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## مجلس حقوق الإنسان

الدورة الخامسة عشرة

البند ٣ من جدول الأعمال

تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

### تقرير الفريق العامل المعني بمسألة استخدام المرتزقة كوسيلة لانتهاك حقوق الإنسان وإعاقة ممارسة حق الشعوب في تقرير المصير

الرئيس - المقرر: شايستا شامين

إضافة

البعثة الموفدة إلى الولايات المتحدة الأمريكية (٢٠ تموز/يوليه إلى ٣ آب/أغسطس ٢٠٠٩)\*

موجز

بدعوة من حكومة الولايات المتحدة الأمريكية، قام الفريق العامل المعني بمسألة استخدام المرتزقة كوسيلة لانتهاك حقوق الإنسان وإعاقة ممارسة حق الشعوب في تقرير المصير بزيارة إلى الولايات المتحدة الأمريكية في الفترة من ٢٠ تموز/يوليه إلى ٣ آب/أغسطس ٢٠٠٩. وأتاحت هذه الفرصة للفريق العامل إجراء حوار بناء مع الحكومة وغيرها من أصحاب المصلحة بشأن المسائل المتصلة بولايته.

\* يُعمَّم موجز هذه الوثيقة بجميع اللغات الرسمية. أما التقرير نفسه المرفق بهذا الموجز فيعمَّم باللغة الإنكليزية فقط.

إن الحكومة الأمريكية تعتمد كثيراً على القطاع العسكري والأمني الخاص في القيام بعملياتها العسكرية في كل أنحاء العالم. وتهيمن الشركات العسكرية والأمنية الخاصة من الولايات المتحدة على هذا القطاع الجديد، الذي يدر دخلاً سنوياً يُقدر بما بين ٢٠ و ١٠٠ مليار دولار. وقد بلغ العدد الإجمالي للمتعهدين ٢٤٤ ٠٠٠ في عام ٢٠٠٩. وتشكل القوات من الجهات الخاصة نحو نصف مجموع القوات الأمريكية المنتشرة في أفغانستان والعراق.

وفي السنوات القليلة الماضية، ورداً إلى حد كبير على حوادث تورطت فيها شركات عسكرية وأمنية خاصة، اعتمدت الحكومة والكونغرس في الولايات المتحدة تدابير شتى تزيد مراقبة الحكومة لهذه الشركات وتوسع نطاق الولاية القضائية وتوضحها فيما يتعلق بالجرائم التي يرتكبها العسكريون من الجهات الخاصة والموظفون الأمنيون العاملون في الخارج. ويرحب الفريق العامل باعتماد هذه التدابير، التي حسّنت الوضع، ولكنه يلاحظ أنه لا يزال ثمة الكثير مما ينبغي القيام به لكفالة المراقبة الفعالة والمساءلة وسبل الانتصاف القانوني عندما تقع انتهاكات لحقوق الإنسان.

وبغرض تحسين الحكومة الأمريكية لآلياتها للمراقبة وكفالتها لمناخ يتسم بالمساءلة، يوصيها الفريق العامل، ضمن جملة أمور، بما يلي: (أ) أن تدعم قانون الكف عن إسناد مهمة ضمان الأمن إلى القطاع الخاص، الذي يحدد بوضوح المهام التي تقع بحكم طبيعتها على عاتق الحكومة ولا يجوز إسنادها إلى القطاع الخاص؛ (ب) أن تلغي الحصانة الممنوحة للمتعهدين الذين يضطلعون بأنشطة في بلدان أخرى بموجب اتفاقات ثنائية؛ (ج) أن تجري التحقيق الفوري والفعال في انتهاكات حقوق الإنسان التي ترتكبها الشركات العسكرية والأمنية الخاصة وأن تلاحق الجناة المزعومين قضائياً؛ (د) أن تحرص على ألا تُسند مهمة مراقبة المتعهدين العسكريين والأمنيين من الجهات الخاصة إلى شركات عسكرية وأمنية خاصة؛ (هـ) أن تنشئ نظاماً خاصاً لمنح الرخص الاتحادية للشركات العسكرية والأمنية الخاصة فيما يتعلق بأنشطتها في الخارج؛ (و) أن تضع إجراءً لفحص عملية منح العقود للشركات العسكرية والأمنية الخاصة؛ (ز) أن تكفل انطباق القوانين الجنائية الأمريكية على الشركات العسكرية والأمنية الخاصة التي تتعاقد معها الحكومة للقيام بأنشطة في الخارج؛ (ح) أن ترد على الرسائل العالقة الواردة من الفريق العامل، بما في ذلك قضيته الطويلة الأمد المتعلقة بالسيد لويس بوسادا كاريلز.

## Annex

### **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 the United States of America (20 July to 3 August 2009)**

#### CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction .....	1-5	4
II. Legal status of private military and security companies .....	6-8	4
III. Mapping and activities of private military and security companies (PMSCs).....	9-23	5
IV. Oversight of PMSCs and applicable jurisdiction .....	24-74	8
A. Oversight mechanism of the Department of Defense.....	25-29	9
B. Oversight mechanism of the State Department.....	30-37	10
C. Inter-agency coordination .....	38-40	12
D. Audits, inspections and investigations .....	41-51	12
E. Laws governing the conduct of PMSCs and their personnel supporting military operations .....	52-67	14
F. Recent initiatives by Congress representatives .....	68-71	17
G. Labour laws applicable to security contractors.....	72-74	18
V. Impact on human rights.....	75-83	19
A. Lack of transparency .....	76-79	19
B. Challenges to accountability .....	80-83	20
VI. Specific cases of abuses .....	84-96	21
A. Xe/Blackwater .....	84-91	21
B. CACI International, Inc. and L3 Services/Titan .....	92-96	23
VII. Conclusions and recommendations .....	97-101	24

## I. Introduction

1. At the invitation of the Government of the United States, 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 visited the United States from 20 July to 3 August 2009. It was represented by its Chair, Shaista Shameem, and José-Luis Gómez del Prado.<sup>1</sup>

2. The Working Group is grateful to the United States Government for its cooperation throughout the visit, which demonstrated the willingness of the Government to engage with the Working Group in a constructive dialogue on the oversight and accountability of private military and security companies (PMSCs) to ensure the effective protection of human rights.

3. The Working Group notes with satisfaction that in the last few years and especially following the involvement of PMSCs in the abuses in Abu Ghraib and in the 2007 shooting incident Nisoor Square in Iraq, the Government of the United States and Congress have taken serious corrective actions to improve the oversight over and the accountability of PMSCs, including through the adoption of the necessary legislations and regulations. The Working Group welcomes the adoption of these new rules. It also notes with satisfaction a change in attitude of the Administration, from a perceptible sense of effective denial regarding any wrongdoing by the security industry, towards a more rigorous debate around the role of PMSCs and the need for oversight.

4. The Working Group held discussions in Washington DC and New York City with senior officials from the Government of the United States, Congresswoman Jan Schakowsky and senior staff of other members of Congress who sit on Congressional Committees, lawyers, journalists and civil society organizations, the United States trade association of PMSCs as well as with representatives of PMSCs themselves.

5. For the purpose of this report, the Working Group defines a PMSC as a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities.

## II. Legal status of private military and security companies

6. Under international humanitarian law, if private military and security contractors do not directly participate in hostilities, they are considered civilians. As such, they are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.<sup>2</sup>

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<sup>1</sup> The Working Group was established pursuant to resolution 2005/2 of the Commission on Human Rights (para. 11). It is composed of five independent experts serving in their personal capacities. The members are Shaista Shameem (Chairperson-Rapporteur from March 2009 to March 2010, Fiji), José Luis Gómez del Prado (Spain), Amada Benavides de Pérez (Colombia), Alexander Nikitin (Russian Federation) and Najat al-Hajjaji (Libyan Arab Jamahiriya).

