CORPORATE PRIVATE ARMIES IN AFGHANISTAN

Regulating Private Military and Security Companies (PMSCs) in a 'Territorial State'

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EXECUTIVE SUMMARY

Power structures are changing. New political, economical and social actors are emerging, while traditional elites are struggling to maintain their quota of authority and influence. Among other scenarios, this trend is reflected in the contemporary privatization of armed conflicts and the resulting prominent role that the so-called private military and security companies (PMSCs) are acquiring.

The 9/11 terrorist attacks were the turning point of this phenomenon, as it was later reflected in the intervention and occupation of Iraq and Afghanistan. A number of private contractors and companies entered these countries accompanying coalition military forces, giving no political alternative to the invaded and later-elected governments to oppose to such a policy. Yet, after 12 years of international military presence, Afghanistan is still one of the most insecure countries in the world and public institutions are unable to fully guarantee human security in the country, thereby making PMSCs a necessary partner.

Corporate private armies in Afghanistan provides an analysis of the PMSC industry dynamics and the impact these private actors have on the sovereignty of the state and on the human rights of Afghan people. The author makes an exhaustive description of the regulatory puzzle under which PMSCs operate in Afghanistan, while the challenges international community will face to regulate and control this industry is highlighted. The report concludes with key recommendations to improve the regulation of PMSCs in ‘territorial states in order to meet human rights obligations and enhance respect to International Humanitarian Law (IHL).

THE INDUSTRY: The US funded an unprecedented private military and security industry in Afghanistan with the acquiescence of the international community and the government of Afghanistan. PMSCs have been deeply enmeshed in the political economies of the country by employing a majority of Afghan nationals, having links with public officials and integrating local militias and strongmen in their business racket. This has hindered the demobilization and disarmament of irregular armed groups and created an important source of employment and business linked to the conflict and insecurity. As a result, the model of a militarized society with high levels of weapons and armed population is being perpetuated, which may have potentially destabilizing effects in the transitional scenario post-2014.

REGULATION: PMSCs have operated in Afghanistan without a comprehensive national legislation regulating their activities and conducted their activities in an unregulated environment throughout most of the conflict. From the beginning, the regulation of military services was separated from that of security services and left largely to the contracting States by means of the conclusion of military agreements. The regulatory process of security services can be assessed as a series of attempts to exert sovereignty and government control in this area, the last of which consisted in transferring the responsibility for private security services to a public-commercial entity, the APPF. Yet, the human rights component of each one of the PSCs regulations has been rather weak or poorly enforced in practice. Indeed, the current dissolution strategy—which leaves enough room for PSCs to remain in the country under different status and affiliations—results in a puzzle of regulations for PMSC contractors in Afghanistan which creates great uncertainty about who will actually monitor and control private security activities, and, at the final, how human rights will be protected.

ACCOUNTABILITY: Most of the PMSCs’ personnel present in Afghanistan, including certain local personnel, may benefit either from diplomatic immunities and/or immunities agreed in the two SOFAS in force. The contents of the military agreements further means that, unless permission is granted, PMSCs’ personnel will not be surrendered to any international criminal tribunal or any other entity or state willing to exercise its jurisdiction. While Afghanistan has not excluded its primary jurisdiction over all PMSCs’ contractors, prosecutorial activity has been practically non-existent.

THE IMPACT: The interval of almost seven years between the arrival of the companies to the country and the first government regulation favoured the uncontrolled development of the industry and caused unforeseen impacts. As a whole, PMSCs’ activities have had a direct impact (human rights incidents) as well as indirect effect [human security] on the human rights of civilians. Yet, there is a clear deficit of information and analysis about the impact PMSCs’ activities have on human rights, arising from the difficulty of distinguishing contractors form other armed actors, to the lack of specific oversight bodies and claiming mechanisms, as well as the general absence of official statistics.
Afghanistan has experienced a long history of war and conflicts over the last thirty-five years. The last one started with the US-led Coalition Forces intervention following the 9/11 terrorist attacks – Operation Enduring Freedom (OEF) – in order to combat Al-Qaeda and prevent the Taliban regime from providing them with safe harbour. Although the Taliban regime was overthrown by the end of 2001 and replaced with a new Afghan government by 2002, the initial phase of the international armed conflict made its way to an ‘internationalized’ non-international armed conflict between the new Afghan government supported by the DEF Coalition and the NATO-led International Security Assistance Force (ISAF), and non-State armed opposition groups, particularly the Taliban.

This armed conflict still persists nowadays; yet, international military forces are considered to be present in Afghanistan as stabilization forces to assist the Afghan government in addressing the threats to the security and stability of the country posed by the Taliban, Al-Qaeda and other extremists groups and criminal activities. A transition process called Inteqal (meaning ‘transition’ in Dari and Pashtun) has been ongoing since July 2011. Within this process, the lead responsibility for security in Afghanistan is gradually being transferred from NATO and the US forces to the Afghan National Security Forces (ANSF). Afghan forces are expected to have taken full control of security across the country by the end of 2014. As a result, Presidential elections to be held in April 2014 will mark a critical date to assess whether the transition plan has succeeded in bringing stability to the country.

Being the greatest exponent of the global war on terrorism, the Afghan conflict (2001–present) is also, along with Iraq, one of the first examples of the contemporary privatization of war. This armed conflict still persists nowadays; yet, international military forces are considered to be present in Afghanistan as stabilization forces to assist the Afghan government in addressing the threats to the security and stability of the country posed by the Taliban, Al-Qaeda and other extremists groups and criminal activities. A transition process called Inteqal (meaning ‘transition’ in Dari and Pashtun) has been ongoing since July 2011. Within this process, the lead responsibility for security in Afghanistan is gradually being transferred from NATO and the US forces to the Afghan National Security Forces (ANSF). Afghan forces are expected to have taken full control of security across the country by the end of 2014. As a result, Presidential elections to be held in April 2014 will mark a critical date to assess whether the transition plan has succeeded in bringing stability to the country.

Being the greatest exponent of the global war on terrorism, the Afghan conflict (2001–present) is also, along with Iraq, one of the first examples of the contemporary privatization of war. In a quite precipitate manner, although not exactly unplanned, international military forces assisting the Afghan government in the stabilization of Afghanistan relied in turning on private military companies in order to assist them on a wide variety of military functions. Considered as a military support force, private contractors have also played a crucial role in providing security and protection services to other international actors involved in reconstruction, thereby funding an unprecedented private military and security companies (PMSCs) industry in comparison to previous conflicts. Even today, with the ongoing Inteqal process and the dissolution and transference of private security services process under way, PMSCs – or their substitute entity, the Risk Management Companies (RMCs) – still are a critical player in the security scenario of the country. These will indeed, remain in the country as an armed element even surviving the foreign military withdrawal.

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1/ The International Security Assistance Force (ISAF) was created in accordance with the Bonn Conference in December 2001 and its mandate was initially limited to providing security in and around Kabul. On 11 August 2003 NATO assumed the leadership of the ISAF operation, thereby becoming responsible for the command, coordination and planning of this force. In October 2003, the United Nations extended the ISAF’s mandate to cover the whole of Afghanistan (UNSCR 1510), paving the way for an expansion of the mission across the country. See http://www.isaf.nato.int/


3/ SIGAR Audit 13–15/ Security Transition, July 2013, “Afghanistan Public Protection Force: Concerns Remain about Force’s Capabilities and Costs”. WHAT SIGAR FOUND: […] Without RMCs, the APPF would be unable to provide the full range of security services needed by U.S. Agency for International Development (USAID) implementing partners'.
In a moment where the worldwide private military and security industry is being placed under international scrutiny, and a set of diverse regulatory initiatives are being assessed in its potential to regulate PMSCs’ activities and control their impact on human rights, this report provides a case study-based discussion on PMSCs’ use and activities in conflict situations; and particularly, on how ‘territorial States’ where PMSCs operate respond to the challenge of their regulation and control in this context.

To this end, Section I describes the development and the nature of the PMSC industry in Afghanistan. Section II briefly explores some of the consequences arising from this privatization policy by examining the economic, strategic and human rights impact the use and activities of PMSCs have had in the country. Section III examines the policy of PMSCs’ regulation followed by the Afghan government. Accordingly, the first part of section III analyses the regulatory process of private security services from 2001 to date; the second part of the section focuses specifically on the contents of the respective Status of Forces military agreements concluded by the government of Afghanistan with the ISAF and the U.S. Finally, the third part of section III unveils the puzzle of regulatory frameworks applying for private contractors in Afghanistan. The report closes with some concluding remarks and key challenges to be dealt with in the future regulation of PMSCs at a national and international level.

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4/ See among others: 1) the so-called ‘Swiss Initiative’ which comprises The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (2008), http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm; The International Code of Conduct for Private Security Service Providers (2010), http://www.icoc-psp.org; 2) the several country reports and studies as well as the 2010 Draft Convention on Private Military and Security Companies elaborated by the UN Working Group on the Use of Mercenaries http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx; and, 3) the work of the UN Human Rights Council – Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, http://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/GEIWGMilitaryIndex.aspx

5/ The use of the term ‘territorial State’ as well as related terms such as ‘Contracting State’ and ‘Home State’ responds to the terminology used in the Montreux Document (2008).
DEVELOPMENT AND NATURE OF THE PMSC INDUSTRY IN AFGHANISTAN

The use of private contractors in conflict situations was not exactly a new policy by the time the war of Afghanistan began. However, the scale in their use and the scope of their activities experienced a drastic turn during the conflict. Both security needs and military strategic reasons were behind this move. In particular, PMSCs began arriving in Afghanistan in 2001 accompanying the US-led Coalition Forces (CF) intervening in the country, and, as in Iraq, their presence and subsequent rise were linked to a two-fold model of privatization.

On the one hand, international military actors began to rely upon private contractors supporting military operations to a greater extent than before. With the US military at the forefront, the dynamics of military privatization took place within the framework of two international missions [the DEF and the ISAF], and not only did it have its roots in operational needs arising from the conflict -such as insufficient military forces and resources- but also in a long-standing policy of fighting force-reduction and transformation of the military beginning at the end of the Cold War6. Thus, private contractors were initially used to provide logistical and base support services7. However, in contrast to previous conflicts, in the following years their role was further extended to other traditionally military-reserved areas such as training and restructuring of national armed forces –i.e. the Afghan National Army (ANA)8 –, operational support services including maintenance and operation of weapons and combat-related goods9, as well as demining and eradication of poppy fields. Yet, probably the most relevant example observed in Afghanistan regarding privatization of military-related services has been the expansion of the role of private contractors into the realm of intelligence10.

