



World Network of Users
and Survivors of Psychiatry

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International Disability Alliance (IDA)

Member Organizations:

Disabled Peoples' International, Down Syndrome International, Inclusion International,
International Federation of Hard of Hearing People,
World Blind Union, World Federation of the Deaf,
World Federation of the DeafBlind,
World Network of Users and Survivors of Psychiatry,
Arab Organization of Disabled People, European Disability Forum,
Red Latinoamericana de Organizaciones no Gubernamentales de Personas con Discapacidad
y sus familias (RIADIS), Pacific Disability Forum

Submission on the application of Article 9 of the International Covenant on Civil and Political Rights to disability-based detention and institutionalisation, as informed by related provisions in the Convention on the Rights of Persons with Disabilities

Introduction

The submitting organisations welcome the initiative to update and elaborate a General Comment on Article 9, ICCPR. States Parties need clear guidance on how to ensure implementation of this fundamental provision. While appreciating and being respectful of the Human Rights Committees' independence as guarantors of the ICCPR, this paper raises standards of the Convention on the Rights of Persons with Disabilities (CRPD) as well as refers to the CRPD Committee's evolving jurisprudence as it relates to the right to liberty under the CRPD. Given the intersecting mandates of the treaty bodies, common messages will be key to reinforcing each others' work with the aim of increased compliance by States and will also serve to sustain the coherence and legitimacy of international human rights law.

This paper provides an overview of the latest international human rights standards on the right to liberty of persons with disabilities as enshrined in the CRPD, in particular Articles 14 and 19. These provisions overlap with and derive from Article 9 of the ICCPR and provide guarantees to persons with disabilities against the discriminatory practices of disability-based detention, and disability-based discrimination within ordinary detention (such as in penal institutions), in order to ensure that persons with disabilities enjoy the right to liberty on an equal basis with others.

Recommendations are set out at the end of the paper (p 7) as well as an Annex I regrouping recommendations made by other human rights bodies and mechanisms on the subject of the right to liberty and security of persons with disabilities (p 8-11). Annex II provides information on the organisations jointly making this submission (p 12).

I. The right to liberty and non-discrimination

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - (a) Enjoy the right to liberty and security of person;
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

CRPD Article 14 is a non-discrimination provision with regard to liberty and security of the person. There are two significant implications for persons with disabilities.

1. Prohibition of disability-based detention, e.g. civil commitment and compulsory institutionalisation or confinement based on disability

The first is that no person should be subject to discriminatory detention based on a disability. ICCPR Article 9.1 states that no one shall be subjected to arbitrary arrest or detention, or be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. CRPD Article 14.1 tracks the language of ICCPR Article 9.1 and clarifies obligations of States Parties with respect to persons with disabilities, in particular to ensure that “any deprivation of liberty shall in no case be based on the existence of a disability.”

Disability-based detention is discriminatory

Discrimination exists when laws explicitly provide for detention of persons with intellectual or psychosocial disabilities. Even if the detention is not explicitly based on disability, but is based on criteria such as the need for care and treatment, or the likelihood of harm to the person or to someone else, the fact that only persons with disabilities are subject to detention on these grounds makes it a form of discrimination. Discrimination also exists when such detention occurs without any basis in domestic law.

This reasoning applies to Article 9 of the ICCPR, which in combination with Article 2 prohibits any discrimination in enjoyment of the right to liberty and security of the person, by persons with disabilities. Being subject to forms and grounds of detention that are not applicable to non-disabled persons, enjoyment of the right by persons with disabilities is protected to a lesser extent than that of others.

Discriminatory detention may take place in psychiatric institutions or hospitals, prisons, police stations, prayer camps, social care homes or any other location. It is discrimination when disability is according to law or custom a threshold criterion for the detention. It is also discrimination when the liberty of people with disabilities is made conditional to their submission to special abusive and degrading measures, such as forced psychiatric outpatient treatment.

