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Rapport du Groupe de travail sur l'utilisation de mercenaires comme moyen de violer les droits de l'homme et d'empêcher l'exercice des droits des peuples à disposer d'eux-mêmes

Présidente-Rapporteuse: M^{me} Shaista Shameem

Additif

Mission en Afghanistan*

Résumé

À l'invitation du Gouvernement afghan, le Groupe de travail sur l'utilisation de mercenaires comme moyen de violer les droits de l'homme et d'empêcher l'exercice du droit des peuples à disposer d'eux-mêmes s'est rendu en République islamique d'Afghanistan du 4 au 9 avril 2009. Il a saisi cette occasion pour engager un dialogue constructif avec le Gouvernement et d'autres parties prenantes sur des questions relatives à son mandat.

L'Afghanistan, au même titre que l'Iraq, constitue le plus vaste théâtre d'opérations pour les sociétés militaires et de sécurité privées (SMSP). Les États-Unis, qui ont la plus vaste présence militaire et diplomatique en Afghanistan, sont le principal employeur de prestataires de services de sécurité privés dans le pays. Depuis 2005, la détérioration de la situation sur le plan de la sécurité due à une insurrection croissante a entraîné une demande accrue de services de sécurité, en particulier de la part de la communauté internationale. Le Gouvernement afghan, conscient de ses difficultés à assurer de manière adéquate la sécurité de la communauté internationale présente sur son territoire, a permis aux sociétés de sécurité privées étrangères et nationales de fournir des services complémentaires à cet égard.

* Le résumé du présent rapport est distribué dans toutes les langues officielles. Le rapport proprement dit est joint en annexe au résumé, et il est distribué en anglais seulement.

Le Gouvernement afghan a également souligné qu'il était nécessaire d'adopter sans délai des procédures visant à réglementer et contrôler les activités de ces sociétés, déclarant que l'absence de règles en la matière engendrait une culture d'impunité qui était dangereuse pour la stabilité du pays. La société civile avait une vision négative de l'importante présence des SMSP, compte tenu en particulier de la difficulté de distinguer entre l'armée officielle et les forces de police, d'une part, et les troupes étrangères, les sociétés privées, voire les groupes armés illégaux, de l'autre.

La réglementation générale qui a été adoptée par le Conseil des ministres en février 2008 est toujours en vigueur. Elle a conduit à l'autorisation de 39 sociétés afghanes et étrangères¹ et à l'enregistrement de leur personnel et des armes utilisées. Si elle est correctement mise en œuvre, cette réglementation constituera une importante mesure en vue de contrôler les SMSP et de s'assurer que celles-ci s'acquittent de leurs obligations.

Toutefois, l'adoption d'une réglementation ne suffit pas en soi à garantir une surveillance adéquate et une meilleure protection des droits de l'homme. Le Groupe de travail souligne le principe fondamental selon lequel l'État contrôle le recours à la force et se félicite de ce que le Gouvernement afghan soit disposé à renforcer progressivement les capacités de l'armée nationale, de la police et des forces de sécurité, ainsi que leur formation, afin d'assurer la sécurité de sa population et de la communauté internationale présente sur son territoire, tout en garantissant le respect de l'état de droit et des droits de l'homme.

Sur la base de ces constatations, le Groupe de travail formule plusieurs recommandations à l'adresse du Gouvernement afghan. Il lui recommande notamment d'ouvrir des enquêtes sur toutes les SMSP qui exercent des activités sans autorisation dans le pays, de leur retirer leurs armes et de les poursuivre, ainsi que d'enquêter sur tous les incidents dans lesquels des SMSP auraient fait des victimes, de poursuivre les responsables et de veiller à ce que les victimes obtiennent réparation. Il recommande également la création d'un mécanisme de plainte public indépendant que pourrait saisir la population locale et les acteurs internationaux civils concernant des violations commises par des SMSP. En outre, le Groupe de travail a formulé des recommandations à l'intention de la communauté internationale. Il préconise en particulier la publication de statistiques concernant les morts causées par les activités des SMSP parmi leur personnel et les civils, et le renforcement du contrôle des SMSP engagées. Enfin, il encourage le Gouvernement afghan à solliciter l'aide de la Mission d'assistance des Nations Unies en Afghanistan (MANUA) pour mettre en œuvre ces recommandations.

¹ Le Groupe de travail a été informé, lors de sa consultation régionale avec le Groupe asiatique tenue les 26 et 27 octobre 2009, que le Gouvernement afghan avait récemment porté à 52 le nombre de sociétés autorisées, parmi lesquelles 27 SMSP nationales et 25 SMSP étrangères.

Annexe

Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: mission to Afghanistan (4–9 April 2009)

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction.....	1–7	4
II. International human rights commitments.....	8–9	5
III. Private military and security companies operating in Afghanistan.....	10–52	5
A. Context	10–20	5
B. Mapping of private military and security companies operating in Afghanistan	21–32	7
C. The regulation process.....	33–37	10
D. The regulation and its implementation	38–45	12
E. Licensing process	46–52	13
IV. Human rights impact.....	53–70	14
A. Impact of private military and security companies on the local population ...	53–56	14
B. Lack of accountability and transparency	57–67	15
C. Vetting and training	68–70	17
V. Conclusions.....	71–78	17
VI. Recommendations.....	79–80	19

I. Introduction

1. At the invitation of the Government of Afghanistan, the Working Group visited Afghanistan from 4 to 9 April 2009. In accordance with general practice, the Working Group was represented by two of its members, in this case, Alexander Nikitin, and Amada Benavides de Pérez.²

2. The Working Group is grateful to the Government of Afghanistan for its invitation and for its cooperation throughout the planning and conduct of its visit. Due to the volatile security situation in the country, the Working Group was only able to visit the capital Kabul and Jalalabad, in the eastern province of Nangarhar. The Working Group could not travel to the southern provinces, in particular to the province of Kandahar where there is a large presence of PMSCs.

3. In accordance with Commission on Human Rights resolution 2005/2, the Working Group is called upon to “monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world” as well as to “study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities”.

4. For the purpose of this report, the Working Group defines private military and security companies (PMSCs) as corporate entities which provide on a compensatory basis military and/or security services by physical persons and/or legal entities. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; specialized services related to military actions including strategic planning, intelligence, investigation; prisoner detention; and advice to or training of local forces and security personnel.

