

The Uses of Legal Ambiguity: Issues with Legal Protections of International Workers in Afghanistan

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Abstract

The U.S.-led invasion of Afghanistan in 2001 started a now seventeen-year international intervention in Afghanistan that brought thousands of international troops to the country. At the same time, and less commented on in the media or in international legal studies, these troops have been supported by tens of thousands of international contractors providing private security and other services.¹ In

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Most studies of international contractors focus on those working for security firms and spend much time examining the difference between types of private security contractors and private military contractors (e.g. P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, updated edition, (Ithaca, NY: Cornell University Press) and

December 2009, the U.S. Department of Defense alone funded over 96,000 private contractors in Afghanistan.² Particularly those international contractors and laborers from non-Western countries, have faced a myriad of legal challenges ranging from fines for incorrect visa documentation to long term imprisonment on a variety of charges. In almost all cases, these workers are unsure of their rights and struggle to navigate the legal system.

This article looks at some of the challenges faced by international, primarily non-Western, workers in Afghanistan, the limited legal support available to them and the legal ambiguity that often times surrounded their status. It begins with an ethnographic case study, from one of over two hundred and fifty interviews of contractors conducted by the author. As this case suggests, the maintenance of this legal ambiguity has allowed for further exploitation that primarily benefited the companies employing these workers and, less directly, the countries funding these contracts. Attempts to protect workers, both by the governments of their home countries, and by various international agreements have largely been ineffective. The protections that do exist are often inaccessible to poorer workers from non-Western countries. Ultimately, more robust protections by countries providing funds for international workers are the only way to guarantee legal protections in cases of conflict zones and places, like Afghanistan, where there is a significant international presence, but limited rule of law.

1. A Nepali at War

Yash arrived in Afghanistan in 2006 to work as a cook on a U.S. military base.³ Coming from a poor family in southern Nepal, he like most Nepalis seeking

Elke Krahmann, *States, Citizens and the Privatization of Security* (New York: Cambridge University Press 2010)). Laborers and other types of workers are generally not included in these studies. As an anthropologist, approaching these practices from the ground up, one is immediately struck by the fact that those competing for these positions do not actual differentiate between them (e.g. a young man hoping to be a security guard might very well take a job as an operator in a fuel depot instead). These different workers also tend to face similar legal challenges. For that reason, this article considers the groups together except where there are explicit differences. These differences, however, usually arise more from the different levels of support provided by various companies for their workers than the actual category of worker being discussed. For more, see Noah Coburn, *Under Contract: The Invisible Workers of America's Global Wars* (Palo Alto: Stanford University Press, 2018).

2. Heidi Peters, Moshe Schwartz and Lawrence Kapp, 'Department of Defense Contractor and Troop Levels in Iraq and Afghanistan: 2007–2017,' (Congressional Research Service, Washington DC, (April 28, 2017). This does not include contractors employed by other U.S. government agencies, such as USAID, or contractors working for other governments or international agencies, like the UN. A complete census of contractors in Afghanistan is impossible, in part, because many of these organizations do not report or keep the number of contractors they fund. Of these various funders, however, the U.S. Department of Defense remains the largest. For more, see Coburn 2018.

3. Names and some potentially identifying details of those interviewed for this project have been changed throughout, except for in cases when interviewees specifically requested that their names be included.

work in Afghanistan, relied on a broker to arrange his travel and employment. The broker promised him a good job, paying \$500 a month, in exchange for a payment of approximately \$3,000, according to Yash.⁴

Yash entered Afghanistan on a 30-day visit visa arranged by the broker. The broker arranged for an Afghan associate of his to meet Yash at the airport in Kabul and transport him to a compound where Nepali, Indian, Bangladeshi and other laborers from poor Asian countries stayed while looking for employment. Yash said he was one of the lucky ones at the camp and he found work quickly. Others living there had to wait months before finding employment. Depending upon the arrangements they had made with their brokers, many had to continue paying room and board, sinking deeper into debt while waiting for a job. Typically, these workers would also have to pay a finder's fee to the broker who found them a job. This could vary, but according to many informants was typically around three months' salary.

Once Yash was brought to the military base where he was to be employed by an international contracting company that did catering for the military personnel living there, he was told that his pay would be \$350 a month, instead of the \$500 he had been promised. Yash was not happy about this reduction, but, he said, there was little he could do. Returning home without a job would have brought shame on him and his family. Besides, he was now sitting at the gate of a military base in a country at war, without a permanent visa. He did not speak any of the local languages and had no contacts other than the broker who brought him there. He had been told repeatedly by the broker how dangerous the country was. Where could he go? For a workers like Yash, walking away from a job like this was simply not an option, even when they were lied to or abused. As a result, Yash stayed.

In his interview, Yash explained that working on the base was difficult, but not unbearable. He was a kitchen assistant and his main duties were to haul supplies and clean. He worked seven days a week, ten hours a day, with a 30-minute break for lunch. The night shift, during which he had to keep the kitchen open throughout the night in case a new group of hungry soldiers arrived was much

4. In the case of Yash's experience migrating to and working in Afghanistan, many of the specific details of his experience are difficult to confirm. However, as discussed further in the methodology, during this project I interviewed approximately 250 contractors or individuals associated with the contracting world who largely collaborated the details here. In many instances, I was also able to confirm details through interviews with government officials and journalists, the use of media accounts and policy studies which are included in Coburn 2018.

worse, he said, than work during the day, in part because other workers would attempt to steal supplies from the kitchen and he was punished when this happened.

