Preliminary comments on the draft general comment No. 36 on article 6 (right to life) of the International Covenant on Civil and Political Rights

1.In paragraph 3 of the draft there are an arbitrary interpretation of the right to life and an attempt to present human dignity as a "qualifying feature" in relation to the right to life. This violates the causal link laid down in the International Covenant on Civil and Political Rights (hereinafter - the Covenant). In accordance with paragraph 2 of the preamble of the Covenant, human rights are a derivative of the dignity of the human person, and not the other way around ("recognizing that these rights derive from inherent dignity").

Moreover, the conclusion implied in this paragraph contradicts the meaning of article 6 of the Covenant, which allows for the possibility of the death penalty (and, consequently, violation of the right to life) against persons found guilty of "the most serious crimes" by the court.

2. In paragraph 4, the attention is drawn to the attempt to impose unconditional responsibility on the state for all cases of violation of the right to life (including those committed by individuals as a result of their unlawful actions) without exception, and also to oblige them to compensate for the damage caused by these violations. Meanwhile, it is obvious that such a duty may arise either in the case of an appropriate unlawful act by a person representing the interests of the state or acting on its behalf and the availability of a relevant court decision, or with the consent of the state to compensation for damage caused by violation of the right to life.

3. Para 6 needs to be refined as it relates to the reference to article 9 of the Covenant, which deals with deprivation of liberty, not life.

4. The decision of the European Court of Human Rights on a particular case is freely and broadly interpreted in paragraph 7. Thus, it is not clear which "persons or entities" are involved. Also the clarification is required for the reference to certain "threats that can result in loss of life", as well as for the question of why the state should be responsible for violations resulting from illegal actions by individuals.

5. In accordance with the Vienna Convention on the Law of Treaties, "the treaty must be interpreted in good faith in accordance with the usual meaning that should be given to the terms of the treaty in their context ..." (Part 1 of Article 31). The Covenant does not use the terms "private actors", "private entities", "private individuals", "private persons", which are repeatedly used and arbitrarily interchangeable in the text of the draft General Comment. In the absence of their strict and relevant interpretation within the Covenant, difficulties arise with their understanding, and hence with the understanding of the relevant provisions of the draft.

6. The issue of enforced disappearances and bringing those responsible to justice is beyond the scope of this commentary, the International Covenant on Civil and Political Rights and the competence of the Committee. The whole complex of issues related to enforced disappearances is regulated by the norms of the International Convention for the Protection of All Persons from Enforced Disappearance (its parties are less than a third of the UN member states). The consideration of this issue falls within the competence of the Committee on Enforced Disappearance.

It must also be borne in mind that the death of a person subjected to enforced disappearance is the extreme, most serious consequence of this act. Responsibility for the violation of the right to life in cases of enforced disappearance may occur if there is an irrefutable and sufficient reason to consider a person deceased due to this act committed by "state representatives or persons or groups of persons acting with permission, with the support or consent of the state" ( article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance).

7. The issue of abortion raised in paragraph 9 of the draft is inappropriate. We presume that this issue falls within the competence of the Committee on the Elimination of Discrimination against Women (CEDAW), which examines it in the general context of the implementation of women's rights. It should also be borne in mind that CEDAW is pursuing a line to promote reproductive health and prevent abortion, and not encourage them.

8. In the context of the consideration of the question of the realization of the right to life, including the emphasis on States taking measures to preserve and protect the lives of their citizens, it seems inappropriate to include the theme of euthanasia and appeals to countries to legalize it (paragraph 10). This is contrary to article 6 of the Covenant, which allows the forcible removal of a person's life only on the verdict of the court for committing particularly serious crimes in states that have not abolished the death penalty as a measure of criminal punishment. No humanistic considerations or medical evidence can serve as a basis for depriving a person of life. Moreover, providing a "free, clear, conscious and unambiguous decision" taken by the patient without pressure seems to be a very difficult task in conditions when the severe pain experienced by a person is in themselves a factor of pressure on his psyche.