5. The Working Group received information on the numbers, types, structures and activities of PMSCs operating in the country and on the scope and extent of their activities. It focused in particular on the system of regulation of activities of PMSCs registered in Afghanistan and the requirements, if any, for transparency and accountability of PMSCs and their personnel. The Working Group also examined events involving PMSCs which might have given rise to impunity on the part of contractors for violations of human rights. Finally, the Working Group looked at the issue of access to effective remedies for victims of violations.

6. During this visit, the Working Group met with representatives of the Office of the President, the Ministries of Foreign Affairs, Justice, the Interior and Defense, the office of the Attorney General and the chairs and members of the Committee on Legislative Affairs of the Wolesi Jirga (the National Assembly), the Committee on Internal Security, National Security and local organs of power of the Meshrano Jirga and the Prosecutor’s office of Military affairs. The Working Group also had the opportunity to meet with representatives of the Afghan Independent Human Rights Commission and heard the views of civil society

² The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination was established by Commission on Human Rights resolution 2005/12. The Working Group is composed of five independent experts serving in their personal capacities. Since March 2009, Shaista Shameem (Fiji) has been the Chairperson-Rapporteur. The other members are Amada Benavides de Pérez (Colombia), José Luis Gómez del Prado (Spain), Alexander Nikitin (Russian Federation), and Najat al-Hajjaji (Libyan Arab Jamahiriya).

and representatives of PMSCs. In its visit to Jalalabad, the Working Group met with the provincial governor and other local authorities. Meetings were also held with representatives of the Embassies of the United States of America and the United Kingdom of Great Britain and Northern Ireland, the Deputy Special Representative of the United Nations Secretary-General for Afghanistan and representatives of all United Nations agencies present in Afghanistan, including the United Nations Department of Safety and Security. The Working Group would like to thank the United Nations Assistance Mission in Afghanistan (UNAMA) and especially its Human Rights Unit for facilitating its mission.

7. The Working Group regrets the incident in which its convoy was stopped by a local private security company, and one of its vehicles and the occupants searched and fingerprinted by United States soldiers in violation of the privileges and immunities of United Nations officials on mission. The Working Group has received a copy of the formal letter of apology from the United States Army Commanding Major General sent on 10 May 2009 to the UNAMA Special Representative of the Secretary-General and to the United Nations High Commissioner for Human Rights.

II. International human rights commitments

8. Afghanistan has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Discrimination against Women. Afghanistan is also a party to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. It has ratified the Rome Statute of the International Criminal Court as well as the Convention on the Prevention and Punishment of the Crime of Genocide.

9. Afghanistan is not a party to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

III. Private military and security companies operating in Afghanistan

A. Context

10. Afghanistan is currently one of the two biggest theatres of operations for PMSCs. The United States, which has the largest military and diplomatic presence in Afghanistan, is the largest employer of private security in the country. PMSCs have supported the military operations of the United Nations-mandated International Security Assistance Force (ISAF) and the United States-led "Operation Enduring Freedom" since their inception in 2001. The long process towards rebuilding the Afghan National Police and the Afghan National Army coupled with a growing insurgency, have led to an increased demand for the services of PMSCs in recent years. The increasing demand for security has also led to a burgeoning of local Afghan-owned PMSCs. Both local and international PMSCs have recruited widely among former militia members and various armed groups for experienced personnel.

11. After eight years of international efforts to stabilize the situation in Afghanistan, the general security situation remains very tense, with Afghanistan ranking seventh in the

Failed States Index (FSI) of the United States-based Fund for Peace,³ immediately after Iraq. In 2009, the United Nations Assistance Mission in Afghanistan (UNAMA) recorded a 14 per cent increase in civilian casualties compared to the previous year, making the death toll in 2009 the highest since the fall of the Taliban regime in 2001. Anti-Government elements (AGEs) remain responsible for the largest proportion of civilian casualties.⁴

12. The rampant insecurity throughout the country has led many to call on the services of PMSCs to ensure their protection. For example, foreign Governments have contracted PMSCs to protect their embassies and interests while private businesses or contractors and some international non-governmental organizations (NGOs) have hired PMSCs to ensure their protection when carrying out projects in zones where the insurgency is active. The United Nations has also been contracting individual private security contractors and local PMSCs to protect its compounds in several conflict-prone areas of the country, including Kabul and some other field offices. The use of PMSCs increased drastically prior to and during the 2009 elections.

13. The High Commissioner for Human Rights emphasized the impact of PMSCs on human rights in Afghanistan, in particular when unregulated, in her annual report dated 21 February 2008. She stated that PMSCs were increasingly being drawn into military-type activities when operating in volatile areas and provided two examples of incidents in which they were involved in fighting.⁵

14. The presence and activities of PMSCs in Afghanistan are very much interconnected with the large number of unauthorized armed groups of various kinds on Afghan territory. The Ministry of the Interior (MoI) has estimated that no fewer than 2,500 unauthorized armed groups were operating in those provinces under governmental control, which represent less than half the territory of the country. Many de facto non-State armed groups have used the regularization process for PMSCs to disguise their groupings as private security companies, reinforcing the perception that PMSCs were a threat to stability.⁶

15. Existing PMSCs — especially local companies but also some international ones — became a “reservoir” for adoption and legalization of armed individuals with military skills who in the recent past had belonged to unauthorized military groupings.

16. Former armed elements, whether considered to be warlords or anti-Government elements, could either join the Government armed forces (Afghan National Police or Armed Forces), disband under the Disbandment of Illegal Armed Groups (DIAG) programme, transform into a public protection force in an arrangement with local authorities (in specific regions), join the border monitoring brigades or register as employees of one of the officially licensed private security companies. Some also continued operating individually or in small groups as armed elements, and some were hired to provide security services, by international forces inter alia.

³ The Fund for Peace has published multilateral ratings of failed States (estimating aggregated parameters of loss of governmental control over the territory, growth of corruption, criminalization of society, etc.) annually since 2005; see www.fundforpeace.org. The Brookings Institution ranked Afghanistan second only to Somalia in its index of the 141 weakest States in the developing world (Rice, Susan E. and Patrick, Stewart, *Index of State Weakness in the Developing World* (The Brookings Institution, Washington, D.C., 2008). www.brookings.edu/reports/2008/~media/Files/rc/reports/2008/02_weak_states_index/02_weak_states_index.pdf) while the United Nations Human Development Index ranks it 181 out of the 182 countries profiled (<http://hdr.undp.org/en/statistics/>).

