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**PROCEDURES SPECIALES DU  
CONSEIL DES DROITS DE L'HOMME**

**UNITED NATIONS  
OFFICE OF THE UNITED NATIONS  
HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE  
HUMAN RIGHTS COUNCIL**

**Mandate of the Chair-Rapporteur of the Working Group on the use of mercenaries.**

REFERENCE: AL G/SO 214 (2005-4)  
USA 22/2011

8 December 2011

Excellency,

I have the honour to write to you in my capacity as Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, pursuant to Commission on Human Rights Resolution 2005/2, General Assembly resolution 65/203 and Human Rights Council resolution 18/4.

In paragraph 12 of resolution 2005/2, the Council requested the Working Group to “monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights [...]”.

In this connection, the Working Group would appreciate receiving information with respect to the legal status and accountability of United States private military and security companies (“PMSCs”) in Iraq and elsewhere.

As you are aware, the Status of Forces Agreement (SOFA) between the United States and Iraq will expire on 31 December 2011. The SOFA removed the immunity from prosecution in Iraqi courts of private contractors which have contracts with the United States and their employees, which immunity had been granted by Coalition Provisional Authority Order 17 of 27 June 2004. However, as we discovered during our country visit to Iraq in June 2011, and detailed in our report to the 18<sup>th</sup> Session of the Human Rights Council, it is unclear whether the SOFA covers all PMSCs in Iraq under contracts with United States Government agencies. Your Excellency’s Government has announced that it will withdraw the remainder of its troops from Iraq by the end of the year. But the Department of State, USAID, and other United States agencies are expected to continue to maintain a significant presence in Iraq into the new year and it has been made clear that they will rely on PMSCs for security. The Working Group would like to know about the arrangements contemplated by your Excellency’s Government with respect to these PMSCs, in particular, whether it is anticipated that some or all PMSC employees will be subject to jurisdiction in Iraqi courts and what measures your Excellency’s Government is taking to ensure proper cooperation with the Iraqi justice system in case of an incident.

Turning to the issue of jurisdiction in the United States – which is the home country of many private military and security companies – the Working Group is also interested in obtaining information regarding the status of the proposed Civilian Extraterritorial Jurisdiction Act. Moreover, because the United States Senate version of the bill includes a statutory carve-out for authorized intelligence activities, the Working Group would like to convey to your Excellency's Government its concern that such a provision undermines the possibility of comprehensive criminal accountability for PMSC employees involved in serious human rights violations.

In addition to these legislative issues, the Working Group has been following the progress of several United States court cases that directly relate to, or potentially affect, contractor accountability: *Kiobel v. Royal Dutch Petroleum*, *Minnecci v. Pollard*, *Al-Quraishi v. Nakhla*, *Al Shimari v. CACI*, *Saleh v. Titan* and *Mohamed v. Jeppeson Dataplan*.

On 29 October 2011, the United States Supreme Court granted certiorari in the case of *Kiobel v. Royal Dutch Petroleum*, a case raising the issue of whether a corporation could be held liable in United States courts for human rights violations abroad. In *Kiobel*, the plaintiffs, Nigerian nationals, allege that three oil companies enlisted the Nigerian Government to use its military to suppress local opposition to oil exploration in the Niger Delta. The case will require the Court to decide whether the Alien Tort Statute of 1789, which authorizes civil actions in United States courts for violations of international law or United States treaties, applies to corporations and not only to natural persons. If the Court finds that the Alien Tort Statute does not provide for corporate liability for human rights violations, an important avenue of accountability for PMSCs would be foreclosed.

In addition, the Working Group has learned that on 1 November 2011, the Supreme Court heard oral arguments in *Minnecci v. Pollard*, a case involving the GEO Group, a company that specializes in private detention facilities. This case may have far reaching implications for private contractors working for your Excellency's Government as it raises the issue of whether private prison guards should be protected by the same immunity afforded to government agents. If the Court finds that private prison guards perform an inherently governmental function, this could affect standards for accountability for other contractors performing traditionally State functions.

