

## **UPDATE: State of Affairs: Four Years After Nisoor Square**

### **Accountability and Oversight of U.S. Private Security and Other Contractors**

#### **Executive Summary**

Four years after Blackwater private security contractors killed 17 unarmed civilians and wounded dozens more in Nisoor Square, Iraq, the U.S. government is still grappling with establishing an effective system of accountability and oversight for private military and security contractors it fields abroad. In less than 3 months, when U.S. troops withdraw from Iraq, private security contractors will be performing critical security-related functions once performed by the military, including convoy security, recovering killed and wounded personnel, recovering damaged vehicles and downed aircraft, clearing travel routes, and disposing of explosive-ordnance. The U.S. government has a responsibility and a national interest to act now.

The tragedy of September 16, 2007 should serve as a stark reminder that failing to establish an effective system of oversight and accountability for private security and other contractors undermines U.S. national security interests. The Nisoor Square massacre revealed the United States' unprecedented reliance in size and scope on private contractors to perform military and security functions in a war zone without a commensurate U.S. policy for overseeing this contractor force and holding contractors accountable for serious violent crimes. The United States' inadequate oversight and inability to hold contractors accountable has alienated local populations and undercut the United States' efforts to "win hearts and minds" in Iraq and Afghanistan.

As Human Rights First (HRF) [reported](#) in 2010, positive reforms in U.S. law and policy were made in the years after Nisoor Square, but many oversight and accountability gaps remained. In the year since HRF's report, some progress has been made, but significant challenges persist. As outlined below, there are still considerable concerns relating to the oversight and accountability of U.S. private security and other contractors, including: clarifying and expanding U.S. criminal jurisdiction over civilian contractors; increasing investigatory and prosecutorial resources for contractor crimes; increasing oversight and control over contractors in the field; ensuring contractors are not drawn into hostilities; and ensuring victims of contractor abuse are not denied their right to a remedy.

The U.S. government has a rare opportunity to immediately close a significant portion of the contractor accountability and oversight gap by enacting the [Civilian Extraterritorial Jurisdiction Act \(CEJA\) of 2011](#) into law. CEJA, if enacted, will address a serious deficiency in contractor accountability and oversight by extending U.S. criminal jurisdiction over contractors for serious crimes and establishing investigative task forces for contractor oversight. In the past year, CEJA has received support from U.S. agencies, independent oversight commissions, industry, and civil society. The United States should seize this critical moment and pass CEJA into law.

As the United States withdraws from Iraq and eventually from Afghanistan and private contractors replace military forces there, the United States must increase its oversight and accountability of private security and other contractors if it wants to prevent another tragic incident such as Nisoor Square from happening again. The United States has both a responsibility and a national security interest to ensure

that contractors who perform military and security services in its name will be held accountable for serious abuses – just as it does for our men and women in uniform.

## I. Criminal Accountability for Contractor Violent Crimes

### Criminal Jurisdiction

- **Growing Chorus that U.S. Criminal Jurisdiction over U.S. Civilian Contractors Needs to be Clarified.** In the last year, Congress took a significant step in closing a gap in U.S. law that was first raised soon after Nisoor Square, in which some asserted prevented criminal prosecutions of non-Defense contractors.<sup>1</sup> The Civilian Extraterritorial Jurisdiction Act (CEJA), legislation designed to hold U.S. contractors accountable for serious crimes committed abroad, was simultaneously introduced in both chambers of Congress by Sen. Patrick Leahy (D-VT)<sup>2</sup> and Rep. David Price (D-NC).<sup>3</sup> In June, the Senate Judiciary Committee unanimously voted for the bill, which now moves to the full Senate for the first time. The [Justice Department](#), [State Department](#), [Commission on Wartime Contracting in Iraq and Afghanistan](#), and [Industry leaders](#) have all called for legislation to clarify U.S. criminal jurisdiction of civilian contractors fielded abroad. The United States should not squander this critical moment where U.S. agencies, independent oversight commissions, industry, and civil society have reached a consensus that CEJA is needed to close a serious accountability gap. Congress should pass and the President should sign CEJA into law immediately.