<sup>2</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross, 2009), p. 37.

7. However, the legal status of PMSC personnel performing functions closely linked to military operations – such as analysing intelligence data, maintaining weapon systems, and resupplying forward-based forces – is less certain.<sup>3</sup> Those performing such functions could be deemed to take an active part in hostilities, in which case they would no longer qualify as non-combatants. A contractor who participates in hostilities could therefore be charged with both violations of the laws of war and violations of the relevant domestic law.

8. In situations of non-armed conflict, the legal status of private military and security contractors is governed by international human rights laws and relevant national laws. The Human Rights Committee has stated that “the contracting out to PMSCs of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under international human rights law”.<sup>4</sup>

### **III. Mapping and activities of private military and security companies (PMSCs)**

9. The United States has relied and continues to rely heavily on private military and security contractors in conducting its military operations. The State used private security contractors to conduct narcotics intervention operations in Colombia in the 1990s and recently signed a supplemental agreement that authorizes it to deploy troops and contractors in seven Colombian military bases.<sup>5</sup> During the conflict in the Balkans, the United States used a private security contractor to train Croat troops to conduct operations against Serbian troops. Nowadays, it is in the context of its operations in Iraq and Afghanistan in particular that the State is massively contracting out security functions to private firms. Though the Government of the United States is the main employer of PMSCs, companies are also providing their services to international organizations, non-governmental organizations (NGOs), private companies and individuals. Estimates of the size of the industry vary from US\$ 20 billion a year as stated by the industry<sup>6</sup> to US\$ 100 billion a year according to some researchers.<sup>7</sup>

10. Despite attempts to increase coordination between agencies employing PMSCs, the Government of the United States could not provide comprehensive figures regarding private military and security companies it has under contract. Each agency has its own figures and the intelligence agencies do not provide any figures. The Department of Defense figures provided to the Working Group indicate that in Iraq and Afghanistan alone, the Department employed 218,000 private contractors (all types) while there

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<sup>3</sup> Congressional Budget Office, “Contractors’ support of U.S. operations in Iraq”, August 2008, p. 22. Available from [www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf](http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf).

<sup>4</sup> *Official Records of the Economic and Social Council, Fifty-eighth Session, Supplement No. 40* (A/58/40 (vol. II)), p. 357, para. 7.2.

<sup>5</sup> Supplemental Agreement for Cooperation and Technical Assistance in Defense and Security between the Governments of the United States of America and the Republic of Colombia, signed on 30 October 2009.

<sup>6</sup> Interview with Doug Brooks, president of the Association of the Stability Operations Industry.

<sup>7</sup> Barry Yeoman, “Soldiers of good fortune”, *Mother Jones* (May/June 2003). Available from <http://motherjones.com/politics/2003/05/soldiers-good-fortune>.

were 195,000 unformed personnel.<sup>8</sup> According to the figures, about 8 per cent of these contractors are armed security contractors, i.e. about 20,000 armed guards. If one includes other theatres of operations, the figure rises to 242,657, with 54,387 United States citizens, 94,260 third-country nationals and 94,010 host-country nationals.<sup>9</sup>

11. The State Department relies on about 2,000 private security contractors to provide United States personnel and facilities with personal protective and guard services in Afghanistan, Iraq, Israel and Pakistan, and aviation services in Iraq.<sup>10</sup> The contracts for protective services were awarded in 2005 to three PMSCs, namely, Triple Canopy, DynCorp International and the U.S. Training Center, part of the Xe (then Blackwater) group of companies. These three companies still hold the State Department protective services contracts today.<sup>11</sup>

12. The Working Group also found that the Government of the United States has a very restrictive definition of what constitutes a PMSC, restricting consideration to those companies that provide guard services and protection for persons or physical objects. For example, the Government does not consider a company such as CACI, which provided contracted interrogators at the prison run by the United States in Abu Ghraib, Iraq, a private security company. The CACI website states it is an information technology company - it is therefore not included in the figures provided. Such a company, however, falls within the Working Group definition of a PMSC because of the specialized service it supplies in respect of the United States military activity in Iraq.

13. In other cases the involvement of PMSCs can be seen as controversial and therefore contracts have not been disclosed. This is the case in Pakistan, where despite allegations in the media, both Xe (Blackwater) and the Government of the United States denied that the company operated in Pakistan until it was finally acknowledged by the Secretary of Defense. However, the Secretary of Defense did not provide information on the type of services it is providing.<sup>12</sup>

14. PMSCs are typically hired to provide personnel protection, site security and convoy security for military and civilian personnel working for international institutions, Governments or private entities. In addition, PMSCs may be involved in policing and security protection services, strategic planning, intelligence collection and analysis, interrogation of detainees and covert operations.

15. According to Government policy, the United States bars security contractors from engaging in “combat” or in “offensive” military operations and from performing

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<sup>8</sup> Moshe Schwartz, “Department of Defense contractors in Iraq and Afghanistan: background and analysis” (Congressional Research Service, 14 December 2009), summary.

<sup>9</sup> Department of Defense, presentation, “Contractors on the battlefield”, Gary Motsek, 27 May 2009.

<sup>10</sup> United States of America, “State Department: diplomatic security’s recent growth warrants strategic review” (Government Accountability Office, November 2009), p. 10.

<sup>11</sup> Powerpoint presentation by Charlene Lamb, Deputy Assistant Secretary and Assistant Director for International Programs, 20 July 2009.

<sup>12</sup> Robert Gates, interview on Express TV in Pakistan, 21 January 2010. Transcript available from [www.defense.gov/transcripts/transcript.aspx?transcriptid=4542](http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4542).

inherently governmental functions.<sup>13</sup> Contractors are limited to a “defensive response to hostile acts or demonstrated hostile intent”.<sup>14</sup>

16. However, the situation on the ground is often very different from these policy statements. Contractors in Iraq and Afghanistan are tasked to protect military facilities in combat zones where there is a strong likelihood that they will have to engage in combat. In such cases, the Department of Defense advises only that “contracts shall be used cautiously in contingency operations where major combat operations are ongoing or imminent”.<sup>15</sup>

17. According to a congressional report on the behaviour of Xe/Blackwater in Iraq, Xe/Blackwater guards were found to have been involved in nearly 200 escalation-of-force incidents that involved the firing of shots since 2005. Despite the terms of the contracts which provided that the company could engage only in defensive use of force, the company reported that in over 80 per cent of the shooting incidents, its forces fired the first shots.<sup>16</sup>

18. The Government of the United States has not yet clearly defined what constitutes “inherently governmental functions”. The existing definition states that that an inherently governmental function is “a function so intimately related to the public interest as to require performance by federal Government employees”.<sup>17</sup> Given the concerns that the lack of clarity regarding this definition might have led to the contracting out of inherently governmental functions by the Department of Defense and other agencies, Congress passed legislation in September 2008 requiring the Office of Management and Budget to develop a single consistent definition of inherently governmental functions.<sup>18</sup>

19. The Department also specifically authorizes its contractor personnel to “conduct or support intelligence interrogations, detainee debriefings, or tactical questioning” when such functions are specified in the contract. However following the many accounts of the participation of contractors in detainee abuses in Abu Ghraib, Congress, in the National Defense Authorization Act for Fiscal Year 2010, recommended a specific ban on the use of contractors in the interrogation of detainees.<sup>19</sup> However, the Executive Office of the

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<sup>13</sup> For more on “inherently governmental functions” in the United States, see para. below.

<sup>14</sup> United States, Department of Defense instruction No. 3020.50 of 22 July 2009, p. 12.

<sup>15</sup> Department of Defense instruction No. 3020.41 of 3 October 2005, para. 4.4.2.

<sup>16</sup> “Additional information about Blackwater USA”, memorandum dated 1 October 2007 from Majority Staff to the Members of the Committee on Oversight and Government Reform, p. 2. Available from <http://i.a.cnn.net/cnn/2007/images/10/01/blackwater.memo.pdf>.