9. The idea contained in paragraph 11 on the removal of persons guilty of committing serious human rights violations from private security activity does not correspond to the principle of the inevitability of punishment for the committed unlawful action. Such persons should be held accountable in accordance with the norms of national legislation.

10. With respect to paragraph 12 of the draft, it should be noted that the use of lethal weapons and new weapons systems goes far beyond the scope of the Covenant, but also of the Committee's competence. Conclusions on this topic should be based on a thorough analysis of the relevant international legal instruments.

11. The problem of the proliferation of weapons of mass destruction, mentioned in paragraph 13, goes beyond the provisions of the Covenant and the competence of the Committee. It is regulated by the norms of a number of international legal documents having a certain circle of participants. In this regard, the automatic dissemination of their provisions and related obligations to States parties to the Covenant is unlawful.

12. The issues considered in paragraph 14 are beyond the scope of the provisions of the Covenant and the competence of the Committee.

13. The conclusions of the paragraph 17 cannot be considered legitimate without reference to the decisions of a higher court in the procedure for appealing the imposition of the death penalty. During the trial of any case, the judge verifies as well the legality and compliance with all procedural rules at the investigation stage. The conviction, including the imposition of punishment in the form of the death penalty, is made if there is incontrovertible evidence of the guilt of the suspect in the commission of the crime and the absence of procedural violations. It is unjustifiable to call such a verdict arbitrary or unlawful.

14. Arguments about the unequality of the concept of "arbitrariness" to the term "unlawfulness" seems controversial with regard to the deprivation of life (para. 18). The use of force or special means, including by law enforcement officials, is regulated in detail by legislation. Any deviations from these rules make these actions arbitrary and, accordingly, illegal in nature.

15. The documents referred to in paragraph 19 are not legally binding, therefore it is not entirely correct to talk about their mandatory observance by law enforcement officers. If they are mentioned, it should be only in the context of the need to take into account their provisions when developing national legislation regulating the activities of law enforcement agencies.

16. In the statement set forth in paragraph 21, there is a clear excess of the imperative and the absence of a justification. Any fact of deprivation of life by anyone is subject to investigation and can be recognized as illegal, and therefore arbitrary in nature, only by a court decision.

17. It seems that in paragraph 22 it would be more correct to talk about the task of States to clearly define the list of illegal actions, to develop mechanisms for responding to them, and to establish measures of responsibility for their commission.

18. The types of crimes or unlawful activities listed in paragraph 24 cannot be unequivocally qualified as an arbitrary deprivation of life. It would be advisable to exclude this list from the draft in the light of the Committee's assertion that States should criminalize such acts at the level of their legislation.

19. We note the emphasis of paragraph 26 only on the activities of legal entities. It would be more logical to draw attention to the activities of terrorist and extremist groups, transnational organized crime, which pose a great threat to the realization of the human right to life.

In addition, it must be borne in mind that international standards in the field of corporate social responsibility do not have any binding force for states. When implementing a set of measures aimed at preventing cases of deprivation of life by various factions or "legal entities", states should be guided not by these standards but by their international obligations and national legislation.

20. Pursuant to article 2, paragraph 1, of the Covenant, each participating State "undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." In this regard, the settling of a "hierarchy of value" of human life, depending on professional activity, social and other status, lifestyle and other characteristics of a particular person is unacceptable.

Attention is also drawn to the biased approach of the authors of the general comment. For example, human rights defenders, journalists are given priority, and children are mentioned last among other categories that can be considered vulnerable, which contradicts the priority principle of the child's interests as enshrined in the Convention on the Rights of the Child.

In addition, it is necessary to respect the internationally recognized terminology in determining the grounds for discrimination, in particular, to use the language of article 4 of the Covenant. Notions of casts, albinism, sexual orientation or gender identity (para. 64) are not defined by international universal instruments and are an free interpretation of the grounds for discrimination clearly spelled out in the Covenant. It is also unacceptable to use non-legal terms, such as, for example, «femicide".

