UNITED STATES MISSION
TO THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

June 1, 2012

Ms. Faiza Patel
Chair-Rapporteur
Working Group on the Use of Mercenaries
c/o Special Procedures Branch
Office of the High Commissioner for Human Rights
Geneva, Switzerland

Dear Ms. Patel,

Thank you for your letter dated December 8, 2011, regarding the legal status and accountability of U.S. private security contractors (PSCs) in Iraq and elsewhere. The United States takes issues of PSC regulation and accountability very seriously, and we appreciate your attention to this issue. We have prepared a response to each of your numbered questions, as set out below.

Question 1

In "Kiobel v. Royal Dutch Petroleum", the U.S. Government recently filed an amicus brief in the Supreme Court supporting reversal of the judgment of the lower court. In its brief, the U.S. Government argued that the lower court erred in adopting a categorical exclusion of corporations from civil liability under the Alien Tort Statute (ATS). The U.S. Government argued that courts may recognize corporate liability in actions under the ATS as a matter of federal common law. After oral argument, the Supreme Court directed supplemental briefing on "[w]hether and under whatcircumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." The case will be reargued in the fall. We have provided additional information on the possible implications of this case in response to question 5 below.

In "Minneci v. Pollard", the U.S. Government filed a brief with the Supreme Court arguing that the lower court erred in recognizing a "Bivens" remedy against employees of a private prison corporation where state law remedies are available. The Supreme Court recently reversed the decision of the lower court and declined to imply a "Bivens" remedy under the facts of the case. We have provided additional information on the possible implications of this case in response to question 4 below.

In "Saleh v. Titan", the U.S. Government filed a brief arguing that the Supreme Court should deny the petition for writ of certiorari because the developing area of law warranted further percolation in the lower courts before the Supreme Court intervened. The Supreme Court denied the petition for certiorari.

In "Al Shimari and Al-Quraishi", at the invitation of the court, the U.S. Government filed an

amicus brief in the Fourth Circuit on rehearing en banc, arguing that the appeal should be dismissed because the court of appeals lacks jurisdiction to decide the interlocutory appeal. The brief further argued that, if the court were to address the preemption issue, it should hold that federal preemption principles generally apply to the acts of civilian contractors in this context, but that preemption should not apply in these cases to the extent that the conduct by the civilian contractors or their employees constituted torture as defined in federal criminal law. The government's analysis of preemption principles focused on the unique facts and circumstances associated with the instances of prisoner abuse at Abu Ghraib reported in 2004. In May the Fourth Circuit dismissed the contractors' appeals for lack of appellate jurisdiction, allowing the cases to proceed in the lower courts. We have provided additional information on the possible implications of the preemption cases in response to question 5 below.

In "Mohamed v. Jeppesen", the U.S. Government asserted the state secrets privilege and moved for dismissal. The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the lower court decision, concluding that "significant harm" to the national security "would result from further litigation" because "the claims and possible defenses [in that case] are so infused with state secrets that the risk of disclosing them is both apparent and inevitable." In early 2011, the Supreme Court declined to review the case.

The facts of the cases identified in your letter and the holdings by relevant courts in those cases are detailed in published decisions by U.S. federal courts and are publicly available. The positions taken by the U.S. Government in these cases are thoroughly presented in the briefs filed publicly with the courts, which are attached to this response.

Question 2

The employees of security contractors operating pursuant to a contract with the U.S. Government in Iraq are not afforded diplomatic status and are subject to Iraqi criminal and civil jurisdiction. We have advised U.S. security contractors of our understanding that Coalition Provisional Authority Order No. 17 was suspended in January 2009, and that, as a result, U.S. Government security contractors are not immune from Iraqi jurisdiction. Although this is a question of Iraqi law best referred to the Government of Iraq, it is our understanding that the expiration of the "Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq" will have no implications for the jurisdictional status of security contractors in Iraq working for the Department of State, the U.S. Agency for International Development, or any other U.S. departments or agencies. We have advised U.S. security contractors of their obligation to comply with Iraqi law.

It is not the practice of the United States to accredit as members of the diplomatic mission security contractor personnel or to grant such requests submitted by other countries for such personnel working in the United States. Most U.S. Government security contractors operating around the world, including those currently operating in Iraq and Afghanistan, are not immune from the laws of the host government.