<sup>17</sup> United States, Federal Activities Inventory Reform Act of 1998 P.L. 105-270, 112 Stat. 2382, sect. 5, para. 2(a).

<sup>18</sup> J. Luckey, V. Grasso, K. Manuel, “Inherently governmental functions and Department of Defense operations: background, issues, and options for Congress”, Congressional Research Service, 14 September 2009, p. 1.

<sup>19</sup> S. 1390, Sec. 823, p. 396.

President explicitly rejected this limitation, stating that “in some limited cases, a contract interrogator may possess the best combination of skills to obtain critical intelligence”.<sup>20</sup>

20. The Act eventually reflected a compromise: it provides that “no enemy prisoner of war ... or any other individual who is in the custody or under the effective control of the Department of Defense ... may be interrogated by contractor personnel”. However, contractor personnel with proper training and security clearances may be used as linguists, interpreters, report writers and information technology technicians in interrogations provided (a) they are covered by the same rules governing detainee interrogations as Government personnel performing the same interrogation functions and (b) that Department of Defense personnel will oversee the contractor’s performance. The prohibition may be waived if such a move is vital to the national security interests of the United States.<sup>21</sup>

21. The Working Group received information from several sources that up to 70 per cent of the budget of United States intelligence is spent on contractors.<sup>22</sup> These contracts are classified and very little information is available to the public on the nature of the activities carried out by these contractors.

22. Media reports, however, have indicated that a number of private security guards were playing central roles in some of the most sensitive activities of the Central Intelligence Agency (CIA) - clandestine raids against alleged insurgents in Iraq and Afghanistan and the involvement in CIA rendition flights<sup>23</sup> as well as joint covert operations.<sup>24</sup>

23. These examples raise concerns about the extent to which private security companies, hired for defensive guard duty, have joined in offensive military and intelligence operations. These reports also highlight that the relationship between the intelligence agencies and PMSCs - and perhaps Xe/Blackwater in particular - likely runs far deeper than what is publicly acknowledged. .

#### IV. Oversight of PMSCs and applicable jurisdiction

24. In the last few years and largely in response to specific incidents involving PMSCs, such as abuses of detainees and killings of civilians, the Government of the United States and Congress have adopted a series of measures increasing Government oversight over PMSCs and expanding and clarifying criminal jurisdiction over offences committed by PMSC personnel contracted by the United States and operating abroad.

<sup>20</sup> Statement of Administration Policy, S. 1390 National Defense Authorization Act for Fiscal Year 2010, Executive Office of the President, 15 July, 2009.

<sup>21</sup> National Defense Authorization Act for Fiscal Year 2010, Section S. 1038, pp. 262-263.

<sup>22</sup> Interviews with Tim Shorrock, author of *Spies for Hire: The Secret World of Intelligence Outsourcing*, 2008 and Peter W. Singer, senior fellow in Foreign Policy at Brookings, July 2009.

<sup>23</sup> James Risen and Mark Mazzetti, “Blackwater guards tied to secret C.I.A. raids”, *New York Times*, 10 December 2009.

<sup>24</sup> Adam Ciralsky, “Tycoon, contractor, soldier, spy”, *Vanity Fair*, January 2010. See also para. 77 below. See also Claim No.HQ08X02800 in the High Court of Justice, Queen’s Bench Division, *Binyam Mohamed v. Jeppesen UK Ltd*, report of James Gavin Simpson, 26 May 2009.



The Working Group welcomes the adoption of these measures but notes that much remains to be done to ensure effective oversight and legal remedy when violations occur. It is particularly concerned by oversight mechanisms which grant the responsibility of oversight to PMSCs themselves. In addition and as illustrated below, the clarification of applicable jurisdiction has yet to lead to a successful prosecution and punishment of those responsible for human rights abuses and other crimes. The Government argues that insofar as prosecutions under the Military Extraterritorial Jurisdiction Act of 2000 have resulted in guilty pleas, there have been successful prosecutions. However, in most cases, those prosecutions have not led to the punishment of those responsible in accordance with international law.

## **A. Oversight mechanism of the Department of Defense**

25. Officials from the Department of Defense emphasized to the Working Group that no organization had more at stake than their Department in ensuring the accountability of PMSCs, and underlined the measures the department had taken to improve oversight, build accountability and develop coordination with host nations on jurisdiction and accountability.

26. A 2005 Department of Defense instruction specifies the functions that private military and security contractors are authorized to carry out. It states that “contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated by the force they accompany and are provided with an appropriate identification card under the provisions of the 1949 Geneva Convention relative to the Treatment of Prisoners of War”. It also stipulates that contractor personnel may “support contingency operations through the indirect participation in military operations, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment [and] providing security services”.<sup>25</sup> Department contractors are required to follow military orders. It reiterated that contingency contractor personnel retain the inherent right of individual self-defense.

27. A United States Congressional study released in August 2008 noted that military commanders do not have direct control over PMSC contractors, as the duties of contractor personnel are set out in a fixed written contract. Rather, it is the contracting officer – the official civilian designee of the head of the agency - who oversees the implementation of the contract.<sup>26</sup> The Government indicated that, in many cases, Department of Defense contracting officers are not civilian but uniformed military officers reporting to the military chain of command.

28. The Working Group is particularly concerned by situations where oversight has been contracted out to PMSCs themselves. This is the case in Afghanistan, for example, with the Armed Contractor Oversight Division (ACOD), which is responsible for overseeing and developing policies for PMSCs and for investigating and reporting incidents that involve the use of force by Department of Defense security contractors. While in Iraq ACOD is managed by Department of Defense officials, in Afghanistan the

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<sup>25</sup> Department of Defense instruction No. 3020.41, para. 6.1.1.

<sup>26</sup> Congressional Budget Office, “Contractors”, p. 20.

responsibility for the oversight of PMSCs is outsourced to a PMSC, namely, the British firm Aegis. Aegis had received US\$ 624.4 million for those services, as of November 2008. The United States Commission on Wartime Contracting expressed concerns at this situation in its interim report, stating that since its establishment, ACOD in Afghanistan has been run primarily by contractor personnel from Aegis and had received limited supervision from the Government of the United States. The Commission stated that the oversight of security contractors in Afghanistan did not reflect the lessons learned from Iraq.<sup>27</sup> The Government pointed out that although certain staff functions are performed by a contractor, ACOD is directly managed by United States military personnel with all oversight and decisions remaining the responsibility of United States officers.

29. In July 2009, the Department of Defense published a new binding federal regulation - the interim final rule on private security contractors (PSCs) operating in contingency operations<sup>28</sup> - to clarify policy and guidance regulating the actions and movements in the operational area of PMSCs contracted by the Department and also those contracted by other governmental department and agencies. It regulates the selection, accountability, training, equipping, and conduct of personnel performing private security functions. It also establishes procedures for incident reporting. The Department underlined the critical importance of this interim final rule, which should help close existing gaps in the oversight of PMSCs and ensure compliance with laws and regulations pertaining to the outsourcing of inherently governmental functions.

## **B. Oversight mechanism of the State Department**

30. The Bureau of Diplomatic Security of the State Department bears the responsibility for the protection of its personnel and facilities in the United States and abroad. The Bureau of Diplomatic Security has become increasingly reliant on PMSCs and today approximately 90 per cent of all Diplomatic Security personnel are contractors.<sup>29</sup>

31. The Working Group was briefed about the State Department Worldwide Personal Protective Services contract, which is the programme established to “pre-plan, organize, set up, deploy and operate Contractor protective service details for the protection of U.S. and/or certain foreign government high-level officials”.<sup>30</sup> It includes provisions for selection of personnel, as well as procedures for the vetting of staff and compulsory training.

