Fifth Session of the
Open-Ended Intergovernmental Working Group on
Private Military and Security Companies

December 12-16, 2016

U.S. Government Delegation Closing Statement

Thank you, Madam Chair. We would first like to express our gratitude for your efforts over the week to facilitate numerous interesting and informative sessions. We would also like to thank the presenters, particularly those who traveled from far away to share their knowledge and perspectives, as well as the translators. The members of the Secretariat staff also deserve special thanks for their work to organize and support these meetings.

We sincerely appreciate the good faith efforts of many participants this week to point out challenges raised by private security contractors and private military contractors, as well as to offer constructive suggestions on how to address these challenges. It is important to note that there is widespread agreement regarding the need to improve conduct by these companies and address abuses where they occur. As we consider the way forward for this working group, we should assess both the challenges that confront state regulation of this industry as well as the means by which States are working to meet those challenges.

The experience of the United States has been raised at several points throughout the week. We previously discussed how the United States has taken steps to hold legally accountable those who committed crimes at Nissour Square. Four civilian contractors were prosecuted for and convicted of various offenses committed in violation of the Military Extraterritorial Jurisdiction Act or MEJA, which provides extraterritorial criminal jurisdiction over federal contractors to the extent their employment relates to supporting the mission of the Department of Defense overseas. The tragedy of Nissour Square bears many of the hallmarks that have motivated the formation of this working group: serious harm to victims, committed in a complex environment, involving companies and individuals that cross international borders. The successful prosecution by the U.S. Department of Justice of those responsible demonstrates the commitment of the U.S. government to pursuing justice on behalf of victims in cases of violent crimes committed by

contractors. This example also demonstrates the necessity of utilizing the force of domestic law to deliver accountability for wrongdoers and protect human rights. It does not demonstrate the need for new international law.

We have heard some delegations argue that an international legally binding instrument is the best way to improve conduct and address abuses. Based on our experience in many treaty negotiation processes, which will be familiar to most other states, it has become clear that there are significant costs – in terms of money, effort, and most importantly, time – associated with negotiating a multilateral convention. Such an effort would take years and would consume well-meaning states, advocates, and companies who could otherwise be engaged in more practical and consequential efforts to produce actual change on the ground. Even if the negotiation of a binding instrument were to succeed – a result that we are admittedly skeptical about – it is far from clear that it would make any meaningful change that couldn't otherwise be achieved sooner and less acrimoniously. It is not enough to argue that a new convention would do no harm. Rather, the cost of negotiating a new convention, in terms of money, effort, and time, could only be justified by a clear articulation of how existing international law is lacking in this area. Over the past five sessions, we have not seen this case made. States do not need a new legally binding international instrument to develop effective national regulation of this industry. There are many steps that States can and should take now. And a new legally binding international instrument would not ensure that States effectively implement and enforce the law where capacity is currently lacking.

Another question that has not been discussed in sufficient detail is how such a negotiation would relate to the separate but very much related process that is already underway to develop a binding instrument with respect to *all* business enterprises. We think it is incumbent on those who are supporting both those efforts to explain what value is added by investing time and resources in two parallel processes, when it seems quite clear that one is intended to produce a treaty that would subsume the other. We would reiterate that the mandate of this Working Group is to *consider* the *possibility* of elaborating an international regulatory framework, including, *inter alia*, the *option* of elaborating a legally binding instrument. Given the lack of consensus on this particular *option,* we respectfully request that the Working Group focus instead on possibilities that can be both effective and practical.

Let me stress again that these concerns about a lengthy, redundant, and likely inconclusive treaty-drafting process should not be interpreted as arguments for complacency or inaction on the part of this Working Group. To the contrary, the United States agrees wholeheartedly with the need for enhanced international and multi-stakeholder collaboration and coordination in this area. In fact, that is why the United States has been and is a strong supporter of the Montreux Document Forum and the International Code of Conduct Association. We believe that this Group should focus on developing an action plan for States to improve the regulatory framework for this industry.

By "action plan," we mean a negotiated document, informed by the expertise assembled by this Working Group, that could provide specific guidance to States with concrete steps to improve the regulation, oversight, and monitoring of this industry. Such an action plan could, for example, provide States with guidance on steps to take to ensure accountability through clarifying and expanding criminal jurisdiction. An action plan could eventually provide the foundation for further practical efforts such as model legislation or regulatory approaches, exchanges, enhanced mutual assistance, and capacity building. This approach would allow States to borrow approaches from other States that have been examined and deemed successful in order to strengthen their domestic law while adapting those ideas to their unique circumstances. We believe that such an action plan would contribute significantly to the development of an effective and impactful international regulatory framework for PSCs and PMCs, thus delivering on the mandate that this group was given by the Council.

As many have eloquently expressed here this week, there is a pressing need for action to improve State regulation of PSCs and PMCs. Victims do not have time to wait for a new convention of uncertain political viability or practical utility. An action plan, however, would allow this Working Group to produce a tangible benefit in the near term to improve State regulation of this industry. A single-minded march towards a treaty would serve only to divert attention and resources from efforts to help prevent human rights related abuses and ensure accountability for such abuses if they occur.

We look forward to continued engagement on these issues and are hopeful that this Working Group can ultimately make progress in a manner that garners consensus.

Thank you.