21. The topics touched upon in paragraphs 28 and 30 refer to the issues of the International Covenant on Economic, Social and Cultural Rights and falls within the competence of the relevant treaty body.

22. The issues addressed in paragraph 29 (conditions of detention, psychiatric hospitals and refugee camps) have an indirect link to the topic of respect for the right to life and is not the subject of this commentary.

23. A number of the statements in paragraph 32 go beyond the obligations of States defined in universal international treaties. Thus, the definition of the procedural features of investigative actions and the conduct of the investigation of crimes are the exclusive prerogative of States. The procedural legislation of many countries provides for the possibility of imposing restrictions on the dissemination of information on the progress of the investigation of crimes. This is done not only for the purpose of promptly investigating the crime, but also for the protection of the interests of third parties passing in criminal cases as witnesses, etc. Thus the implementation of the recommendation of the Committee in practice would only weaken the level of protection of these individuals, and in some cases would provoke a direct violation of their legal rights and freedoms on the part of persons associated with the suspects in the commission of the relevant crime.

It should also be borne in mind that States do not have "universal" obligations to cooperate with any of the investigative mechanisms. Interaction with them is carried out within the framework of the implementation of the provisions of relevant international treaties or on a voluntary basis.

24. Similar concerns go to paragraph 45, where the Committee also interferes in the procedural aspects of criminal investigations. In general, the violations listed in the paragraph may be grounds for reviewing the criminal case, annulling the sentence, etc. But this is done by the court, which is not mentioned in the draft. Meanwhile, without such a decision of a higher court, the imposition of the death penalty cannot be recognized as illegal / arbitrary. In any case, the violation of procedural norms, as well as the compilation of their list, does not apply to the topic of the commentary.

25. Article 21 of the Covenant recognizes the right to peaceful assembly. In this regard, it is necessary to clarify in paragraph 33, concerning the use of firearms against "demonstrators", adding the definition of «peaceful".

26. The attempt to give the universal meaning to the principle of non-refoulement in paragraph 34 is contrary to the norms of international law. The grounds for allowing the extradition of a person to the country of his citizenship or to the country of origin are clearly spelled out in the 1951 Convention relating to the Status of Refugees or bilateral treaties. As a rule, there are threats only for refugees, as well as for those who may face the death penalty in the territory of the receiving state. In other cases, the principle of non-refoulement applies only when it is explicitly stated in bilateral treaties on mutual legal assistance in criminal matters or in extradition agreements. There is no universal duty of states in this sphere.

27. Paragraph 37 freely interprets the article 6 of the Covenant, which does not limit the use of the death penalty, but rather allows its application for the most serious crimes in countries that have not abolished this type of punishment.

28. The assertion of paragraph 38 of the draft that States that have abolished the death penalty "by amending national legislation, accession to the Second Optional Protocol to the Covenant or to another international instrument for the abolition of the death penalty, are not entitled re-enter it, is not irrefutable and incontrovertible. Like the Covenant, the Second Optional Protocol does not contain provisions for the termination of its operation and states that are its parties cannot denounce it. Consequently, the abolition of the death penalty is legally final. "

First, in the absence of a clear and unambiguous prohibition of denunciation in the texts of the Covenant and the Optional Protocol, the assertion that it is impossible to withdraw from requires justification which should be based, in particular, on the "preparatory materials and circumstances" for their conclusion (article 32 of the Vienna Convention on the Law of Treaties) .

Secondly, if a state which previously abolished the death penalty by one of the ways indicated in the draft, or in another way, for example, by a constitutional interpretation, a new referendum adopts a new constitution which provides such a capital punishment, it can become a fundamental change in circumstances and grounds for withdrawal from an international treaty and the revision of national acts abolishing the death penalty.