32. Officials from the State Department explained that following the 2007 Nisoor Square incident, their Department enhanced oversight of its PMSCs, notably through an increased number of supervisory staff, use of video and audio recording systems to track missions, and policy revisions regarding private security contractors and firearms.

<sup>27</sup> Commission on Wartime Contracting in Iraq and Afghanistan, *At what cost? Contingency Contracting in Iraq and Afghanistan, Interim Report* (June 2009), p. 76.

<sup>28</sup> This rule supplements Department of Defense instruction No. 3020.41.

<sup>29</sup> United States, “State Department” (see footnote 10 above), p. 21.

<sup>30</sup> Worldwide Personal Protective Services contract, available from <http://r.m.upi.com/other/12216818791223.pdf>, second page.

33. Oversight is reportedly ensured by a contracting officer based in Washington DC and not in the theatre of operation. The Government specified that some aspects of oversight are the responsibility of State Department employees in the theatre of operations. The Regional Security Officer provides general oversight and has responsibility to investigate any incidents involving PMSCs. According to the Government, State Department special agents are assigned to provide oversight of protection operations and represent the designated contracting officer.

34. Regarding the reporting of serious incidents, the Working Group was informed that between 2001 and 2007, 400 cases were reported and reviewed by the State Department. Out of those 400, 15 were referred to the Department of Justice. Since September 2007, 15 incidents in Iraq and Afghanistan have been referred for Department of Justice review, including incidents that occurred prior to September 2007.

35. Officials from the State Department were keen to stress to the Working Group that there were no loopholes in the oversight of its security contractors. Nevertheless, the Working Group was informed of recent allegations of misconduct among employees of ArmorGroup North America, contracted by the State Department to protect the United States Embassy and personnel in Kabul. The company, a unit of Wackenhut Services, Inc., came under scrutiny after the release of a report and photos by the Project on Government Oversight showing their employees engaging in hazing, alcohol abuse and sexual misconduct.<sup>31</sup>

36. Following these allegations, the Commission on Wartime Contracting conducted a hearing on 14 September 2009 on State Department selection, management, and oversight of security and other contractors in support of the United States Embassy in Kabul.<sup>32</sup> The Senate Subcommittee on Contracting Oversight also initiated an investigation and reported a pattern of ineffectual Department of State oversight of the ArmorGroup North America contract. The report noted that despite repeated warnings, the contractor was failing to meet major contract requirements, with allegations of inadequate training, insufficient number of guards, inadequate language skills and supervisors engaging in “deviant hazing and humiliation”. The contract was repeatedly extended, a situation which may have put the security of the United States Embassy in Kabul at risk.<sup>33</sup> The ArmorGroup North America Kabul contract is currently in the second option year, which expires on 30 June 2010. The State Department has decided that the next option year should not be exercised and work has begun to compete a new contract. However, due to delays in the procurement process, the Department has extended ArmorGroup North America for six months beyond the option expiration.

37. The Working Group also took this opportunity to remind State Department officials of pending communications, including its long-standing communication dated 11 June 2007 regarding the case of Luis Posada Carriles, allegedly involved in mercenary activities in the Americas in the 1980s and residing in the United States (see A/HRC/7/7/add.1, paras. 84-87). The Working Group invites the Government to demonstrate its full cooperation with the mandate given to the Working Group by the

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<sup>31</sup> Project on Government Oversight, letter to Secretary of State Clinton regarding the United States Embassy in Kabul, 1 September 2009.

<sup>32</sup> See [www.wartimecontracting.gov/index.php/hearings/commission/hearing20090914](http://www.wartimecontracting.gov/index.php/hearings/commission/hearing20090914).

<sup>33</sup> Project on Government Oversight, letter to Secretary of State.

General Assembly and the Human Rights Council by responding to all pending communications.

### **C. Inter-agency coordination**

38. The urgent need for systematic coordination between the different departments contracting PMSCs was finally acknowledged after the Nisoor Square killings. The Department of Defense and State Department signed a Memorandum of Understanding in December 2007 to increase coordination. Before that date, both departments ran their operations independently. The Memorandum of Understanding requested the departments to jointly develop and implement core standards, policies and procedures for the accountability, oversight and conduct of private security contractors.

39. In July 2008, the Department of Defense, the State Department and the United States Agency for International Development (USAID) signed a Memorandum of Understanding in which they agreed to use a Department of Defense database to collect and maintain information on contracts and contractor personnel in Iraq and Afghanistan. The Working Group was told that the system would improve the agencies' ability to report on the number and value of the contracts and the number of contractor personnel, including the agencies' capacity to track information on killed or wounded contractor personnel.

40. However, the database shortcomings were underlined in a memorandum of the Subcommittee on Contracting Oversight.<sup>34</sup> The memo stresses that personnel are not systematically entered, and that the system lacks the capability to track all required data elements, including the value of the contract, whether it was completed, descriptions of the service performed, and the number of personnel killed and wounded. The Government indicated that the Synchronized Predeployment and Operational Tracker (SPOT) system now does track complete descriptions of service contracts and the number of personnel killed or wounded.

### **D. Audits, inspections and investigations**

41. To assess the oversight carried out by the Department of Defense, State Department and USAID, several new legislative and investigative bodies have been established - mostly since 2007 - to conduct audits, inspections and investigations into contracting practices for Afghanistan and Iraq. None of these bodies is mandated to assess contracts entered into by United States intelligence agencies.

#### **1. Commission on Wartime Contracting**

42. The Commission on Wartime Contracting, an independent bipartisan legislative commission, was set up in 2008 by Congress to study federal agency contracting for the reconstruction, logistical support of coalition forces, and the performance of security functions in Iraq and Afghanistan.<sup>35</sup> The Commission looks at ways to improve the

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<sup>34</sup> Subcommittee on Contracting Oversight Majority Staff, "Hearing - Afghanistan contracts: an overview", Memorandum, 16 December 2009, p. 6.

<sup>35</sup> See [www.wartimecontracting.gov/](http://www.wartimecontracting.gov/).

system, in particular from the perspective of cost effectiveness. Officials from the Commission informed the Working Group that the current model of extensive contracting out (at a ratio of approximately one contractor for every Government employee), has not yet proved it is more cost-effective than a model with fewer contractors.

43. In its interim report, the Commission drew several important conclusions regarding the contracting of security functions. It criticized the Government for not having “clear standards and policy on inherently governmental functions” and called for the development of a single consistent definition to ensure that only officers or employees of the federal Government or members of the armed forces perform inherently governmental functions and other critical functions.<sup>36</sup>

44. The Commission also stated that the Department of Defense failed to provide enough staff to perform adequate contract oversight, which contributed to billions of dollars in wasteful spending in the army’s largest contract for support service, and underlines problems with the selection, training, equipping, arming, performance and accountability of private security.<sup>37</sup>

## **2. Government Accountability Office**

45. The Government Accountability Office is an independent and nonpartisan investigative arm of Congress that investigates how the federal Government spends public funds. Regarding the issue of PMSCs, the Office issues regular reports on the oversight and coordination of PMSCs by United States departments and agencies. In the most recent of these reports, issued in July 2009, the office expressed concerns at the lack of adequate background screening of foreign nationals hired by PMSCs under Department of Defense contracts.<sup>38</sup>

46. An official from the Government Accountability Office told the Working Group that the office had found insufficiencies in the Department of Defense screening mechanisms, especially in respect of foreign nationals that would be working for PMSCs contracted by the Department. In such cases, screening was at times left to the contracting PMSC. The report recommended that the Department establish a department-wide approach and procedures for conducting and adjudicating background screenings of foreign national contractor personnel. The official emphasized that, in comparison, the State Department had fairly good screening standards and was using its network of embassies to ensure that screening was carried out in more depth.