Disability profiling: absence of reasonable and objective criteria and legitimate purpose for disability-based detention

The Human Rights Committee's General Comment No. 18 says that not every distinction will amount to discrimination, if the criteria are reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant. Disability-based detention does not meet any part of this standard.

Allowing detention that has the existence of a disability as a threshold criterion is stereotyped profiling that treats all persons with psychosocial disabilities as second-class members of society. Studies have shown that persons with psychosocial disabilities are no more likely than anyone else to cause harm to others,¹ and for the most part perform equally as well as others on evaluations of decision-making ability.² Even if statistical correlations had been demonstrated, the use of disability to screen out who may be subjected to detention on such grounds would be unfair and unnecessary if the real concern is behaviour. In practice, the criteria are vague and highly discretionary, and psychosocial disability is the true reason for the detention.

While the abstract purposes of public safety and providing care and treatment for individuals who may need it are not controversial, use of preventive detention of one sector of the population to accomplish these purposes is unreasonable, and not supported by objective findings. Detention causes significant suffering, including enforced separation from the community, disruption of life, being placed under the control of others with loss of personal autonomy, and being made aware of one's difference as grounds for adverse treatment. It is especially ironic for detention to be presented as a measure to promote mental health, given its harmful consequences.

CRPD: "authoritative guidance in the interpretation of the rights and fundamental freedoms of persons with disabilities" including right to liberty, right to recognition before the law and the right to be free from torture and ill treatment

As the CRPD brings a particular focus and expertise to the guarantee of human rights without any discrimination to persons with disabilities, particularly by shifting the focus to persons with disabilities themselves as rights-holders and considering the world from their perspective, we suggest that the CRPD text and its interpretation by the Committee on the Rights of Persons with Disabilities should be given considerable weight by other treaty bodies and by Special Procedures. The Special Rapporteur on Torture adopted this approach and considered provisions of the CRPD to be authoritative guidance supplementing the international law prohibiting torture and ill treatment.³ CRPD Article 14.1(b) has been interpreted and applied consistently by the Committee on the Rights of Persons with Disabilities to prohibit involuntary institutionalisation and other detention targeting persons with disabilities, and to require repeal of legal provisions allowing such detention.⁴

¹ MacArthur Community Violence Risk Study, summarized at <http://www.macarthur.virginia.edu/violence.html>. In fact, a recent study shows that people with psychosocial disabilities were far more likely than others to be victimized by the violence of others. <http://www.nhs.uk/news/2012/02February/Pages/mental-illness-disability-attack-risk.aspx>.

² MacArthur Treatment Competence Study, summarized at <http://www.macarthur.virginia.edu/treatment.html>. The study found higher levels of impairment among those diagnosed with schizophrenia, however according to CRPD Article 12 such impairment, to the extent that it is legitimate and not an artifact of prejudicial classifications, must be met with supportive measures rather than substituted decision-making or restriction of personal autonomy.

³ A/63/175, paragraph 44.

⁴ CRPD Committee Concluding Observations on Tunisia (CRPD/C/TUN/CO/1, 13 May 2011, para 25), Spain (CRPD/C/ESP/CO/1, 19 October 2011, para 36), Peru (CRPD/C/PER/CO/1, 9 May 2012, para 29).

Furthermore, we note that the CRPD not only prohibits deprivation of liberty based on the existence of a disability, it also provides for recognition of the legal capacity of persons with disabilities on an equal basis with others in all aspects of life,⁵ mirroring ICCPR Article 16, and for the provision of health care based on free and informed consent.⁶ The Committee emphasises respect for the person's autonomy, will and preferences in its interpretation of Article 12 on legal capacity. Reading these requirements together, the Committee on the Rights of Persons with Disabilities and the Special Rapporteur on Torture have indicated that the CRPD prohibits compulsory mental health treatment and requires free and informed consent of the person concerned (i.e. not substituted consent). The CRPD Committee addressed the requirement of consent in the context of Article 14 (as well as Article 17 on respect for physical and mental integrity), reflecting that admission to hospitals and institutions is a health care decision subject to the person's free choice, and should never be a means of exercising control over behaviour.⁷

Finally, we note that the Special Rapporteur on Torture considers that institutionalisation and indefinite detention in psychiatric institutions can amount to torture and ill treatment, in light of the considerable suffering inflicted. The significant and devastating impact of detention in the lives of persons with disabilities underscores the urgency of ensuring that such detention is prohibited and not permitted under domestic laws. Establishing an enforceable right to compensation for such detention as required by ICCPR Article 9.5 can also be helpful as deterrence, so long as it is recognised that all instances of detention based on disability are unlawful.