As a non-Western, low-level employee, Yash was also subject to “security restrictions” that limited his movement and his ability to communicate with others. These appeared to have little to do with actual safety, and had much more to do with the ways in which the company he was working for controlled him and his fellow workers. Yash was not allowed to have a cell phone or computer, since, he was told, this might enable a worker to give information about the base to the Taliban or other insurgents. In reality, Yash said, this did not make much sense since he was restricted to the dining hall, his sleeping quarters and a few other buildings. He had no access to most of the base and, besides, he added, Afghan workers had much more latitude to come and go and seemed far better positioned to have real information about the base. The limits on cell phones and access to the internet cut Yash off from his family and from other Nepalis in the country.

His co-workers were from a mixture of primarily south Asian countries. His boss was an Indian who, Yash said, particularly discriminated against non-Indian workers. At one point, he protested this treatment and his boss beat him repeatedly, while the other workers laughed. On another occasion, Yash got into a dispute with an Afghan worker who threatened to have him killed. Because his supervisors had also been abusive towards him, he didn't feel like there was anyone who would support him if he reported the incident. Yash doubted the Afghan could really do him serious harm while he was on the base, but was still fearful in the weeks that followed.

Yash, however, was less concerned about insurgent attacks or other types of attacks than he was of the Afghan authorities. The firm that Yash worked for had an ongoing dispute with the Afghan government over tax payment, so the Afghan government refused to grant employees of the company new work visas. This did not greatly disrupt things for the firm since there were military flights to the base that went in and out of the country bypassing Afghan immigration. Yash initially never left the base so his lack of paperwork was not a major issue, though it still worried him somewhat. Technically, there was nothing preventing him from leaving the base during his limited time off, but in reality, the lack of a visa prevented him from leaving and doing things like visiting other Nepalis working

for other companies in Kabul.

Later in 2011, when the U.S. government began decreasing the number of troops in the country, the contracting firm that Yash was working for began reducing staff. Yash was given a new position on a different base closer to the center of Kabul. His housing, however, was still on the original base near the airport and so he commuted on a bus across town every day. This was more harrowing he said, since the road to the airport had been attacked on numerous occasions and they were not given the secured armored vehicles that Western contractors had. Beyond these attacks, however, they were also required to pass through numerous police checkpoints and he had heard of cases of other Nepalis who had been arrested for failing to have the correct documents. Once detained it was very difficult for them to secure their release. The Nepali government had no diplomatic representation in the country (their closest embassy was in Pakistan) and so many workers were left paying large fines, which were more likely to have been bribes, in order to secure their release.

Once while driving across town, the police pulled the driver off the bus at a checkpoint and began asking about their paperwork. The driver made some quick phone calls and after some money exchanged hands, they were allowed to pass through. Yash, however, said that he remained terrified in the days that follow. The incident meant that he and his coworkers were even more concerned about leaving the base at all.

Back in Nepal in 2015, describing his experiences in Afghanistan, Yash did not regret his time in Afghanistan, but it certainly did not turn out as he had expected. By the time he had paid his broker and for his various travel costs, he was left with almost no money remaining. He also remained somewhat amazed that he had escaped serious legal issues due to his lack of visa or work permit. All in all, the experience had been incredibly stressful and not particularly financially rewarding.

In many ways, Yash's experience could have been much worse. I interviewed other Nepali, Indian and Turkish workers who ran into more serious legal trouble. One had been detained for almost three years, following a trial which he did not understand, since no interpreter had been present. Others had been detained on more minor charges and were eventually released through legal processes that were almost entirely nontransparent to those involved..

Yash's experience, however, was fairly typical of the non-Western, non-Afghan

workers who did much of the labor of the war in Afghanistan and who existed in a legal limbo that allowed them to be further exploited and taken advantage of.

2. Illegality and Legal Ambiguity

The international intervention that followed the U.S. led invasion in Afghanistan, created a political economy that favored certain groups and markets, largely building on America's increasing neo-liberal approach to war. International and Afghan companies that supported the U.S. military, often times in construction or logistics, benefited most and in 2010, before U.S. spending peaked, an audit calculated that \$17 billion dollars had already been allocated to over 7,000 different companies.⁵ Other sectors benefited more indirectly and the cell phone industry, for example, received more than \$2.6 billion dollars of U.S. investment.⁶ Contracting companies in these sectors profited and this greatly increased the demand for labor. In the meantime, those at the margin of the economy did not benefit from this wealth. In 2006–7, 36% of Afghans did not have the buying power to satisfy basic material needs. Despite a massive influx of funds in 2011–12, 36% of the population was still poor and the bottom 20% had experienced a decline of 2% in the amount of money they had to spend on basic necessities. In contrast with this, the top 20% had seen a 9% increase.⁷