## **3. Offices of the Inspector Generals for Iraq and Afghanistan**

47. Established by Congress respectively in 2004 and 2008, the Office of the Special Inspector General for Iraq Reconstruction (SIGIR) and the equivalent office for Afghanistan (SIGAR) conduct audits and investigations to promote the efficiency and

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<sup>36</sup> Commission on Wartime Contracting, *At What Cost?* (see footnote 27 above), pp. 2 and 20.

<sup>37</sup> *Ibid.*, p. 3.

<sup>38</sup> United States, “Contingency contract management: DOD needs to develop and finalize background screening and other standards for private security contractors”, (Government Accountability Office, 31 July 2009).

effectiveness of reconstruction programs, and to detect and prevent waste, fraud and abuse of public funds.<sup>39</sup>

48. SIGAR is conducting a review to identify the number and volume of contracts to provide private security services in Afghanistan, to determine the adequacy of the contracting process and to assess the agencies' management of security contractors. SIGAR reported that its preliminary findings indicate that at least 14,000 private security contractors are working directly for United States agencies in Afghanistan. It is also trying to identify private security subcontractors, but noted in the report that most federal agencies still do not keep track of subcontracts in their contracts databases. The Government of the United States also does not know how many other private companies or individuals are providing security services to reconstruction contractors.<sup>40</sup>

#### **4. Senate Armed Services Committee**

49. The Working Group met with staff of this committee, and was briefed about their ongoing investigation into the use of PMSCs in Iraq and Afghanistan and the existing oversight mechanisms.

50. The Committee is investigating in particular a shooting incident by two private security contractors that killed one Afghan civilian and injured two others in Kabul on 5 May 2009. The contractors were working for the private security firm Paravant LLC – a Xe (formerly Blackwater) subsidiary - which provides contracted services to the United States Army in Afghanistan and Iraq.<sup>41</sup> The Senate is also looking into allegations that the men were issued AK-47s despite a letter of authorization from the Department of Defense specifically stating that the Xe/Blackwater personnel would not be armed.

51. The Working Group welcomes this investigation and urges the Committee to release its findings when completed.

### **E. Laws governing the conduct of PMSCs and their personnel supporting military operations**

52. PMSC personnel allegedly responsible for committing crimes and human rights abuses can be prosecuted under different statutes and laws. There may be occasions whereby both the military justice system and the civilian justice system have jurisdiction. For example, with respect to killings by PMSC personnel in the context of armed conflicts, the military justice system may have jurisdiction (under the Uniform Code of Military Justice), and the civilian justice system may also have jurisdiction under a variety of statutes. The current arrangement in cases implicating contractors is that the Department of Justice will generally prosecute the case in the federal courts, and

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<sup>39</sup> See [www.sigir.mil/about/index.html](http://www.sigir.mil/about/index.html) and [www.sigar.mil/](http://www.sigar.mil/).

<sup>40</sup> SIGAR, "Quarterly report to the United States Congress", 30 October 2009, p. 4.

<sup>41</sup> The Government of the United States stated that Paravant LLC and its employees are not considered as "private security contractors" and that company was hired to train the Afghan national army in the use and maintenance of certain weapons and weapons systems.

the military justice system will act only if the Department declines to do so.<sup>42</sup> However, attempts to apply that jurisdiction so far have led to challenges in court.<sup>43</sup>

53. Private military and security contractors are also subject to local laws and could in theory also be tried in local courts. In reality, however, due to agreements signed between the United States and other countries, for example with Iraq until the end of 2008 or currently with Colombia and Mexico, PMSC personnel supporting the United States frequently enjoy immunity from prosecution or suit in local courts. The United States can always waive that immunity but has chosen not to do so in any case thus far.<sup>44</sup>

#### **Alien Tort Claims Act of 1789**

54. Civil cases can be brought under the Alien Tort Claims Act of 1789<sup>45</sup> which allows United States courts to hear human rights cases brought by foreign citizens for conduct committed outside the United States.<sup>46</sup> For example, a civil suit was filed under this act in the case of *Abtan et al. v. Blackwater USA et al.*<sup>47</sup> brought by those injured and the family of those killed following the Nisoor Square shooting in Baghdad on 16 September 2007.

55. An action has also been submitted under this Act by two former employees of Xe/Blackwater against the owner of the company, Erik Prince. The two men alleged that Mr. Prince may have murdered or facilitated the murder of individuals who were cooperating with federal authorities investigating the company on alleged criminal conduct.<sup>48</sup>

#### **War Crimes Act of 1996**

56. PMSCs may be prosecuted for certain war crimes if their conduct is found to violate the War Crimes Act. However this act has never been used.

#### **Uniform Code of Military Justice**

57. Traditionally, Department of Defense contractor personnel have been subject to the Uniform Code of Military Justice only when they participated in a declared war or were “retired members of a regular component of the armed forces who are entitled to pay” (art.2, para. a(4)). In 2006, Congress expanded the jurisdiction of the Code to “persons serving with or accompanying an armed force in the field” whether “in time of

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<sup>42</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, (A/HRC/11/2/Add.5), appendix 3, para. 6.

<sup>43</sup> See paras. 80-83 below.

<sup>44</sup> Congressional Budget Office, “Contractors” (see footnote 3 above), p. 23.

<sup>45</sup> 28 USC § 1350.

<sup>46</sup> The Act reads: “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.

<sup>47</sup> See <http://ccrjustice.org/ourcases/current-cases/atban,-et-al.-v.-blackwater-usa,-et-al>.

<sup>48</sup> Jeremy Scahill, “Blackwater Founder Implicated in Murder”, *The Nation*, 4 August 2009.

declared war or a contingency operation” (art. 2, para. a(10)). Therefore, the Code may cover Department of Defense contractors in Iraq and Afghanistan.<sup>49</sup>

58. The first and only conviction of a private security contractor under this provision occurred in June 2008 in response to a contractor stabbing incident in Iraq. The contractor was sentenced to five months of confinement.<sup>50</sup>

### **Military Extraterritorial Jurisdiction Act of 2000**

59. The Military Extraterritorial Jurisdiction Act extended jurisdiction of the United States Courts to contractor personnel supporting Department of Defense missions who commit a felony (an offense punishable by more than one year in prison) outside sovereign United States territory while accompanying United States forces.<sup>51</sup> The defendants may be tried in federal court after being brought to the United States. The jurisdiction of the Act applies only if contractor personnel have not been prosecuted by the host nation’s legal system or under the Uniform Code of Military Justice. It applies to Department of Defense employees and contractors, as well as to the employees and contractors of any other federal agency to the extent their employment relates to supporting the mission of the Department overseas. Contractors working for the State Department are therefore not automatically subject to the Military Extraterritorial Jurisdiction Act.<sup>52</sup>

60. The Department of Justice has a key role to play to ensure application of the stated commitment of the Government that crimes and violations of human rights committed by PMSCs will not remain unpunished. The Human Rights and Special Prosecutions Section<sup>53</sup> of the Criminal Division of the Department of Justice is the Department’s central point of contact regarding investigations and prosecutions related to the Military Extraterritorial Jurisdiction Act.

61. With respect to crimes committed by contractors abroad, the Section provides support to the United States Attorneys’ Offices. In many cases, the cases are prosecuted solely by the Attorneys’ Offices, which commit their own limited resources to these invariably complex and expensive prosecutions. In some cases, the Section also litigates Military Extraterritorial Jurisdiction Act cases, solely or in partnership with the Attorneys’ Offices.

62. Prosecution is carried out by United States attorneys at the district level, with a grand jury of 23 civilians ultimately deciding if an indictment can be brought or not. As of March 2008, the Department of Defense had referred 58 cases related to the Military Extraterritorial Jurisdiction Act to the Department of Justice, 12 of which have been indicted in federal court and one in state court. Of those, eight resulted in a conviction

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<sup>49</sup> Art. 2, para. (a)(10) was amended through Public Law 109-364 (enacted 17 October 2006) to expand its scope from declared wars to “contingency operations”. Military operations in Afghanistan and Iraq are characterized in United States law as “contingency operations”.