2. Equality and non-discrimination, including reasonable accommodation, in rights of detainees with disabilities

The second implication of non-discrimination in the right to liberty and security of the person, as delineated in CRPD Article 14.2, is equal guarantees in the context of arrest, trial and detention for reasons related to a crime or other such detention that is not per se discriminatory or unlawful. This encompasses rights guaranteed in ICCPR Articles 9, 10, 11, 13 and 14. CRPD Article 13 on access to justice is also relevant to any legal proceedings on detention involving persons with disabilities, and obliges states to ensure training of police, prison staff and judiciary in the relevant standards.

In addition to equal guarantees, CRPD Article 14.2 calls for persons with disabilities who are deprived of their liberty through any process to be "treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation." The principles of the CRPD, enumerated in Article 3, include respect for inherent dignity, individual autonomy including the freedom to make one's own choices, non-discrimination, full and effective participation and inclusion in society, respect for difference, equality of opportunity, accessibility, equality between men and women, and respect for the evolving capacities of children with disabilities. As these principles are fully elaborated and developed through the obligations throughout the text, all obligations in the CRPD should be understood to apply in detention settings insofar as they pertain to fundamental rights and freedoms that cannot be forfeited by virtue of detention.

⁵ CRPD Article 12.2.

⁶ CRPD Article 25(d).

⁷ Concluding Observations on Tunisia (CRPD/C/TUN/CO/1, 13 May 2011, para 29), Spain (CRPD/C/ESP/CO/1, 19 October 2011, para 36), Peru (CRPD/C/PER/CO/1, 9 May 2012, paras 28 & 29; A/63/175 paragraphs 44, 73, 74).

Reasonable accommodation in detention: positive obligation and non-discrimination

Reasonable accommodation is both a positive obligation and an aspect of non-discrimination; the CRPD definition of discrimination based on disability includes “denial of reasonable accommodation” as a form of discrimination. Compliance with the CRPD would include, in addition to reasonable accommodation, matters such as respecting individual choice as to programs and services available within a detention setting on an equal basis with other detainees.

For example, excluding detainees with psychosocial disabilities from eligibility for programs such as work release or jobs within the prison, segregating detainees with psychosocial disabilities in a mental health unit against the person’s will, placing them under medical supervision or requiring them to take unwanted medication, are counter to obligations under the CRPD⁸ and cannot be considered legitimate policy decisions by detention authorities. Support groups and services, medical and mental health services based on free and informed consent of the person concerned, and eligibility for all programs within the prison with provision of reasonable accommodation as required, are needed to fulfill positive obligations towards detainees with disabilities.

Right to non-discrimination of persons with disabilities in arrest and detention

The following aspects of non-discrimination should be addressed under ICCPR Article 9, in the context of arrest and detention on grounds that are not per se discriminatory:

- Accessible information and communication concerning the reasons for arrest and any charges. This includes the use of sign languages, Braille, plain language, and use of language that respects the person’s dignity and integrity.
- Equal eligibility for release pending trial.
- Accessibility and accommodations, “including procedural and age-appropriate accommodations,”⁹ in all judicial hearings, trials, and proceedings regarding the lawfulness of detention.
- Equal access to a trial to determine liability on criminal charges. Diversionary schemes for persons with disabilities need to be scrutinised as to whether they are discriminatory and amount to social exclusion. Schemes that require a person to submit to medical supervision or compulsory treatment (e.g. mental health courts that take a guilty plea and provide for fulfilment of a prison sentence if the person stops complying with treatment) are discriminatory and counter to the CRPD. Schemes that do not give individuals a meaningful and effective choice with regard to diversion would also be discriminatory if the diversion is based on disability.
- Removing a person from criminal liability by virtue of a disability (such as a defense of “not guilty by reason of insanity”) and placing the person under disability-based security measures supervised by medical personnel also deprives individuals of equal access to a determination of the charges against them. Such proceedings result in a form of detention that is discriminatory because the initial detention and its continuation are based on the existence of a disability.

