

Open Letter to U.S. Congress

On December 31, 2009, United States District Judge Ricardo Urbina dismissed all criminal charges against five Blackwater security guards accused of killing 17 unarmed Iraqi civilians in Nisour Square of Baghdad on September 16th 2007. The contractors had been indicted for 14 counts of manslaughter, 20 counts of attempting to commit manslaughter and one count of weapons violation. In his decision the Judge did not rule on the substance of the charges against the security guards, but on the prosecutorial misconduct of the U.S. attorney Kenneth Kohl and the trial team.

Judge Urbina's 90-page opinion does not dispute the investigations by the Iraqi police, the U.S. Army, and the F.B.I. The Iraqi and U.S. investigators found that the guards of the Raven 23 convoy had indiscriminately fired on unarmed civilians in an unprovoked and unjustified assault in the crowded Nisour Square of Baghdad on September 16, 2007. Witnesses and reports stated some of the victims were shot in the back trying to flee the scene. A nine year old boy riding in the back seat of his father's car was shot in the head and died. None of the investigators were able to find any physical evidence to support the guards' contentions that they had been fired upon. The F.B.I. stated in their report that the Blackwater guards recklessly violated American rules for the use of lethal force. The U.S. military investigators went further saying that all the deaths were unjustified and potentially criminal. Iraqi authorities called the shootings "deliberate murder."

Judge Urbina labeled the misconduct of the trial team, headed by Assistant U.S. attorney Kenneth Kohl, as a "reckless violation of the defendants' constitutional rights." This violation

occurred when U.S. Attorney Kohl and Department of Justice trial lawyer Stephen Ponticello built their case around the written statements made by the contractors immediately following the shooting. The Judge stated, “In short, the government has utterly failed to prove that it made no impermissible use of defendants’ statements or that such use was harmless beyond reasonable doubt. Accordingly, the court must dismiss the indictment against all the defendants.”

However, in the background section of the opinion, it becomes obvious that this violation could have been avoided. Judge Urbina describes in detail the many instances where Kohl and the trial team ignored the directives and warnings of Raymond Hulser, a Deputy Chief in the Public Integrity Section of the Criminal Division, who was assigned as the “taint attorney.” His responsibility was to prevent prosecutors and investigators handling the investigation from using statements that could contaminate the case causing it to be dismissed.

On page 82 of the written opinion, Judge Urbina points out that the government’s attempts to characterize Kohl’s failure to heed the warnings and directives of Hulser as a mere “miscommunication” are “simply implausible.”

Judge Urbina writes, “These inconsistent, extraordinary explanations (given in interviews by Kenneth Kohl) smack of post hoc rationalization and are simply implausible.” He continued, “The only conclusion the court can draw from this evidence is that Kohl and the rest of the trial team **purposefully flouted the advice of the taint team when obtaining the substance of the defendants’ compelled statements, and in so doing, knowingly endangered the viability of the prosecution.**”

Rep. Jan Schkowsky (D - IL) said in the Los Angeles Times, “We’re going to have to understand how this happened.” The Iraqi families and the U.S. citizens that are funding companies like Blackwater, as well as paying for the investigations, have a right to know the motivation behind such reckless misconduct by a seasoned U.S. Attorney.

An adviser to the Iraqi council of ministers said, “This (the dismissal of the case) is very bad for the overall look of the United States outside its borders. It’s very important for the Americans to realize that this will work against their interests in Iraq and other places.”

Given the prosecutorial misconduct of this case, the tragedy of the shooting incident and the larger trend of private security contractors, we call upon the U.S. Congress to take the following actions:

1. Conduct a Congressional investigation into the prosecutorial misconduct of U.S. Attorney Kenneth Kohl and the trial team. Judge Urbina’s decision describes in detail the many times the investigators and prosecutors seemed determined to sabotage the case from the beginning. It is also known that senior officials of the Justice Department did not want this case to go to trial. According to Scott Horton, international law expert and contributor to *Harper’s*, reported one Congressman who was present at early briefings of the case held on Capitol Hill said the Justice Department prosecutors assigned to the case were behaving like defense lawyers building a case to defend the Blackwater employees, not prosecute them. A Congressional investigation is needed to verify and explain the

Justice Department's actions and motivations in this case.