Question 3

The Civilian Extraterritorial Jurisdiction Act (CEJA) was introduced in the Senate this year as Senate Bill 1145 and is currently pending. The Bill has been reported by the Senate Judiciary Committee and placed on the Senate Legislative Calendar where it awaits further action by Congress.

The U.S. Government is fully committed to ensuring that U.S. contractors who are accused of committing serious crimes abroad are investigated and, when warranted, fully prosecuted. The Administration strongly supports swift passage of CEJA to expand and clarify extraterritorial jurisdiction over U.S. Government contractors, and is working on an ongoing basis with Congress to encourage passage of the Bill.

Though CEJA does contain a limited carve-out for certain intelligence activities of the United States, the carve-out, as it appears in the Bill, applies only to activities authorized in a manner consistent with applicable U.S. law. Moreover, pre-existing bases for extraterritorial jurisdiction will continue to exist, including 18 U.S.C. paragraph 3261 (Military Extraterritorial Jurisdiction Act), 18 U.S.C. paragraph 2441 (war crimes), 18 U.S.C. paragraph 2340A (torture), 18 U.S.C. paragraph 1596 (trafficking in persons), 10 U.SC. paragraph 802 (application of the Uniform Code of Military Justice to contractors that serve with or accompany an armed force in the field during declared war or a contingency operation), and 18 U.S.C. paragraph 7 (crimes committed in the special maritime and territorial jurisdiction of the United States).

Question 4

Victims of abuse by private contractors may have a number of avenues available for pursuing remedies under U.S. law. For example, state common law may provide for tort liability in certain circumstances. Other cases have been brought under various federal statutes. PSCs that engage in fraud on a U.S. Government contract can also be held accountable by whistleblowers through qui tam actions under the False Claims Act.

The U.S. Government has been careful to consider the importance of accountability for PSCs and remedies for potential victims when filing briefs in these cases. Issues associated with the ATS and principles of preemption, including preemption informed in part by the combatant activities exception to the Federal Tort Claims Act (FTCA), are addressed below in response to the specific inquiries in the fifth question. The remaining issues include the availability of a "Bivens" remedy and the state secret privilege.

In "Minneci v. Pollard", the U.S. Government argued, inter alia, that a "Bivens" remedy should not be implied if alternative state law remedies are available to the plaintiffs. In the unlikely event that a "Bivens" remedy, which is in any case a narrow doctrine, was otherwise available to a plaintiff alleging a violation committed by a PSC abroad, the argument advanced by the U.S. Government in "Minneci" would only eliminate that remedy if an alternative remedy was

available. Consistent with this limited approach, the Supreme Court's decision in "Minneci" denied a "Bivens" action where state tort law provides an alternative process for seeking a remedy.

The U.S. Government recognizes the implications that an overly broad application of the state secrets privilege may have on accountability, and has adopted a publicly available policy to invoke the privilege only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests. Furthermore, it is contrary to U.S. Government policy to assert the privilege in order to conceal violations of law or prevent embarrassment.

The U.S. Government has also looked for new and innovative ways to facilitate accountability and the resolution of disputes between PSCs and those alleging a violation of human rights. The U.S. Government has supported the International Code of Conduct for Private Security Service Providers (ICoC) initiative, which is in the process of establishing external independent mechanisms for oversight of PSCs acting in complex environments. This process will likely include a mechanism to address alleged violations of the ICoC and a means for facilitating resolution of disputes.

It is also important to note that PSCs are typically subject to both civil litigation and criminal proceedings in the courts of the territorial state in which they operate. PSCs operating pursuant to a contract with the U.S. Government in Iraq or Afghanistan are not immune from the jurisdiction of local courts.

With respect to Article 14 of the Convention Against Torture, we can refer you to paragraphs 79-84 of the Second Periodic Report of the United States of America to the Committee Against Torture, and paragraphs 267-76 of the Initial Report of the United States of America to the Committee Against Torture, which detail mechanisms relevant to our obligations under Article 14. We also note that the United States entered an understanding upon ratification of the CAT clarifying our understanding that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

Question 5

As noted above, the U.S. Government has filed an amicus brief supporting the reversal of the holding by the U.S. Court of Appeals for the Second Circuit in "Kiobel". The Second Circuit split with the holdings of four other U.S. Courts of Appeals in concluding that corporations cannot be found liable for violations of the law of nations under the ATS. The ATS aside, corporations are routinely sued in U.S. courts pursuant to tort law for violations including negligence and assault. The Supreme Court has since ordered supplemental briefing in "Kiobel" on issues of extraterritoriality and the case will be reargued next Term – but the Court's decision should not directly impact state tort law channels for redress against corporations.