⁴ UNAMA, *Annual Report on Protection of Civilians in Armed Conflict, 2009*, para. 3 (January 2010).

⁵ A/HRC/7/27, 21 February 2008, para. 68.

⁶ DIAG Evaluation, *Disbandment of Illegal Armed Groups in Afghanistan*, Poulton, Robin-Edward, PhD, (EPES Mandala Consulting, Chichester, 22 April 2009).

17. In Jalalabad, for example, the Working Group was informed that the Afghan National Police in the province of Nangarhar had counted 500 private security entities operating in the eastern region which were not registered with the MoI. These illegal entities, with a minimum of five men, fall under the definition of illegal armed groups and should be dismantled. By comparison, there were only six PMSCs registered with the MoI operating in the area.

18. Foreign PMSCs and international forces also used to recruit former militias, or still do so, in particular to guard Provincial Reconstruction Teams (PRTs) and Forward Operating Bases (FOBs) and to work alongside Special Forces, especially in the south of the country and where international forces are based.⁷

19. The Working Group is particularly concerned about the information that the international military forces (IMF) are directly recruiting Afghan security guards operating under their command. In Nangarhar, these are known as the Shaheen unit and it is not clear whether it falls under the control and command of the Afghan MoI or not. Without transparency on structure and command, accountability cannot be guaranteed. This concern has been raised by the Afghanistan Independent Human Rights Commission (AIHRC), which stressed the lack of accountability of militia groups operating under the umbrella of PMSCs. AIHRC was also worried that those former warlords who also own important PMSCs could challenge the authority of the Government.

20. For example, a shooting incident occurred on 29 June 2009 between armed Afghan Special Guards (also referred to by the local population as “Afghan Special Forces”) and Afghan National Police (ANP) inside the Attorney General’s office in Kandahar. Reports state that the Afghan Special Guards opened fire and killed the Chief of Police, the head of criminal investigations and four other ANP officers. There were unconfirmed reports of civilian casualties. While the precise identity and chain of command of the Afghan Special Guards is unclear, according to information received they are an Afghan private entity operating as a security company. Information received indicates that they may be working with or led by American Special Forces in Afghanistan, or armed international intelligence services. According to reports quoting police records, 41 suspects were arrested in connection with the incident and were waiting to be charged before the court in Kabul. The Working Group sent a communication on 17 July 2009 to the Government of Afghanistan regarding this incident.

B. Mapping of private military and security companies operating in Afghanistan

21. It is difficult to estimate with accuracy the number of PMSCs in Afghanistan as there are reportedly some Afghan PMSCs not registered with the MoI. According to the information received, the estimated number of PMSCs operating in the country until early 2008 varied between 60 and 90 companies. In addition to local companies, foreign PMSCs were in the majority registered in the United States and the United Kingdom, with some in Canada, Germany, South Africa and the Netherlands. Third-country nationals are also being recruited by international PMSCs.⁸ The number of PMSCs may increase given United States troop surges and NATO operations.

⁷ For more information, see Schmeidl, Susanne, “Case Study Afghanistan – Who Guards the Guardians?” pp. 14–45, *Private Security Companies and Local Populations: An Exploratory Study of Afghanistan and Angola*, Research Report, Berne, p. 15 (swisspeace, November 2007).

⁸ Third-country nationals are recruited from a variety of countries in Asia, Latin America and Africa.

22. The Regulation adopted in February 2008 (see following chapters) led to the licensing of 39⁹ Afghan and foreign companies and the registration of their personnel and weapons. Of the 39 companies, 18 were Afghan owned and 21 were foreign or international, with 10 registered in the United States, 8 in the United Kingdom and 3 in other countries.¹⁰

<i>Country of origin</i>	<i>Name of company</i>
Afghan (18)	ARGS, Asia Security Group (ASG), Burhan Security Service, Commercial Security Group (Guards Service) CSG, Good Knight Security Services, IDG Security, ISS (also known as SSI) – International Specialized Services, Kabul Balkh Security Services, Khorasan Security, NCL Holdings LLC., PAGE Associates, Pride Security Services, Shield, Siddiqi Security, SOC – Afg, Tundra SCA, WATAN Risk Management, White Eagle Security Services
UK (10)	Aegis Defense Services Ltd, ArmorGroup Services, Blue Hackle, Control Risks (CR), Edinburgh International, Global Risk Group, Hart Security, Olive Group, Saladin Security Afghanistan, TOR
US (8)	Xe Services/Blackwater USA, DynCorp International, EODT Technologies Inc./GSC, Four Horsemen/ARC, REED Inc., RONCO, Strategic Security Solution International Afghanistan (SSSI), US Protection and Investigations (USPI)
Other (3)	Australia: Compass Canada: GardaWorld (as Kroll) Dubai: UNITY-OSG

23. Following the example of Iraq and the establishment of a Private Security Company Association of Iraq (PSCAI) “to discuss and address matters of mutual interest and concern to the industry conducting operations in Iraq”,¹¹ the main international companies in Afghanistan have been grouped together in a Private Security Company Association of Afghanistan (PSCAA). However, the PSCAA Chairman¹² told the Working Group that PSCAA had not been registered formally as an association or an NGO in accordance with national laws and remained more of an informal club or network of international security companies. Its influence and role have remained limited to preserving the interests of the companies and it has not adopted a code of conduct for the industry and does not monitor the conduct of its members.

24. The exact number of PMSC personnel is difficult to ascertain and the Government was not able to provide the Working Group with statistics. According to academic studies, the estimated number of PMSC personnel varied from 18,000 to 28,000 before the adoption

⁹ The Working Group was informed during its regional consultation with the Asia Group on 26–27 October 2009 that the Government of Afghanistan had recently extended the number of licensed companies to 52, with 27 national and 25 international PMSCs.

¹⁰ Schmeidl, Susanne, *The Good, the Bad and the Ugly – The Privatized Security Sector in Afghanistan*, p. 6 (Geneva Centre for the Democratic Control of Armed Forces - DCAF).

