot offer its unqualified support for a vetting process during the 2009-10 electoral cycle. Based on its research and findings, three possible options exist for stakeholders who want to ensure that elections are as fair and credible as possible. The three alternatives have been developed with a recognition that verification of candidate eligibility criteria (vetting) is a requirement of the Electoral Law, but also with a recognition that the importance of vetting lies in to what extent a vetting process can contribute to free and fair elections. While it is important to focus on the above mentioned legal, operational and political challenges to vetting, it is equally important to have a clear view of the risks of a failed vetting process and to view vetting as part of other mechanisms aimed at promoting free, fair elections.

OPTION ONE:

Move now to effectively address the legal, operational and political challenges to enable a feasible and fair vetting process during the 2009-10 electoral cycle.

If the Afghan government and its international partners are serious about overcoming the fundamental flaws of the vetting process in the elections in 2005 and about implementing a substantial vetting process, the government in cooperation with donors should ensure that:

- Political commitment for an effective, credible and fair vetting process exists among both Afghan government and donors;
- Vetting is done with equal attention to legal and procedural standards for the 2009 presidential and provincial council and the 2010 legislative elections. This means that preparations for vetting have to be in place in time for the 2009 elections, and these should not be used merely as a “test-run” for the Wolesi Jirga elections. There are, however, possibilities to use different forms of vetting in the different electoral processes. For example, “soft” vetting may be an option for the presidential elections (see Option Two);
- The vetting criteria are clearly defined and functional. Of particular concern is the legal definition of what constitutes an IAG, and what constitutes both membership and participation in an IAG, which should be clarified either through legislation or by presidential decree;
- Institutional and operational shortcomings are overcome. This will involve designing an impartial and effective mechanism to coordinate and implement the vetting process, and making sure it has enough resources to sustain it.

Option One requires immediate attention from the IEC, D&RC and UNDP Elect to ensure that:

- Preparations for vetting are initiated immediately through joint high-level consultations between the three offices;
- A joint secretariat is established to regulate the procedures and sharing of information between the IEC and the D&RC, with the technical support of UNDP Elect;
- There is a separation both in function and in personnel of those responsible for compiling the DIAG list and those in the IEC entrusted to disqualify candidates based on that list;
- Close consideration is paid to the role, function and independence of the ECC in the electoral cycle. Serious differences of opinion exist between those who are working to institutionalize the vetting process.¹⁴³ At the very least, the ECC should be functioning before the candidate nomination period begins. Its members should be appointed by the most transparent legitimate means possible, perhaps by a vote of confirmation from the National Assembly;
- The IEC, D&RC and UNDP Elect develop a clear code of procedures and institutional responsibility. Some of the major procedural questions that need to be asked are:
 - What will happen to the list of individuals with links to IAGs? Will the list be publicized before the nominations? If not, what entity will be responsible for reviewing the information and announcing disqualified candidates? If the list is not publicized, how will transparency and legitimacy of the process be ensured?
 - What measures can be put in place to ensure that the body acting to disqualify candidates is secure enough to make decisions not favorable to armed and influential figures and groups?
 - Can the D&RC and DIAG institute verification measures to assess whether candidates who seek reinstatement have truly disarmed and disassociated themselves from an illegal armed group? How is ongoing compliance monitored? What happens if a candidate takes arms again or renews his or her association with an illegal armed group?
 - What will the appeals process entail? There should be a provision for appeals and due process for the candidates to get their names removed from the disqualification list according to set criteria and a stringent verification procedure.

OPTION TWO:

Design and implement a “soft” vetting process

Given the legal, operational and political challenges confronted in 2005 and that these challenges have increased since 2005, a “soft” vetting process may be an alternative. In a “soft” vetting process electoral candidates with links to IAGs would be given the opportunity to withdraw their candidacies or the information about their association with IAGs would be broadly disseminated and made available to the electorate. Soft vetting does not entail the removal of candidates with links to IAGs but leaves it to the electorate to decide whether such a candidate should be elected or not. Soft vetting demands less organization and fewer resources from official Afghan and international stakeholders, whose capacity and willingness to enact a vetting process are limited.

In Option Two, the Afghan government, donors and other key stakeholders should ensure that:

- Information on links with IAGs is made available to the prospective candidates, who would be offered the opportunity to withdraw their candidacies;
- The electorate is widely informed (through the media and civic education) about the links with IAGs of candidates who do not withdraw;
- Candidates take a public oath declaring that they are not affiliated with an IAG and will not be in the future. This is meaningful only if the activities and membership of armed groups are monitored after the elections;

143. According to the IEC, the main body responsible for announcing the disqualification of candidates with links to IAGs should be the ECC. Other interlocutors argue that the IEC has the authority to disqualify candidates, and no one else.

- After taking all possible measures to inform the electorate, allow the voices of voters to reflect political choices. International and national security forces should be given the mandate and resources to protect communities who speak out or vote against entrenched warlords.

While Option Two is less demanding, it nevertheless requires political commitment and the will to ensure extensive outreach and freedom of the media during the electoral process. Option Two would also involve changes to the existing legal framework to adapt the conditions for candidate eligibility.

OPTION THREE:

Downplay the vetting process and focus support on other mechanisms that are more likely to yield positive results and contribute to free and fair elections. (Note: due consideration should also be given to the recommendations of Option Three even if Options One or Two are selected.)

In case the Afghan government and donors do not think they can overcome the legal, operational and political shortcomings of the 2005 vetting process, the focus and resources should be redirected to other processes and mechanisms. It is critical to recognize that such a step would contravene Afghan law, and at minimum, the National Assembly would need to repeal the vetting provision in the electoral law.

The Afghan government, donors and other key stakeholders should ensure that:

- All possible means of limiting fraud during the voter registration should be implemented;
- International and Afghan organizations are given the permission and opportunity to observe all phases of the electoral process (from registration to counting). Organizations such as the Free and Fair Elections Foundation of Afghanistan should be allowed to continue expanding their monitoring processes and build coalitions with local organizations in the various regions. Extensive presence of international election monitors should be ensured (including in sparsely populated and insecure areas);
- Human rights and monitoring organizations are encouraged and allowed to play an important role in voter education and outreach. This would involve managing access to rural populations, supplying information to a largely illiterate electorate, and ensuring that voters have accurate and complete information on both the electoral process and the candidates;
- Members of the Afghan and international media can report freely about the electoral process and contribute to civic awareness and outreach in an electoral cycle;
- The best possible security arrangements are in place to ensure the rights of the electorate to vote, including the provision of a mandate to international security forces to protect the integrity of the elections directly, rather than as a back-up to Afghan security forces.