The TVPA also provides a statutory cause of action available to hold individuals liable for acts of torture and extrajudicial killing committed under the authority or color of law of a foreign nation. The Supreme Court recently held in "Mohamad v. Palestinian Authority" that held that only a natural person is an "individual" who can be held liable under the TVPA.

With respect to preemption informed by the FTCA's combat activities exception, this remains a developing area of law. The U.S. Government amicus brief in "Al Shimari and Al- Quraishi" proposed a standard for application of preemption principles that recognizes the need to balance the various important federal interests at stake, such as the interest in ensuring that state tort litigation does not lead to second-guessing of military judgments, and the interest in ensuring that military detention operations are conducted in a manner consistent with humane treatment obligations and the law of war and that contractors are held accountable for misconduct. The Fourth Circuit dismissed the contractors' appeal for lack of appellate jurisdiction, allowing the case to proceed in the district courts, and declining to resolve the preemption issues at this time.

Question 6

The Department of Justice takes allegations of criminal conduct involving torture, war crimes and other human rights violations very seriously. The allegations at Abu Ghraib primarily concerned the conduct of members of the U.S. military, which were investigated and prosecuted by the Department of Defense. With respect to the actions of contractors and other non-military persons, the Department of Justice set up a special task force made up of career prosecutors from the Eastern District of Virginia to look at various allegations of detainee abuse including those relating to Abu Ghraib. For a variety of legal and policy reasons, the Department has not, for those referrals specifically and for referrals generally, provided detailed information.

Further, in August 2009, the U.S. Attorney General appointed a special prosecutor to investigate certain allegations of detainee abuse by elements of the intelligence community and contractors. As of May 2012, the investigations are ongoing, although the Attorney General indicated in a U.S. House of Representativescommittee hearing on February 2, 2012, that a number of investigations were near completion.

Question 7

The U.S. Government is fully committed to ensuring that PSCs respect international law and are held accountable when they engage in misconduct. This commitment is evidenced by many of the steps laid out in this response.

The United States Government also has taken a number of steps to improve contractor oversight. E.g., National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, para 841, 122 Stat. 230 (establishing independent "Commission on Wartime Contracting" to study contracting in Iraq and Afghanistan; reports and hearing documents available at the wartime contracting website (http://www.wartimecontracting.gov); Congressional Research Service,

DoD Contractors in Afghanistan & Iraq: Background & Analysis 18-19 (Mar. 29, 2011) (noting steps DoD has taken to improve management of contractors in Iraq and Afghanistan). Significantly, moreover, Congress has now expressly barred civilian contractors from performing interrogation functions, and has required private translators involved in interrogation operations to undergo substantial training and to be subject to substantial oversight. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, para 1038, 123 Stat. 2451; 75 Fed. Reg. 67,632 (2010).

The U.S. Government is working toward expanding and clarifying extraterritorial criminal jurisdiction by encouraging Congress to pass CEJA. In the meantime, the U.S. Government continues to pursue criminal prosecutions involving PSC misconduct, including the prosecution of several individuals involved in the Nissour Square incident in 2007. The earlier dismissal of that case was reversed on appeal, and the prosecution remains active.

The U.S. Government is also working to promote appropriate remedies for victims of misconduct. We have filed briefs in the course of litigation to influence the development of the law in a manner that recognizes that one of the government's interests is providing an appropriate remedy to victims. For example, the U.S. Government amicus brief in "Al Shimari and Al-Quraishi" argued against preemption of state tort law claims in those cases to the extent that they involve conduct by civilian contractors that, in the circumstances associated with the instances of abuse at Abu Ghraib in 2004, constitutes torture as defined in federal criminal law. In addition, through participation in the ICoC initiative, we are pursuing innovative means of facilitating dispute resolution under circumstances where traditional legal processes may be difficult to access.

We hope you find the above information useful in your work.

Sincerely,

Eileen Chamberlain Donahoe
Ambassador