29. The definition of the severity of a crime, which the Committee tackles in paragraph 39, is the exclusive prerogative of the state. The international law doesn’t provide for a unified list of criteria for the qualification of crimes in terms of their severity, as well as the "universal" duty of states to review their national legislation with a view to reducing the list of crimes for which the death penalty can be imposed.

30. Paragraph 40 freely interprets the provisions of the Covenant. States have the right to determine the degree of the public danger of illegal actions, criminalize them and establish measures of responsibility till international treaties prescribe it differently.

31. The provisions of paragraph 44 should be amended. The mere fact of bringing the death penalty to execution by methods that can be equated to torture does not make the application of the death penalty arbitrary. Firstly, the death penalty has been decided by a court decision and therefore it is legal, and secondly, the methods of execution of death sentences are regulated by the state and therefore cannot be arbitrary. If we have to deal with these methods then one can define then only as extremely violent and violating article 7 of the Covenant.

As for the issues of observance of the rights of persons sentenced to exceptional punishment, they don’t have direct link with the article 6 of the Covenant. It would be more logical to consider them in the context of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

It is also not entirely correct to use the word "yet" in relation to states that have not abolished the death penalty. Given the fact that the Covenant allows for the death penalty, and states have no obligation to abolish it, paragraph 44 should be reformulated by removing the word «yet".

32. The provisions on the disproportionate use of the death penalty with respect to racial, ethnic and religious minorities, indigenous peoples and foreigners are incorrectly stated, as are the allegation of unequal application of the death penalty (para. 48). Taking into account the fact that, according to article 6 of the Covenant, the death penalty can be used in cases of particularly serious crimes, above mentioned provisions can be interpreted in two ways: either as a recognition of a particularly high level of crime offenders among the representatives of these groups, or as an appeal by the Committee to "evenly" apply this type of punishment to all categories of the population, which is contrary to the provisions of the Covenant. Obviously, one can talk only about prejudices and stereotyped attitudes of certain representatives of law enforcement agencies and the judiciary to certain groups of the population when adopting sentences for the death penalty.

33. In paragraph 50, it is necessary to include a reservation highlighting that the decisions of international courts, tribunals and other bodies to suspend execution of the death penalty can only be binding if there is such a provision in international treaties to which the States concerned are parties to.

However, it is inacceptable to include in the list of international judicial bodies various monitoring mechanisms and treaty bodies that do not have the appropriate powers.

34. The provisions of para 51 are unnecessarily imperative, since the Committee itself recognizes that the Covenant does not regulate the procedural aspects of pardon, which must be regulated at the legislative level.

35. The paragraph 53 should be amended as questions of determining the grounds for mitigating criminal responsibility are the exclusive prerogative of the state.

36. The statements in paragraph 55 are not indisputable. The mere fact of the prohibition of the death penalty or the imposition of a moratorium on its application does not automatically imply this type of punishment as torture. This applies equally to the thesis of the allegedly general orientation of article 6 of the Covenant on the prohibition of the death penalty. This statement is controversial, since the Covenant recognizes the right of States to establish the highest measure of a person's responsibility for the commission of the most serious socially dangerous acts.

37. It seems unreasonable to attempt to link the right to life solely with the exercise of freedom of expression, as well as with reprisals for cooperation with international organizations (paragraphs 56-57). Neither the legislation of states, nor their law enforcement practice, confirm the risk of losing their lives for the enjoyment of individual freedoms or other mentioned actions.

38. The issues raised in paragraph 61 go beyond the competence of the Committee and do not correspond to the topic of the commentary.

39. В **п.67** предпринята попытка уравнять нормы международного гуманитарного права и международного права в области прав человека в контексте вооруженных конфликтов. Между тем международно признано, что в условиях вооруженного конфликта нормы международного гуманитарного права имеют приоритет над всеми другими отраслями международного права.

39. Haragraph 67 attempts to equalize the norms of international humanitarian law and international law in the field of human rights in the context of armed conflicts. Meanwhile, it is internationally recognized that in the context of an armed conflict, the norms of international humanitarian law prevail over all other branches of international law.