### Reporting & Investigating Serious Incidents

- **Transition in Iraq Leaves a Serious Gap in Tracking and Investigating Serious Incidents Involving PSCs in Iraq.** In August, the Special Inspector General for Iraq Reconstruction (SIGIR) found that once the U.S. military forces leave Iraq “it appears no single U.S. organization in Iraq will be responsible for overseeing the actions of U.S.-funded PSCs and resolving any serious incidents with the Government of Iraq involving PSCs.”<sup>4</sup> The Armed Contractor Oversight Branch (ACOB) and Contractor Operations Cells (CONOC), DoD divisions responsible for tracking and investigating serious incidents of DoD PSCs and those PSCs and subcontractors who indirectly support DoS, may be closed down when the U.S. military leaves Iraq at the end of the year. The U.S. Embassy’s Regional Security Office (RSO) has no plans to assume ACOB and CONOC responsibilities once U.S. military leaves Iraq, even though PSCs currently reporting serious incidents to the DoD divisions will be operating in Iraq after 2011.

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<sup>1</sup> *The State Department and the Iraq War: Hearing Before House Committee on Oversight and Government Reform*, 110th Cong. 93-105 (2007) (statement by Secretary of State Rice).

<sup>2</sup> Civilian Extraterritorial Jurisdiction Act (CEJA) of 2011, S. 1145, 112th Cong. (2011).

<sup>3</sup> Civilian Extraterritorial Jurisdiction Act (CEJA) of 2011, H.R. 2136, 112th Cong. (2011).

<sup>4</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, MONITORING RESPONSIBILITIES FOR SERIOUS INCIDENTS INVOLVING PRIVATE SECURITY CONTRACTORS ONCE U.S. MILITARY FORCES LEAVE IRAQ HAVE NOT BEEN DETERMINED SIGIR 11-019 (August 2011).

The Office of Security Cooperation-Iraq (OSC-I) has agreed to monitor ACOB PSCs, but not all DoD PSCs.

### Prosecuting Serious Incidents

- **First Completed Prosecution of a Contractor for Abuse or Violence Against Local Nationals, But Prosecutions for Serious Crimes of Past Abuse Remain Abysmal.** Despite [numerous allegations](#) of serious criminal conduct by contractors working in Iraq and Afghanistan against civilians, there has been only one completed prosecution of a contractor for detainee abuse<sup>5</sup> and one completed prosecution of two contractors for abuse or violence against local nationals. This past year brought the first completed prosecution of a contractor for abuse or violence against a local national. After the first trial ended in a hung jury, two Blackwater contractors were convicted of involuntary manslaughter for the shooting death of an Afghan civilian.<sup>6</sup> Also, in April, the D.C. Circuit Court of Appeals reinstated the criminal case against four of the Blackwater guards implicated in the Nisoor Square shootings.<sup>7</sup> By contrast, earlier in the year, the Justice Department dropped the murder charges against a Blackwater contractor who allegedly shot and killed a member of the Iraqi Vice President's security detail.<sup>8</sup>

The dearth of prosecutions for contractor crimes are not only a result of ambiguity in U.S. law, but also a result of the gross mishandling of investigations by U.S. government officials who were ill-equipped to conduct investigations. Not only would CEJA clarify that U.S. courts have criminal jurisdiction over these contractor crimes, but it would also establish investigative units that would provide additional resources to bolster investigations and prevent botched investigations from occurring in the future.

## II. Control and Oversight of Contractors

### Tracking Contracts and Contractor Personnel

- **No Progress Made in Tracking Contracts and Contractor Personnel in Past Year.** Three years after DoD, DoS, and USAID agreed to use a common database – the Synchronized Predeployment and Operational Tracker (SPOT) - to track contracts and contractor personnel in Iraq and Afghanistan, SPOT is still not yet fully implemented. DoD continues to track the number of its contractors in Iraq and Afghanistan through a self-reporting mechanism and there

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<sup>5</sup> U.S. v. Passaro 5:04-cr-00211-BO (4th Circ.) (Aug. 2009). David Passaro, a CIA contractor, was convicted of assault in August 2006 for the beating death of a detainee in Afghanistan. He was sentenced to 8 years.

<sup>6</sup> United States v. Cannon (E.D.Va. June 27, 2011). Justin Cannon and Christopher Drotleff were sentenced to 30 and 37 months respectively.