Indeed, the first private contractors had been hired to enter in Afghanistan nearly after 9/11 as a part of the first CIA-commanded counter-terrorism mission to conduct offensive operations against the Taliban and Al-Qaeda11. Activities of private contractors in this area have also included reconnaissance, conduction of interrogations as well as the collection of information and data analysis12 including ‘gatekeeping’13. Moreover, it has to be noted that the counter-terrorism strategy articulated around the CIA and the US Special Forces did not only encompass the reliance of private contractors but also the employment of local militias affiliated with Afghan strongmen. According to some commentators ‘these local partners provided usable intelligence in their hunt for ‘terrorists’, a reserve of auxiliary manpower, and sometimes a proxy force for conducting covert

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7/ Logistical and base support services include transportation of military supplies (soldiers and/or combat related goods), food preparation, laundry services, communication, and construction of living, dinning and bathing facilities for military personnel.
8/ Once the Taliban regime was ousted, the US concluded with the new established Afghan government an agreement that allowed to the provision of military assistance, including defence services, related training and non-combatant personnel pursuant to the United States International Military and Education Training Program (IMET). See 22 U.S.C. Section 2311 and 2347.
9/ Combat-related goods include satellites, military software, and weapons systems including the operation of drones, especially in surveillance operations. Furthermore, in Afghanistan ‘operational support services’ also encompassed raid assistance. Generally, operational support has also been classified as to cover certain functions in the command and control chain. See “The Private Security Database [PSD] for Areas of Limited Statehood”, elaborated by Zeljko Branovic, Freie Universität aus Berlin. http://www.sfb-governance.de/teilprojekte/projekte_phase_1/projektbereich_c/c2/The_PSD/index.html
13/ See Fernando Brancoli and Tomaz Paoliello, Private military and security companies in Afghanistan: nationality circumvention and intelligence gatekeeping, 2013 [on file with the author], at 1/4: ‘the concept [gatekeeping] is used in different field of studies, such as Journalism, Sociology and Political Science. In broad terms, it describes how information is filtered by different agents until it is effectively delivered to the expected audience’.
activities such as cross-border raids into Pakistan. It has also been reported that this policy is being applied by other members within international military forces.

On the other hand, as the conflict evolved and violence escalated due to the growing insurgency in late 2005, the government of Afghanistan had to acknowledge its limitations in providing adequate security across the whole territory and proceed to outsource part of its security responsibilities by permitting ‘reliable and professional private security companies’ to provide additional security services in order to support reconstruction and stabilization efforts. Government regulations later defined [private] security services as ‘activities which provide security of real and natural persons, logistics, transportation, goods and equipment, training of security employees [and] warning services’, and classified them into five different categories: a) area security; b) convoy security; c) fixed-site security; d) mobile security; and e) police training missions. Actually, this privatization of security linked to the reconstruction of the country mainly focused on providing security for foreign entities’ personnel and facilities, ensuring the safety of the VIPs, and consultancy related to risk assessments. As a result of this, a system combining public and private security was set up in the country; through this system security of international actors and assets was transferred to PMSCs, while protection of public places, properties and citizens remained largely under the responsibility of the yet unprepared Afghan police and security forces (ANP and ANSF), whose training, in turn, was outsourced to the same PMSCs.

The wide range of services integrating each of these security categories radically fuelled the growth of the private military industry in the country and further inaugurated its new dimension in scope. Meanwhile private military companies quickly adapted to the new needs and began to offer and perform military and security services at the same time. Moreover, the large variety of security services gave rise to a great diversity of new clients contracting PMSCs. Public customers such as international military forces, diplomatic missions, reconstruction agencies, and international organizations like the UN, as well as private entities and individuals like journalists, reconstruction implementing partners, NGOs, commercial enterprises, foreigners and Afghans turned to private security contractors when looking for protection services and/or security-related support.

16/ As stated in the Introduction of the 2008 Procedure for Regulating Private Security Companies (PSCs).
17/ Ibid, Article 4.
18/ See The Bridging Strategy for implementation of presidential Decree 62 (Dissolution of Private Security Companies), March 22, 2011.
19/ Ibid. Definitions: ‘Area Security involved long linear development project sites such as road or power lines providing security over a large and changing area of land. Area security is a particularly complex and detailed operation that requires command and control of the forces executing it by the operation being protected. Area security may include […]’.
20/ Ibid. Definitions: ‘Convoy security involves conducting security which ensures safe passage of equipment and personnel along a designated route. Convoy security may include […]’.
21/ Ibid. Definitions: ‘Fixed site security involves the fixed and non-mobile provision of security of personnel and/or equipment at static locations. Locations may be semi-permanent [such as a road construction work-camp], or permanent [such as ISAF, Coalition forces or and implementer headquarters or project sites]. Fixed site security is the most common form of security used by ISAF, Embassies, diplomatic entities, police training missions and implementing partners that PSCs provide nationwide. Fixed site security may include […]’.
22/ Ibid. Definitions: ‘Mobile security is the form of ‘convoys’ that Embassies, diplomatic entities, police training missions, implementing partners and international organizations utilize the most and involves the secure movement of personnel. Generally mobile operations originate at secure fixed sites, with destinations or missions that are either secure, such as visiting a beneficiary community, or non-secure destinations, such as conducting construction site reconnaissances, bridge assessments, or visits to remote power switch stations. Mobile security may include […]’.
23/ Ibid. Definitions: ‘Police training missions: Specific, law enforcement-oriented activities that have been authorized by the Afghan Government and include personnel involved in mentoring, advising and training of police. […]’.
24/ Certain distinguished public personalities as well as rich Afghan businessman also enjoyed private security.
Nevertheless, numerically and geographically speaking, the private military and security industry continued to follow international military presence, with the US-military and the ISAF country members being the main employers of PMSCs in the country. By December 2008, contractors made up 69% of the US Department of Defence’s (DoD) workforce, the highest recorded percentage of contractors used by the DoD in any conflict in the history of the US. Moreover, from December 2008 to March 2011, the number of DoD’s security contractors increased from 3,689 to 18,971, this is, a rise of over 400%. As of March 2011, security personnel made up 21% of all DoD’s contractors and it was equal to 19% of the overall US troop presence in Afghanistan. Although similar estimates for PSC employment with ISAF members are unknown, commentators reported around 31,250 guards had been contracted by the ISAF in February 2011.

The military and security privatization dynamics rapidly permeated Afghanistan, a country with a vast armed labour surplus and a consolidate militias network inherited from previous conflicts. PMSCs soon became involved in the country’s economy and politics. In contrast to Iraq, where at least in the first stage of the conflict PMSCs were mainly international companies employing third-country nationals and Western-elite contractors, in Afghanistan the majority of licensed PMSCs were afghan-owned, and even the bulk of foreign PMSCs’ workforce were Afghan nationals. Certainly, the role of international PMSCs cannot be underestimated as they have been assigned to providing those services particularly linked with the strategic and operational design of military and security activities such as the consulting and advice, training and instruction, command and control, and intelligence and risk management services. However, when arriving in the country, this industry, which was eminently foreign in nature and concept, progressively became a business with a strong national component.

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26/ See UNWGM Report - Afghanistan, para. 10; also, Aikins, M., op. cit, p. 7.
29/ Ibid.
30/ Aikins, M., Appendix 1: On PSC Statistics, p. 16
32/ See SwissPeace report - Afghanistan, Appendix II, Table I - Overview of PSC services provided in Afghanistan. See also Section III - Regulations of Security services/Third stage: dissolution below.
33/ See Aikins, M., op. cit, pp. 7-9.
In particular, as a mirror of the own US military strategy of relying on private militias for counter-terrorism operations, both local and international PMSCs turned to local commanders affiliated with private militias and armed groups to recruit experienced personnel and/or ensure free passage in Taliban-controlled routes. This private-irregular security forces symbiosis not only resulted in the emergence of a parallel local security structure out of the government’s control but also provided private militias with a sort of legitimacy and community strength that have impeded efforts of the Afghan central government and the international community in disarming regional strongmen and their networks as part of the Disarmament of Illegal Armed Groups (DIAG) programme.

Considering the mixture of private companies and forces providing military and security services, and the political implications behind their use, it is not surprising the lack of reliable statistics about the number of PMSCs operating and/or that have operated in the country. As we will see below, the government of Afghanistan did not start an official license process until 2008 and the US military only began to track the number of contractors since the half of 2007. Furthermore, PMSC statistics are generally uncompleted or lack a comprehensive perspective in scope, in particular due to the general trend of excluding military services such as training and intelligence from those statistics, but also because official numbers obviously do not include irregular forces and militias contracting and/or subcontracting.

The first official license process initiated by the Afghan Ministry of Interior (MoI) in 2008, and which imposed a manning cap of 500 personnel per registered company, led to the license of 39 private security companies, later extended to 52 PSCs in 2009 –with 27 national and 25 international PSCs– with around 30,000 employees. However, these numbers fall short to represent the size and the scope of the PMSC industry in Afghanistan since, as it will be explained below, from 2001 to 2007 the estimated number of PMSCs varied between 60 and 140 companies, with around 18,000 to 28,000 personnel.

Moreover, the 2008 license process left out the registration and license of private military companies and, due to the legal restrictions imposed, a number of PSCs were reported to have operated without license and maintained more personnel than what they registered. Since 2010, the PMSC industry is decreasing in size as a consequence of the presidential decree ordering the dissolution of all PSCs in the country. Yet, the programme implementing the decree –the 2011 Bridging Strategy– included several exceptions, allowing PSCs to remain in the country. Besides, demobilization and disarmament of irregular security forces and militia groups associated to PMSCs remains uncertain.

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35/ See United Nations Assistance Mission Afghanistan (UNAMA), Afghanistan Annual Report 2011, p. 31: “ISAF identifies four categories of ‘local defence forces’ that operate outside the Afghan government’s control. These include Community-Based Security Solutions (CBSS), the Critical Infrastructure Protection (CIP) Program, Intermediate Security for Critical Infrastructure (ISCI) and the Afghan Public Protection Program (AP3), and Local Security Forces (LSF). This last category, LSF, includes unlicensed private security companies, militias, and arbakai forces still in operation. The ISAF briefing stated that all such groups are either in the process of being disbanded, planning to be disbanded, planning to transfer to the Government’s control or to transition to ALP.”
36/ See also SwissPeace report - Afghanistan, p. 15: “…worth mentioning for a better picture of the security landscape in Afghanistan, are three sets of non-state actors who also provide security, although information on these groups is even scarcer than on PSCs. First, the US military is working with an estimated 2-3,000 former Afghan militia fighters as auxiliaries in their war against terrorism. These individuals, engaged in combat duties, are not part of the ANA. Secondly, locally recruited former militiamen guard military compounds (incl. those of Provincial Reconstruction Teams - PRTs) and convoys by the Coalition Forces. Thirdly, the narcotics industry turns to the Taliban for security, and also hires for their protection and that of their drug convoys security guards, which are allegedly local militia leaders and former small-time warlords”.
37/ Aikins, M., op. cit., p. 6.
As in Iraq, the use of PMSCs in Afghanistan was not totally an improvised policy but the outcome of previous decisions and practices. However, the development of the PMSC industry in scale and scope was indeed quite unanticipated and precipitate. Thus, although using contractors instead of military personnel or civil servants provided several advantages and a rapid response to immediate operational needs, it also resulted in a number of unexpected consequences. In particular, the impact of PMSCs’ use and activities in Afghanistan can be described from several perspectives.

For instance, in terms of economy, the PMSC industry has been said to have a positive impact on the local economy, since it employed most of Afghan guards and provided employment opportunities for uneducated and low-skilled former militia fighters. PMSCs have also tended to pay their staff better salaries than public security and military forces, increasing private security employees’ purchasing power. Additionally, the presence of PMSCs has been considered by some ‘as a positive contribution to the local real-estate market’ due to ‘the fact that PSCs, as other international actors, pay a higher rent for offices and houses than Afghans’. However, at the same time, the high expenditure allocated to private security and the funding of part of these services via reconstruction budget has resulted, in practice, in the diversion of reconstruction funds to the same international actors funding it. This has meant, in the end, less money left for genuine reconstruction. Furthermore, certain privileges granted to private security employees, such as the tax exemption agreed by the ISAF and US contractor personnel, as well as the irregular license systems applied to PSCs during the different stages of their regulation and resulting in variable license fees, seem to have diffused the full economic potential that an industry of such proportions can have on a host State.