The neo-liberal ideals that shaped the flow of funds into Afghanistan, particularly through the constant outsourcing of key projects, ranging from infrastructure, like roads, to capacity building and training of government officials deeply shaped the ways in which Afghanistan's political economy developed after 2001. While narratives around war often times emphasize the supposed sovereignty of states, in actuality war often increases ambiguity around notions of sovereignty and legality. Charles Tilly's study of state formation in Europe points to the ways in which banditry, crime, local violence and war all contribute to the rise and form of the modern state.⁸ These links continue to tie together both perceived licit and

5. Special Inspector General for Afghan Reconstruction (SIGAR), 'DOD, State and USAID Obligated over \$17.7 Billion to about 7,000 Contractors and Other Entities for Afghanistan Reconstruction During Fiscal Years 2007–2009,' (SIGAR Audit 11–4, Washington, DC, May 27, 2010) and, more generally, see Douglas Wissing, Douglas, *Funding the Enemy: How U.S. Taxpayers Bankrolled the Taliban*, (Amherst, NY: Prometheus Books, 2012) and Noah Coburn, *Losing Afghanistan: An Obituary for the Intervention* (Palo Alto: Stanford University Press, 2016).

6. Special Inspector General for Afghan Reconstruction (SIGAR), 'Afghanistan's Information and Communications Technology Sector: U.S. Agencies Obligated Over \$2.6 Billion to the Sector, but the Full Scope of U.S. Efforts is Unknown' (SIGAR 16–46AR/Afghanistan's ICT Sector, Washington, DC, July 2016).

7. Omar Joya, Claudia Nassif, Aman Farahi, and Silvia Redaelli, 'Afghanistan Development Update,' (Washington, DC: The World Bank, October 2015) 17.

8. Charles Tilly, 'War Making and State Making as Organized Crime,' in *Bring the State Back In*, ed. Peter B Evans,

illicit economies across the globe.⁹

This blurring is even more severe in cases where war practices are outsourced. As John and Jean Comaroff argue in their volume on *Law and Disorder in the Postcolony* that “[w]ith market fundamentalism has come a gradual erasure of received lines between the informal and the illegal, regulation and irregularity, order and organized lawlessness.”¹⁰ Gun running, drugs and other typically illicit practices take advantage of this space between legality and illegality, which Carolyn Nordstrom calls the “shadows” of war.¹¹ These economic activities merge with more mundane economic practices, from construction on military bases with questionable building permits to the employment of private security guards to act as informal militias. Those who are best positioned to take advantage of the unclear legal distinctions between legal and illegal economies are those with the most economic and political power in both of these realms. These figures can then exploit those who do not have the ability to manipulate this boundary. This particularly became the case as more workers migrated to the conflict in Afghanistan.

While Afghanistan has long been more connected to the global economy than commonly presumed,¹² this economic growth in specific sectors connected to global markets and connected it to certain global flows of labor migration in more extreme ways. This is most notable in the influx of private contractors and other workers supporting the war effort. These contractors were neither soldiers, nor militia members, and as such their legal status was often questioned, but rarely clarified.¹³

Existing in legally grey areas was both an advantage and a disadvantage for these workers. In particular, they could take advantage of the rapid growth of contracts that drove the wartime economy. Such economies rely on workers and others with questionable legal status that Daniel M. Goldstein suggest often

Dietrich Rueschemeyer and Theda Skocpol, (Cambridge: Cambridge University Press, 1985).

9. Carolyn Nordstrom, *Shadows of War: Violence, Power and International Profiteering the Twenty-First Century* (Berkeley, CA: University of California Press, 2004).

10. Comaroff, John L., and Jean Comaroff, *Law and Disorder In The Postcolony* (Chicago: University of Chicago Press, 2006) 5.

11. Nordstrom 2004, chpt 7 and 8.

12. See for example, Robert Crews, *Afghan Modern: The History of a Global Nation* (Cambridge, MA: Belknap Press, 2015).

13. Such outsourcing of security to mercenaries is, of course, not new. In America's recent wars it has, however, taken on levels not seen in previous centuries. For more, see Sean McFate, *The Modern Mercenary: Private Armies and What They Mean for World Order* (New York: Oxford University Press, 2015).

appear as the state begins outsourcing many of its traditional functions.¹⁴ These “illegal people” are legally marginalized, but necessary for the privatization of the economy and, particularly, state functions, including the work of wars. Such individuals who exist on the legal margins, their status rarely defined, include those who have built homes illegally on government land, permanent illegal migrants and private security militias. All of these figures exist in a type of legal limbo; they are essential to the functioning of global economies, yet also at risk at any time of arrest, or more often, shake down, intimidation and exploitation. The legal ambiguity of their status makes them vulnerable while also providing a means for companies to continue to keep costs low.

In the case of the outsourcing of much of the war in Afghanistan, international contractors relied on this legal ambiguity to ensure the continued supply of stable, low cost labor, which did not require costly benefits like health insurance and secure housing. This legal ambiguity is in stark contrast with the status of those internationals, such as Western soldiers and officials with international organizations like the UN, who received diplomatic and legal protections. Even more marginal international civilian contractors from Western countries are able to maintain influence at Western embassies and largely able to protect themselves in the economically and politically unstable war economy, while workers from poorer countries can not.