¹¹ www.psc.ai.org/index.html.

¹² In April 2009, the country manager of the United Kingdom company ControlRisks.

of the Regulation.¹³ The Regulation imposed a cap of 500 personnel per registered company, although it seems that was not rigorously enforced, with a number of companies employing a higher number of personnel. This number is likely to increase in the coming months given increased insecurity due to the growing insurgency attacks. The number of PMSCs will also increase to match the deployment of additional military forces as announced by the American President with the new United States strategy for Afghanistan. Already by August 2009, the total number of PMSC personnel contracted by the United States Department of Defense had increased by 19 per cent.¹⁴ At the end of October 2009, the Working Group was informed by the Government of Afghanistan that, with the increase in registered companies from 39 to 52, 24,690 personnel were operating in Afghanistan, of whom 19,928 were nationals and 4,772 international employees.

25. The Government of the United States is the main employer of PMSCs in Afghanistan, employing about a quarter of all private security personnel, according to the Commission on Wartime Contracting in Iraq and Afghanistan. The companies are usually managed by United States staff and employ about 85 per cent Afghan nationals with sometimes a small proportion of third-country nationals.¹⁵

26. The main services provided by PMSCs range from traditional guarding to more novel high-tech intelligence and risk management services. They are mainly known to provide static guarding of premises and construction projects (e.g. offices, residences, embassies, checkpoints, international organizations) and escort and protection services (e.g. VIPs, civilian and military convoys). These services are provided in Kabul as well as in active battle zones. For example, in July 2009 the United States Army solicited information from prospective contractors who would develop a security plan for 50 or more forward operating bases and smaller command outposts across Afghanistan, used to support tactical operations.¹⁶

27. In addition, PMSCs are also providing consulting services (e.g. policy development for the Ministries of the Interior and Defence), training (e.g. for the Afghan National Police and Army), logistics support (including for military support operations), intelligence and risk management services (for the military, private companies and non-governmental organizations), including electronic security and surveillance. Some companies are also specialized in demining and poppy eradication.¹⁷

28. The Working Group received allegations that one or possibly more PMSCs had been contracted to undertake interrogation of detainees. The Working Group has not obtained evidence of such allegation in Afghanistan but notes that, given their use in United States custody in Iraq, similar arrangements may have been in place.

29. The Working Group has not received information that PMSC personnel have engaged in direct combat activities since the adoption of the Regulation. Nevertheless, the

¹³ Schmeidl, Susanne, "Case Study Afghanistan – Who Guards the Guardians?" pp. 14–45, Private Security Companies and Local Populations: An Exploratory Study of Afghanistan and Angola, Research Report, Berne, p. 17 (swisspeace, November 2007).

¹⁴ Sherman, Jake and DiDomenico, Victoria, *The Public Cost of Private Security in Afghanistan*, briefing paper, p. 1 (Center on International Cooperation, September 2009).

¹⁵ The exact figures as reported by the US Commission on Wartime contracting are: 4,373 private security personnel on United States Department of Defense (DoD) contracts and 689 on Department of State (DoS) contracts in March 2009. Of these 5,062 personnel, 4,402 (85 per cent) were Afghan nationals.

¹⁶ Pincus, Walter, *Military Weighs Private Security on Front Lines* (*Washington Post*, 26 July 2009).

¹⁷ Schmeidl, Susanne, *The Good, the Bad and the Ugly – The Privatized Security Sector in Afghanistan*, DCAF, p. 4.

Working Group notes that by protecting Forward Operating Bases (FOBs) or individuals or projects in conflict zones, a civilian contractor may lose protection under international humanitarian law by protecting legitimate military targets. The International Committee of the Red Cross (ICRC) stressed the extreme difficulty of determining whether the activity of a private security contractor is of a civilian or military nature: “The line between the defence of military personnel and other military objectives against enemy attacks (direct participation in hostilities) and the protection of those same persons and objects against crime or violence unrelated to the hostilities (law enforcement/defence of self or others) may be thin. It is therefore particularly important in this context to observe the general rules of [international humanitarian law] on precautions and presumptions in situations of doubt.”¹⁸ Others are even more explicit: “A civilian government employee or private contractor defending military personnel or military objectives from enemy attack directly participates in hostilities. His or her actions are indistinguishable from the quintessential duties of combat personnel.”¹⁹

30. The two examples below illustrate how the distinction between military and civilian activities can be blurred. In August 2008, Afghan employees of two private security companies (Compass, and US Protection and Investigations (USPI)) may have inadvertently killed a Canadian soldier during a firefight between insurgents and Canadian soldiers. The contractors thought insurgents were attacking them as they travelled along the Kandahar-Herat highway and returned fire, while the Canadian soldiers were engaged in an operation against the insurgents.²⁰ In another incident in October 2008, the United States forces in Afghanistan killed up to 20 Afghan private security guards in an air strike after claiming they were attacked by the guards.²¹

31. Many PMSCs in Afghanistan hire armed staff owing to the problem of obtaining arms legally in Afghanistan. Currently, only the Government of Afghanistan, foreign military and embassies are allowed to import a limited number of weapons for use by their international staff.

32. According to data of the Kabul Police, 35 private security companies possessed 4,968 units of registered weapons of various types in 2008 (registered under the names of 1,431 employees). The police authorities informed the Working Group that private security companies possess no fewer than 44,000 registered and unregistered weapons. A total of 17,000 weapons were confiscated by the Ministry of the Interior (MoI) within the framework of the DIAG (Disbandment of Illegal Armed Groups) programme, while another 18,000 were officially registered as belonging to 39 licensed companies.

C. The regulation process

33. The Government of Afghanistan began its work towards regulating the industry in late 2004. In March 2005, the MoI issued a ministerial directive ordering the Criminal Investigation Unit to officially start registering PSCs.²² A year later, the newly appointed

¹⁸ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, p. 38.

¹⁹ Schmitt, Michael, “Humanitarian law and direct participation in hostilities by private contractors or civilian employees”, *Chicago Journal of International Law*, vol. 2 (5), pp. 511–546, 538 (2004).

²⁰ CTV news, “Canadian soldier killed in Afghanistan firefight”, 9 August 2008, www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080809/cdn_dead_080809/20080809?hub=TopStories.