Deeper on this point, the current PSC dissolution strategy and the subsequent transference of their local personnel to the Afghan Public Protection Force (APPF) – a new State-owned entity –, proceeds slowly and under conditions which in the end may result in a huge unemployed armed workforce. On the contracting States’ side, reported cases of fraud and misuse, and particularly the diversion of contracting funds to warlords and even to the Taliban, have been said to have had a disproportionate adverse impact on U.S. efforts in Afghanistan.

From a political and strategic perspective, the reliance on PMSCs has also had both positive and negative effects. On the one hand, the majority of international actors present in Afghanistan agree that, even today, they would not be able to operate in the country without the assistance of PMSCs.
Yet, on the other hand PMSCs’ use and activities have been a constant source of tension between the Afghan government and the international community, and PMSCs are considered to have undermined both the political credibility of the Afghan government and the stability efforts of the international military. Part of this tension arises from the parallel local security structure created in connivance with the PMSC industry and the proliferation of irregular armed groups operating beyond the control of the Afghan government and funded either by international military forces – such as ‘Campaign PSCs’ – or indirectly through PSCs’ activities 47. Furthermore, the better wage and working conditions associated to security companies resulted in massive desertions from public forces and increased the difficulty for the government to recruit and retain public military and police personnel 48.

In addition, another significant source of tension has derived from a series of practices and incidents in which PMSC contractors have been involved. These range from inappropriate and irresponsible behaviours, lack of transparency in their operations, and poor collaboration with local security forces, to criminal activities and human rights violations.

Abuses committed by contractors also compose a substantial base of the impact PMSCs’ use and activities have had on human rights of local population in Afghanistan. In 2008, these events led the Afghan government to the adoption of an administrative regulation for PSCs in order to control the industry and its activities. However, in 2010 the Presidential issued a decree ordering the dissolution of all private security companies in the country, a process which is still ongoing 49. Furthermore, the strategic consequences of the privatization policy have also been adverse in the international military arena. PMSCs’ ties with local militias as well as the abuses committed by contractors have been assessed as strengthening anti-American insurgents and generating an overall negative perception among a civil society unable to differentiate between private contractors and international and/or national military and security forces. This has hindered Coalition efforts to build local support. In the United States, these and other considerations led government officials and military analysts to call for legislative action. In particular, they have suggested options such as completely barring the use of contractors in combat and stability operations, or even limiting their use in this context to the provision of certain services while barring them from performing other activities considered particularly problematic such as convoy escort, some personal security and quick reaction force services 50.

Abuses committed by contractors also compose a substantial base of the impact PMSCs’ use and activities have had on human rights of local population in Afghanistan. In broad terms, PMSCs’ activities have had both a direct and an indirect impact on human rights.

48/ Hammes, T.X. Private Contractors in Conflict Zones, The good, the bad and the Strategic Impact, JFQ, Issue 60, 1st quarter 2011, p. 31 and sources cited therein.
49/ See Section III, Regulation of security services below.
Direct impact on human rights encompasses a series of incidents and instances of abuses involving private military and security contractors 51. In particular and according to the available information, such incidents include serious human rights violations such as detainees’ torture and mistreatment, unlawful killings, cases of disproportionate and indiscriminate use of force against local population, as well as in high profile incidents of Direct Participation in Hostilities (DPH) resulting in civilian casualties. Additionally, cases have been reported of abuse of power particularly in night raids and house inspections, leading to arbitrary detentions, destruction and theft of property, intimidation, and obstruction of access to public places.

Reports have also noted PMSCs’ questionable labour practices and contractual irregularities, including sleep deprivation, lack of proper training and mistreatment of Afghan national staff. Tentatively, considering the armed conflict context some of these incidents involve actions that may also rise to the level of “cruel treatment and torture,” or “outrages upon personal dignity, in particular humiliating and degrading treatment” in contravention of Common Article 3 of the Geneva Conventions. On the other hand, human rights impact of PMSCs is also patent in the indirect effect of their activities in the human security in the country.

In particular, several field-research studies provided reliable information showing that while PMSCs’ services are generally linked to security, their use and activities have not resulted in a positive spill over effect in the general security environment of the country 52. On the contrary, studies have noted that the large number of armed individuals, vehicles and weapons, as well as the links between PMSCs and militias, created a feeling of distrust, fear and insecurity among local population and sends the message that security is not a public good, but a commodity for foreigners and wealthy Afghans 53.

It has to be noted here that, despite the general information on human rights incidents, this is an under-reported area where a lack of statistics and substantial examination is observed. Practical difficulties, such as the difficulty to distinguish between contractors and other armed actors, have been said to complicate the process of accurately reporting incidents and human rights violations by Afghan citizens and NGOs. Even human rights institutions such as the UN Working Group on mercenaries during its mission in the country in 2009, have been unable to obtain documented and verifiable evidence of reported violations 54.

Additionally, there has been a lack and/or unworkability of specific monitoring mechanisms at a national level which have further complicated oversight of PMSCs’ activities and proper identification and investigation of incidents by contractors. Notwithstanding, this does not mean that contractor abuses have not been studied. Reports from foreign and international institutions have documented past abuses committed by contractors. However, most of these studies analyse contractors’ abuses from a strategic perspective, and thus, have not generally provided detailed information and statistics that allow answering fundamental questions concerning the impact of PMSCs’ activities on human rights, such as whether abuses are higher among contractors than among military personnel or the number of civilian casualties arising from specific services. Furthermore, the UN Assistance Mission in Afghanistan (UNAMA) has considered PMSCs’ behaviour a particular concerning issue and proposed and advocated for an adequate national regulation for them. However, in contrast with the UNAMI in Iraq, it has not provided specific documentation or separated reporting on incidents of civilian casualties by contractors in its mid-year and annually reports. Statistics of incidence of abuses committed by contractors would be a useful tool for assessing the quantitative and qualitative impact of PMSCs’ activities on human rights, particularly those, such as intelligence, which avoid public scrutiny due to their nature 55.

Notwithstanding these limitations, documented abuse cases substantially show human rights violations have occurred during the provision of both security and military-related services, and furthermore, they have been committed by PMSCs working for different clients and in different activities. In particular, PSCs engage in

51/ A compilation of incidents and documented cases extracted from several sources is provided in Appendix I, serving as an illustration of the violations below.
52/ SwissPeace report – Afghanistan, p. 32-34.
53/ Ibid. Also, UNWG Mercenaries Report on Afghanistan, paragraph 53.
54/ UNWG Mercenaries Report on Afghanistan, paragraph 57.
55/ See UNAMA reports on the protection of civilians in armed conflict; see http://unama.unmissions.org/, Activities/Human rights.
protection of reconstruction projects and diplomatic entities as well as PMSCs working for military and intelligence agencies have been involved in human rights abuses. Thus, although from a strategic perspective some PMSCs’ services such as convoy security may be considered particularly sensitive, the same consideration may not necessarily arise from a human rights perspective. In regard to this, further examination and statistics would be useful to determine whether abuses are higher than others in relation to the provision of some services, or among PMSCs working for certain clients and/or in specific areas. Furthermore, from a human rights perspective the qualitative impact of contractors’ activities should also be taken into account. There are certain conducts and violent crimes that, due to their seriousness, may result in serious human rights violations such as torture and/or even rise to the level of war crimes when they take place or are associated with an armed conflict, such as unlawful killings.

Consequently, these abuses attract particular State obligations under international law in terms of investigation and jurisdiction and cannot be treated as other regular abuse incidents. Finally, detailed publications of incidents reports can help identifying questionable recruiting practices by PMSCs as well as the sort of quality standards that tend to be infringed in practice. For instance, the case of CIA US contractor David A. Passaro in Afghanistan raised questions not only about what activities it is appropriate to delegate to contractors, or the legal qualification of certain interrogation techniques, but also for the need of better training and screening of contractors. In particular, Mr. Passaro was convicted of two counts of assault with a dangerous weapon for his connection with the interrogation and beating to death of prisoner Abdul Wali, but his criminal background was already questionable at the time of his contracting.

Legally speaking, documented cases also raise particular concern in certain areas. Firstly, the widely accepted civilian status of PMSCs’ contractors is problematic and clearer rules of engagement are needed. As civilians, private contractors are expected to abstain themselves from participating in hostilities and they are only allowed to use defensive force. However, reported incidents reflect that, due to the nature of their activities and even in an involuntarily basis, PMSC contractors find themselves in a position that can easily make them become involved in combat, and defensive tactics can also result in civilian casualties. From a human rights perspective, PMSCs’ contractors should be seen as a very different kind of civilians in comparison to journalists and humanitarian, religious or administrative personnel.

Therefore clearer rules for the use of weapons and armed force should be established. Secondly, documented cases call for an urgent need to set up direct oversight mechanisms and figures for the command and control of PMSCs’ contractors in theater. Since contractors are not considered military personnel, they are not placed under the direct military chain of command, even when accompanying the military in theatre and/or performed military-related activities. Generally, responsibilities for the command and control of PMSCs are shared by contracting and host States. However, the case of Afghanistan provides evidence on the reasons why this modus operandi may fail in practice. As we will see in greater detail below, on the Afghan government side, PMSCs’ contractors have not been properly supervised by publics authorities, firstly due to the lack of PMSCs’ regulation and secondly due to deficient implementation of the regulations in place. On the contracting States side, guidelines for the command and control of PMSCs’ contractors have also been established, including through the terms of their contracts. Accordingly, their adherence has been supervised in practice by military, diplomatic and/or reconstruction contracting officers. Yet, foreign regulatory and monitoring entities have constantly documented the need for a better contractor oversight and screening, concluding that the laxity of contractor oversight has significantly contributed to contractor abuses in Afghanistan.

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56/ The past background of Mr. Passaro allegedly included previous abuses to his wives and his dismissal from the police force due to a beating incident. See Keffe, ‘Don’t Privatize our Spies’, New York Times, 25 June 2007; Chesterman, S., ‘We can’t Spy…’, op. cit. pp. 1063-1064.

57/ See US Congress Subcommittee on National Security and Foreign Affairs, Warlord Inc.: Extortion and Corruption Along the US Supply Chain in Afghanistan, 21 June 2010. According to the report, Finding 6, p. 4, DoD’s regulations require oversight of all private security contractors who work for the US government, and this oversight includes ‘ensuring that all private security company personnel comply with U.S. government and local country firearm laws, that all private security company equipment be tracked, and that all incidents of death, injury, or property damage be fully investigated’. Nonetheless, it concludes that ‘despite serious concerns regarding operations, no military managers have ever observed truck operations on the road or met with key security providers[…and] The Department of Defense is grossly out of compliance with applicable regulations and has no visibility into the operations of the private security companies that are subcontractors on the HNT contract’. See also Schwartz, M., CRS Report 13 May 2011, p. 17.
In general terms, the analysis of the issue of regulation of PMSCs, and thus of the control of their activities, tends to distinguish between the different categories of States involved in the privatization/contracting process. This is so because home States (countries in which PMSCs are based), contracting States (countries that hire PMSCs) and territorial States (countries in which territory PMSCs operate) are not in the same position and may not have equal responsibilities with respect to the performance of private contractors.

The territorial State is in a strong position to regulate PMSCs as far as they operate within their territorial sovereignty and it can impose rules on their activities by means of national laws. It can also ensure criminal accountability of contractors easier than other States because it has access to witnesses and evidence. In addition, it can choose to adopt legislation providing for companies’ corporate responsibility through the introduction of administrative, criminal and civil sanctions. Still, in practice territorial States where PMSCs operate usually lack political stability as to take legislative action, and may not have sufficient territorial control and/or institutional conditions to enforce it. Besides, substantial and formal deficiencies within the established legal framework as well as military agreements granting immunities have also had an impact on their ability to exercise jurisdiction over PMSCs.

