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Continental solidarity to promote and protect the rights of persons with psychosocial disabilities



Submission to Human Rights Committee on its Draft General Comment No. 35, from the perspective of persons with disabilities¹

9 September 2013

I. Response to points made during the Human Rights Committee's discussion of paragraph 19

While the Committee has considered the text of CRPD Article 14, paragraphs 1 and 2, it has not inquired into the interpretation made of those provisions by its sister treaty body or by other experts in the UN system who have expertise in the human rights of persons with disabilities. As a global NGO representing people with psychosocial disabilities, which participated actively in the drafting of the CRPD, WNUSP brings significant expertise of its own to a discussion of liberty and security of the person, which is supported by the other organizations that join this brief.

A. Summary of positions expressed by Committee members

Several Committee members favor a standard by which detention can be permitted in the mental health field so long as it is based on a motivation to protect the safety of the person or others, and not based only on the existence of a disability. They see such a standard as being consistent with CRPD Article 14.1(b), which prohibits deprivation of liberty based on the existence of a disability. One Committee member sees CRPD Article 14.2 as inviting the Committee to highlight and make clear the protections and guarantees required under international human rights law, to which persons with disabilities are entitled on an equal basis with others, and considers that draft paragraph 19 lives up to that request. Some Committee members refer to the “duty to protect” as a grounding for the legitimacy of mental health detention, while one member questions whether the paragraph is patronizing and whether individuals are free to choose programs in the context of mental health detention and what is to be done if someone has a general desire of suicide. One Committee member suggests that it is not necessary to take into consideration the wishes of the “patient”. A Committee member also questioned whether the consequences of a disability might justify detention and whether the appropriate place for such detention would be a mental health institution or a prison if the grounds are criminal.

B. Response

Summary

1. The CRPD shifts the paradigm from patient to full personhood of people with psychosocial disabilities. The protectionist impulse that posits a duty to act against persons the will of persons with psychosocial disabilities for their purported best interests is offensive and is an obstacle to realization of full and equal human rights.

¹ For information about submitting organizations, see Appendix III.

2. According to the Committee on the Rights of Persons with Disabilities, mental health detention violates the CRPD; two Special Rapporteurs on Torture and the High Commissioner for Human Rights agree. Such detention furthermore amounts to ill-treatment or torture. The Special Rapporteur on Torture and High Commissioner for Human Rights hold that mental health detention cannot be justified based on a motivation to protect the safety of the person or others. Furthermore, nonconsensual interventions in the field of mental health cannot be justified based on the good intentions of medical professionals.

3. Persons with psychosocial disabilities remain subject to criminal law on an equal basis with others. CRPD Articles 12, 13 and 14 articulate an equality-based paradigm for holding persons with disabilities responsible for offenses against the law. In criminal proceedings and in conditions of detention, persons with disabilities must be provided with procedural accommodation and other reasonable adjustments, and must be treated in compliance with the objectives and principles of the CRPD. Mental health institutions, contrary to common beliefs, are not a less harsh alternative to prison; as observed by the Special Rapporteurs on Torture and by advocates, such detention inflicts severe suffering.

4. The continued application of outdated and discriminatory standards to the rights of persons with disabilities will result in violation of Article 2 of the Covenant, which guarantees equal enjoyment of rights irrespective of any status.

Detailed argument

1. *Paradigm shifts from patient to full personhood; protectionist impulse is offensive and an obstacle to realization of human rights*

The CRPD shifts the paradigm of psychosocial disability from a medical model that addresses people as “patients” to a social model that addresses people as members of society entitled to equality and non-discrimination in all aspects of life. WNUSP uses the term “persons with psychosocial disabilities” and the Committee on the Rights of Persons with Disabilities has adopted this terminology as well; it is considered respectful and preferable to “mental illness” which in some contexts has a medical model connotation.

Under the new paradigm, persons with psychosocial disabilities and persons with intellectual disabilities are entitled to take risks and to make mistakes, and to be held responsible for violations on an equal basis with others.² Protectionist motivations are offensive to persons with disabilities – just as such motivations are offensive to women, to indigenous peoples and others who are marginalized by dominant groups in society - and pose an obstacle to the realization of full and equal human rights. Instead of a duty to protect, the CRPD imposes a duty to provide access to support that may be desired by persons with disabilities, and to ensure that such support respects the person’s autonomy, will and preferences.³

The shift from “patient” to person entitled to full and equal human rights corresponds to a changed understanding of how the human rights framework applies to actions taken in the field of mental health. According to then-Special Rapporteur on Torture Manfred Nowak:

The Special Rapporteur notes that in relation to persons with disabilities, the Convention on the Rights of Persons with Disabilities complements other human rights instruments on the prohibition of torture and ill-treatment by providing further authoritative guidance. For instance, article 3 of the Convention proclaims the principle of respect for the individual autonomy of persons with disabilities and the freedom to make their own choices. Further, article 12 recognizes their equal right to enjoy legal capacity in all areas of life, such as deciding where to live and whether to accept medical treatment. In addition, article 25 recognizes that medical care of persons with disabilities must be based on their free and informed consent. Thus, in the case of earlier non-binding standards, such as the 1991 Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (resolution 46/119, annex), known

² See Amicus Brief by Carlos Rios Espinosa, member of Committee on the Rights of Persons with Disabilities, presented to the Supreme Court of Justice of the Nation (Mexico) on the regime of interdiction in the Federal District and its compatibility with Article 12 of the CRPD, Case No. 159/2013, July 2013.

³ See Appendix II, materials under Legal Capacity.

as the MI Principles,⁴ the Special Rapporteur notes that the acceptance of involuntary treatment and involuntary confinement runs counter to the provisions of the Convention on the Rights of Persons with Disabilities.⁵ [Internal footnote renumbered]

2. Mental health detention violates CRPD and can amount to ill-treatment or torture; cannot be justified by motivation to protect safety of the person or others or by the good intentions of medical professionals

i. Mental health detention violates CRPD and amounts to ill-treatment or torture, according to Committee on the Rights of Persons with Disabilities and Special Rapporteurs on Torture

The Committee on the Rights of Persons with Disabilities holds that CRPD Article 14 requires States to repeal provisions that allow for deprivation of liberty based on psychosocial or intellectual disability, including those provisions “which authorise involuntary internment linked to an apparent or diagnosed disability.”⁶ Addressing both liberty and security issues, States are required to “ensure that health care services including all mental health care services are based on informed consent of the person concerned.”⁷ The CRPD Committee’s position against any involuntary treatment or confinement in the field of mental health is further clarified in its observation under Article 25 on the right to health:

The Committee advises the state party to adopt measures to ensure that all health care and services provided to persons with disabilities, including all mental health care and services, is based on the free and informed consent of the individual concerned, and that laws permitting involuntary treatment and confinement, including upon the authorisation of third party decision-makers such as family members or guardians, are repealed.

The CRPD Committee has also pronounced against mental health detention under Article 15 on freedom from torture and ill-treatment:

For those involuntarily committed persons with actual or perceived intellectual and psychosocial impairments, the Committee is concerned that the “correctional therapy” offered at psychiatric institutions represents an inhuman and degrading treatment...

The Committee urges that the state party cease its policy of subjecting persons with actual or perceived impairments to such therapies and abstains from involuntarily committing them to institutions.

Special Rapporteurs on Torture Manfred Nowak and Juan E. Méndez recognize that mental health detention, as well as nonconsensual treatment, meets the criteria for inhuman and degrading treatment or torture.⁸ According to Méndez:

Deprivation of liberty that is based on the grounds of a disability and that inflicts severe pain or suffering falls under the scope of the Convention against Torture. In making such an assessment, factors such as fear and anxiety produced by indefinite detention, the infliction of forced medication or electroshock, the use of restraints and seclusion, the segregation from family and community, should be taken into account.⁹

ii. Negotiating history of CRPD demonstrates intent to prohibit mental health detention including when disability is coupled with other grounds

⁴ See the International Disability Alliance position paper on CRPD and other instruments of April 2008, available at: www.psychrights.org/Countries/UN/IDACRPDpaperfinal080425.pdf.

⁵ A/63/175 para 44. See also A/HRC/10/48 para 48; Appendix I.

⁶ CRPD/C/ESP/CO/1 para 36; See Appendix II.

⁷ Id.

⁸ A/63/175 paras 38, 40, 41, 47, 61-65 ; A/HRC/22/53 paras 81 and 89 ; See Appendix I.

⁹ A/HRC/22/53 para 69.