²¹ Reuters “U.S. troops say Afghan security guards attacked them” Reuters Online News Service, Monday, 27 October 2008, see: www.reuters.com/article/worldNews/idUSTRE49Q2HP20081027?feedType=RSS&feedName=worldNews&rpc=22&sp=true.

²² The Government of Afghanistan refers to Private Security Companies (PSCs) only and not to

MoI tasked a Commission composed of representatives from the Ministries of the Interior, Defence and Justice to continue working on a PSC law, in consultation with UNAMA, ISAF and embassies. However it was only after private security guards were found guilty of robbing several banks in Kabul that President Karzai passed a presidential decree (No. 4549) on 5 February 2007 tasking a new commission to develop a regulation on PSCs.²³

34. In February 2007, a resolution from the Council of Ministers gave authority to the MoI to undertake a survey and register PSCs operating in Afghanistan. In its draft Government Policy on Private Security Companies of August 2007,²⁴ the Government stated that despite significant improvements and reforms in many areas, Afghanistan remained “an institutionally unstable and weak State” and allowed the Government and the international community present in the territory to hire international or local PMSCs to ensure their protection. It insisted that PMSCs should comply with Afghan laws and recognize international human rights standards.

35. It also recognized the urgent need to regulate and monitor the activities of PMSCs in a coordinated and precise manner and through a set of clear mechanisms, stating that an excessive reliance on PMSCs could undermine the State’s legitimate monopoly on the use of force in the absence of effective regulatory and monitoring mechanisms to ensure accountability among all stakeholders.²⁵

36. In response to this assessment of a legislative gap, the Joint Secretariat of the Disarmament and Reintegration Commission of the Ministry of the Interior began work on a regulation aimed at filling the existing legal gaps in the regulation of the activities of private security companies. These efforts led to the release by the Ministry of Interior in February 2008 of a “Procedure for Regulating Activities of Private Security Companies in Afghanistan.” The procedure states that its goal is “to ensure transparency, accountability and quality services by private security companies in accordance with the laws of Afghanistan”. The document also states that the Government cannot allow illegal armed groups to transform into private security companies.²⁶

37. Several other draft laws on regulating PMSCs have also been submitted to Parliament, including one during the Working Group’s visit in April of 2009, but none has been adopted so far.²⁷ The Parliament sent back the draft law without discussing it, arguing that the not-yet-established Independent Commission for Overseeing Implementation of the Constitution, once established, should examine the legitimacy of having PMSCs operate in the country. The Working Group did not receive a copy of the draft law but is of the understanding that the language of the new draft law broadly reflects the wording of the regulation.²⁸

PMSCs. The Working Group uses the abbreviation PSCs when referring to official documents or reports of the Government of Afghanistan.

²³ Schmeidl, Susanne, “Case Study Afghanistan – Who Guards the Guardians?” pp. 14–45, *Private Security Companies and Local Populations: An Exploratory Study of Afghanistan and Angola*, Research Report, Berne, pp. 22–24 (swisspeace, November 2007).

²⁴ Draft Government Policy on PSC, 6 August 2007.

²⁵ Draft Government Policy on PSC, 6 August 2007.

²⁶ Procedure for Regulating Activities of Private Security Companies in Afghanistan, p. 2, available on www.privatesecurityregulation.net/files/Afghanistan_2008_PSCInterimRegulations.pdf.

²⁷ Schmeidl, Susanne, “Case Study Afghanistan – Who Guards the Guardians?” pp. 22–24.

²⁸ The Working Group is of the understanding that the draft law under discussion in Parliament proposes to change the word “security” to “protection”, which would make the wording, if adopted, “private protection company”. The Working Group recommends the adoption of a broader definition of PMSCs in the draft law which would include all military and security services in order to avoid situations where some companies could argue that the legislation does not apply to them.

D. The regulation and its implementation

38. The “Procedure for Regulating Activities of Private Security Companies in Afghanistan” was approved by the Council of Ministers at its meeting on 7 January 2008.

39. The first part of the regulation comprises 40 articles regulating private security companies while the second part is composed of guidance and samples of documents to assist companies in their compliance with the regulation. The implementation of the regulation led to the licensing of 39 Afghan and foreign companies and the registration of their personnel and weapons.²⁹

40. The Procedure lists the activities that private security companies are not allowed to perform (art. 6: Illicit activities), the composition and functions of the High Coordination Board (arts. 8–10), responsible for issuing licences and monitoring compliance of PMSCs, the conditions for applying for an operational licence (arts. 11–17) and conditions of employment (art. 18). It goes on to define the monitoring and reporting obligations (arts. 28–29), and the procedure in the case of violations (art. 31), including the conditions for licence cancellation and for stopping the activities of companies in violation of the Procedure (art. 32). The regulation also covers issues of legal registration and usage of vehicles, weapons and ammunition as well as the use of uniform.

41. It states clearly that PSCs must coordinate and cooperate with the Afghan security forces in conducting their activities. PSCs are prohibited from employing the staff of the Afghan National Army (ANA), Afghan National Police (ANP) and the National Directorate of Security (NDS) for their own activities.

42. Personnel from PSCs are required to wear uniforms and specific logos. The regulation prohibits the buying, selling and distribution of weapons, ammunition and explosives as well as the use and transport and transfer of medium to heavy weapons and “heavily” armoured vehicles (art. 21).

43. Article 20 prohibits high-ranking government officials and their relatives up to the second degree from being the owner or partner of a security company. Despite this rule, the Working Group notes that in at least one case a company affiliated to a government official has been granted a licence in contradiction with this article. The company concerned is NCL Holdings, LLC., which was founded by Hamed Wardak, the son of the current Defence Minister.³⁰

44. The regulation establishes a regulatory Board — the High Coordination Board (HCB) — responsible for monitoring the activities of PSCs, awarding licences and carrying out investigations in the case of violation of the Procedure. The Board shall investigate any violations committed by a PMSC and decide on possible suspension and/or dissolution of the company. It also has authority to process complaints from the general public, clients and individual members of PSCs in relation to violations by PSCs, to conduct investigations and to make case-by-case decisions. The Board consists of seven to nine members from the Government, appointed by the Ministry of Interior after approval of the President. It is stated that the Board should be chaired by a senior member of the MoI. Other members should include the heads of the Departments of Counter-Terrorism and Criminal Investigations, and representatives of NDS, the Ministry of Finance, the National

²⁹ The regulation adopted by the Government defines security companies as “a profit making, non-political and non-governmental company that functions according to the provisions of this procedure to establish security of natural and real persons”.