Yet, the regulation of PMSCs’ activities is far beyond voluntarism and opportunism. Under international human rights and humanitarian law, territorial States have a clear obligation to protect and ensure human rights of all persons under their jurisdiction and ensure respect for humanitarian law. According to human rights treaties and jurisprudence, the obligation to protect and ensure human rights involves duties such as exercising due diligence and taking reasonable steps and appropriate measures to prevent, deter, investigate, punish and redress human rights violations committed by private individuals and entities. Hence, to the extent that, due to their very nature, PMSC’s activities may clearly undermine human rights, the adoption of legislative measures in order to regulate PMSCs and ensure accountability clearly falls within the scope of these duties. On the other hand, under International Humanitarian Law (IHL) – still applicable to Afghanistan’s internal armed conflict – the general ‘obligation to ensure respect’ encompasses particular obligations to prevent any violations of IHL, including those committed by personnel of PMSCs, and suppress them through appropriate means such as military regulations, administrative orders and other regulatory measures.

Afghanistan has ratified main human rights and IHL treaties, except for the UN Convention against mercenarism, and therefore, it is obliged to carry into effect its human rights commitments, including the abovementioned obligations. Furthermore, since February 2003 Afghanistan is Party to the Statute of the International Criminal Court, thereby accepting the prospective complementary jurisdiction of the international court over perpetrators of international crimes committed in Afghanistan and assuming particular obligations of co-operation with the Court, including the arrest and handing over of requested suspects.

Practically, however, when looking at the regulatory efforts undertaken by the Afghan Government, it is necessary from the outset to make a distinction between security services, on the one hand, and military services provided by PMSCs, on the other hand. This distinction is based on the fact that they have been oriented by different policies and subjected to different regulatory frameworks.

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58/ They include the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights (1966); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women (1979); The Four Geneva Conventions of 1949, and its two Additional Protocols (1977) since November 2009; and, the Convention of the Rights of the Child (1989), and its optional protocols on the involvement of children in armed conflict, and on the sale of children, child prostitution and child pornography.

59/ Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998, Art. 8, 17 and 87-89. See the Amendment to article 8 of the Rome Statute, Resolution RC/Res.5., Kampala, 10 June 2010.
The regulatory process of private security companies (PSCs) in Afghanistan can be divided into three different stages that can be briefly summarized as [1] no regulation (2001–2007); [2] administrative regulation (2008-2010); and [3] dissolution order (2010-present). Factual contents of these stages show the potential challenges and limitations territorial States may face in order to regulate the PMS industry in complex environments such as in armed conflicts: [1] once PSCs are already present and operating in the country, and their regulation becomes a political question; [2] when implementation and enforcement remains elusive due to the lack of due diligence and political and commercial interests at stake; and [3] when the capabilities of public security forces are still undermined, consequently making private security companies a necessary partner.

- First stage: 2001–2007 (absence of – but discussion on regulation)

During this period no formal regulation for PSCs was adopted but government efforts dealing with the industry took at least two directions.

Firstly, several government agencies, such as the Afghan investment support agency (AISA), the Afghan Ministry of Interior (MoI), the Director of the Uniform Police in 2003, the Criminal Investigation Unit since 2005, and the Kabul Chief of Police during 2007, initiated arrangements to register companies. Apparently, these processes – which eventually gave rise to the raid and close down of several companies – were developed independently and lacked any sort of coordination between them. Furthermore, registration was limited only to private security companies, and it is unclear whether it was functioning in areas outside Kabul and whether the same criteria were required for obtaining a license. Altogether, 35 PSCs were officially registered with the MoI and received investment licenses and permits issued by the AISA. The AISA license is a business license required to operate any business in Afghanistan legally and it was not specifically designed for PMSCs. Investment permits from AISA (Private Security Guard Permit for Foreign Institutions) functioned in practice as a procedure for the registration of private security guards and their weapons and, to the best of the author’s knowledge, they did not seriously take into account human rights considerations for granting the licenses. Remaining companies present in the country during this period were apparently unlicensed. Consequently, given the limited records, the total number of PMSCs and personnel operating in Afghanistan during this period is uncertain. Estimations range from 60 to 90-140 companies with between 18,000 to 28,000 personnel.

Secondly, following certain incidents involving private security contractors in illicit activities, a process to develop a regulation on PSCs was initiated. During 2007 several draft regulations and government policy documents were issued by commissions created by the government in consultation with foreign representatives as well as members of the PSC industry.

However, revisions of the different draft versions opened a political debate – clearly influenced by the interests of the diverse set of stakeholders involved – showing different positions and understandings about how to regulate the industry. Certain members within the government, as well as some international actors such as the UN and the PSC industry itself, were in favour of some kind of regulation.

Despite that other members within the legislative and the government questioned the convenience of legitimizing PSC industry through its regulation, and even expressed concerns about the legality of a formal law. In particular, the Ministry of Justice and the Supreme Court opposed to a formal regulation of PSCs on the
grounds that a potential law would be in conflict with the Afghan Constitution because it grants the monopoly of the legitimate use of force only to the State. Therefore, any attempt to regulate the use of force by non-State actors could be unconstitutional. Similar interpretations were also made within Afghan police circles regarding the contents of the 2005 Police law, and the compatibility of PSCs’ activities with statutory provisions in regard to non-interference in police business. This ‘struggle for sovereignty’ in the field of security was also visible in the other two regulatory stages.

Finally, the consideration of a draft regulation by the parliament was conditioned to a previous examination of the legitimacy of having PMSCs operating in the country by the Independent Commission for Overseeing Implementation of the Constitution. As a result, the political alternative to the control of the activities of the PSCs currently operating in the country was to temporarily regulate the industry by means of an administrative regulation until a formal law could be passed.

-Second stage: 2008-2010 (administrative regulation)

The above mentioned efforts to develop a regulation on PSCs led to the release of a ‘Procedure for Regulating Activities of Private Security Companies’ (the Procedure) by the MoI’s Joint Secretariat of Disarmament and Reintegration Commission on February 2008. The Procedure was an administrative regulation enacted in order to fill the legal vacuum until the enactment of the relevant PSC law. Therefore, it did not amount to become a formal law passed by the parliament and specifically considering issues such as the imposition of criminal and civil sanctions or the exercise of jurisdiction. Nevertheless, in practice the Procedure has functioned as the main regulatory framework for PSCs’ activities in Afghanistan.

As stated in its introduction, the procedure’s aim was ‘to ensure transparency, accountability and quality services by private security companies... [and] ensure that both employers and beneficiaries of these PSC are satisfied with the quality of the provided service, and shall remove the public and government concerns over their illegal actions’. On top of that, ‘private security services’ were defined as ‘activities performed [...] for the purpose of establishing security of real and natural persons, logistics, transportation, goods, equipment, training security employees, and warning services’, thus excluding military nature services from its scope of application.

To this end, the Procedure put in place several positive measures to regulate and monitor PSCs’ operations, and it generally was a far more advanced legal framework than the one set down by the Coalition Provisional Authority’s (CPA) regulations in Iraq. Among its strengths, the following stand out:

1. It restricted in different ways the sort of activities that can be performed, and therefore, outsourced to PSCs

Here, previous concerns raised by certain members within the Afghan government about the legality of outsourcing security functions turned into two specific limitations.

On the one hand, security companies were expressly prohibited from performing the so-called ‘illicit activities’ (article 6), many of them being in line with the principle of State monopoly of legitimate use of force and the related concept of ‘inherently governmental functions’, this is, functions ought to be performed by public authorities. In particular, PSCs were banned from doing actions such as the protection of the country’s borders, security of governmental offices, properties and facilities, holy places, and historical areas, mines and forest, unless such areas are transferred to the private sector in accordance with the provisions of the law. Additionally, the provision of security of highways was also prohibited though private road construction companies, companies’ convoys, international organizations, and foreign States’ official delegations and political agencies were exempted.

On the other hand, PSCs were required to refrain from performing certain acts considered contrary to the

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law (article 21) that were mostly related to the use of weapons and non-interference in activities of the public sphere. Some examples of these acts are: the participation and funding of political and religious activities, buying, selling and distributing weapons, ammunitions and explosives, making use of police or national army uniforms, and recruiting public servants. Remarkably, this provision also prohibits ‘recruiting people collectively from one tribe or party’, something clearly connected to the policy of using and subcontracting local militias for security purposes.

2. It established an official license process for PSC in order to legally operate in the country, as well as to carry weapons and using armoured vehicles

PSC currently operating in the country were given a 45-day deadline to complete and provide the required documents and information. Thus, foreign and local PSCs were required to meet certain common conditions, such as having a charter containing its goals, structure and scope of activity, providing a military training certificate in the case of PSC managers, as well as committing to observe IPOA standards. Other conditions were slightly different depending on the company’s origin. Specifically, operations managers of foreign companies should have a clear criminal record certificate from the Interpol and the police administration of the home country. In the case of local PSCs, their directors, members and operations managers should have not been convicted of a misdemeanour or a felony, nor have been suspected or accused of such crimes, and PSC staff should have not been suspected or accused of human rights violations, as the Afghanistan Independent Human rights Commission (AIHRC) confirmed. Licenses fees were also different and more expensive for foreign PSCs.

In a new step the Procedure also imposed a manning cap of a maximum of 500 employees for both foreign and local companies. It also prohibited civil servants from being owner or partner of a security company, on the one hand, and companies from recruiting active officials of state departments, on the other hand. As mentioned above, this license process initially led to the license of 39 PSCs, later extended to 52 in 2009.

3. It favoured the creation of a monitoring authority of PSCs’ activities – the High Coordination Board (HCB) – that was, in turn, responsible for registering and licensing PSCs

The HCB was responsible for the verification and investigation of any violations committed by PSCs – as it was reported by the police headquarters and the department of national security – and, consequently, for deciding whether to suspend and/or cancel their license and dissolving the company. It also had the authority to process public complaints in relation to violations committed by PSCs, and to undertake due investigations. Further in this regard, this regulation made security companies responsible for compensating losses resulting from unlawful acts carried out by their staff (art. 27). These compensations included taking them the bank guarantee required under license fees, although the process and criteria for determining compensations was not clearly set forth.

4. It established a set of rules on the use of force by PSCs [Annex 1]

In general, the Annex states that the using of armed force by security companies should be limited to the defence of their own security and it should take into account the provisions of articles 20 of the 2005 Police law (’If possible, use the lowest degree of force’) and 59 of the 1976 Penal Code (legitimate right of defence). Specifically, it limits the use of force in cases of: a) self-defence; b) cases where clients or property under protection need to be defended; and c) when civilian people get threatened or attacked and there is no other responsible organization in the area to help them. It further agrees on the ‘usage of gradual power’ during daily activities, and requires that contractors to pass a training period before giving them permission to carry weapons. Incidents involving the use of firearms should be immediately reported to local police in order to seek its assistance.

PSCs were also bound to cooperate with Afghan and international forces and to respect religious values, human rights, tradition and local population customs. Moreover, in a new step, the imposition of certain limits to the activities of PSCs also finds its way into these rules. Thus, for instance, security contractors can only stop or body search civilians, and stop vehicles and search the passengers when they have been assigned to do so.
As a whole, the above mentioned stipulations certainly made the Procedure a detailed regulation for private security contractors in a conflict situation. However, several reasons questioned the effectiveness of the Procedure as a comprehensive national regulatory framework for PMSCs, and these arguments, in turn, explain its failure to properly regulate their activities in practice.