The negotiating parties to the CRPD rejected proposals that would have created an exception in Article 14 to permit detention that was based on disability plus other factors such as a motivation to protect the safety of the person or others or to provide treatment. As reported by Manfred Nowak:

During the convention-making process, some States (Canada, Uganda, Australia, China, New Zealand, South Africa and the European Union) supported deprivation of liberty based on disability being permitted when coupled with other grounds. Finally, at the seventh session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Japan, with the support of China, sought to amend the text of article 14 to read “in no case shall the existence of a disability ‘solely or exclusively’ justify a deprivation of liberty”. However, the proposal was rejected. See daily summary of discussion at the seventh session, on 18 and 19 January 2006, available at www.un.org/esa/socdev/enable/rights/ahc7summary.htm.¹⁰

The High Commissioner for Human Rights also cited this negotiating history, and observed:

Proposals made during the drafting of the Convention to limit the prohibition of detention to cases “solely” determined by disability were rejected.¹¹ As a result, unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person’s disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by article 14.”¹² [Internal footnote renumbered]

Special Rapporteur on Torture Juan E. Méndez agrees, saying to the Human Rights Council on 4 March 2013, “I believe that the severity of a mental illness cannot justify detention nor can it be justified by a motivation to protect the safety of the person or others.”¹³

Individualized risk assessment within a discriminatory regime of detention is still discrimination. If States are concerned with the prevention of violence by or against any members of society, laws and protocols must be adopted that are disability-neutral in law and in fact (for example, the availability of an Order of Protection requiring a person to avoid contact with someone whom the person has threatened, subject to arrest if the Order is violated).¹⁴ As noted by the High Commissioner:

The legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.

In particular, this means that, in order to be compliant with the CRPD, detention regimes and security measures cannot rely on psychiatric testimony to justify the application of detention or security measures to an individual, cannot take place in psychiatric institutions or other institutions designed to segregate persons with disabilities from society, and cannot have the purpose or effect of requiring a person to submit to psychiatric treatment or supervision, or depriving the person of the exercise of free and informed consent with respect to mental health services.

¹⁰ A/63/175 footnote to paragraph 64 ; See Appendix I.

¹¹ In the course of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, proposal were made to add the word “solely” to then draft article 10, para.1(b), so it would read “any deprivation of liberty shall be in conformity with the law and in no case shall be based solely on disability”.

¹² A/HRC /10/48 para 48. OHCHR also concluded that such detention violates provisions of the UDHR and ICCPR in their Information Note No. 4; See Appendix I.

¹³ See Appendix I. In his statement, the Special Rapporteur reversed his previously held opinion that was stated in A/HRC/22/53 para 69.

¹⁴ See for example, <http://www.nycourts.gov/faq/orderofprotection.shtml>.

iii. Good intentions of medical professionals cannot justify intrusive nonconsensual practices against persons with psychosocial disabilities

Special Rapporteurs on Torture Manfred Nowak and Juan E. Méndez reject the doctrine of medical necessity as applied to nonconsensual psychiatric interventions. According to Méndez:

The mandate has recognized that medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned (ibid., paras. 40, 47) [referring to Nowak's report, A/63/175]. This is particularly the case when intrusive and irreversible, non-consensual treatments are performed on patients from marginalized groups, such as persons with disabilities, notwithstanding claims of good intentions or medical necessity. For example, the mandate has held that the discriminatory character of forced psychiatric interventions, when committed against persons with psychosocial disabilities, satisfies both intent and purpose required under the article 1 of the Convention against Torture, notwithstanding claims of "good intentions" by medical professionals (ibid., paras. 47, 48).¹⁵

Méndez continued:

It is therefore appropriate to question the doctrine of "medical necessity" established by the ECHR in the case of *Herczegfalvy v. Austria* (1992),¹⁶ where the Court held that continuously sedating and administering forcible feeding to a patient who was physically restrained by being tied to a bed for a period of two weeks was nonetheless consistent with article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because the treatment in question was medically necessary and in line with accepted psychiatric practice at that time. [Internal footnote renumbered]

The doctrine of medical necessity continues to be an obstacle to protection from arbitrary abuses in health-care settings. It is therefore important to clarify that treatment provided in violation of the terms of the Convention on the Rights of Persons with Disabilities – either through coercion or discrimination – cannot be legitimate or justified under the medical necessity doctrine.¹⁷

3. Persons with psychosocial disabilities remain subject to criminal law on an equal basis with others; reasonable accommodation and treatment of prisoners in accordance with objectives and principles of CRPD required

As with any legal text, CRPD Article 14 has to be read as a whole, taking the prohibition of disability-based regimes of detention, in paragraph 1(b), together with the right to equal guarantees when persons with disabilities are deprived of their liberty through any process, in paragraph 2. Article 14 itself must also be read in the context of the treaty, in particular the provisions on equality and non-discrimination (Articles 2, 4 and 5) and the purpose and principles (Articles 1 and 3).

Article 14 reads:

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

¹⁵ A/HRC/22/53 para 32.

¹⁶ Application No. 10533/83, paras. 27, 83.

