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مجلس حقوق الإنسان
الدورة الرابعة
البند ٢ من جدول الأعمال المؤقت

تنفيذ قرار الجمعية العامة ٢٥١/٦٠ المؤرخ ١٥ آذار/مارس ٢٠٠٦ المعنون "مجلس حقوق الإنسان"

مذكرة شفوية مؤرخة ٢٣ كانون الثاني/يناير ٢٠٠٧ موجهة من البعثة الدائمة لهندوراس
لدى مكتب الأمم المتحدة في جنيف إلى مفوضية الأمم المتحدة السامية لحقوق الإنسان

تُهدي البعثة الدائمة لهندوراس لدى مكتب الأمم المتحدة والمنظمات الدولية الأخرى في جنيف تحياتها إلى مفوضية الأمم المتحدة السامية لحقوق الإنسان، وتشرف بأن تحيل طيه تعليقات وتوضيحات حكومة هندوراس بشأن تقرير الفريق العامل المعني بمسألة استخدام المرتزقة وسيلة لانتهاك حقوق الإنسان وعرقلة ممارسة حق الشعوب في تقرير المصير.

وتطلب البعثة الدائمة لهندوراس إلى مفوضية الأمم المتحدة السامية لحقوق الإنسان تعميم هذه التعليقات والتوضيحات* بشأن تقرير الفريق العامل بوصفها وثيقة رسمية للدورة الرابعة لمجلس حقوق الإنسان، باللغات الرسمية للأمم المتحدة.

* استُنسخت في المرفق كما وردت، وباللغة الإنكليزية.

Annex

COMMENTS ON THE REPORT OF THE UNITED NATIONS WORKING GROUP

In response to the request sent by the Ministry of Foreign Affairs, the Ministries of Labour and Social Security, Foreign Affairs, National Defence and Public Security present these comments and explanations on the report of the United Nations 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.

Summary

Third paragraph: According to the information and records of the Ministry of Labour and Social Security, the recruitment of Honduran nationals to work in Iraq was discontinued after the hiring of the 189 workers referred to in the report.

While it is true that the report points to irregularities in the hiring of those workers, it should be explained that the document signed by the workers who travelled to Iraq contains the provisions of the Labour Code in force in Honduras.

Introduction

Paragraph 2. In Honduras, private security companies are for-profit commercial legal entities, not private military security companies (PMSCs), under the terms of Decree No. 156-98 containing the National Police Organic Act and Agreement No. 0771-2005 containing the rules governing private security companies. As a result, the term “private military security companies” does not exist in Honduran domestic law and private security companies are not military. The only exception is the company Your Solutions Honduras, which is a very special case and was never established as a private security company as its application for an operating licence remained pending. The company is a subsidiary of the American company Your Solutions Incorporated, based in Chicago, Illinois, United States of America, which took advantage of Honduran domestic law to get its Honduran subsidiary to hire private security personnel whom it sent to Iraq.

Paragraph 2 (b). It should be explained that the hiring of Honduran workers was carried out by a foreign company and not by “private security companies (...) subsidiaries of foreign companies”.

I. GENERAL OBSERVATIONS

Paragraph 4. The term “mercenary” does not exist in Honduran law. Although the actions of Your Solutions Honduras have allowed the Commission to use the term to identify a human rights violation, no personnel have ever been trained for that purpose in Honduras. The persons concerned were recruited to work as security guards.

Paragraph 5. The Honduran State is indeed responsible for public security, but the provisions of the Police Act regulating privatized security work make a distinction between such work and law enforcement. There is no question of State functions being privatized.

II. POLITICAL AND LEGAL STRATEGY AND INSTITUTIONAL FRAMEWORK

Paragraph 8. Article 26 of Agreement No. 0771-2005 containing the rules for the registration, control, monitoring and oversight of private security, investigation and training companies and domestic security groups sets forth the obligation of both employees and users of their services to respect the principles of integrity and dignity of the human person.

Paragraph 10. Only the Ministry of Security, subject to a ruling by the units or departments involved, may authorize, register, control, monitor and oversee commercial firms providing private preventive security, investigation, training and similar services, subject to compliance with the requirements of the Police Act and the rules in force for the control and monitoring of private security companies.

Paragraph 15. The Act regulating the possession of weapons and firearms prohibits natural and legal persons from owning high-calibre weapons (military weaponry). Some AK-47 type weapons were confiscated and others were handed over to the Honduran State by members of the public and private security companies, through the National Police.