<sup>7</sup> James Vicini, *U.S. Court Reinstates Blackwater Iraq Shooting Case*, REUTERS, April 22, 2011, available at <http://www.reuters.com/article/2011/04/22/us-usa-iraq-blackwater-idUSTRE73L2XS20110422>.

<sup>8</sup> James Risen, *Efforts to Prosecute Blackwater Are Collapsing*, NY TIMES, Oct. 20, 2010, available at <http://www.nytimes.com/2010/10/21/world/21contractors.html>.

is still no comparable data for DoS or USAID. Without complete and accurate data on contracts and contractor personnel, adequate oversight is impossible.

### **Oversight in the Field**

- **Serious Deficiencies Remain in Training and Number of Qualified Contracting Officer Representatives to Oversee Contractors in Iraq.** In July of this year, SIGIR found that almost 40% of the Contracting Officer's Representatives (CORs) – the only government oversight officials located on-site with the contractors' personnel – said the "training they received did not prepare them for their duties and 25% said they lack sufficient time to conduct effective oversight."<sup>9</sup> This is similar to what SIGIR found in 2009. Moreover, checklists developed to help CORs review contractors' compliance with the contract including human trafficking and arming requirements are not being completed by CORs, or not being maintained by DCMA. SIGIR found those that were completed were of "questionable value or provided little assurance that CORs' oversight was adequate."<sup>10</sup>
- **CORs are Not Fully Prepared for Their Roles and Responsibilities to Provide Adequate Oversight in Afghanistan.** In June, the GAO reported that CORs are not adequately trained to work with private security contractors in Afghanistan.<sup>11</sup> They do not always understand the full scope of their responsibilities – which include compiling a monthly weapon's discharge report and ensuring contractors adhere to arming requirements, personnel reporting systems, property accountability and badging – and as a result, do not always ensure contractor requirements are being met. Moreover, it found CORs frequently lack the required technical skills to monitor contractor performance and the number of CORs is insufficient to provide adequate oversight of thousands of contracts in Afghanistan. Furthermore, it found efforts to vet non-U.S. vendors to reduce the possibility that U.S. funds are financing insurgents or criminal groups needs improvement.

### **III. Ensuring Contractors Are Not Drawn Into Hostilities**

- **Contractors Have Been Banned from Performing Some Functions and Receive Scrutiny for Other Functions, But U.S. Policy Still Threatens to Draw Contractors into Hostilities.** In July of this year, contractors were [banned](#) from interrogating detainees under the control of

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<sup>9</sup> OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, CONTROL WEAKNESSES REMAIN IN OVERSIGHT OF THEATER-WIDE INTERNAL SECURITY SERVICES CONTRACTS (TWISS) SIGIR 11-018 (July 28, 2011). COR responsibilities include verifying the contractor performs all contract and task order requirements; performing necessary inspections; accepting government services performed under the contract and rejecting those that do not meet the contract's requirements; monitoring the contractor's performance; and notifying the contractor, QAR, and contractor officer of deficiencies observed during surveillance.

<sup>10</sup> *Id.*

<sup>11</sup> U.S. GOV. ACCOUNTABILITY OFFICE, OPERATIONAL CONTRACT SUPPORT ACTIONS NEEDED TO ADDRESS CONTRACT OVERSIGHT AND VETTING OF NON-U.S. VENDORS IN AFGHANISTAN GAO-11-771T (June 30, 2011).

DoD. The prohibition can be waived by the Secretary of Defense for a limited time period if necessary to U.S. national security interests.

In 2010, the Commission on Wartime Contracting in Iraq and Afghanistan (CWC) raised serious concerns with security-related tasks normally performed by DoD that would shift to DoS once the U.S. military leaves Iraq. With DoS reporting that it would need up to 7,000 private security contractors to perform functions once performed by the military, CWC found that “[a]part from raising questions about inherently governmental functions, such scenarios could require decisions related to the risk of innocent casualties, frayed relations with the Iraqi government and populace, and broad undermining of U.S. objectives.”<sup>12</sup>

While U.S. government policy bars security contractors from engaging in combat or in offensive military operations, it permits contractors to use deadly force to protect lawful military targets, including military facilities, property and personnel, from even non-imminent threats.<sup>13</sup> This puts contractors at high risk for being drawn into hostilities which renders them targetable under international humanitarian law without the privileges that military personnel enjoy under the law of war as combatants. Restrictions on what functions private contractors are asked to fulfil and when they are permitted to use force are essential to maintaining the important distinction under international humanitarian law, designed to protect civilians in conflict from harm. Eroding the critical distinction between contractors and combatants under the law of war jeopardizes civilians in conflict and leaves contractors susceptible to domestic prosecution.