³⁰ The Nation, Aram Roston, “How the US funds the Taliban”, 11 November 2009, www.thenation.com/doc/20091130/roston.

Security Council (NSC), the Ministry of Foreign Affairs and the Ministry of Commerce and Industries. A representative of UNAMA (or an independent international expert) with an advisory function could be included for the purpose of increasing transparency. At the time of the mission, the Board was being established and had not yet received any complaints.

45. Annex 1 to the Procedure is the “Law on Using of Force by Private Security Companies in Afghanistan.” It states in particular the obligation to cooperate with national and international security forces, limits the use of force to self-defence in accordance with the law, in the case that the person or property protected is under attack and in the case of attack against civilians. It also specifies the provision of training for the personnel of PSCs and underlines the need to take all necessary measures to prevent civilian casualties.

E. Licensing process

46. As stated above, the regulation on PSCs led to the licensing of 39 companies from February 2008 to April 2009, of which 20 are foreign owned and 19 Afghan owned. The MoI informed the Working Group that prior to the enactment of the regulation, 63 companies were operating in the country but that 24 had not obtained authorization to continue their activities. The Working Group was told that, during this licensing process, eight PMSCs (seven Afghan and one British) operating illegally were forced to shut down by the Afghan police.³¹ However, several representatives from embassies told the Working Group that in the run-up to regulation, American and British PMSCs and their clients were being unnecessarily “harassed”.

47. During the Working Group’s meeting with the MoI, officials stated that the Government believed that the 39 companies licensed fulfilled the security demands of the country at the present stage and did not believe other companies would be licensed in the immediate future.³² In addition, a cap of a maximum of 500 personnel for companies was imposed.

48. The Working Group was informed that companies that were not licensed through this process had to cease their activities accordingly or would otherwise be considered to be illegal armed groups. The Government was not able to confirm whether all those companies that had not obtained licences had indeed ceased their operations in the country or if they were still operating illegally. No information was provided as to the measures taken by the Government to ensure that such companies would cease their activities in the country. However, as noted above, an additional 13 companies, including 9 local PMSCs were granted licences a few months later, indicating that the Government of Afghanistan was subject to internal and external pressure to open its market more widely.

49. The Working Group received information from other sources that illegal Afghan companies were still operating in the country without licences, in particular outside the capital. For example, the Working Group was told that there were reportedly a dozen local armed security groups operating without licences in the province of Nangarhar. The Afghanistan Independent Human Rights Commission (AIHRC) confirmed that unauthorized companies were still operating in different parts of the country, in particular in areas outside Kabul. The Commission also underlined the lack of capacity within the Government to properly monitor the activities of PMSCs and the culture of corruption and lack of accountability.

³¹ Information provided by UNAMA, 29 October 2007.

³² Clearly this assessment changed with the licensing of 13 additional companies between April and October 2009, including 5 international and 8 local companies.

50. The High Coordination Board (HCB) tasked with granting licences and monitoring the activities of PMSCs is supposed to be represented at the regional level, in each of the five provinces at the governor level. However, the Governor of Nangarhar informed the Working Group that licences were issued in Kabul without any coordination with the provincial authorities. The local authorities have no access to the contracts signed by the companies operating in their provinces and no capacity to disband PMSCs operating without licences.

51. Concerns were raised about the subjectivity and lack of transparency regarding the licensing process. The process of selection and registration of a limited number of 39 PMSCs seemed to be responding more to commercial and personal interest than a competitive process taking into account human rights considerations, including individually issued permissions for some companies to exceed the established limit of 500 employees, and involving attempts by previously registered Afghan companies to exclude their competitors from registration. The very process of selection and imposition of limits has become the subject of political and commercial competition, and is currently being questioned by some of the ministries and agencies on the grounds that it was not based upon a law (which is still in the process of adoption), and therefore could be revised once the law is adopted.

52. Both the United States and United Kingdom representatives stated their support for the legislative efforts undertaken by the Government of Afghanistan. However, they raised concerns about a law that they considered would be too restrictive and that would impede free trade and freedom of choice. They told the Working Group members that they had conveyed their concern about the draft law to the authorities, stressing that over-restrictive legislation would be counterproductive. They insisted that foreign Governments should be free to decide which companies they could hire and that imposing a 500-employee cap on PMSCs was in effect putting hurdles in the way of large companies that provide high quality services.³³

IV. Human rights impact

A. Impact of private military and security companies on the local population

53. The Working Group met with several international and local non-governmental organizations. The vast majority of these stressed that the high presence of armed private guards did not generate a feeling of increased security among the Afghan population and that, to the contrary, the large number of armed individuals, vehicles and weapons created a feeling of fear and insecurity. This was reiterated by AIHRC. Most NGOs pointed to the difficulty for Afghan citizens of distinguishing between international troops and international or local security contractors. This, they said, complicated the process of accurately reporting incidents and human rights violations.

54. In its draft Government Policy of August 2007, the Government of Afghanistan highlighted some of the main complaints received from the Afghan population regarding PMSCs and their personnel. These complaints included the lack of transparency and accountability; disrespect for local security forces and lack of collaboration; difficulty of distinguishing PMSCs from the regular armed forces given similar and indistinguishable

³³ Recent information that 13 new companies have received licences since the visit of the Working Group tends to demonstrate that these pressures for more flexibility were looked at positively.

uniforms and unmarked vehicles; the obstruction of access to official buildings and roads; and the intimidation suffered by local Afghans from PMSCs.³⁴

55. A research fellow for the NGO swisspeace conducted a study on the perception of PMSCs by the local population in 2007, where she found that there was a feeling among those interviewed that the absence of regulation encouraged bad behaviour, bad business practices, corruption, lack of accountability and impunity for those working for PMSCs.³⁵

56. Most civil society organizations recognized that the adoption of a specific procedure to regulate PMSCs was positively received by the population, which had asked for greater transparency and accountability. This was confirmed to us by the MoI, which stated that although the general perception remained mainly negative, the introduction of specific regulations had contributed to improving the situation. However, police sources said that about a dozen companies had been suspected of involvement in criminal activities and were expected to be closed or forced to cease operations.