<sup>50</sup> Congressional Budget Office, “Contractors”, p. 23.

<sup>51</sup> 18 USC. § 3261.

<sup>52</sup> Congressional Budget Office, “Contractors”, p. 24.

<sup>53</sup> Created through the merger of the Domestic Security Section and the Office of Special Investigations.



and five await trial.<sup>54</sup> The Government informed us that to date the Department of Justice has initiated action or prosecution in 34 cases related to the Act.<sup>55</sup>

63. When the Department of Justice considers it has insufficient information to pursue a contractor under the Military Extraterritorial Jurisdiction Act, the contractor is usually simply taken out of the country under an administrative disciplinary action.

#### **Special maritime and territorial jurisdiction of the United States**

64. Certain federal criminal statutes govern actions in United States facilities overseas, including the premises of the United States military in foreign States that qualify as part of the special maritime and territorial jurisdiction of the United States. Examples of such statutes include those addressing murder, torture and assault committed by or against United States nationals.

65. The USA Patriot Act of 2001, adopted after 9/11 to enhance the ability of domestic security services to prevent terrorism, expanded the coverage of the special maritime and territorial jurisdiction to include the “premises of the United States diplomatic, consular, military, or other United States Government missions or entities in foreign States” with respect to offenses committed by or against a citizen of the United States.<sup>56</sup>

66. The only successful prosecution of a private security contractor in the civilian justice system was under this statute – a case of beating a detainee to death during an interrogation in Afghanistan (see A/HRC/11/2/Add.5, appendix 3, para. 2).

67. None of the above-mentioned legislation applies to contractors for the United States intelligence agencies, except for the Military Extraterritorial Jurisdiction Act in cases in which the employment of contractors by intelligence agencies relates to supporting the mission of the Department of Defense overseas.

### **F. Recent initiatives by Congress representatives**

68. The Working Group was briefed on a number of initiatives in the United States Congress aimed at further clarifying the jurisdiction applicable to PMSCs. Among these initiatives, then Senator Obama introduced the Security Contractor Accountability Act of 2007, which was to apply to all federal agency contractors, and on 6 May 2008 Representatives David Price and Jan Schakowsky introduced a bill “to enhance oversight of intelligence community contractors and prohibit the use of such contractors in prisoner detention operations, including such sensitive and controversial areas as interrogation and international prisoner transport”.<sup>57</sup> Neither of these bills received the necessary support since .

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<sup>54</sup> Congressional Budget Office, “Contractors”, p. 24.

<sup>55</sup> As of 14 May 2010, the Department of Justice does not release information regarding the number of potential criminal case referrals it receives.

<sup>56</sup> 18 USC § 7(9), as amended by Public Law 107-56 § 804.

<sup>57</sup> “Price-Schakowsky bill would prohibit intel contractors from detainee operations”, news release, 6 May 2008. Available from [http://price.house.gov/list/press/nc04\\_price/050608.shtml](http://price.house.gov/list/press/nc04_price/050608.shtml).

69. Recently, on 2 February 2010, Senator Patrick Leahy and Congressman David Price introduced similar companion bills in the House and Senate. The bills would allow the Government to prosecute Government contractors and employees for other federal agencies than the Department of Defense, such as the State Department, even when those employees are not directly supporting a Department of Defense mission. The bill, among other things, directs the Department of Justice to create new investigative units to investigate, arrest and prosecute contractors and employees who commit serious crimes and requires the Attorney General to report annually to Congress on the number of instances of offenses received, investigated and prosecuted under the statute.<sup>58</sup>

70. On 23 February, Representative Jan Schakowsky and Senator Bernie Sanders introduced legislation that would phase out private security contractors in war zones. This bill is based on a previous draft of the Stop Outsourcing Security (SOS) Act introduced in November 2007. The draft requires that, inter alia, within 180 days of enactment, all personnel providing security to United States diplomatic and consular missions in Iraq and Afghanistan are employees of the United States Government, effectively banning the use of private security contractors for diplomatic security.<sup>59</sup>

71. The Working Group is encouraged by these initiatives but notes with regret that at the time of writing none of these draft bills had been adopted.

## **G. Labour laws applicable to security contractors**

72. Workers' compensation benefits for employees of federal contractors performing work outside the United States, including PMSCs, are provided by the Defense Base Act, which incorporates most provisions of the Longshore and Harbor Workers' Compensation Act (33 USC 901 et. seq.). These Acts are administered by the Office of Workers' Compensation Programs under the Department of Labor. The Defense Base Act covers all employees working on United States defense bases in foreign countries as well as all Government contractor employees working overseas. It provides disability compensation and medical care to employees disabled from injured or occupational diseases and benefits to survivors of covered employees. Compensation can also be claimed by host country and third-country nationals hired under federal contracts. The Act requires that federal contractors purchase workers' compensation insurance from authorized insurance carriers. The War Hazards Compensation Act, enacted in 1942 and also administered by the Office of Workers' Compensation Programs, completes the protection provided to federal contractors' employees by providing compensation and medical benefits for injury or death due to a war-risk hazard that is not compensable under the Defense Base Act. All liability for injury, death and detention benefits under the Act is assumed by the Government of the United States.

73. The agency has failed to enforce key provisions of the law, including informing employees of their rights and ensuring that companies purchase such insurance. The

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<sup>58</sup> "Price, Leahy introduce bill to hold American contractors overseas accountable under U.S. law", news release, 2 February 2010. Available from [http://price.house.gov/apps/list/press/nc04\\_price/020210a.shtml](http://price.house.gov/apps/list/press/nc04_price/020210a.shtml).

<sup>59</sup> See <http://sanders.senate.gov/files/SOS%20Text.pdf>. See also Jeremy Scahill, "Schakowsky prepares legislation to ban Blackwater", *The Rebel Report*, 13 January 2010.

system has produced hundreds of millions of dollars in out-sized profits for the private insurance companies in the United States. The top four providers received US\$ 1.5 billion in premiums through 2008, yet paid out only US\$ 900 million in benefits - a profit margin of nearly 40 per cent.<sup>60</sup> In some instances, the insurance policies are faked or can be enforced only in the United States. There have also been reports of insurance brokers paying 30 per cent of the claims, and the rest only once an administrative tribunal compels them. The Government of the United States challenged the assessment of the Working Group and stated that the agency has responded to the difficulties of enforcing the provisions of the law, through, inter alia, employees being notified by the insurance carrier in the appropriate languages and through the holding of various seminars in which the Office of Workers' Compensation Programs participated.

74. In response to public requests for data following the extension of civilian contracting activities, the Office of Workers' Compensation Programs began to compile and issue statistics on the cumulative number of newly reported Defense Base Act cases sorted by employer, by insurance carrier and by country.<sup>61</sup> For these statistics, the Office compiles reports of injury or death received from employers or insurance companies in a workers' compensation context, and therefore they do not constitute complete or official casualty statistics of civilian contractor injuries and deaths. Reports received by the Office from employers and carriers indicate that, since 2001, more than 1,700 civilian contractors were killed in Iraq and Afghanistan and nearly 40,000 were injured during the period 10 January 2008 to 30 September 2009.<sup>62</sup>

## V. Impact on human rights

75. The Working Group was briefed by a number of civil society representatives, journalists and lawyers on reported cases of human rights abuses and criminal misconduct by private military and private contractors contracted by the Government of the United States. While the Working Group commends the steps taken so far by the Government and Congress to improve oversight, it remains concerned at the continuing lack of transparency regarding the activities of PMSCs and at the failures of the civilian justice system to effectively prosecute those responsible for human rights violations.