III. PRIVATE SECURITY COMPANIES IN HONDURAS

Paragraph 19, last sentence. The Ministry of Labour learned in November 2005 of the complaint of breach of contract by four workers hired by Your Solutions Incorporated (Dennis Chavarria Vega, Saúl Edgardo Maradiaga A., Mario Rene Urquia Villena and Daniel Alvarado Matamoros), whereupon the Labour Inspectorate attended to the workers and referred them to the Individual Disputes Office of the Department of Labour. The Office summoned the company and, when the latter did not appear, ruled that the administrative channel had been exhausted, leaving the way open for the workers to file their complaint through the judicial channel. Accordingly, three of the workers secured the assistance of legal counsel, in the person of the lawyer Jerónimo Leonel Irias Suazo, rather than the free legal representation provided by the Ministry of Labour through the Office of the Labour Attorney, for pursuing their complaint in the labour courts.

Paragraph 20, penultimate sentence. With regard to working hours, clause 5 of the contract stipulates that the employee formally undertakes to provide his services for the maximum legal ordinary working day established in the applicable legislation (State of Illinois, United States of America, and Honduras, according to clause 14 of the contract). However, he may work for up to 12 hours a day, subject to statutory overtime pay, and is entitled to a minimum break of one and a half hours during the working day, which may be split into periods of no less than 30 minutes each.

Paragraph 23. Supervision by the Ministry of Labour and Social Security in the case of the Honduran nationals hired to work in Iraq did not include monitoring of the selection process or the training programme.

Paragraph 24, last sentence. Since this statement was published in the newspaper *La Tribuna*, we refrain from commenting on it.

Paragraph 25. The Ministry of Labour wishes to explain that, while it is true that one of the clauses of the contract signed between the company and the workers established that the employer reserved the right to transfer or move the employee from any given post, assignment or task as required, the same clause established that the assignment could not be at a level or a wage lower than the employee's current assignment and that the change must be communicated immediately to the Ministry of Labour and Social Security.

With regard to the initial wage offered (US\$ 9,000), the Ministry was aware only of the wage agreed in the employment contract.

Paragraphs 26 and 27. With regard to the information in these paragraphs, it should be explained that the Ministry of Labour and Social Security required the hiring company to submit a copy of the workers' insurance policy to ensure that they were covered for occupational risks. A copy of the policy is attached.

Paragraph 28, first sentence. The information contained in paragraph 19 applies to this sentence. The Ministry of Labour and Social Security investigated the claims of breach of contract filed by the Honduran workers with the Honduran labour courts. Those claims currently total 16, of which 3 have received a response.

Paragraphs 30 and 31. With regard to the use of military instructors, weapons and training centres, the Ministry of National Defence states that the Honduran armed forces did not provide military personnel, equipment or facilities for Your Solutions training activities, in that the property in question, located in the municipality of Lepaterique, was donated by the armed forces to AFE-COHDEFOR in 2002.

Paragraph 32. The contract signed between the workers and Your Solutions Incorporated contains both the clauses cited in the report, which read as follows: Clause 14. Jurisdiction. "The contract shall be governed by the laws of the State of Illinois, United States of America, and of Honduras, as though signed in that location and without reference to its conflicts of laws principles. In the event of compliance disputes, the competent courts shall in all cases be at the employee's request, or wherever the service is being provided." Any matter not regulated by the contract is to be governed by the provisions of the Labour Code, internal rules and other applicable labour and social security laws, the basic principles of labour law and the internationally recognized fundamental rights of workers (ILO), subject to changes agreed between the employer and the employee. Under clause 16, for the purposes of compliance with the obligations agreed between the employer and the employee, "Your Solutions Honduras shall be jointly responsible with Your Solutions Incorporated" with respect to the rights of employees.

Paragraph 33. The Ministry of Labour wishes to explain that the contract signed between the company and the workers is the basis of a labour relationship and contains the clauses that, under article 37 of the Labour Code, any such contract must contain.

Paragraph 34. It is true that Your Solutions Honduras did not complete the procedure for obtaining an operating licence. However, the information to which the report refers was provided by the Ministry of Security with a view to confirming that the company's application for an operating licence was pending.

Paragraph 36. Private security companies and individuals who have set up their own security teams are strictly prohibited from performing functions that, under the Constitution or the law, fall within the jurisdiction of the security forces, the Public Prosecutor's Office or the judiciary (article 59 of the rules on the control and monitoring of private security companies).

Paragraph 37. Prior to 1998, the Ministry of Defence, through the General Audit Office, was responsible for regulating private security companies. Article 10, paragraph 5, of the Police Act places the National Police in charge of regulating and monitoring private security services. To that end, the Ministry of Security, by internal agreement and in exercise of its powers, set up the Security Company Registration, Supervision and Oversight Unit, which was to be assisted by the Preventive Services Directorate and the Criminal Investigation Directorate for activities falling within their respective jurisdictions.

Paragraph 38. Article 92 of the Police Act defines preventive services, but article 91, paragraph 4, categorizes private security companies into those providing preventive security (security guards), private investigation or training services. Thus, the Ministry of Security defines the company's functions in article 92 and categorizes the specific service described in the company's articles of constitution, with the result that the company is not allowed to duplicate existing preventive functions but must specify the precise service that it is to provide. As a result, the Unit is fully responsible for categorizing such companies.