B. Lack of accountability and transparency

57. AIHRC conveyed to the Working Group the lack of clarity regarding the jurisdiction applicable to PMSCs and the lack of accountability when crimes have been committed. By contrast with the immunity accord granted to PMSCs working for United States forces in Iraq until the end of 2008, in Afghanistan all PMSC personnel are subject to Afghan laws. However, despite concurring reports of the involvement of PMSCs in human rights violations, the Working Group could not obtain documented and verifiable evidence of these violations. There has been no prosecution at the national level for human rights violations by PMSCs.

58. The Board set up by the regulation is designed to act as a central body for the registration and investigation of all incidents involving PMSCs. However, the mechanism was not yet functioning and the population was not aware of its role. AIHRC has set up its own special investigation team, but is already busy investigating many human rights abuses and lacks the capacity to investigate allegations of incidents involving PMSCs.

59. The Working Group received information about the involvement of PMSC contractors in robberies, kidnapping, interrogation, torture of detainees and irregular and abusive house inspections. The MoI confirmed cases of excessive use of force.

60. In one case, local private security contractors are alleged to have shot seven adult males and injured one child in what appear to have been extrajudicial killings. On 27 October 2008, the international military forces (IMF) and Anti-Government elements (AGEs) engaged in an exchange of fire in the Haft Asyab area, Saydabad District, Wardak Province, which killed 11 AGEs and injured 12 others.³⁶ During the fighting, private security contractors working for the RWA Road and Construction Engineering Company entered Hakim Khail village in the Haft Asyab area and, according to witnesses, entered a house, forced out the adult males inside and shot them one by one. A child who tried to run away was allegedly shot in the back.³⁷ Other reports state that five people were killed by IMF air strikes during the operation. No information has been provided on whether this incident has been fully investigated and anyone prosecuted.

³⁴ Draft Government Policy on PSCs dated 6 August 2007.

³⁵ UNAMA Press conference, 12 November 2007.

³⁶ American Forces Press Service, "U.S. forces kill militants after helicopter attack in Afghanistan", (Washington, 28 October 2008).

³⁷ Information provided by UNAMA.

61. The Prosecutor's office of Military Affairs submitted to the Working Group a list of 15 criminal activities carried out by PSCs that are currently under investigation by the Prosecutor's office, concerning the smuggling and illegal transport of weapons and ammunition since 2006. Most cases concern local companies, including some that are not on the list of licensed companies. Several of these cases also relate to the United States company USPI accused of embezzlement and falsification as well as illegal carrying of weapons and ammunition.

62. The Deputy Attorney General emphasized that the main challenge for the local prosecutors was security. He said that some had been kidnapped or killed (with one beheaded) while on duty. He stressed the difficulty of assigning professional prosecutors to areas of insecurity, which led them to hire less well qualified people. He also stressed the lack of clear procedures for local prosecutors for informing Kabul about trials in their jurisdictions.

63. The Working Group also received information about cases where international PMSCs have flown personnel involved in human rights violations or criminal activity out of the country soon after the facts. For example, one American USPI supervisor, who shot and killed his Afghan interpreter after an argument, was quickly flown back to the United States and not handed over to Afghan officials for an investigation. To date he has not been charged or tried.³⁸ This example illustrates the difficulties victims and their families can face in obtaining adequate remedies.

64. The only completed United States Government prosecution of any contractor for detainee abuse in Afghanistan concerned the case of David Passaro, a former Army Special Forces soldier, who had been contracted to work with a team of United States Special Forces and Central Intelligence Agency (CIA) personnel responsible for capturing and interrogating suspected terrorists in 2003. Abdul Wali, an Afghan who had voluntarily turned himself in, died in custody on 21 June, following two days of interrogation by Passaro. On 17 June 2004 – a full year after the event, the United States Attorney for the Eastern District of North Carolina charged Passaro with two counts of assault with a dangerous weapon and two counts of assault resulting in serious bodily injury. In August 2006, Passaro was convicted on a single count of assault resulting in serious bodily injury and three counts of misdemeanor assault and was sentenced to serve eight years and four months in a federal prison.³⁹

65. On 7 January 2010, the United States Department of Justice announced the arrest of two former Blackwater security guards on murder charges and firearms violations following a shooting in Afghanistan in May 2009 that killed two Afghans and wounded one. The men were working for Paravant LLC., a subsidiary of Blackwater, and were assigned under contract to train Afghan soldiers.⁴⁰

66. The Working Group regrets the lack of coordination between Kabul and the rest of the country. The provincial authorities in Jalalabad have no interaction with the High Coordination Board (HCB) and are not requested to report on the activities and violations committed by PMSCs.

³⁸ Nawa, Fariba, "The gunmen of Kabul", CorpWatch, 21 December 2007, www.corpwatch.org/article.php?id=14863 (accessed 23 October 2008), quoted in Schmeidl, Susanne, *The Good, the Bad and the Ugly – The Privatized Security Sector in Afghanistan*.

³⁹ Human Rights First, *Private Security Contractors at War*, p. 29.

⁴⁰ Risen, James, "Former Blackwater Guards Charged With Murder" (*New York Times*, 8 January 2010).

67. States contracting PMSCs also have a crucial role in ensuring the accountability of the PMSCs they have contracted and should assist the national authorities in investigating all incidents. They have an obligation to investigate, prosecute, extradite or surrender persons suspected of having committed crimes under international law, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law, in the awareness that punishment should be commensurate with the gravity of the crime.

C. Vetting and training

68. PMSCs operating in Afghanistan do not have systematic vetting and training procedures. According to the Regulation, the chairman of each company seeking licensing has to sign a “Commitment letter” guaranteeing the qualifications of the personnel employed, to the effect inter alia that they “should not have been imprisoned or committed crimes and should not have had contact with terrorism and should not continue relations with other illegal armed groups”.⁴¹

69. The procedure provides for the involvement of AIHRC in the vetting process of local PMSC employees to ensure that no staff of private security companies have been suspected of or accused of human rights violations. AIHRC confirmed to the Working Group that they did participate in the vetting process at least during the initial phase of the regulatory process for the PMSCs but that this was not effective given the lack of accurate records. The PMSCs that the Working Group met with also acknowledged the difficulty of vetting Afghan personnel given the lack of police records. However, PMSCs stressed that they carried out reference checks as often as possible.