Securing legal protection for non-Western workers is challenging because of their lack of political influence, but also due to difficulties understanding the repercussions of contracting in conflict zones and simply researching these workers.

3. Studying Labor Migration to Conflict Zones

Working in Afghanistan since 2005, I met numerous international workers, like Yash from a variety of countries working for the military, at embassies and even for small NGOs. Despite their near ubiquity, few commented on their presence and as I began to explore their roles in the conflict, I encountered challenges. Interviewing these workers in Afghanistan is almost impossible since in most cases, contracting firms are concerned about receiving negative publicity and it would have put the workers' jobs at risk.¹⁵ As Yash's case indicates, workers

14. Daniel M. Goldstein, 'Illegality: Provocation,' Cultural Anthropology website, <https://culanth.org/fieldsights/557-illegality-provocation> (September 7, 2014).

15. I did interview several contractors in Afghanistan in fall 2016 after having initially interviewed them in Nepal

had few opportunities to speak to anyone other than other workers on their bases. Following a series of incidents around 2007 in Iraq in which private contractors were responsible for civilian deaths, private security contracting companies, in particular began to receive more scrutiny by both the international press and the U.S. government.¹⁶ This made these companies, already secretive in nature, even more concerned with making sure their business practices remained as nontransparent as possible.

Conducting extensive research in Afghanistan beginning in 2005 around a variety of issues concerning the rule of law and governance,¹⁷ the importance of rule of law and access to justice was clear both to me and, increasingly, to the international policy community. Almost all research and programming, however, was aimed at the ability of Afghans to access the legal system. While bilateral security agreements largely dictated the rights of international troops in the country,¹⁸ the rights of international civilian workers were less clear.

In order to better understand the legal challenges for international workers and the wider effect of the war on this population, between the summer of 2015 and fall of 2016, I conducted interviews in Nepal, India, Turkey, the Republic of Georgia, Afghanistan, the U.S. and the U.K. with international contractors and others associated with labor migration to Afghanistan.¹⁹ Many of these workers returned home uninjured, having earned more money than they would have in their countries of origin. A smaller number that I interviewed were extremely abused and exploited. This included multiple workers that had been essentially imprisoned either by the Afghan government or, more informally, held by brokers. None of the two hundred and fifty that I interviewed, however, were clear on what exactly their legal rights were while in Afghanistan and most lived in fear of this legal ambiguity and the unknown legal consequences of their work. While significant work has been done on the importance of migratory labor for

and India, but such arrangements were difficult to make.

16. See Nathan Hodge, *Armed Humanitarians: The Rise of the Nation Builders* (New York: Bloomsbury, 2011) 204–207.

17. See in particular Noah Coburn, 'The Politics of Dispute Resolution and Continued Instability in Afghanistan,' (Washington, DC: USIP, 2011) and Noah Coburn, 'Hybrid Forms of Dispute Resolution and Access to Justice in Afghanistan: Conceptual Challenges, Opportunities and Concerns,' *The Yearbook of Afghan Legal Studies* (Kabul: Hamida Barmaki Organization for the Rule of Law and Max Planck Foundation, 2015).

18. This is not to say that their legal status was not controversial and President Karzai particularly called for the prosecution of U.S. troops in Afghanistan on several occasions. See for example Jack Healy, 'Soldier Sentenced to Life Without Parole for Killing 16 Afghans,' *The New York Times* (August 23, 2013).

19. Funding for this study was provided by a Fulbright Fellowship and a grant from the Gerda Henkel Foundation.

Nepal and other south Asian countries,²⁰ much less has been done on the role of these workers in conflict zones, particularly in connection to America's recent wars in Afghanistan and Iraq. This is despite the fact that Nepal, in particular, has a deep history of providing soldiers first to the East India Trade Company and later the British Imperial Army, the Indian Army, the Singapore Police and other foreign militaries.²¹ Those studies of contractors that have been produced tend to focus on quantitative data and on the financial implications of contracting and, when they do touch on the actual experiences of the contractors themselves, the focus is almost exclusively on Americans and other Western contractors.²² This is despite the fact that the large majority of contractors during the war in Afghanistan were, in fact, non-Western.²³

The fact that there have been so few ethnographic studies done on the lived experience of these contractors has made it even more difficult to imagine policy solutions that might begin to protect these workers.

4. Legal Challenges

Non-western, non-Afghan workers in America's wars in Afghanistan and Iraq faced a series of challenges that other workers did not. In some instances, Western media sources have highlighted some of the most egregious cases of exploitation. These include unsafe working conditions, failure to receive payment and, in some cases, near slavery-type conditions leading to a series of riots in contractor compounds in Iraq.²⁴

Interviews with contractors, however, reveal that while cases of extreme abuse and exploitation did occur, of more concern to the vast majority of contractors was low level harassment, difficulty securing payments, early and unjustified termination of contracts and general unsafe working conditions. Most of these practices were generally allowed to continue because they were not perceived as egregious by those supervising contracting companies and because of the limited

20. See, for example, Tristan Bruslé, 'What Kind of Place is This? Daily Life, Privacy and the Inmate Metaphor in a Nepalese Workers' Labour Camp (Qatar)', *South Asian Multidisciplinary Academic Journal* (2012) 6 and Bandita Sijapati, Ashim Bhattarai and Dinesh Pathak, 'Analysis of Labour Market and Migration Trends in Nepal' (Kathmandu: GIZ and ILO, 2015).