Firstly, the Procedure came very late in time, almost seven years after the beginning of the conflict, and it was only in force two and a half years, until President Karzai announced the PSC dissolution strategy. Clearly, this was an insufficient period of time to properly regulate the complex private security market present in Afghanistan. In particular, political and commercial interests to control lucrative routes at a provincial level, coupled with the lack of coordination between HCB and regional authorities, hampered the goal of preventing irregular armed groups and private militias from operating as security providers at a local level.

Secondly, the legitimacy of the Procedure was publicly questioned and its scope of application was too restrictive to function as a long-term national PMSCs' regulation. As reported by the UN working Group on Mercenaries, the license process became the subject of political and commercial competition and was questioned by some of the ministries and agencies on the grounds that it was not based upon a law, and therefore, it could be revised once the law was adopted. Likewise, foreign States representative complained about the restrictive approach of the Procedure and insisted that they should be free to decide which companies they could hire. On the other hand, the Procedure only regulated private security services, leaving aside private military-related services sometimes performed by the same company. Furthermore, the Procedure was only applicable to those security companies that have been active in the country prior to the enactment of the Procedure (Art. 2). The fact new companies were apparently impeded to apply for a license, together with irregularities and subjectivity in the granting of licenses, turned the licensing process more into a political tool for regularizing politically-aligned PSCs rather than a comprehensive legislation for regulating, in the long term, the PMSC industry taking into account human rights considerations.

Thirdly and foremost, the Procedure was inconsistently implemented in several aspects and its enforcement was limited. Regarding the license process, for instance, the Government did not seem to have taken the necessary measures to ensure that unauthorized companies ceased their activities. As a result, a number of unlicensed Afghan companies were still operating in different parts of the country, especially outside Kabul where the HCB authority was weak and local authorities lacked the capacity to disband them. Information about the subjectivity and lack of transparency regarding the licensing process – including individually issued permissions allowing some companies to exceed the established limit of 500 employees – was also reported.

66/ See ‘Third stage: 2011-present (dissolution)’ below.
69/ Ibid.
Moreover, government officials allegedly received licenses to operate PSCs subsidiaries despite the Procedure’s explicit prohibition 70.

Remarkably, the lack of representation of the HCB at a regional level did not only hinder the license process, but also made its monitoring and investigating functions highly inoperative in practice. The poor coordination with police headquarters together with corruption as well as the lack of dissemination of the complaint process among local population prevented the reporting and investigation of human rights violations and, in the end, PSCs’ accountability. Furthermore, the required involvement of the Afghan International Human Rights Commission in the vetting process of local PSCs’ employees was also confirmed by the organization as ineffective due to the lack of accurate police records 71.

- Third stage: 2010-present (dissolution)

The failure of the Procedure to properly regulate and monitor PSC’s activities in Afghanistan rapidly became evident. On August 17, 2010, following some incidents by PSCs and in a climate of distrust and frustration due to the lack of governmental control of the many parallel security structures that had been created, President Karzai issued Presidential Decree N° 62 ordering the dissolution of all PSCs in the country within a period of 4 months 72.

The articles of the Decree justified PSCs dissolution “in order to fight corruption, provision of security for all citizens, avoiding the public disorder and misusing the weapons, uniform and military equipment by private security companies which causes tragic incidents” 73. However, international actors on the ground, with the US in the forefront, immediately opposed to the measure arguing its potential negative impact on development projects and stability operations, and they exerted pressure to get the Decree amended. Coupled with the fact that the Afghan police and security forces still lacked the capacity to assume the overall security responsibilities instead, this proved the Decree unrealistic and difficult to be implemented on time. Thus, after a period of negotiations with the relevant actors 74 a more practicable compromise was reached, and in March 2011 a so-called Bridging Strategy (the Strategy) 75 was approved by the MoI.

The Strategy established a plan to disband PSCs in stages – from one to two years – while progressively transferring their Afghan personnel and the security services they were performing to a pre-existent state-owned entity, the Afghan Public Protection Force (APPF) 76. Therefore, in contrast to the original Presidential Decree, the goal behind the Strategy was not an attempt to eliminate private security activities in the country but a measure to institutionalise and/or nationalise the private security sector by establishing a totally Afghan private security service (the APPF) of a commercial nature [pay-for-service] and which was run under public control 77. In principle, once the APPF is fully operative, private security services – with some exceptions – ought to be contracted directly through it.

However, as it was designed, the provisions of the Strategy clearly reflect the concessions negotiated with international stakeholders, with several loopholes and exceptions to its dissolution, and what’s more, it has not established a substantial basis to improve the monitoring and oversight of security contractors by government authorities. In particular, according to Presidential Decree 62, embassies in Kabul, foreign consulates in provinces

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70/ See infra Bridging Strategy [Third stage], which ordered the dissolution of seven PSCs due to their government ties.
71/ See UNWG Mercenaries Report on Afghanistan, paragraphs 68-70.
73/ Ibid, Article 1.
75/ The Bridging Strategy for Implementation of Presidential Decree 62 (Dissolution of Private Security Companies), Bridging Period March 22, 2011 to March 20, 2012; also available at DCAF website
76/ The APPF was initially established in 2009 to take over some tasks of the Afghan Uniformed Police, thereby allowing them to focus more on traditional law enforcement tasks. See the APPF website: http://www.appf.gov.af/index1.htm
77/ The APPF is defined in the Strategy document as a government ‘security service provider intended to protect people, infrastructure, facilities and constructions projects. The APPF will be organized as a state-owned company and does not have a police mandate to investigate crime or arrest suspects’. In addition, the following definition has been included in its official website: ‘The APPF is a pay-for-service Afghan government security service provider underneath the Ministry of Interior that protects people, infrastructure, facilities, construction projects and convoys. It is organized as a State Owned Enterprise (SOE) in order to be able to contract with domestic and international customers for security services.’
and also international organizations, NGOs and economic organizations could have their self-belonged private security inside their compounds; meanwhile, external security for these entities as well as the provision of security for logistical transportsations of international troops was to be assigned to MoI in cooperation with MoD and National Security Directorate (NDS) [art. 6 and 7 PD].

However, the Strategy considerably broadened these cases and provided indefinite exemptions to PSC dissolution arising from diplomatic privileges as well as temporary exceptions based on the necessary capacity of the APPF. As a result, while initially the Strategy document initially established a first 12-month bridging period—from March 20, 2011 to March 20, 2012 – in order to accommodate diplomatic, development and coalition forces security requirements during the time that the APPF established sufficient capacity and capability, a second key deadline for the disbandment of most of PSCs operating in Afghanistan was envisaged by March 20, 2013, and even then there was scope for flexibility. In particular:

1. PSCs with diplomatic and training missions’ contracts and in ‘good standing’ will be permitted to operate in Afghanistan after March 2013

   In accordance with the principles of the Vienna Convention on Diplomatic Relations (1961), embassies and entities accredited with diplomatic status are exempted from the Decree and will be allowed to use PSCs ‘until deemed unnecessary’, provided that they are in ‘good standing’ with the government (according to a list maintained by the MoI and the APPF). This exemption also applies to police training missions, thereby apparently granting PSC training personnel the diplomatic status and privileges members of the administrative and technical staff of the missions enjoy 78.

   Furthermore, according to the wording of the Strategy, this exemption seems to also allow the registration and license of new PSCs, with an authorised manning cap of 500 personnel. Yet, this cap can be exceeded up to a maximum of a 1,000 personnel in exchange for a quite expensive one-time ‘tiered pricing structure fee’ 79.

2. For all other ‘non-diplomatic PSCs’, the dissolution is gradual until March 2013 but also subject to exceptions linked to the capability of the APPF:

   a) Development programmes, the ISAF, and Coalition forces were allowed to contract in-good-standing PSCs to take care of area and convoy security 80 for another year [March 2012]. However, according to the Strategy provisions, ‘until the APPF is judged capable of assuming all the ISAF’s relevant security requirements, the ISAF is expected to continue being able to contract PSCs within [a] 500 manning cap’ for a maximum of two years (March 20, 2013). Again, the staffing limit can be exceeded through two options. Firstly, PSCs having more than 1,000 personnel just need to pay a fine, though they do not seem to be obliged to modify the situation (this is called ‘manning ceiling’); and secondly, for those PSC that have more than 1,000 employees, by moving the excess guards to an APPF subcontract namely ‘bridging Tashkil’, ‘a separate list of personnel hired by the PSC in excess of the 500 manning cap that will be recruited, vetted, commanded, equipped, trained, and paid by the PSC on behalf of the APPF’.

   b) The ISAF and Coalition forces could also continue to use in-good-standing PSCs for fixed site security 81 for up to two more years (March 20, 2013). And once more, after this date, the ISAF will allow to contract PSCs within their 500 manning cap if the APPF is judged incapable.

The above referred loopholes regarding the 500 manning cap and 1,000 manning ceiling equally apply to this case.

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78/ See Art. 37.2 of the Vienna Conventions on Diplomatic Relations, 1961, UNTS Vol. 500, p. 95.
79/ These 1,000 additional men will cost 32,500,000 Afghan Afghans, or around 650,000 US dollars.
80/ It includes development of site, convoy and commercial security.
81/ It includes ISAF bases and military constructions.
c) Seven PSCs were identified in the Strategy as to be disbanded within 90 days due to their ties with government officials. This clearly revealed that relevant prohibitions set forth by the Procedure had not been duly enforced.

3. ‘Non-diplomatic PSC’ have also the opportunity to transform into different sort of entities and remain in the country under other status and affiliations.
This includes at least two options:

1) Firstly, to formally register as Risk Management Companies (RMCs), this is, ‘companies with consultants that advise on the security of persons, logistics, transportation, goods and equipment, command and control of security employees from the APPF, on the basis of professional norms derived from industry best practices and agreed with MoI’. In this regard, a special procedure for the regulation of RMCs’ activities was adopted by MoI on 2012. According to the terms of the Procedure and additional information stated in the APPF official website for PSCs/RMCs, ‘RMCs will not provide security services but provide training and security advisory services to, and/or contract for such services with the APPF on behalf of, organizations and persons requiring security services’. Yet, RMCs’ personnel are allowed to keep their weapons (which must be registered and licensed) and can use deadly force for the purpose of self-protection and defence of others. However, with the exception of the requirement of certification of the non-existence of a criminal record for RMCs’ personnel and a few simple rules on the use of force, the Procedure omits any human rights considerations when providing the criteria for granting or renewing licenses, and it does not include such considerations in the terms of the licenses themselves. The document simply states that ‘RMCs must employ personnel already professionally trained and qualified to deliver security advisory services or provide them with full proficient training prior to their employment’ and that, in any case, periodic refresher training is mandatory for all armed personnel. The section of the APPF official website for PSCs/RMCs further states that RMCs are ‘an organization that advises on the security of sites, buildings, persons […] on the basis of professional norms derived from industry best practices’, without providing an explanation of the rules themselves or their specific content.

2) Secondly, the language of the Strategy is sufficiently ambiguous as to leave open a second possibility for PSCs to transform into another security-related force mentioned in the document, a Quick Reaction Force (QRF), ‘a small team of security professionals capable of rapid response in emergency situations to defend life or equipment during security incidents [and that] may also serve as reinforcements during security incidents at fixed sites and area security locations’.