Paragraph 40. Most of the figures cited by members of the public are drawn from reports in the national press. The Private Security Company Registration, Supervision and Oversight Unit of the Ministry of Security is therefore verifying in situ the existence of legally constituted companies and, in the case of companies that have been constituted illegally either out of ignorance of the law or by fraud, closing them down and fining them for failure to comply with the laws in force. As a result, the Unit will determine the real number of private security guards once it has concluded its nationwide inspections.

No private security company has, on its own, exceeded the figure of 15 per cent of the total National Police force or of individual equipment, weapons and communications stipulated in the Police Act.

Paragraph 42. The illegal companies discovered in the different departments of Honduras are closed down and fined. The rules require them to submit: (1) a statement of general liquidation of the company's human and material resources, with a report to the Ministry of Security; (2) a certificate of solvency issued by the country's tax authorities; and (3) a certificate of liquidation issued by the Property Institute (formerly the Property Registry). Moreover, the ballistics registry cannot register any weapon if the company does not have an operating licence authorized by the Ministry of Security.

Final sentence. With regard to the private security companies in Honduras that are not legally constituted, the Ministry of Labour and Social Security, in coordination with the Ministry of Security within their respective spheres of competence, has held working meetings with some 72 managers of legally constituted and registered private security companies with a view to: (1) ensuring that those companies comply with labour law (allow access by labour inspectors

and respect each worker's individual rights); (2) urging them to provide information on private security companies that are operating illegally and in unfair competition; and (3) educating such managers about their labour obligations and duties.

Paragraph 43. To date, in the course of its nationwide inspections, the Registration, Supervision and Oversight Unit has not found any private security company, legal or illegal, to be using prohibited weapons (AK-47s).

Paragraph 44. The Police Act and the rules initially allow individuals and legal entities to use up to 100 people as security guards for business, banking, industry and farming. Their wages are paid by the companies and they cannot work for third parties in return for remuneration as their activities are carried out on the grounds or premises of the property of the individual or legal entity hiring them.

IV. CONCLUSIONS

Paragraph 55. It should be explained that the employment contracts signed between Your Solutions Inc. and Honduran civilians stated that the Honduran workers would work as security guards in Iraq.

Paragraph 58. Under amended articles 43, 44 and 45 of the Labour Code, the Ministry of Labour and Social Security has an obligation to regulate, monitor and control the recruitment and hiring of Honduran workers to provide services or carry out works abroad.

The intervention of the Ministry of Labour and Social Security in the present case chiefly involved: (1) reviewing the employment contract; (2) assessing how dangerous the activity would be, which is why it demanded that the company insure the workers against occupational risks; (3) warning the workers of the dangers of the work that they were to do; workers had to sign a statement, appended to the contract, that they had received such a warning.

Paragraph 60. The establishment of private security companies in Honduras is governed by domestic and international law, but if a Honduran citizen working in private security commits illegal acts in another country, he will be subject to international law as described in the contract, which states that Your Solutions Honduras and Your Solutions Incorporated will be jointly responsible for his defence.

Paragraph 61. It should also be explained that the employment contracts of the Honduran workers hired to go and work in Iraq contain the legal provisions and the requirements stipulated in article 37 of the Labour Code in force in Honduras.

Paragraph 62, first sentence. The Ministry of Labour and Social Security had no knowledge of and no involvement in the measures taken by the Department of Migration and Foreign Nationals with regard to the Chileans mentioned in the report.

Decree No. 32-2003 containing the amendments to articles 43, 44 and 45 of the Labour Code stipulates that the Ministry of Labour has jurisdiction over the recruitment of Hondurans to work abroad, but not of foreign nationals hired to work in a third country.

Paragraph 66. The neighbourhood watch committees mentioned in the report are not operated by private security companies, they are groups of worthy citizens competent to keep watch in their own neighbourhoods according to a timetable drawn up by the community police in support of the National Police. With reference to the organization of security corps for businesses, these simply carry out guard duties on those parts of the business property that are used exclusively by the owner. Under the Police Act, such security corps can have up to 100 members and are registered, controlled and monitored by a unit of the Ministry of Security.

Paragraph 67. The Ministry of Security wishes to state that any citizen who wishes to establish a commercial business is free to do so, although it is true that the general managers of many private security companies are sometimes retired officers of the armed forces and the National Police, who are very familiar with established legal norms and most of whom are younger-generation career officers with one or more higher education qualifications. Honduran law does not prohibit them from performing such functions and most of the companies managed by them are those that have most fully supported and complied with the norms of the Police Act and the rules governing private security companies, providing a professional service with regard to the procurement of weapons inventories, human resources, communications, special equipment inventories and frequently radio operations.