21. See, for example, Mary Katherine Des Chene, 'Relics of Empire: A Cultural History of the Gurkhas: 1815-1987' (Phd dissertation, Stanford University, 1991).

22. See, for example, Singer 2007, McFate 2015 and Krahmann 2010.

23. While numbers fluctuated, non-Western contractors were almost always at least twice the number of Americans being contracted by the U.S. Defense Department (Peters, Schwartz and Kapp 2017).

24. See Sarah Stillman, 'The Invisible Army: For Foreign Workers on U.S. Bases in Iraq and Afghanistan, War can be Hell,' *The New Yorker* (June 6, 2011).

legal recourses that most workers had. Companies in particular took advantage of the lack of oversight and the workers' legally ambiguous status in the country to ensure continued imbalances that favored contracting companies.

Yash's case is exemplary of many of the challenges that these workers faced. Workers like Yash were never sure of their legal status and, in fact, there was ambiguity and disputes between contracting companies and the Afghan government over things such as the requirements of workers to have visas and pay taxes. A U.S. government audit conducted largely in response to this ambiguity in 2013 (after the peak of migration to Afghanistan for labor) concluded: "The Afghan government requires contractors to receive annual visas and work permits for each non-Afghan employee working in Afghanistan. While some bilateral agreements between various U.S. government agencies and the Afghan government may exempt certain U.S. personnel from requirements to obtain visas, other agreements are silent on the matter."²⁵ Despite this, through this period for workers like Yash there was virtually no clarity around their status and need for documents like work permits. Some larger companies had made arrangements with the Afghan government and many of those workers on large international bases, who rarely actually left these bases, had no work permits, while a few others did. In several instances I interviewed contractors who were assured by their employers that they did not need visas, when, in fact they did. In other instances employers seemed to encourage the ambiguity. For workers, the major fear was that if they were stopped off the base, they would be susceptible to arrest or simply shake down.²⁶

As a result, instead of using terms like legal or illegal, Yash said that his position had been "set" by a broker and the contracting company. This term implied an arrangement that usually worked around legal structures and was based upon personal relations. In Yash's case, he was almost always afraid of either arrest or deportation. Since his company refused to grant him a visa or clarify his legal status, Yash never left the base that he worked except in company vehicles and even then he was constantly worried. Others, however, had even more difficulties and some companies would take workers' passports, which prohibited them from leaving their compounds.

25. Special Inspector General for Afghan Reconstruction (SIGAR), 'Alert 13-3,' SIGAR letter to Congressional Committees, <https://www.sigar.mil/pdf/alerts/SIGAR%20Alert%2013-3.pdf> (June 28, 2013) 2. The report also noted a conflicting set of fees and timing for processing various work documents.

26. This was true, though to a much lesser extent, of contractors from Western countries, which is discussed further below.

All this greatly restricted the movement of these workers and ensured that they could not search for new work elsewhere, meet up with other Nepalis and do things like seek medical attention beyond what was available on their compound. Accounts by workers make it clear that these brokers and the contracting companies they worked with further benefited greatly by emphasizing the danger that the workers were in and by creating a climate of fear. This meant that workers like Yash were willing to put up with abuse and exploitation on levels that normally they would have resisted since their supervisors could at any moment essentially remove them or, worse, hand them over to Afghan police.

Similarly, workers had no real control over their living conditions, particularly around their own security. This became a more public issue after it was discovered that the 13 Nepali guards who were killed on their way to work at the Canadian embassy were unarmed at the time of the attack.²⁷ Many others that I interviewed described being left in unsafe conditions, in some instances with contracting companies cutting back on weapons or other security measures to save on costs.²⁸ Nepalis working at many embassies, for example, were provided with weapons while on duty, but were required to hand them over and travel unprotected back to their living quarters.

With no way to file grievances in most companies (and even in companies that had such mechanisms, poor workers were convinced that such a complaint would lead to termination), migrant workers were highly reliant on the group of brokers from Afghanistan, Nepal, India and various other countries who facilitated their contracts. These brokers transported workers between the airport, informal labor camps and bases where the laborers worked. They also arranged contracts and connected them with firms. These individuals in turn often exploited workers, like Yash, demanding more money in certain instances and essentially handing workers over to the Afghan police in cases when they could not pay. In several instances, interviewees gave accounts of brokers demanding cash, cell phones and other valuables, before driving the worker to their new place of employment, essentially robbing them of all that they had in exchange for a job.

The problem for Yash and others was that when they were exploited by either

27. The Himalayan Times, 'Lift the Ban For Foreign Job-Seekers,' <https://thehimalayantimes.com/business/lift-ban-afghanistan-foreign-job-seekers/> (August 24, 2016).