As we will see below, several PSC have followed the first option and have become RMCs; as for the second option, it has not been clearly developed within the Strategy document but it may entail:

82/ See van Bijlert, M., “The Survival of the Private security companies”, The Afghanistan Analysts Network (AAN), March 27, 2011. ‘They include NCL Security, established by Hamed Wardak, son of Defence Minister Rahim Wardak, who claims he no longer has any links to the company (see here his response to the bridging strategy); SSSI [Strategic Security Solutions International], linked to Hasseen Fahim brother of First Vice President Marshall Fahim; Watan Risk Management, headed by the Papal brothers, Rateb and Rashed, but closely linked to Ahmad Wali Karzai; Elite, belonging to Sadeq Mojadedi, son of Hazrat Sibghatullah Mojadedi, and Mowdud Popal; and ASG [Asia Security Group] founded by Heshmat Karzai, who claims to have sold the company. Two other companies – LSG [Logistic Solutions Group] and Shepherd Security – are not so well known. LSG is said to be linked to the son of an ANA division commander, while Shepherd Security is reportedly headed by a cousin of Zaher Aghbar, currently Head of the Olympic Committee. Aghbar used to be responsible for PSC registration in the MoI.’

83/ See Strategy document/Definitions
84/ Procedure for Regulating Activities of Risk Management Companies in Afghanistan, 10 January 2012.
86/ In general, the 2012 Procedure reproduces some of the 2008 Procedure for PSCs, including the designation of the “MoI’s PSC/RMC office” in consultation with the High Council as the authorities to issue and renew the license, the requirement of military training and certification of non-existence of criminal record for RMC personnel, and the inclusion of rules restricting the use of force and requiring the registration and license of weapons.
fit for those PSCs which have been working as auxiliary campaign forces for the international military.

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In sum, the new private security scenario arising from the Strategy will encompass at least three separated private security entities: ‘diplomatic PSCs’, RMCs, and the APPF which will be integrated by the definitively dissolved PSC personnel. This rather than eliminate private security services has diversified them into different security providers: 1) diplomatic PSCs will continue to provide armed guarding of embassies and diplomatic personal as well as the training of Afghan police; 2) RMCs will be in charge of training and mentoring the APPF personnel as well as provide the advisory-related security functions, which in fact allowed them to design how security is provided; finally, 3) the APPF will provide the remaining in-field security services, such as the security for reconstruction projects, which are considered sensitive activities due to the contact with local population and insurgent forces.

Considering the goal of the dissolution strategy as an attempt to increase the State control over the PSC industry, however, this scenario creates indeed greater uncertainty about who will monitor and control each security activity. Diplomatic PSC have to be in good standing with the MoI but apparently will be commanded and controlled according to contractual polices and diplomatic regulations. RMCs’ operations will be monitored by the MoI’s PSC/RMC office according to the RMCs Procedure, but they will continue to recruit, train and command their own forces, which are equally authorized to carry weapons and use lethal force. Finally, the APPF will be monitored by APPF officers or non-commissioned officers though it seems that foreign advisers from RMCs also cooperate with them in this field.

Progress in the implementation of the Strategy

Overall, the initial Bridging period for the dissolution of PSCs by March 2012 was not reached and subsequently it was extended to March 2013 for most of the cases contemplated under the Strategy. At the moment, reliable data about the exact degree of implementation of the Strategy are unavailable although the APPF website provides some information about the operational situation of PSCs in the country and the current capacity of the APPF. In particular, as of June 2013, 57 illegal PSCs had been cancelled, and out of the 52 legal PSCs, 18 had already been terminated and 19 of them obtained an extension of their licenses and serve for diplomatic missions in Kabul. Also, a proposal for termination of 15 remaining PSCs was sent to the Security High Council. However, this number matches the number of PSCs that currently remain protecting NATO military installations and that, based on recent NATO-MoI agreements, will be transitioned to APPF by May 2014 along with all remaining PSCs that protect military installations.

On the other hand, regarding the capacity of the APPF, as of June 2013 it has only assumed a fraction of the PSCs’ activity. A number of private security services, such as protection for NATO installations sites, have not been transferred to the APPF, and it remains unclear whether certain PSC are still operative and, in this case, which is actually their status and regulatory framework. In addition, Special Inspector General for Afghanistan Reconstruction (SIGAR) found that, as of July 2013, implementing partners carrying out reconstruction and development assistance programmes for US Agency for International Development (USAID) ‘hired RMCs to fill APPF capacity gaps and perform critical functions’ such as recruiting and training guards, supervision, and even the performance of required duties. As a result, it concludes that ‘without RMCs, the APPF would be unable to provide the full range of security services needed by the USAID implementing partners’.

Moreover, the SIGAR audit notes that, as a monopoly service provider, the APPF charges inconsistent and inappropriate fees, and on the other hand, that USAID’s review mechanisms do not ensure that these partners are using properly

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89/ Risk management services are described under the RMC Procedure [2012] as including but not limited to: ‘threat and risk assessment, audit of security operations, emergency response procedures, evacuation planning procedures, project management, site security assessment and staffing scales, security plan development, security contract assessment, development of standard operating procedures, contingency planning, and personal protection planning and management’.
licensed RMCs and are not exceeding the maximum number of allowable armed RMCs’ personnel 92.

With regard to the implementation and enforcement of the 2012 Procedure for RMCs, at the time of this writing, 35 companies had been granted an RMC license, while 11 have applied for it and are still awaiting for a decision 93. Remarkably, one of the seven banned companies under the Strategy, Watan Risk Management, is included among the new licensed RMCs. Furthermore, as noted above, there have been reports regarding the use of unlicensed PSCs and improper use of RMCs by implementing partners engaged in reconstruction projects. This misuse includes exceeding the maximum number of allowable armed RMCs’ personnel 95. Regulatory and monitoring bodies from Contracting States have noted that government regulations on RMCs are unclear and can be interpreted in different ways. Accordingly, they recommend contracting agencies to develop their own guidance on the proper use of RMCs 96.

B // REGULATION OF MILITARY SERVICES

Private contractors providing military services in Afghanistan do not fall into the scope of applicability of the above mentioned PSCs’ regulations. While there is still a debate about the definition of the terms ‘military services’ and ‘security services’, the Afghan regulations define the latter as the ‘activities performed for the purpose of establishing security of real and natural persons, logistics, transportation, goods and equipment, training security employees and warning services’ 97. Accordingly, any other services provided by PMSCs in Afghanistan are not subject to those regulations. Tentatively, private military services provided by PMSCs in Afghanistan have included the following:

- Intelligence services: including reconnaissance, translation services, gathering information and interrogation of detainees.
- Military assistance: including training and consulting of national armed forces;
- Operational support services: including maintenance and operation of combat-related goods [satellites, military software, and weapons systems including the operation of drones, especially in

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92/ Ibid. In June 2002, SIGAR found out that USAID’s implementing partners continued to use unlicensed PSCs.
94/ This company applied for an RMC license in 2012 and, on its website, it states to be a fully licensed RMC. See http://www.watansrisk.com/ [last visited on 25 June 2013]: ‘it [WRM] is able to work alongside the APPF and can provide static and mobile security under the command of AWRM’s risk consultants’.
96/ SIGAR Audit 13-15, p. 10.
97/ 2008 PSCs Procedure, op. cit.
surveillance operations), raids assistance, command and control functions;

- Military logistic support: including transportation of military supplies 98;
- De-mining and eradication of poppy fields.

From a regulatory perspective, the territorial State could decide to jointly regulate private military and security services under a comprehensive PMSCs’ regulation, as they are often provided by the same companies even at the same time within its territory. Furthermore, they can equally affect the enjoyment of human rights of its citizens. Moreover, in Afghanistan where the continued use of private companies and militias for counter-terrorism operations has constantly riled President Karzai, national regulation of military services would mean greater control over these military actions and their political effects. However, and contrary to the direction adopted regarding security services, the position of the Afghan government with respect to private military services has been to relinquish its jurisdiction in order to regulate this area to the sending States that have contracted these services. Two particular actions have driven this policy.

On the one hand, the issue of private contractors working for the international military has fallen in the scope of applicability of the so-called Status of Forces Agreement (SOFA), multilateral or bilateral agreements that generally establish the framework under which military personnel operate in a foreign country and the way domestic laws of the foreign jurisdiction apply toward military personnel in that country. In Afghanistan, this includes the SOFA conclusion within the framework of the two military operations in the country: the NATO-led ISAF mission 99 and the US-led OEF mission 100. Indeed, despite private contractors are not generally considered regular military personnel and, eventually, even differentiated from government civilian employees working for the military 101, they are considered as a supporting force within national militaries, and as such, have fall under the scope of the respective SOFAs under labels such as ‘contracted personnel’ and ‘supporting personnel’ 102.

On the other hand, the negotiated contents of the respective SOFA has not only resulted in privileges and immunities under local laws for some contractors and the exclusive and/or shared jurisdiction over them – a common issue generally addressed in SOFA –, but also in the relinquishment of the legislative competence for the regulation and oversight of their military activities to the contracting States. This is so to the extent that, for instance, despite local personnel contracted by ISAF Forces remain subject to local laws and regulations, no specific national regulations have been adopted for the provision of military services. Therefore, and in the absence of such a national regulatory framework, their discipline as well as their administrative control largely relies on the contracting States. Regarding foreign contract personnel, mutatis mutandis the same rule can be said to apply. For instance, the US-Afghanistan SOFA states in this regard that ‘in the event that the government of the United States awards contracts for the acquisition of articles and services… such contracts shall be awarded in accordance with the laws and regulations of the Government of the United States of America’ [Emphasis added]; and additionally, according to the agreement, US contractors and contractor personnel are allowed to import any equipment, training or services required, and such importation shall be exempt from any inspection, license and restrictions within Afghanistan 103. Therefore, in the absence of a specific Afghan regulation establishing the contrary – as it is the case of PSCs regulations – private military services are regulated, as agreed in their respective contracts, by the laws of the contracting States.

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98/ Admittedly, this service may be excluded from the list if it is considered that PSCs’ regulations contemplated the transportation of military supplies as a security service as such, in addition to their protective service

99/ See Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, 4 January 2002. It applies to all of the national military forces members of the ISAF.

100/ See Agreement regarding the Status of the United States military and civilian personnel of the US Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities, US-Afghanistan, 28 May 2003.

101/ This is the case under US DoD’s regulations, as explained by Huskey, C., Sullivan, S., p. 353. This contrasts with the common categorization of PMSCs’ contractors under the IHL as ‘civilians accompanying the armed forces without forming part of them’.

102/ ISAF SOFA, Section 6 - Application: ‘The protections hereby set out shall apply to the ISAF and all its personnel and to forces in support of the ISAF and all their personnel’.

103/ US-Afghanistan SOFA.
Relevantly, as regards accountability issues such as the exercise of criminal and civil jurisdiction over contractors (judicial competence), the provisions of the two SOFAs apply, in principle, to all – military and security – contractors working for military forces. However, the contents of both operative documents vary in this regard.

The US-Afghanistan SOFA (OEF Mission) establishes that US military and civilian personnel on the Department of Defence are to be granted ‘a status equivalent to that accorded to the administrative and technical staff’ of the US Embassy under Vienna Convention on Diplomatic Relations of 1961. Accordingly, US personnel are given immunity from criminal prosecution by Afghan authorities, as well as from civil and administrative jurisdiction with the exception of all acts performed beyond their duties. However, the specific definition of the terms ‘military and civilian personnel’ under US government regulations has led commentators to conclude that the US-Afghanistan SOFA immunity does not apply to PMSC contractors, to the extent that contractors as well as foreign host nationals and third-country civilians are specifically excluded from those definitions. Yet, for now, the status of U.S. contractor personnel remains unclear as this interpretation has not been confirmed and Afghanistan has not yet exercised its jurisdiction over any U.S. contractor. What seems clear is that Afghanistan has relinquished its primary jurisdiction over crimes committed by U.S. personnel in favor of U.S. courts. This is evident from the terms of the SOFA that explicitly ‘authorizes the US to exercise its criminal jurisdiction over US personnel,’ and from which contractors are not specifically excluded, as well as from the fact that, most U.S. contractors involved in serious abuses in Afghanistan to-date are being tried in US courts. Additionally, under the SOFA the government of Afghanistan also confirms that such US personnel will not be surrendered to, or otherwise transferred to, the custody of an international or any other entity or state without the explicit consent of the US government.