2. Our military personnel are bestowed with a special responsibility to use lethal force in the course of their work and are held to a higher standard of conduct as a result, the Uniform Code of Military Justice (UCMJ). The current trend to outsource military operations to private contractors eliminates that higher standard, resolving it instead through corporate contract provisions and civilian law which is far from the higher standard of conduct implied by the authority to use lethal force. The indictments in this case specifically stated that Blackwater Worldwide, the primary contractor in the matter, had no responsibility for the events, despite the fact that the guards were trained by Blackwater and working according to the "culture" of the firm. Blackwater (Xe Services) must be held accountable for their involvement in this event and other events, and the U.S. Congress should grapple with the shortcoming of current contract law when applied to actors in combat zones using lethal force who would otherwise be subject to the UCMJ.
3. The U.S. Congress should cancel and cut off all funding of contracts with Blackwater (Xe Services) and with all of their affiliates. This should include all contracts now in effect under the Department of Defense, the Department of State, Homeland Security, The Drug Enforcement Agency, and the CIA. In addition to the above incident, Blackwater and its owner Erik Prince are named in two other Grand Jury investigations involving the company's possible smuggling of weapons into Iraq and tax evasion. The company may face charges for obstruction

of justice related to the shooting incident in Nisour Square. In August of 2008 Rep. Henry Waxman, then chair of the House Oversight and Government reform Committee, called on then candidate Obama to cancel Blackwater's contracts if elected President. Candidate Hillary Clinton also said that Blackwater contracts should be canceled. We agree with Rep. Waxman when he said, "I don't see any reason to have a contract with Blackwater. They haven't lived up to their contract and we shouldn't be having these private military contracts. We should use our own military."

4. This decision also puts the U.S. in breach of its treaty obligations to prosecute this case, which was an international law obligation. Now if the U.S. cannot, for the technical reasons set forth in the ruling, prosecute the case, the U.S. is required to waive the immunity and surrender these individuals to the Iraqi authorities for prosecution. Congress should ensure that our Government satisfies all of our international obligations as they pertain to this case.
5. We request that the Congress reintroduce and swiftly enact the "Stop Outsourcing Security Act" (known as House Resolution 4102 in the 110th Congress) which cites that a) the United States is increasingly relying on private security contractors, b) one quarter of these contractors are third-party nationals, c) these contractors operate at cross-purposes with our larger mission and undermine the mission, jeopardizing the safety of American troops, d) events such as the Nisour Square massacre have negatively affected the relationship of our country with other countries in those areas, e) security contracts suffer from inadequate oversight, f) Congress does not even have access to security contracts, and g) the

use of private security contractors for mission critical functions should be phased out.

The bill required that a) personnel at any United States diplomatic or consular mission in Iraq are provided security services only by Federal Government personnel, b) the military will transition away from the use of private contractors for mission critical or emergency essential functions in all conflict zones in which Congress has authorized the use of force, c) contracts with security contractors shall be open to inspection by Congress, d) no contracts shall be renewed during the transition period unless those companies have a clean record, and e) that the defense department fully document the number and disposition of all security contractors.

When reintroducing this bill, Congress should insure the scope is adequately broad to include recent revelations of “black-ops” CIA activities, and to update it to include regions and operations of relevance today, including domestic and foreign training operations, which is a core-competency of our military and must not be relegated to for-profit firms.

The safety of our soldiers and our citizens, as well as citizens in Iraq and Afghanistan, can no longer be put into risk by the careless actions of hired military and security companies like Blackwater. Legal loopholes that provide immunity for all contractors, regardless of how

murderous their actions may be, continue the pattern of inadequate accountability. We ask you how much longer will you allow those whom we fund to get away with murder in our name?

BY THE UNDERSIGNED:

No Private Armies: Dan Kenney & Mary Shesgreen, co-coordinators of

www.NoPrivateArmies.org Chicago Area (IL)

Voices For Creative Non-Violence: Kathy Kelly <http://vcnv.org/>

Stop Blackwater: Raymond Lutz, coordinator, www.StopBlackwater.net (San Diego, CA)

Blackwater Watch: Christian Stalberg, www.XeWatch.info (NC)

Peace Resource Center: Carol Jahnkow, director, www.prcsd.org (San Diego, CA)

Citizens Against Private Armies (Riverside County, CA)