28. Generally, laborers who had not been fully informed of the dangers of their job before arriving in Afghanistan were more critical of these practices than security contractors who generally assumed there would be certain risks associated with their employment.

brokers or by the companies they worked for, there were few laws to protect them and, even when there were, the justice system was generally inaccessible to these workers.

5. The Limits of Legal Protection

Workers from Nepal and other countries in the Global South face numerous challenges when working abroad and their unstable legal status is often linked to the ability of employers and brokers to take advantage of them. In countries with more developed legal systems, such as many in the Gulf for instance, these workers are rarely able to take advantage of local legal protections, even when these have technically been codified.²⁹ In conflict zones like Afghanistan, accessing the legal system is even more of a challenge. None of the contractors I interviewed had been successful in using the Afghan legal system to correct any of the abuses they faced. In fact, the overwhelming majority viewed the Afghan justice system as corrupt and more likely to further exploit them in attempts to extract bribes, than to provide them with any sort of protection. Instead, workers felt the only potential avenues for protection were through the various internationals working in Afghanistan and, even these approaches were challenging.

For international workers on contracts funded by the U.S. government, there were certain avenues of legal protection that were, unfortunately, rather difficult to access. American laws on issues ranging from human trafficking to unsafe work conditions were often not applicable in Afghanistan. One of the exceptions to this and a key protection for international workers on contracts funded by the U.S. is the Defense Base Act.

The Defense Base Act outlines compensation for workers who are killed or injured while working on U.S. funded projects. It was established in the wake of World War II, meant primarily to provide protection for U.S. civilians working on Marshal Plan projects in Germany. The wording of the act, however, is expansive and does not specify that the worker need to be an American citizen. This means that contractors, Nepalis and others in Afghanistan and Iraq who were working on projects funded by U.S. government dollars were protected by the act. This is technically still true even if they were not working directly for a U.S. agency, but

29. Bandita Sijapati, Sarah Paoletti, Eleanor Taylor-Nicholson and Bassina Farbenblum, 'Overseas Assistance for Nepali Migrant Workers Seeking Justice Abroad,' Police Brief (Kathmandu: Centre for the Study of Labour and Mobility, 2014).

were on a sub-contract or even a sub-sub-contract.³⁰

In the case of death on the job, immediate family members are entitled to compensation based on a complex formula that include the salary of the contractor, the number of years of work they would have been expected to do, including potential salary increases. For twelve Nepalis killed in Iraq, primary beneficiaries collected some \$223 dollars a month for the rest of their lives or around \$150,000 for those requesting an immediate pay out.³¹ In other cases, these figures could be much higher and I interviewed one lawyer who represented an Iraqi family recently that received more than a million dollars through a settlement he arranged. These cases of death while working for the U.S. government all garnered media attention and received international legal assistance. This was not the case for more common instances of injury, several of whom I interviewed and none of whom had received compensation through the act.

While the Defense Base Act provides a potential road for recourse and legal protection for international workers employed by U.S. funds, in many ways the law is more façade than true legal protection. Companies are expected to self-report injuries or deaths to the U.S. Department of Labor when they occur. There are not, however, mechanisms for making sure that this happens and workers who are not reported might receive little or no compensation.³²

The reality of the Defense Base Act is that it is almost impossible for foreign nationals to invoke the law. As a lawyer I interviewed in Washington pointed out, if a worker is denied the benefits laid out in the Defense Base Act, the worker need a lawyer to file a claim in the U.S. None of those I interviewed knew anything about the Defense Base Act and the amounts of money that a few had received as compensation were so low that it suggested that the payments had been made simply aimed at preventing the worker from speaking to a journalist or someone else who might generate negative publicity for the contracting company. The

30. The cases involving the Defense Base Act that I collected were primarily against “primary” contractors, or those contracting directly for the U.S. government. I did hear of one case where the law was applied to a sub-contractor, but it is not clear whether it has been applied to sub-sub-contractors and those further down the contracting ladder, though theoretically it is possible.

31. Thakuri, Rajendra, ‘Finally, Justice Served to Families of 12 Nepalis Killed in Iraq,’ Nepal America Legal Information Center, <https://anlus.wordpress.com/2008/05/22/finally-justice-served-to-families-of-12-nepalis-killed-in-iraq/> (n.d.).

32. A lawyer I interviewed suggested that since companies were required to have Defense Base Act insurance, failure to report incidents might have more to do with their desire to avoid scrutiny after an attack rather than the financial cost of making these payments.

lawyer I interviewed in Washington had taken on some high-profile Defense Base Act cases, but he struggled getting into contact with those who had been injured. Those in Nepal similarly had no real means of finding the lawyer and several who I interviewed who had been injured described being rushed back to their home countries, perhaps so they could not speak with any journalists. In several cases, the workers were provided with virtually no paperwork about their injuries, despite having paperwork from the companies about a wide range of issues from before their injury. While not conclusive, this certainly seemed that it could be in part to make sure the workers had little documentation of their injury.³³