In contrast, however, jurisdiction over non-US contractor personnel has been envisaged in different terms. Since the SOFA does not prohibit Afghanistan from exercising jurisdiction over contractor personnel, and furthermore, it has not specifically excluded the primary criminal jurisdiction of Afghanistan over non-US personnel, those non-US contractors working for PMSCs hired by US DoD are indeed subject to the criminal jurisdiction of Afghan courts. Finally, regarding civil jurisdiction, the agreement generally establishes that ‘claims by third parties that will arise as a result of the actions and omissions of the [US] personnel, should, at the discretion of the United States Government, be dealt with and settled in accordance to the United States law’. Again, the clause seems to exclude from its scope non-US contractor personnel, which will remain, therefore, subject to civil jurisdiction of Afghan courts.

On the other hand, the SOFA concluded for the ISAF mission explicitly provides that ISAF and supporting personnel will be subject to the exclusive jurisdiction of their respective national elements in respect to any criminal or disciplinary offences which may be committed in Afghanistan. Furthermore, they are given immunity over personal arrest or detention, and may not be surrendered to, or otherwise transferred to, the custody of an international court or any other entity or state without the explicit consent of the contributing nation. The contents of the document also provide immunity for local personnel hired by ISAF Forces: while they remain subject to Afghan laws, they are also ‘immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity’. With regard to civil claims, the ISAF and its personnel are not liable for any damage to civilian or government property caused by any activity in pursuit of the ISAF Mission; yet, such claims for damages or injury to public or private personnel or property have to be submitted through Far

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105/ Ibid. See also, Huskey, C., Sullivan, S., p. 353.


To this date, however, the operation of judicial mechanisms to ensure accountability for contractors’ abuses and provide victims with an effective remedy has been rare and deficient.

On the one hand, coupled with the immunity clauses mentioned above, procedural irregularities have also been reported in legal proceedings, including in cases for alleged violations committed by those contractors subject to the primary jurisdiction of Afghanistan (i.e., non-US personnel, non-ISAF personnel, non-‘diplomatic contractors’). Extensive research has uncovered only four cases of PMSC contractors prosecuted in Afghanistan, one for drug smuggling, one for bribery charges, and two for killing Afghan contractors. In one of these two last cases, concerning a South African contractor who killed an Afghan guard in self-defence and was originally sentenced to 5 years, reported irregularities included lack of consideration of exonerating circumstances such as self-defence, abuse of power by the court of appeal (by increasing the sentence on appeal), and a general lack of proper investigation and consideration of the evidences and facts.

On the other hand, investigative and prosecutorial activity has been and still remains scarce with regards to contractors’ violations committed against the local population. The unworkability of the HCB and a lack of proper monitoring have clearly prevented the reporting of incidents. However, even with those cases that have been identified or reported, there is a lack of public action, as incidents have not been fully investigated nor perpetrators prosecuted, and the implicated PMSCs have continued to operate. Lack of proper action has also included cases where investigative and prosecutorial authority is interwoven between Afghan authorities and foreign entities, but no co-operative efforts have been taken. Furthermore, practices of corruption within the police as well as the reported difficulty of assigning professional prosecutors to local areas where security is not guaranteed are also factors patently influencing the inadequate exercise of prosecution. This impunity gap is particularly grave as local areas outside Kabul is where monitoring and oversight has been especially poor and where most incidents seem to have occurred.

**D// THE PUZZLE OF REGULATIONS FOR PMSCs’ CONTRACTORS IN AFGHANISTAN**

Far from a single and comprehensive legislation for the PMSC industry, the above mentioned separated regulatory frameworks for private security services, on the one side, and private military services, on the other, have resulted in a complex collection of diverse regulations and rules for private contractors, the application of which largely depends on the clients PMSCs work for as well as the nationality of their personnel in each case. Specifically:

1) PMSCs guarding diplomatic entities or working in police training missions have been exonerated from dissolution and it appears that they also benefit from the privileges and immunities accorded to...
members of the administrative and technical staff of diplomatic missions. Thus, they enjoy immunity from Afghan criminal, civil, and administrative jurisdiction (with the exception of all acts performed beyond their duties) and are subject to prosecution only in their home countries.

2) **PMSCs working for clients other than diplomatic and military entities** (i.e., development entities, NGOs, private businesses) fall into the scope of application of PSC regulations, and therefore, they will have sooner or later either to be dissolved and their personnel transferred to the APPF, or become an RMC, in which case they will be subject to the rules of the RMC Procedure (2012). Furthermore, until 2010 their activities have been regulated by the 2008 PSC Procedure, so they do not enjoy immunity from Afghan jurisdiction. Therefore any illicit and/or criminal actions arising from their activities should apparently be dealt with and settled in accordance with Afghan laws.

3) **The activities of PMSCs working for military entities** (NATO-ISAF countries, and/or US-led Coalition Forces) are regulated according to a complex set of rules:

- PMSCs performing security services for the international military forces fall into the scope of applicability of the dissolution strategy, and therefore, have to be dissolved or restructured as RMCs, in which case their activities are subject to the RMC Procedure (2012). Those PMSCs that have not been dissolved and are still operative due to the lack of capacity of APPF remain under uncertain status and regulations.

- PMSCs performing military services for the international military do not fall into the scope of PSCs’ regulations. Therefore, they are not affected by the deadlines of the dissolution strategy and can remain in the country. The conditions for their presence in the country will continue to be linked to the negotiation of the respective security and status of forces agreements. Thus, their activities are subject to the laws and regulations of the contracting States unless otherwise provided in Afghan laws.

- In terms of jurisdiction, however, the provisions of the respective SOFA apply to all categories of contractors. Accordingly, PMSCs’ personnel either enjoy total immunity with respect to Afghan laws (in the case of foreign contractors hired by ISAF countries), or immunity from legal process in regard to any actions performed in their official capacity (for local contractors hired by ISAF Forces); and/or they are subject to the primary criminal jurisdiction of Afghanistan (in the case of non-US contractors within OEF). Lack of clarity persists regarding the status and jurisdiction applicable to US contractor personnel due to the ambiguous wording of the US-Afghanistan SOFA. In practice, however, Afghanistan has not yet exercised its jurisdiction over any U.S. contractor and most U.S. contractors involved in serious abuses in Afghanistan to-date are being tried in US courts. Unclear as it may be, this has led to a de facto immunity from Afghan jurisdiction, while the U.S. exercises shared-but-primary jurisdiction over U.S. contractor personnel involved in abuses in Afghanistan.

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115/ This is not explicitly stated in the Bridging Strategy, however, this interpretation clearly follows from the wording and the rules of diplomatic operations, and furthermore, according to the document of the Strategy, PSC working on police training missions will hold diplomatic passports. Moreover, according to some sources, Western diplomats would have confirmed that PSC staff protecting embassies fell under diplomatic immunity; see SwissPeace report (2007), 35-36.
By the time private military companies first arrived in Afghanistan in 2001 there was little room to talk or even think about their regulation. The initial armed conflict situation and the fact that private contractors entered in the country accompanying the intervening troops left the new appointed leader of the nation, Hamid Karzai, with little capacity to negotiate the presence and the operating conditions of private military contractors. Later on, the need for security of international actors linked to stability and reconstruction efforts and the inability of Afghan institutions to ensure it laid down fertile conditions for the president to accept the extension of PMCs’ activities to the security sector, giving rise to an unprecedented PMSC industry in size and scope.

The interval of almost seven years between the arrival of the companies to the country and the first PMSC regulation by the government favoured the uncontrolled development of the industry and caused unforeseen impacts: 1) the exact number of PMSCs, personnel and weapons was uncertain, and the hiring practices, license requirements and training and supervision of staff were irregular and/or lacked transparency; 2) PMSCs became deeply enmeshed in the local political economies of the country by integrating pre-existing irregular armed groups into their business racket, granting them raison d’être and fostering the emergence of a parallel local security structure out of governmental control; 3) the lax PMSCs’ oversight significantly contributed to contractors abuses, having a direct impact on the human rights of local population as well as indirect effects on the human security and political stability of the country.

By the time the Afghan government tried to manage this scenario, the regulation of PMSCs had become a political matter affecting the interests not only of international actors and the industry itself but also of national public institutions and the local political power structures. This ultimately prevented the adoption of a formal law on PSCs, and in the end, as in Iraq, PMSCs have operated in Afghanistan without a comprehensive national legislation regulating their activities and conducted their activities in an unregulated environment during most of the time of the conflict (2001-2007).

The 2008 Procedure on PSCs has been to date the most serious attempt in Afghanistan to regulate the PMSC industry and control their activities to date, and in some aspects, can be seen as an element of State practice indicating the will to limit the outsourcing of certain security functions, such as those related to the protection of public places and the performance of law-enforcement functions. Furthermore, the establishment of a monitoring body with the capacity to process public complaints and undertake investigations on violations by PSCs and their personnel is definitely a step forward to reduce the impact of their activities on human rights and prevent future abuses. However, in practice, the effectiveness of the Procedure was limited to the establishment of a license system driven more by political than human rights considerations, and the monitoring and investigative functions of the HCB were just inoperative due to the lack of due diligence and generally improper implementation and enforcement.

As a consequence, and given the absence of regulation and a lack of its subsequent enforcement, PMSCs’ activities were not adequately and effectively overseen and monitored in practice, causing serious human rights incidents and generating a perception of lack of government control which ultimately led in 2010 to the decision of disbanding all PSCs in the country, a process which is still ongoing.

Conclusion

In time of armed conflict, territorial States may be unable to address the issue of PMSCs in a timely manner. Once the PMSCs are fully operative in the country, the adoption of a national regulation turns into an intricate task not responding exclusively on human rights considerations. Furthermore, the adoption of a regulation without proper implementation and enforcement is not sufficient to ensure adequate oversight and prevent human rights violations.

Recommendation: Due to the global impact of the use and activities of PMSCs in territorial States, it is highly recommended that an international regulation for PMSCs exist in advance so that it serves as a model for regulating PMSCs at the time of their arrival and development in war torn countries. From a human rights perspective, this would simply mean for territorial States meeting their obligations to protect human rights and to ensure respect for humanitarian law.
Again, the dissolution strategy based on the empowerment of the Afghan Protection Public Force can be assessed as a measure by the government to assert sovereignty in the realm of security and the monopoly of the use of force, while, at the same time, benefiting from this lucrative business. However, the political and economic interests at stake coupled with the incapacity of the APPF to provide the full range of security services needed in the country progressively turned the initial dissolution strategy into a sort of ambiguous regulation under which PSCs can remain in the country under several exceptions and diverse status and affiliations. It seems the situation is not going to change in the near future as far as the APPF continues at the top of the commercial security industry and acts as intermediary to collect its profits. Despite this, current reports indicate that Risk Management Companies are in fact designing and controlling in a greater extent how commercial security is being provided in practice.

On the other hand, in contrast to the struggle for sovereignty in the realm of security and the State-centred regulatory framework arising thereof, the Afghan government has voluntarily relinquished its jurisdiction for regulating the military dimensions of PMSCs’ activities in its territory. In a practically unnoticed manner, the regulation of military services have been separated from that of security services and left largely to contracting States by means of the conclusion of international military agreements. Importantly, the contents of the two SOFA in force further means that some of the PMSCs’ personnel present in Afghanistan benefit from immunity, either de iure or de facto, from local laws, and, unless permission is granted, will not be surrendered to any international criminal court or even to a State willing to exercise jurisdiction over serious human rights abuses.

