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**COMMENTS ON DRAFT GENERAL COMMENT 36 ON ARTICLE 6 OF THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS ADOPTED AT
FIRST READING BY THE HUMAN RIGHTS COMMITTEE IN JULY 2017 DURING ITS
120TH SESSION**

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Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists works for the legal protection of human rights and the promotion of the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

INTERNATIONAL COMMISSION OF JURISTS' COMMENTS ON DRAFT GENERAL COMMENT 36 ON ARTICLE 6 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS ADOPTED AT FIRST READING BY THE HUMAN RIGHTS COMMITTEE IN JULY 2017 DURING ITS 120TH SESSION

Introduction

1. The International Commission of Jurists (ICJ) welcomes the opportunity to provide the following comments to the Human Rights Committee (the Committee) on the draft adopted at first reading of General Comment 36 on article 6 of the International Covenant on Civil and Political Rights (the Covenant): the right to life.
2. The present submission focuses on specific issues relating to the conduct of private actors – notably private security companies –that affect the right to life, and it is complementary to other submissions made by the ICJ.¹

Introduction

3. The activities and operations of private military and security companies (PMSCs) can have a direct impact on the enjoyment of the right to life, and in the protection that States parties to the Covenant should afford to anyone under their jurisdiction. PMSCs have expanded dramatically their scope of action in recent decades, and today their activities cover such broad areas as prison management, static security, logistic and training to military and police, intelligence gathering, among others. Some private security services are provided to other private actors, such as mining companies or banks, operating in sensitive contexts.
4. The activities and eventual human rights abuses committed in the context of such PMSCs' activities have been amply reported in the specialized literature, and have also received the attention of several United Nations human rights bodies.²
5. The draft General Comment on article 6 provides an important opportunity to clarify the standards under ICCPR in relation to the obligations of States vis-a-vis PMSCs.

The Draft General Comment

6. The Draft General Comment addresses the role of PMSCs, and the relevant State parties' obligations under ICCPR, in several sections (i.e. in Section I General remarks, at para. 11; and in Section III Duty to Protect Life). The draft rightly restates the general principle that States parties have a duty to protect the right to life -- through the adoption of legislative and other measures (para. 22) -- against all foreseeable threats originating from private persons and entities whose conduct may not be attributable to the State (para. 25).
7. The growing States' practice of contracting private security entities to deliver a series of security-related services and functions without the State itself assuming the final

¹ The ICJ has made two additional submissions: a joint one with Columbia Law School's Human Rights Clinic, the Open Society Justice Initiative and the American Civil Liberties Union on right to life issues relating to the use of force; as well as one with the Center for Reproductive Rights, Amnesty International and Ipas on sexual and reproductive health rights aspects related to women's and girls' right to life.

² See for instance several reports by the Working Group on the Use of Mercenaries as a Means of Violating Human Rights, <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx> especially reports A/HRC/7/7, paras 23-51, Addendum 2 visit to Peru; and A/HRC/15/25; *The Invisible Force- A Comparative Study of the Use of Private Military and Security Companies in Iraq, Occupied Palestinian Territories and Colombia*, NOVACT, 2016; *the Privatization of Warfare, Violence and Private Military & Security Companies*, NOVACT, 2011. See also the *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the right to life and the use of force by private security providers in law enforcement contexts*, 2016, A/HRC/32/39.

responsibility or ownership of those acts is one of the grey areas in international normative context giving rise to accountability and remedy deficits. States do not generally accept international responsibility for acts of those private entities performing security functions under State contract, frequently in complex situations and outside the territory of the contracting State. Given the serious accountability gaps that exist in those environments, there is a high risk that deprivation of life committed by a PMSC in any of those contexts will go uninvestigated and unpunished, and the victims, including the relatives of the deceased, will not be afforded a remedy and reparation.

8. At the universal international level, the Committee against Torture, established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has clarified the grounds on which the Committee considers States parties to be internationally responsible. With regard to private agents, it has noted:

"The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, *private contractors*, and others acting in official capacity or on behalf of the State, *in conjunction with the State*, under its direction or control, or *otherwise* under colour of law."³ (*emphasis added*)

9. Further, the Committee against Torture has observed, "[W]here detention centres are privately owned or run, the Committee considers that *personnel are acting in an official capacity on account of their responsibility for carrying out the State function*."⁴

10. At the regional level, the Inter-American Court of Human Rights found that the members of a civil self-defense patrol, a paramilitary group, should be considered agents of the State and, thus, that their actions should be imputed to the State. In *Blake v. Guatemala*, the Court found that this group had "an institutional relationship with the Army, performed activities in support of the armed forces' functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision", and that it was thus a *de facto* agent of the State.⁵ The Inter-American Commission on Human Rights has followed the same doctrine, and has established that in "cases in which members of the paramilitary group and the army carry out joint operations with the knowledge of superior officers, the members of the paramilitary group act as agents of the State."⁶ The Commission disregarded the fact that the said groups had been declared illegal by the State and found that agents of the State had helped to coordinate, carry out, and cover up the massacre, such that the State was also liable for the paramilitary groups' acts.⁷

11. The Special Rapporteur on extrajudicial, summary or arbitrary executions also considers that in certain circumstances, the conduct of PMSCs contracted by the State should be attributable to the latter: "where States choose to devolve some of their responsibilities for the provision of security to private entities, it is clear that those actions are attributable to the State..."⁸.

12. The draft General Comment should incorporate the developments and clarifications provided by other human rights bodies and Special Procedures with a view to contributing to the closing of existing gaps in accountability in relation to activities of PMSCs that have a detrimental impact on the right to life.

³ Committee against Torture, General Comment No. 2 (2008). In a clear sign of openness to developments in international law, the Committee also notes that the Convention against Torture does not limit the responsibility that States or individuals can incur under customary law or international treaties.

⁴ Committee against Torture, General Comment No. 2 (2008) para. 17.

⁵ Inter-American Court of Human Rights, *Case of Blake v. Guatemala*, (1998) para. 76.

⁶ Inter-American Commission of Human Rights, *Riofrío Massacre*, (2001) para. 51.

⁷ Inter-American Commission of Human Rights, *Riofrío Massacre*, (2001) para. 52. See also: Inter-American Court of Human Rights, *Case of the 19 Merchants v. Colombia*, (2004) paras 118-123.

⁸ Op Cit para. 76.

13. In light of the above, the ICJ recommends adding the following text to paragraph 11 of the draft as currently formulated: "States parties bear international responsibility for the acts and omissions of their officials and others, including agents, *private contractors*, and others acting in official capacity or on behalf of the State, *in conjunction with the State*, under its direction or control, or *otherwise* under colour of law."