The U.S. government should stop tasking PSCs with functions that are likely to draw them into hostilities. Consideration should be given to the nature of the object, property, or persons that contractors are hired to protect and other circumstances that put civilians at high risk of being pulled into combat.

#### **IV. Remedies for Victims of Contractor Crimes**

- **Victims of Contractor Crimes are Denied Their Right to an Effective, Enforceable Remedy.** Despite the United States’ international legal obligation under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to provide access to effective remedies for human rights violations, the U.S. government has invoked the states secret privilege or other immunity doctrines to block civil lawsuits from being heard in U.S. courts.

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<sup>12</sup> COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, SPECIAL REPORT ON IRAQ TRANSITION PLANNING: BETTER PLANNING FOR DEFENSE-TO-STATE TRANSITION IN IRAQ NEEDED TO AVOID MISTAKES AND WASTE (July 2010), available at [http://www.wartimecontracting.gov/docs/CWC\\_SR2010-07-12.pdf](http://www.wartimecontracting.gov/docs/CWC_SR2010-07-12.pdf).

<sup>13</sup> For further discussion, see HUMAN RIGHTS FIRST, STATE OF AFFAIRS: THREE YEARS AFTER NISOOR SQUARE, ACCOUNTABILITY AND OVERSIGHT OF U.S. PRIVATE SECURITY AND OTHER CONTRACTORS (2010), available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/State\\_Of\\_Affairs.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/State_Of_Affairs.pdf).

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In May 2011, the U.S. Supreme Court declined to hear the case of *Mohamed, et al. v. Jeppesen Dataplan, Inc.*, letting stand the Ninth Circuit Court of Appeals decision to dismiss the civil case against the contractor before any evidence – even public records – could be produced after the U.S. government asserted that doing so would expose states secrets and cause significant harm to national security. Jeppesen, a subsidiary of Boeing, is reported to have worked with the Bush Administration to carry out the extraordinary renditions of five men who were allegedly kidnapped and transferred to foreign countries where they allege they were interrogated under torture.

Similarly, in June 2011, the U.S. Supreme Court declined to hear the case of *Saleh, et al. v. Titan Corporation, et al.* a civil lawsuit brought by 250 Iraqi detainees alleging torture, abuse and sexual violence by U.S. private contractors CACI and Titan (now L-3 Services) who provided interrogation and translation services at the notorious Abu Ghraib prison. In September 2009, the D.C. Circuit Court of Appeals [dismissed](#) the civil case on the ground 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 U.S. government, which is not a party to the suit, its opinion on the case. While noting the shortcomings of the appellate court's ruling, the U.S. government [recommended](#) that the Court should decline to hear the case, effectively denying victims a remedy.

### V. Promoting International Standards

- **International Code of Conduct for Private Security Providers Finalized, But Must Be Accompanied by a Robust Governance Structure.** The International Code of Conduct (ICoC) was finalized and opened for signature in November of last year. A Temporary Steering Committee (TSC) was formed to develop a governance structure for the code. The government, industry and civil society representatives of the TSC have been working to create a mechanism to perform the Code's core functions – certification of policies and procedures, in field monitoring and performance assessment, and a grievance process. The key issues confronting the TSC are: ensuring that the governance mechanism has a truly multi-stakeholder governance structure; empowering the governance mechanism to conduct its own independent certification and assessment functions that lead to credible determinations of industry compliance with code provisions; and creating a grievance mechanism that is accessible and credible. Human Rights First's experience with multi-stakeholder initiatives counsels that a code must be accompanied by a robust enforcement mechanism if it is to have an impact in addressing and mitigating the negative human rights impacts of a company's global operations. To be effective, the governance mechanism must go beyond a review of company policies and procedures to assess in field performance and recommend remedial steps to address the issues identified.

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The United States should continue its participation in efforts to establish a credible, independent multi-stakeholder governance mechanism for the ICoC and work to ensure its ability and capacity to perform its certification, assessment and grievance functions.