Military contractors such as auxiliary campaign forces and intelligence contractors have caused similar serious issues as those of security contractors in Afghanistan, and have equally irritated President Karzai due to their covert operations and night raids, activities which, by their nature, make them closer to combatants and/or mercenaries. In simple terms, the policy of relinquishing the regulation of military services seems to basically respond to the fact that, in contrast to security contractors, military contractors only work for military clients and perform activities that are technically and traditionally of military nature, which has led to consider them as part of the international military establishment and be assimilated in practice to regular military personnel –even if they are not officially categorized as military and civilian personnel-. Had the Afghan government considered military contractors an external independent military force alien to the international military forces, it would probably have proceeded to ratify and apply the International Convention against Mercenarism as one of its regulatory options. A more political argument explaining the absence of national regulation for private military services may be that, as far as military contractors function as a support force aligned with pro-government armed forces, it is not of political interest to become involved in its regulation. Even a misguided regulatory policy over private military services on the part of contracting States can be used, in case of bitter incidents, in favour of the local government to de-legitimize the foreign military presence.

Yet, from a human rights perspective, this separatist regulatory policy is not justified. Materially, military and security services have often been provided by the same PMSCs, and substantially, private military services have resulted in Afghanistan having as serious human rights incidents as security services. Furthermore, military services can also result in direct participation in hostilities and have even greater probability to result in war
crimes. It is the authorization to use armed force, even in a defensive manner, coupled with the lack of clear rules of engagement and proper supervision, which make contractors’ activities a potential threat to human rights. Thus, to the extent that private military services may affect human rights and result in humanitarian violations similar preventive, investigative and accountability measures should be adopted for them by Afghanistan as a territorial State as it is required for security services. In this regard, immunity clauses and provisions preventing perpetrators from surrendering to international or foreign courts under the SOFA contradict international obligations of territorial States to investigate, punish and redress human rights and humanitarian law violations. In addition, these provisions and clauses are in conflict with the obligation and/or faculty to exercise universal jurisdiction over international crimes as well as with the obligation to cooperate for States that as Afghanistan are Parties in the ICC Statute.

A legal national regime only regulating private security services while omitting rules for military services is inappropriate and insufficient to mitigate the potential negative impact of PMSCs’ activities and does not fulfill the human rights and humanitarian law obligations of territorial States. Immunity clauses and provisions preventing perpetrators from surrendering to international or foreign courts are in conflict with these obligations and should be reconsidered.

Recommendation: Adequate regulation of PMSC activities must:
- include a comprehensive definition of the term PMSCs’ which cover all of de facto services provided by these companies.
- include the creation of specific and resourceful oversight mechanisms, at national and international level, to receive, register and investigate claims of abuses and PMSCs’ personnel. Coordination between national mechanisms and existing and prospective international oversight mechanism should be established, so that in those cases where national procedures fail or demonstratively inoperative, victims may appeal to an international independent oversight mechanisms.
- preclude immunity provisions, and other legal, practical or procedural barriers that can prevent appropriate accountability of contractors and effective reparation for victims.

Last but not least, from a regulation perspective, the regulatory process of PMSCs in Afghanistan leaves room to reflection. On the one side, the regulatory puzzle arising from the President dissolution strategy and the separatist regulation of military and security services does not only result chaotic but also put the emphasis of regulation largely in contracting States, which is probably not the most ideal option for an effective control of PMSCs’ activities. On the other side, while it is now evident so far that regulating PMSCs means great control the case of Afghanistan arises key questions regarding the substantial contents of a potential regulation that will have to be discussed in forums addressing the issue of PMSCs’ regulations from a human rights perspective:

1) Whether the ‘client for which the PMSC is working’ is an appropriate criterion for establishing the applicable legal regime. In Afghanistan this has resulted in a lack of uniformity among regulations, which is discriminatory for contractors and may lead to a commercial transformation of the PMS business towards a two-gear PMSC industry: those companies awarded diplomatic and military contracts which will enjoy immunity and be subject to particular rules, and all of the others, which will remain subject to the local laws and regulations.

2) The question of which is the most appropriate legal regime and status, civilian or military, that should be applied in order to ensure greater oversight and accountability of PMSCs. In turn, in the civilian regime case, whether private contractors performing diplomatic protective activities and training missions have to be granted immunity just for the sole reason of being hired by entities with a diplomatic status. And, in the case of military regimes, whether the status and jurisdiction over contractor personnel working for military forces should be negotiated or not within the scope of the SOFA and in an equal footing than the military and civilian personnel within the armies.
APPENDIX 1- REPORTED INCIDENTS AND ABUSE CASES BY PMSCs IN AFGHANISTAN

The following information has been extracted from several sources. Incidents and abuse cases are listed chronologically and/or according to the date on which they were reported. As far as possible, the description of each incident reproduces the wording used in the original source of citation. The names of the companies and/or contractors have been deliberately omitted.

> In June 2003, an independent contractor working in paramilitary training activities for the US Central Intelligence Agency (CIA) conducted an interrogation for several days which ended with the death of an Afghan national on the military base of Asadabad, in the northeast of Afghanistan. In February 2007, the contractor was convicted on four counts of assaults and sentenced to eight years and four months of prison in US Courts.

> By March 2005, the independent expert on the situation of human rights in Afghanistan noted he had ‘received credible accounts suggesting that agents of PSCs have committed human rights violations, including arbitrary arrests, illegal detentions, and torture’ 2;

> Between 2006 and 2009, private security contractors escorting supply convoys to Coalition bases have been said to be responsible for killing and wounding more than 30 innocent civilians in the Afghan district of Maywand alone 3.

> In 2008, the UN High Commissioner for Human Rights reported that: 1) in October 2007, a PSC was caught in a six-hour battle in Kandahar, causing casualties on both sides; and, 2) in November 2007, following a suicide-bombing attack in the province of Baghlan which resulted in a high number of casualties, individually hired bodyguards indiscriminately opened fired for approximately five minutes, adding to the number of casualties 4.

> In October 2008, during a fighting between international military forces and ‘Anti-Government elements’, private security contractors working for a reconstruction entity have been said to have entered Hakim Khail village in the Haft Asyab area and reportedly entered a house, forced out the adult males in the inside and shot them one by one. A child who tried to run away was also allegedly shot 5.

> In December 2008, a private security contractor working for the US Army’s Human Terrain System program shot and killed a handcuffed detainee in retaliation for an earlier attack against another anthropologist contractor. In May 2009, the PSC contractor 6 was sentenced to five years’ probation and a $12,500 fine in US courts 7.

> In May 2009, two US DoD’s security guards assigned to train Afghan soldiers killed two Afghans

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1/ See UNWG Mercenaries Report on Afghanistan, paragraph 64. Exhaustive information about this case (known as ‘The Passaro case’), including legal documents and criminal proceedings, is available at The War Profiteers: http://www.expose-the-war-profiteers.org/CIA/Personnel/david_passaro/profile.htm


5/ UNWG Mercenaries Report on Afghanistan, paragraph. 60.


and wounded one in a shooting incident while on an unauthorized convoy in Kabul. In January 2010, the US Department of Justice announced the arrest of the two contractors on murder charges and firearms violations; in June 2011 they were convicted of involuntary manslaughter while acquitted of other charges.

> In June 2009, a shooting incident between Afghan Special Guards and Afghan National Police officers inside the Attorney General’s office in Kandahar resulted in the killing of the Chief of the Police, the head of criminal investigations and four other ANP officers.

> In September 2009, a report by the independent Project on Government Oversight (POGO) noted several events of misbehaviour as well as questionable labour practices and contractual irregularities regarding the PSC hired to protect the US Embassy in Kabul. These included sleep deprivation, lack of proper training, chain of command and adequate armoured vehicles, and mistreatment of Afghan national staff. In January 2013, POGO reported similar allegations.

> In October 2009, a South African contractor working for a US logistics supply company killed an Afghan guard in self-defence after the guard threatened him and started firing at the vehicle the contractor was driving. In 2010, the contractor was found guilty in an Afghan court and sentenced to five years in prison. The sentence was increased to 16 years after the prosecutor tried to secure death sentence through an appeal. Finally, the sentence was reduced to seven years.

> In January 2010, an Australian contractor working for a US PMSC was sentenced to death in an Afghan court for the murder of an Afghan colleague following a dispute in 2009. The contractor had tried to cover up the crime by staging a Taliban ambush, but a Nepalese employee reported the incident after returning from the mission. He was about to board on a flight to Dubai when the Afghan police arrested him. In January 2011, the sentence was revised by the Afghan Supreme Court and reduced to 20 years of jail. The decision to commute the initial penalty was remarkably favoured by the decision of the victim’s family to accept the compensation (known as “Ibra” under the Sharia law) offered by the contractor’s family. The amount of the compensation is unknown.

> In May 2010, news reported U.S. and Afghan officials’ complaints about bad practices by local Afghan security contractors protecting NATO supply convoys in Kandahar who “regularly fire wildly into villages they pass, hindering coalition efforts to build local support”.

> The UN Working Group on the use of mercenaries noted after its mission to Afghanistan in 2009 that it received information about the involvement of PMSCs’ contractors in robberies, kidnapping, interrogation, torture of detainees, and irregular and abusive house inspections, and the [Afghan] MoI confirmed cases of excessive use of force.

> In June 2010, a report by the US Committee on Oversight and the Government Reform’s Subcommittee on National Security and Foreign Affairs found that “[t]he private security companies that

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10/ POGO Letter to Secretary of State Hillary Clinton regarding U.S. Embassy in Kabul, September 1, 2009.


protect the [US DoD supply] convoys are frequently involved in armed conflict with alleged insurgents, rival security providers, and other criminal elements. [...] Many of the fire fights purportedly last for hours and involve significant firepower and frequent civilian casualties.’ 16.

About the organizations

Through the use of nonviolent action, NOVACT struggles to achieve a society based on human security and real democracy, as well as a society free of armed conflicts and violence in all its dimensions. Understanding nonviolence as a strategy for transformation, NOVACT aims to contribute to a peaceful, just, and dignified world.

In co-operation with its international advisory committee and networks composed by experts, human rights defenders and civil society organizations from Middle East, North Africa, Europe and America, NOVACT supports those non-violent movements which are working for social change and developing mechanisms for civilian peace interventions to protect vulnerable groups in conflict situations.

As a committed and political independent actor, NOVACT promotes peace initiatives, training programs and action-oriented research to advocate for international and national public policies and regulations to guarantee human security and the effective protection of human rights and fundamental freedoms.

With its headquarters in the Mediterranean city of Barcelona, NOVACT is an initiative of Nova-Social Innovation. Nova is registered as a non-governmental organization [NGO] and it is qualified organization before the United Nations. The Institute raises funds from committed citizens and public institutions.

www.novact.org

Control PMSC is an international civil society coalition aimed to stop the privatization of war and security through the international and national regulation of the use and activities of the private military and security companies (PMSA).

To achieve this goal, Control PMSC: analyse the impact of PMSA on the Human Rights of the people living in conflict situations and the development of the Private Military and Security Industry; advocates at international and national level; and organize public actions to mobilize and aware our societies about this new and increasing phenomenon.

Control PMSC is composed by 37 civil society organizations and is articulated with worldwide experts, research institutes and social movements.

The Steering Committee of Control PMSC is composed by War on Want (UK), Un Ponte Per... (Italy), Peaceful Tomorrow (US), Iraqi Civil Society Solidarity Initiative and NOVACT (Spain)

www.controlpmsc.org