### A. Lack of transparency

76. The information accessible to the public on the scope and type of contracts between the Government of the United States and PMSCs is scarce and opaque. The lack of transparency is particularly significant when companies subcontract to others. Often, the contracts with PMSCs are not disclosed to the public despite extensive freedom of information rules in the United States, either because they contain confidential

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<sup>60</sup> T. Christian Miller, "The story so far: civilian contractors in Iraq and Afghanistan", *ProPublica*, 19 June 2009.

<sup>61</sup> Defense Base Act Case Summary Reports. Available from [www.dol.gov/owcp/dlhwc/lsaboutdbareports.htm](http://www.dol.gov/owcp/dlhwc/lsaboutdbareports.htm).

<sup>62</sup> "More than 1,700 contractors have been killed", 22 February 2010. Available from [www.dangerzonejobs.com/artman/publish/index.shtml](http://www.dangerzonejobs.com/artman/publish/index.shtml) (subscription only).

commercial information or on the argument that nondisclosure is in the interest of national defense or foreign policy.

77. The situation is particularly opaque when United States intelligence agencies contract PMSCs. Given the agencies' power to invoke confidentiality in the interest of national security, the public does not have access to information on the company hired, the activities it is contracted to do and its area of deployment. Some of these contracts have later been revealed through the media. For example, in January 2010 a magazine revealed that the CIA allegedly deployed a team of Blackwater operatives on a clandestine operation in Hamburg, Germany, after the 9/11 attacks, ultimately aimed at assassinating a German-Syrian citizen with suspected ties to Al-Qaida.<sup>63</sup> German authorities have reportedly launched a preliminary investigation into the matter.<sup>64</sup>

78. The American Civil Liberties Union has also been arguing that State secrets privilege has been improperly used to prevent several national security-related lawsuits from proceeding against the federal Government. This privilege, which is intended to protect discrete pieces of sensitive evidence at trial, has been asserted by the Government to block entire lawsuits before any specific evidence has been considered.<sup>65</sup>

79. The Working Group believes that private military and security contractors of intelligence agencies should not operate outside democratic control and that the public should have the right to access information on the scope, type and value of the contracts between United States intelligence agencies and PMSCs.

## B. Challenges to accountability

80. In the course of litigation, several recurring legal arguments have been used in the defence of PMSCs and their personnel, including the Government contractor defence, the political question doctrine and derivative immunity arguments. PMSCs are using the Government contractor defence to argue that they were operating under the exclusive control of the Government of the United States when the alleged acts were committed and therefore cannot be held liable for their actions. This argument has been asserted in current litigations against contractors in cases of torture and abuse of Iraqi detainees in prisons across Iraq as well as that regarding the shooting of Iraqi civilians in Nisoor Square in 2007.<sup>66</sup>

81. In current litigations contractors also invoke the political question doctrine to argue that the lawsuits deal with fundamental policy decisions or powers constitutionally reserved to the executive and legislative branches and therefore that the courts should refrain from reviewing. Even where the court does have jurisdiction over a case, a court

<sup>63</sup> Adam Ciralsky, "Tycoon" (see footnote 24 above).

<sup>64</sup> David Crawford, "Germany investigates Blackwater-CIA report", *Wall Street Journal*, 8 January 2010.

<sup>65</sup> American Civil Liberties Union, "ACLU testifies in support of bill to reform State secrets doctrine", media release, 4 June 2009.

<sup>66</sup> Information provided by the Center for Constitutional Rights to the Working Group on 31 July 2009. The Government of the United States said that the fact that an argument was made in court by a non-United States Government attorney is not evidence of United States law or any position or practice of the United States.

may decline to hear it under the premise that it would be second-guessing a sensitive political decision.

82. Contractors also submit that they have “derivative immunity”. Given that the Government of the United States enjoys immunity, and that contractors are carrying out Government functions delegated to them by the Government, they argue that they too should enjoy such immunity. Further, PMSCs have argued their immunity for illegal and even offensive conduct, explicitly arguing that private military and security contractors should be immune from prosecution for committing torture acts.<sup>67</sup>

83. In several cases, contractors have also challenged the applicability of international law to them, claiming that international law obligations – including the prohibitions on torture and war crimes – do not extend to them as they are “non-State actors”. This argument has been successful in at least two cases.<sup>68</sup>

## VI. Specific cases of abuses

### A. Xe/Blackwater

84. Blackwater Worldwide – also known as Xe or U.S. Training Center - is one of the largest of the United States private security contractors; up to 90 per cent of the company’s revenue comes from Government contracts. State Department contracts and task orders with Blackwater in Iraq topped US\$1 billion as of 29 May 2008.<sup>69</sup>

85. Following the shooting by Blackwater personnel of innocent civilians in Nisoor Square, which killed 17 people and severely injured many others on 16 September 2007, the Iraq Ministry of the Interior revoked Blackwater’s license and threatened to expel the company’s employees. Despite this, the United States renewed the company’s contract. Only after the entry into force of a new Status of Forces Agreement in January 2009 and the cancellation of Coalition Provisional Authority Order 17 which granted immunity to contractors, was the Government of Iraq able to deny Blackwater’s application for an operating license. However, the company is still under contract with the State Department and some Blackwater personnel were working in Iraq at least until September 2009.<sup>70</sup>

86. According to a congressional memorandum, Blackwater guards had been involved in nearly 200 shootings in Iraq between 2005 and 2007.<sup>71</sup> The document also raises serious questions about how State Department officials responded to reports of Blackwater killings of Iraqis. For example, in the case of a shooting of the guard of Iraqi Vice President Adil Abd-al-Mahdi in December 2006 by a Blackwater contractor, the

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<sup>67</sup> The Government of the United States specified that this theory of immunity applied to civil liability and not to criminal prosecution.

<sup>68</sup> Center for Constitutional Rights, *Saleh et al. vs. Titan et al.* and *Al Shimari vs. CACI et al.*

<sup>69</sup> United States, “Joint audit of Blackwater contract and task orders for Worldwide Personal Protective Services in Iraq” (Office of the Inspector General, June 2009).

<sup>70</sup> Jeremy Scahill, “Blackwater still armed in Iraq”, *The Nation*, 14 August 2009.

<sup>71</sup> “Additional information about Blackwater USA” (see footnote 16 above), p. 1.

State Department had allowed Blackwater to transport the contractor out of Iraq within 36 hours of the shooting and suggested a payment of \$15,000.<sup>72</sup> A similar approach was taken in other cases involving the shooting of innocent Iraqi civilians.

87. When the Working Group asked both the Department of Defense and the State Department why Xe/Blackwater was still under contract, both departments commented that there was “no basis for not employing Xe/Blackwater”. While the Working Group fully recognizes the presumption of innocence, it believes there was enough evidence of grave acts of misconduct to at least temporarily suspend contracts with Blackwater until all judicial processes were concluded.

88. On 8 December 2008, the Department of Justice unsealed a 35-count indictment in the District of Columbia charging five Blackwater security guards with voluntary manslaughter, attempt to commit manslaughter, and weapons violations for their alleged roles in the 16 September 2007 shooting at Nisoor Square in Baghdad, Iraq. The defendants were charged with killing 14 unarmed civilians and wounding 20 other individuals. In addition, a sixth Blackwater security guard pleaded guilty on 5 December 2008 to charges of voluntary manslaughter and attempt to commit manslaughter.<sup>73</sup>

89. The Blackwater lawsuit is the first case to be filed under the Military Extraterritorial Jurisdiction Act against non-Department of Defense private contractors. In a motion to dismiss filed by Blackwater in July 2009, the defendants invoked the political question doctrine, immunity under Iraqi law and the Government contractor defense. The defendants also argued that their actions were covered by absolute immunity because they were performing “delegated actions” that would have otherwise been performed by the State Department. On 31 December 2009, Judge Ricardo M. Urbina of the United States Federal District Court for the District of Columbia dismissed the indictment, stating that evidence against them was inadmissible under the United States Constitution.<sup>74</sup>

90. Following this decision, the Working Group publicly expressed its concerns in a press release dated 7 January 2010.<sup>75</sup> It said that this decision may lead to a situation where no one would be accountable for grave human rights violations. The Working Group has been encouraged by the statement of Vice President Joe Biden in Baghdad that the “United States is determined...to hold accountable anyone who commits crimes against the Iraqi people” and by the initiative of the Government to appeal the court decision on 29 January 2010.<sup>76</sup>

91. The Working Group was also informed of a civil lawsuit against Xe/Blackwater. The allegations include a spate of unprovoked civilian shootings by Xe/Blackwater

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<sup>72</sup> Ibid, p. 2.