Other legal attempts within the U.S. legal system to protect non-U.S. workers have been even less successful. Following some media criticism of the treatment of contractors, the U.S. Congress commissioned a study of the role of US funds in encouraging migration that led to exploitation. It eventually concluded that “globalization of the world economy has spurred the movement of people across borders, legally and illegally, especially from poorer countries, to fill low-skill jobs in support of the U.S. contingencies in Iraq and Afghanistan. Exploitation includes forced labor, slavery, and sexual exploitation.”³⁴

Despite this, even in cases in which crimes occur, it is difficult to bring an actual case against the companies employing the contractors. One lawyer in Washington I contacted described how in one case he had been involved in a judge acknowledged that human trafficking occurred and lamented that he was still required to throw the case out: if a crime did not involve Americans and was not committed on American soil, it was nearly impossible to proceed with a case, even if the contractor had been employed by U.S. funds when the crime occurred. As if to further emphasize the difficulty of providing any real protection for international workers, several government reports highlight the difficulty that the U.S. government had monitoring or even simply maintaining a count of the number of contractors employed by the U.S. government. The Department of Defense has generally reliable numbers on contractors on Defense contractors, but the Special Inspector General for Afghan Reconstruction, the U.S.’s lead oversight body for U.S.-funded reconstruction in Afghanistan after citing Department of Defense numbers, complained that: “We could not obtain similar data for the number of

33. For more, see Coburn 2018.

34. Commission on Wartime Contracting in Iraq and Afghanistan, “Transforming Wartime Contracting: Controlling Costs, Reducing Risks,” Final report to Congress (Arlington, VA: Commission on Wartime Contracting, August 2011) 92

non-Afghan contractors supporting State and USAID.”³⁵ Instead other agencies either do not keep track of numbers or ask contracting companies to self-report. This also tends to be true of contractors employed by government funds from other ISAF coalition countries. Unsurprisingly, while media accounts of certain extreme cases of misdeeds in 2007 spurred Congressional hearings, contractors themselves reported no change in practices on the ground during this period and suggested that companies primarily got better at avoiding media criticism.³⁶

While all civilian contractors in Afghanistan faced certain legal challenges, those from Western countries often had access to diplomatic support from their home embassies, this was in sharp contrast with those from countries with a less robust diplomatic presence.

6. Issues with Countries from the Global South in Protecting Workers

For workers like Yash, there was little support available while they were in Afghanistan from their countries of origin. The Nepali government, for example, has no permanent diplomatic presence in Afghanistan and instead, the Nepali embassy in Pakistan provided representation for Nepalis in Afghanistan, Pakistan, Iraq and Iran.³⁷ According to the cases I gathered of Nepalis who were arrested in Afghanistan, most described being provided with little to no legal support.³⁸ This was even more severe if the case occurred outside of Kabul. One Nepali I interviewed had been charged with espionage in a case that he described as a set up by a rival employer. He was sentenced to 18 years in prison without even being provided with a translator.

In a less severe, but comparative case I looked at several instances where the Afghan government raided restaurants in Kabul serving alcohol to foreigners. In one instance American and Turkish contractors were arrested together: the American was released before the night was over, while the Turk remained in prison for several months.³⁹ In other interviews, I heard of Nepalis who were

35. SIGAR June 28, 2013, 12

36. Ann Hagedorn, *The Invisible Soldiers: How America Outsourced our Security* (New York: Simon and Schuster, 2014). This in some ways had an adverse effect by making contractors more secretive and nontransparent, further isolating their workers.

37. Those contractors I interviewed from countries with an active diplomatic presence, such as India and Turkey, often times had more legal options, but many other countries supplying workers, including Sri Lanka, Bangladesh, Kenya, Fiji and others did not have such a presence.

38. Technically they should have been supplied with a defense attorney, but the overtaxed, under-resourced Afghan legal system often did not supply these even for Afghan citizens.

39. Laura King, 'Afghan Enforcement of Liquor Ban Rankles Foreigners,' *The Los Angeles Times*, <http://articles.latimes.com/2010/apr/26/world/la-fg-afghan-booze-20100426> (April 26, 2010).

similarly detained for extended period.

In some of these instances, individual diplomats reached out to assist Nepalis in need and I examined one case in particular where the Nepali ambassador to Pakistan was instrumental in securing the release of a Nepali laborer who had been imprisoned. In general, however, workers like Yash relied on personal contacts to secure such support and ordinary workers received no legal assistance from their countries of origin. To compound the issue, workers had no knowledge whether support was available and, often, workers were concerned that government involvement would only get them into more problems and potentially mean that they would lose their employment.

The Nepali government did not provide much additional support or even information for Nepalis at home in Nepal. In fact, most of the information provided was confusing and, at times, contradictory. At times, particularly after the killing of Nepalis working at the Canadian embassy, Nepalis were “banned” from working in Afghanistan. In actuality, these prohibitions rarely lasted and were not enforced - even at the height of the crisis, Nepalis could still cross into India by land with no paperwork, then fly from Delhi to Kabul. The Nepali government’s Department of Foreign Employment’s website had a list of countries where Nepalis could technically work and where they could not. Afghanistan was on the list of permitted countries when I visited their offices in late 2015. The only two countries that were noted as banned at that point were Libya and Iraq. However, other countries were completely left off the list, such as Guatemala, while Costa Rica and Panama were there. Congo listed as ok, but Zimbabwe was not on the sheet at all.⁴⁰ It was easy to see how confusing the process was for poor workers and this only made them more susceptible to brokers and other traffickers.