70. NGOs concluded that PMSC staff are generally not well trained and often abusive of their powers. They noted that private security personnel often carry their weapons outside their compounds when off duty and move about in vehicles without number plates.

V. Conclusions

71. In conflict or post-conflict situation where national security forces have to rebuild to fulfil their role as the legitimate holder of the use of force in accordance with the rule of law, private military and security companies (PMSCs) often fulfil a demand for protection from a wide variety of clients, including national institutions, foreign forces, multinational companies, and governmental and non-governmental organizations. The majority of these actors told the Working Group that they would not be able to operate throughout Afghanistan without the assistance of PMSCs.

72. The Working Group commends the efforts made by the Government of Afghanistan to seriously address these issues and with regard to the adoption of a comprehensive regulation that led to the licensing of initially 39 and then 52 companies. The Working Group acknowledges that Afghanistan is among the few countries to have drafted a specific directive to regulate national and international private security companies. It has also attempted to control — at least partially — the flow of weapons in coordination with the disarmament and demobilization programme.

⁴¹ Procedure for Regulating Activities of Private Security Companies in Afghanistan, p. 23, available from www.privatesecurityregulation.net/files/Afghanistan_2008_PSCInterimRegulations.pdf, document 7.

73. The Working Group notes, nevertheless, that the adoption of a regulation is not sufficient in itself to ensure adequate oversight. There is a lack of information on incidents and human rights violations committed by PMSCs. The Working Group urges the Government to ensure that the regulatory Board responsible for monitoring the activities of PMSCs systematically registers incidents and violations committed by PMSCs. It encourages the Board to carry out its monitoring functions with due diligence and transparency and calls on UNAMA to provide advice and report on the activities of the Board. The Government should ensure that the Board is sufficiently resourced to implement its functions and should encourage the Afghanistan Independent Human Rights Commission (AIHRC), NGOs and civil society groups and the Afghan people to refer incidents and violations to the Board.

74. The Working Group stresses the responsibility of international forces present in the territory to ensure that the companies they contract do not infringe human rights and are held accountable when violations occur. This is also valid when subcontracting takes place. This principle is of particular importance at a time when the Government of the United States is considering the option of a surge in Afghanistan that will most probably be accompanied by a comparable increase in PMSCs.

75. The Working Group is concerned at the lack of prosecution in Afghanistan and in contracting States of private security contractors suspected of having committed human rights abuses. All States shall ensure that investigations are carried out promptly and efficiently and that those responsible are brought to justice in accordance with international law and sanctioned in a way that is commensurate with the gravity of the crime.

76. The Working Group observed linkages between the presence of a large number of illegal armed groups and the formation of local PMSCs operating with or without licences. Local PMSCs represented an opportunity for former warlords to continue their activities legally.

77. The Working Group raised concerns at the lack of clear criteria and transparency during the licensing process. There were strong allegations that corruption was widespread.

78. The Working Group reiterates the fundamental principle of State control over the use of force. The State should retain control and oversight over the legal use of force and should not hand it over to non-State actors without exercising proper control. In that regard, the Working Group welcomes the willingness of the Government of Afghanistan to gradually increase the State army, police and security force capacity and training in order to ensure the safety and security of its population and of the international community present in its territory, while ensuring respect for the rule of law and human rights. It notes with satisfaction the statement of President Karzai to the effect that PMSCs would have to cease operating in Afghanistan within the next two years and that their operations would be taken over by the army and police.⁴²

⁴² Times Online, 19 November 2009, www.timesonline.co.uk/tol/news/world/afghanistan/article6922760.ece.

VI. Recommendations

79. In the light of the above observations, the Working Group recommends to the Government of Afghanistan that it:

- (a) Investigate all PMSCs operating without licences in the country and take appropriate action to disarm them and other legal action as appropriate;
- (b) Ensure credible investigation of incidents involving casualties committed by private security contractors, prosecution of the perpetrators and adequate remedies for victims;
- (c) Strengthen the investigative capacity of the Afghanistan Independent Human Rights Commission, in particular its special investigation team;
- (d) Establish a credible enforcement mechanism for regulation, with regular oversight and control of the PMSCs that have been licensed;
- (e) Establish an independent, public and easy to access complaints mechanism through which the local population and civilian international actors can submit their complaints regarding any violations committed by PMSCs;
- (f) Establish lines of cooperation between the High Coordination Board and the Ministry of Finance responsible for collecting taxes to avoid corruption and enhance transparency;
- (g) Ensure the speedy adoption of legislation on PMSCs following a broad consultation process and adequate awareness campaign. All types of activities de facto carried out by PMSCs are covered by the new legislation; the Government should also take all necessary steps to ensure its full implementation once a new law is adopted;
- (h) Ensure the process of licensing of PMSCs uses open and transparent procedures;
- (i) Invite DIAG to establish clear guidelines to prevent illegal armed groups from transforming into PMSCs or former warlords being employed as PMSC personnel;
- (j) Consider acceding to the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries;
- (k) The Government is encouraged to seek the assistance of UNAMA in the implementation of these recommendations.

80. The Working Group presents the following recommendations to the international community:

- (a) Ensure that PMSCs contracted by the international community and alleged to have committed human rights violations and other crimes are fully investigated, and ensure that perpetrators are promptly brought to justice;
- (b) Provide necessary advice and resources to the High Coordination Board monitoring the activities of PMSCs to ensure it is carrying out its functions in an effective and transparent manner;
- (c) Ensure adequate oversight of the PMSCs they have contracted, in particular by making regular background checks of PMSCs they hire, by screening PMSC records, in particular regarding any human rights violations, by practising transparent bidding processes and by ensuring transparency through releasing publicly the operative clauses of contracts with PMSCs;

(d) Invite the International Security Assistance Force (ISAF) and all States concerned to publicly report any military and civilian casualties resulting from the activities of PMSCs;

(e) Invite ISAF and all States concerned to publicly release statistics of private military and security casualties;

(f) Invite the international community, in coordination with the Afghan authorities, to develop standard training packages on human rights and international humanitarian law that would be provided to PMSCs by national institutions or local NGOs with the assistance of the United Nations.