<sup>73</sup> Department of Justice, “Five Blackwater employees indicted on manslaughter and weapons charges for fatal Nisur Square shooting in Iraq”, press release, 8 December 2008.

<sup>74</sup> United States District Court for the District of Columbia, criminal action No: 08-0360(RMU), Memorandum Opinion, *United States of America vs. Paul A. Slough et al.*

<sup>75</sup> Office of the High Commissioner for Human Rights, “Mercenaries: UN experts say that the Nissour Square killings in Iraq should not remain unpunished”, press release, 7 January 2010.

<sup>76</sup> Reuters, “U.S. to appeal dismissal of Blackwater charges: Biden”, 23 January 2010. See also [www.justice.gov/usao/dc/Victim\\_Witness\\_Assistance/files/January\\_26\\_2010\\_update.pdf](http://www.justice.gov/usao/dc/Victim_Witness_Assistance/files/January_26_2010_update.pdf).

personnel in Iraq between 2005 and 2008 and are presented by the families of those killed and wounded in six different incidents. The company is accused of committing war crimes, assault and battery, wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent hiring, training and supervision and tortious spoliation of evidence.<sup>77</sup>

## **B. CACI International, Inc. and L3 Services/Titan**

92. The Working Group was briefed about the alleged involvement of two United States-based corporations, CACI and L-3 Services (formerly Titan Corporation), in the torture of Iraqi detainees at Abu Ghraib. CACI and L-3 Services, contracted by the Government of the United States, were responsible for interrogation and translation services, respectively, at Abu Ghraib prison and other facilities in Iraq.

93. The Center for Constitutional Rights and a team of lawyers brought claims against the two companies under the Alien Tort Claims Act in 2004 on behalf of over 250 plaintiffs. The plaintiffs claimed they were “subjected to rape and threats of rape and other forms of sexual assault; electric shocks; repeated beatings, including beatings with chains, boots and other objects; prolonged hanging from limbs; forced nudity; hooding; isolated detention; being urinated on and otherwise humiliated; and being prevented from praying and otherwise abiding by their religious practices”.<sup>78</sup>

94. CACI and L-3 Services argued that they should receive immunity because they were contractors and because the violations in this case arose out of detentions in Iraq. The plaintiffs argued that torture is clearly against the law and that anyone who commits acts of torture must be held accountable.

95. In September 2009, a federal appeals court dismissed a lawsuit against CACI and L3 Services, saying the companies had immunity as Government contractors. The judge explaining the ruling said that “during wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted”. One judge dissented, stating that “no act of Congress and no judicial precedent bars the plaintiffs from suing the private contractors - who were neither soldiers nor civilian government employees”.<sup>79</sup>

96. No employee of either company has been convicted of an offense in relation to this. The Working Group requested a meeting with CACI but the request was denied. CACI stated that the company was not a PMSC – but an information technology company – and therefore did not fall under the mandate of the Group. Nevertheless it recognized that at the request of the United States Army, the company did provide intelligence analysts and interrogators at Abu Ghraib prison.<sup>80</sup>

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<sup>77</sup> Center for Constitutional Justice, “Xe-Blackwater faces new claims over civilian shootings in Iraq, according to U.S. legal team for Iraqi families”, 27 March 2009.

<sup>78</sup> See <http://ccrjustice.org/ourcases/current-cases/al-quraishi>.

<sup>79</sup> James Vicini, “U.S. court dismisses Iraqi contractor torture case”, Reuters, 11 September 2009.

<sup>80</sup> J. William Koegel, Jr., letter to the *New York Times*, 12 January 2010. Available from [www.caci.com/iraq/CACI\\_Letter\\_NYT.pdf](http://www.caci.com/iraq/CACI_Letter_NYT.pdf).

## VII. Conclusions and recommendations

97. The Working Group reiterates its appreciation to the Government of the United States for extending to the Working Group an invitation to discuss the measures taken by the Government to ensure oversight and accountability of private military and security companies (PMSCs) it has contracted. The Government is not only one of the main users of PMSCs, but it is also the corporate home to many of the PMSCs. United States leadership in ensuring their accountability is therefore crucial.

98. The Working Group is pleased that the Government has since taken serious corrective actions and welcomes the recent adoption by the United States authorities of legislation and regulations aimed at strengthening further the oversight and accountability of PMSCs.

99. The Working Group is also encouraged by the initiatives of some representatives of Congress, who have introduced draft legislation that would comprehensively provide criminal jurisdiction over contractors and civilian employees of all federal agencies. This additional legislation is crucial to remove the existing loophole on the accountability of contractors.

100. The Working Group wishes to recall that States have the responsibility to take appropriate measures at all times or to exercise due diligence in order to prevent, punish, investigate and redress the harm caused by acts of private military and security companies or their employees that impair human rights.

101. With a view to improving its oversight mechanism and ensuring a climate of accountability, the Working Group recommends that the Government of the United States:

(a) Urge Congress to clarify and expand the reach of United States criminal jurisdiction over contractors abroad, either by amending the Military Extraterritorial Jurisdiction Act or by enacting new legislation specific to private contractors of the Government of the United States abroad;

(b) Support the Stop Outsourcing Security (SOS) Act, presently in Congress, which clearly defines the functions which are inherently governmental and that cannot be outsourced;

(c) Specify the rules of engagement for PMSCs to minimize the risks of direct participation in hostilities, including in covert operations and the manning of unmanned aerial vehicles;

(d) Renounce the inclusion of immunity provisions in bilateral agreements for United States contractors working abroad;

(e) Ensure that the Department of Justice carries out prompt and effective investigation of any allegations of human rights violations committed by PMSCs and prosecutes alleged perpetrators. For that purpose, Congress should allocate appropriate additional resources to investigating and prosecuting contractor crime and the Department of Justice should strengthen its investigative resource capacity and appoint an independent prosecutor for such crimes;



(f) Direct the Department of Justice to promptly make public the statistical information on the status of the investigations launched into PMSC human rights abuses and criminal activities as well as on prosecutions and penalties;

(g) Reduce the application of classified information and State secret privileges in court, in particular regarding alleged human rights violations involving PMSCs;

(h) Release regular statistics on the number of private military and security contractors injured or killed while supporting United States operations;

(i) Allocate appropriate substantial new resources to federal agency contracting, acquisition, audit and Inspector General operations to ensure effective management and oversight of private security and other contractors;

(j) Ensure that the oversight of private military and security contractors is not outsourced to PMSCs;

(k) Establish a specific system of federal licensing of PMSCs and especially of their contracts for operations abroad, as well as a centralized register of all contracts to private military and security companies;

(l) Establish a more vigorous vetting procedure before awarding contracts. This would require an assessment of past performance, including steps taken to provide victims with remedy and compensation for past abuses and to prevent further abuses. Otherwise, suspended or convicted companies and employees involved in human rights abuses should be banned;

(m) Ensure that all requirements for transparency and oversight apply when subcontracting;

(n) Launch, through Congress, an investigation on the use of PMSCs on rendition flights;

(o) Respond to pending communications from the Working Group, including its long-standing allegation letter related to Mr. Posada Carriles.

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