The annual report from the Department of Foreign Employment also listed workers heading to Afghanistan as receiving 605 permits the previous year (598 for men and 7 for women).⁴¹ This number was thousands lower than the number of Nepalis actually working there, suggesting a systematic avoidance of the government registration system. This was confirmed in interviews and most Nepali workers I spoke with said that they found it easier to attempt to completely

40. Government of Nepal Ministry of Labour and Employment, ‘Recognized Countries,’ Department of Foreign Employment (Kathmandu: n.d.).

41. Government of Nepal Ministry of Labour and Employment, ‘Year Report FY 2070–71,’ Department of Foreign Employment (Kathmandu: n.d.).

avoid any interactions with the Nepali government regarding their work abroad. A few workers I interviewed did secure work permits to work abroad, but others managed to avoid this by either lying about where they were going at the airport in Kathmandu, taking a land exit to India or paying a small bribe. Since there were no direct flights between Kathmandu and Kabul, most could simply claim they were headed elsewhere at the airport to avoid further scrutiny. Almost all of the workers felt that instead of providing real protections the Nepali government structures were mostly aimed at extracting small bribes from them, leaving them feeling almost entirely alone in struggling in the legally ambiguous system.

7. International Cooperative Attempts at Worker Protection

While attempts by the individual governments of countries providing the funds for these contractors and attempts by the governments of the countries supplying the laborers have largely failed to provide legal protection for international workers in conflict zones, there have also been international, multi-organizational attempts at more cooperative approaches to worker protection, particularly in the security sector.

The most significant of these was a gathering in Switzerland in 2008 of government officials from several of the key funder governments and company representatives from several major security companies, including G4S and Aegis. This group drafted the “Montreux Document,” an agreement outlined the legal obligations of private security firms and laid out a code of ethics in an attempt to try and create business norms.⁴² The pact prohibited signatories from some of the most egregious practices associated with private security contracting. While many of the ideals and practices laid out in the doctrine would make work conditions better for private security contractors in conflict zones better, there is no way for signatories to enforce or even monitor the guidelines outlined in the document. (The fact that the Defense Base Act has not been implemented more rigorously suggests that firms are extremely unlikely to self-regulate in ways that would be detrimental to their business practices.) This has led some analysts to conclude that such attempts were little more than the industries attempt to pacify its critics and generate a more positive media image.⁴³

42. See International Committee of the Red Cross (ICRC), ‘The Montreux Document’ (Geneva, Switzerland: ICRC: August 2009).

43. For a complete account of the issues surrounding the signing of the Montreux Document, see Hagedorn 2014, chapter 9 and 11.

Furthermore, the Montreux Document and other attempts at reforming contracting practices and assuring certain legal protections for workers addresses only those contractors working for private security firms. While outsourcing security to this group of workers in many ways present the most legal concerns around sovereignty in this era of neo-liberal intervention, the number of non-security contractors will continue to grow and in some ways be even more challenging to monitor since these workers are employed by such a wide range of companies receiving their funds from numerous donor countries and international organizations, like the UN..

8. The Future of Worker Protection in Afghanistan and Beyond

While the number of international contractors in both Afghanistan and Iraq has declined significantly in recent years, the neo-liberal practices of outsourcing that have become embedded in international interventions is likely to continue. As Western countries become increasingly concerned with the political costs of military casualties and with the economic costs of paying higher wages, outsourcing companies will continue to hire both security contractors and workers from the Global South. These workers will be entering a world of legal ambiguity where they have few protections and where brokers and the companies hiring them will actually be profiting from their unstable legal status.

Such processes, however, are not purely inevitable and smart, sensitive policies can help ensure the protection for workers in a range of ways.

As this article has argued, putting the onus on either contracting companies or the countries supplying the laborers is unlikely to provide better protection for workers. Companies do not have an incentive to make their systems transparent since they are competing against other firms and actually benefit from some of the legal insecurity that their workers are subject to. The governments of the countries supplying the workers often times lack both the economic and diplomatic resources to provide real support. Thus far, attempts at international cooperation in setting up standards for the protection of international workers have largely failed because they primarily rely on companies to self-report.

It is these donor governments which are the key to reform and the promotion of legal protections. Already, various governments handle the outsourcing of private security in very different ways.⁴⁴ A more collaborative effort between these

44. See Krahmann 2010 for some of the differences between the U.S., the U.K. and Germany in their security contracting practices.

governments to create minimum standards of legal protection is an important first step. Even more important, however, is pro-active monitoring of contracting companies and their treatment of their workers. The U.S. Special Inspector General for Afghan Reconstruction provides one such model for this work, but most of their focus has been on financial auditing. More attention should be paid to the actual treatment of workers and transparency around their legal rights. Without some effort, donor countries that are continuing to claim that they are working to protect human rights, while not ensuring the rights of those working for them, will only appear more hypocritical and make these international efforts more difficult.