Moreover, article 94 of the Police Act stipulates that a licence to provide private security services shall in no circumstances be issued to commercial companies that have criminal records or whose former officials, whether members of the armed forces or the police, have been dishonourably discharged. Likewise, no operating licence shall be issued to serving officers and members of the armed forces and the National Police.

Paragraph 68. The State decided that the armed forces armoury would be the source of supply for sales of weapons to any individual or legal entity, a decision that the Unit welcomed. However, firearms control is a recent operation introduced by the Act on possession of weapons and private security companies have always provided an inventory of their firearms when first applying for a licence. The Unit is currently gathering information on registered weapons through the national ballistic weapons registry. As a result, for a discretionary period, comparative tables will be produced to check those inventories against the official lists of registered weapons. However, there is no ban on individuals or legal entities importing firearms legally, through the procedures established by the country's land, air and sea customs authorities. The pledge to change this situation is therefore gratifying, since it means that Honduras is putting some order into the possession and circulation of firearms.

Paragraph 69. The Ministry of Labour and Social Security learned unofficially that the general manager of the private security company Intercom was a foreign national, but when the Labour Inspectorate conducted a routine inspection, it found that the current manager is a Honduran national.

It should be mentioned that the Ministry of Labour and Social Security reiterates its concern at the fact that some private security companies are not complying with labour law, a concern expressed to the Working Group in August of last year. At the same time, it reiterates its commitment to work for the improvement of working conditions for, among others, private security guards, who constitute a large, strong but highly vulnerable group of workers.

Under the National Plan for the Generation of Decent Employment, more especially its social protection element, there are plans to carry out a number of specific activities, starting this year, for the benefit of private security guards.

The concern that transnational companies may be established in Honduras, as a result of the liberalization brought about by free trade treaties and the consequent easing of legal requirements, is not a problem for the Ministry of Security's Supervision and Oversight Unit. It is logical that it will promote competition between companies, leading to a liberalization of competition in the provision of services in relation to the National Police. It is more than likely that transnational companies would offer higher pay than that paid in the National Police, subject to the provisions of the Honduran Labour Code.

On the other hand, article 91, paragraph 3, of the Police Act stipulates that, in applying for permission to provide security services, foreign companies (legal entities) must establish partnerships with Honduran firms engaging in the same activities and appoint a manager who is Honduran by birth. In 99 per cent of cases, companies registered with the Unit have fulfilled this requirement thanks to enforcement of this oversight measure.

Paragraph 71. Members of private security companies in Honduras are persons with firearms who perform security functions stipulated in their contracts with their employers. The commission of the three branches of government set up to design a security policy established a series of rules under which private security companies would provide backup to the National Police in the fight against organized crime and in the areas of intelligence and operational information, taking advantage of the distribution of the companies' services across the country. However, the principal activities in these areas would be carried out by the National Police, as the body lawfully responsible for the maintenance of law and order.

The Constitution of the Republic authorizes any ordinary citizen to temporarily arrest any person caught in flagrante delicto and to hand that person over to the police for the corresponding legal action. It is therefore inconceivable that armed members of a private security company should not be able to intervene as ordinary citizens to prevent a crime from being committed or to hand the lawbreaker over to the police.

V. RECOMMENDATIONS

Subparagraph (b). It should be mentioned that the Ministry of Security Unit for the registration and control of private security companies has strengthened its collegiate inter-agency relationships with the Ministry of Labour for all labour-related matters, the Honduran Social Security Institute for matters relating to health-care coverage, the Revenue Department for tax matters, municipal mayor's offices for the payment of operating licences and sales tax, the Social Housing Fund contribution scheme (RAP/FOSOVI) for the enforcement of employers' obligations to workers, and chambers of commerce for the registration of private security companies as commercial entities. In this way, such organizations are obliged to comply with a number of legal norms and, if they fail to do so, their operating licences may be suspended or cancelled on grounds of non-compliance.

Subparagraph (d). The recommendation that the services provided by private security companies should be certified seems a good one, but special regulations covering all private security companies would have to be drawn up, given that this is a very selective issue and that these are not just ordinary company employees but employees who require special training. That is why these companies are being asked to submit their training programmes for evaluation and authorization by the Directorate of Police Education in the Ministry of Security, to ensure that all employees receive standard training, in addition to specific training for the kind of service that they are to provide. In this way, Honduras can both certify all guards for private security services and extend this initiative to certifying the quality of the services provided by private security companies at different levels.

Subparagraph (g). Globalization and free trade agreements will lead to the globalization of private security services. As a result, we will be dealing with security companies that provide services internationally and our authorities will have to implement national and international legal controls to ensure that security guards are protected and that employment contracts protect the rights of employees of private security companies, with particular emphasis on monitoring the granting of operating licences to such companies.