In June 2011, the United States Supreme Court declined to hear the case of *Saleh v. Titan Corporation*, a civil lawsuit brought by 250 Iraqi detainees alleging torture, abuse and sexual violence by United States private contractors CACI and Titan (now L-3 Services) who provided interrogation and translation services at Abu Ghraib prison. In September 2009, the United States Court of Appeals for the District of Columbia Circuit dismissed the civil case on the ground, *inter alia*, that the contractors were involved in combat activities and therefore, should be protected from lawsuits. Before deciding whether or not to hear the case, the Supreme Court asked the United States Government, which was not a party to the suit, its opinion on the case. While noting the shortcomings of the ruling of the Court of Appeals, the United States Government recommended that the Supreme Court should decline to hear the case, effectively denying victims a judicial

remedy. The Working Group is concerned that the decision, and the United States Government's opposition to Supreme Court review, may be inconsistent with your Excellency's Government obligation to provide enforceable remedies for human rights violations. The Working Group is also concerned that the decision blurs the distinction between civilians and combatants. By doing so, it encourages PMSCs to participate in hostilities even without the accountability constraints imposed on the military and thus increases human rights risks.

Earlier this month, the 4<sup>th</sup> Circuit Court of Appeals agreed to en banc consideration of two cases: *Al-Quraishi v. Nakhla* and *Al-Shimari v. CACI*. These cases also involve claims against contractors for detainee abuses at Abu Ghraib prison in Iraq. They were dismissed on the same "combat activities" grounds, *inter alia*, asserted by the United States Court of Appeals for the District of Columbia Circuit decision in *Saleh v. Titan*.

Finally, in May of this year, the United States Supreme Court declined to hear the plaintiffs' appeal in *Mohamed v. Jeppesen Dataplan*, a case alleging complicity by private companies in extraordinary renditions. We understand that the dismissal – which was on the basis of the government's assertion that litigation would necessarily reveal national security secrets that it was entitled to keep confidential (the 'state secrets privilege') – leaves the plaintiffs with no judicial remedy against the defendant.

These cases, especially when taken together, raise questions about whether the United States system provides adequate remedies to the victims who allege human rights abuses by PMSCs. The Working Group would like to reiterate our view that Governments should ensure comprehensive accountability for human rights violations involving private military and security companies and should provide adequate remedies for victims. The Working Group believes that the potential for civil liability is an important element of comprehensive accountability for human rights violations by such companies and urges your Excellency's Government to take the necessary measures to ensure the availability of this important remedy.

We would therefore appreciate if your Excellency's Government could provide detailed information on the following questions:

1. Are the facts alleged in the above summaries of cases accurate, including regarding positions taken by your Excellency's Government and grounds for rulings by the relevant courts?
2. What is the effect of the expiration of the SOFA on the legal status, in terms of immunity, of United States private military and security company employees in Iraq, including those working for the Department of State, USAID, and other United States agencies?
3. What is the status of the Civilian Extraterritorial Jurisdiction Act within the legislative process? Please explain how the inclusion of a carve-out for authorized

intelligence activities is compatible with international human rights standards regarding the State's responsibility to ensure comprehensive accountability for human rights violations by private actors, including PMSCs. The CEJA rule of construction states that it shall not be construed to limit or affect extraterritorial jurisdiction related to any other federal law. Please clarify the extent to which contractors who fall under the CEJA 'intel carve-out' could be held criminally liable and victims would have judicial remedy for human rights and international humanitarian law violations. If such remedy is available, please specify the provisions in United States law where it is contained. Please explain how such provisions are sufficient to ensure contractors who fall under the CEJA 'intel carve-out' are held accountable for human rights violations.

4. Please provide information as to any measures taken by your Excellency's Government to provide adequate remedies for the victims of violations of human rights by private contractors, including redress in civil court. In particular, in light of the issues raised by the cases cited above, please provide information on any use by your Excellency's Government of private contractors in detention facilities abroad and measures taken to ensure their accountability for human rights violations. In addition, we would appreciate information on how the United States meets its obligations under Art. 14 of the Convention against Torture ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an *enforceable* right to fair and adequate compensation. . .") (emphasis added) in light of the apparent blockage of judicial remedies for alleged violations of the Convention.
5. In the event that the Alien Tort Statute is held to apply only to natural persons and not to corporations, please clarify any measures under consideration by your Excellency's Government to ensure that companies can be held accountable for human rights violations and to provide effective remedies to victims. If courts continue to apply the "combat activities" exception to civilian contractors, please clarify any measures under consideration by your Excellency's Government to maintain compliance with human rights obligations to provide effective judicial remedies to victims of human rights violations involving private military and security companies.
6. What is the current state of investigations and criminal accountability measures for abuses allegedly perpetrated by PMSCs against detainees at Abu Ghraib and other prisons, as detailed in the Taguba Report?
7. Any additional information which your Excellency's Government wishes to share with us in this regard would be much welcome.

We would appreciate a response within six weeks. We undertake to ensure that your Excellency's Government's response to these questions is accurately reflected in the reports we will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

Faiza Patel  
Chair-Rapporteur of the Working Group on the use of mercenaries