⁸ See CRPD Articles 3, 5, 12, 17, 19 and 25.

⁹ CRPD Article 13.1.

II. Corollary right of the right to liberty: the right to live in the community

Article 19 - Living independently and being included in the community

States Parties to this Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 19 of the CRPD secures “*the equal right of all persons with disabilities to live in the community*”. The article is comprised of three main components:

1. That a person can **choose** where and with whom they live and **not be obliged to live in a particular living arrangement**.
2. That **supports** are available to **prevent isolation and marginalisation** and facilitate living and being included in the community.
3. That **communities** (education systems, health systems, recreation, transportation etc.) organise themselves in **inclusive** ways.

1. Institutionalisation: violation of the right to liberty and non-discrimination

The basic tenets of this right – in particular the right to live in the community and not be obliged to live in a particular living arrangement – are regularly violated in many countries and situations where compulsory institutionalisation of persons with disabilities continues. This is a fundamental violation of the right to liberty and security.

The ICCPR guarantees human rights to all people without distinction of any kind, now understood to include distinctions based on disability. The ICCPR also guarantees freedom of movement and freedom from arbitrary detention, but people with disabilities do not enjoy these rights equally under current laws and practices.

2. CRPD: the right to live and be included in the community on an equal basis with others, including through the provision of support

The CRPD guarantees a **right** to live and be included in the community. This means that living and being included in the community is not subject to proving one’s ‘ability’, ‘eligibility’ or ‘entitlement’. It means that persons with disabilities have the same right as persons without disabilities to live in the community with the supports they need.

Realisation of Article 19 requires that persons with disabilities are able to exercise their legal capacity to choose where and with whom they live. ICCPR Article 1 confirms the right to self-determination' CRPD Article 12 goes further in recognizing the right to use support in exercising ones legal capacity. While some people may make decisions about where to live independently, some may need support to understand what their choices are and what the outcomes of their decisions will be. Some may need support to articulate their decisions and to make their voices understood by others. Regardless of the supports required for someone to make decisions in their lives, persons with disabilities still have equal right to choose where they live. CRPD Article 12 places an obligation on States Parties to ensure that all persons with disabilities have the right to exercise their legal capacity and the necessary supports required to do so.

For true fulfilment of ICCPR Article 9, States Parties must also consider their obligations in ensuring that community services and facilities for the general population are accessible and available to persons with disabilities. There is a positive obligation to build inclusive communities that are responsive to the needs and supports of persons with disabilities.

3. No justification for disability-based detention

Deprivation of liberty as a result of compulsory institutionalisation laws or as a default due to a lack of supports cannot be tolerated under the CRPD. A denial of this basic right on the basis of disability constitutes discrimination. The denial of supports or a perceived lack of capacity cannot be justification for deprivation of liberty.

III. WNUSP, II, DSI & IDA Recommendations:

In recognition of the rights of persons with disabilities enshrined in the CRPD as they relate to ICCPR Article 9, the following recommendations are proposed to the Human Rights Committee concerning its upcoming General Comment and monitoring activities:

- Call on States to repeal legal provisions which allow disability-based detention including institutionalisation without the free and informed consent of the individual concerned;
- Call on States to ensure the provision of reasonable accommodation for persons with disabilities in the context of arrest and detention;
- Call on States to take effective steps to eliminate institutions and assist people in leaving them, and to develop community based supports and services to ensure that persons with disabilities enjoy their right to liberty and the right to live in the community on an equal basis with others.