¹⁷ A/HRC/22/53 paras 34-35.

with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

As a member of the Human Rights Committee has noted, the guarantees referred to in paragraph 2 are elaborated in the ICCPR, and this Committee has the duty to further define and apply those provisions as a general matter. However, under both the CRPD and under the Covenant, such guarantees must apply equally to persons with disabilities as to others. For example, article 14 of the Covenant guarantees that “all people shall be equal before courts or tribunals. In the determination of any criminal charge against him [or her], everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” and “shall have the right to be presumed innocent until proved guilty according to law.”¹⁸ These rights are violated when persons with disabilities are denied a clear adjudication of guilt or innocence but instead are adjudicated and sentenced based on their mental health condition at the time of the offense, and retained in custody based on periodic evaluations of their condition by psychiatrists, as is the case with individuals who plead “not guilty by reason of insanity” or who are determined to be “*inimputable*”. In some countries, a person can even be involuntarily transferred to proceedings before a non-court tribunal (typically composed of a lawyer, a psychiatrist and a lay member of the community) for disposition once a court decides that an individual accused of criminal context is a person with psychosocial disability.¹⁹

The CRPD provides “further authoritative guidance”²⁰ that supplements the Covenant by prohibiting disability-based detention, emphasizing the obligation of non-discrimination, and requiring that persons with disabilities under detention be treated in accordance with the objectives and principles of the CRPD, including provision of reasonable accommodation. These principles include among others, “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons,” “non-discrimination,” and “full and effective participation and inclusion in society.”

There is a wide range of measures that can be applied to fulfill the requirement of humane treatment of all detainees including those with disabilities, under CRPD Article 14.2 and ICCPR Article 10. Such measures include:

- Reasonable accommodation for psychosocial disability, including adjustment of non-essential behavior rules.
- Training of law enforcement, court and prison personnel in a human rights based, CRPD-compliant understanding of psychosocial disability, and in trauma-informed practices aimed at avoiding for all detainees potentially traumatizing conditions of detention.
- Generally-applicable legal standards taking into consideration a person's transient emotional or mental state as a mitigating factor in the seriousness of a crime and/or in punishment.
- Alternatives to custodial incarceration so long as they are applicable to the general population and do not interfere with a person's ongoing right to exercise free and informed consent with respect to mental health services.
- Individuals' free choice to enter mental health units inside a prison or to accept mental health treatment, including conventional as well as alternative services, according to the free and informed consent of the person concerned.
- Making available a wide range of supports and services including peer support and trauma counseling.

¹⁸ ICCPR Article 14.1 and 14.2.

¹⁹ Japan National Group of Mentally Disabled People, Parallel Report to the Committee against Torture 2013, <http://www.jngmdp.org/e/index.php?CAT%20Report%202013#r2b850c9>.

²⁰ A/63/175 para 44.

Articles 12 and 13 of the CRPD also apply to criminal proceedings. Article 12, on equal recognition before the law, provides that persons with disabilities “enjoy legal capacity on an equal basis with others in all aspects of life.” According to the High Commissioner for Human Rights:

In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.²¹ Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant. Procedural accommodations both during the pre-trial and trial phase of the proceedings might be required in accordance with article 13 of the Convention, and implementing norms must be adopted.²² [Internal footnote renumbered]

Article 13, on access to justice, provides:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

The Committee on the Rights of Persons with Disabilities calls for the same guarantees and conditions to be applied to persons with disabilities subject to criminal proceedings as to others, along with reasonable accommodation.

The Committee recommends that the State party amend its criminal legislation in order to make penalties applicable to persons with psychosocial or intellectual disabilities subject to the same guarantees and conditions as those applicable to any other person who is the subject of criminal proceedings, making provision as necessary for reasonable accommodation and procedural adjustments.²³

The Committee suggests that the state party reviews its procedural civil and criminal laws in order to make mandatory the necessity to establish procedural accommodation for *those persons with disabilities who intervene in the judicial system can do it as subject of rights and not as objects of protection*.²⁴ [emphasis added]

The international community is currently undertaking a revision of the Standard Minimum Rules on the Treatment of Prisoners, which was adopted in 1955 before any of the core human rights treaties. Along with the ICCPR and the Convention against Torture, the Convention on the Rights of Persons with Disabilities needs to inform that revision. The standards being developed now in the Human Rights Committee, the Committee on the Rights of Persons with Disabilities, and other treaty bodies have the potential to inform a progressive development of international law under which persons with disabilities are acknowledged as full members of society, or to position themselves as opponents of such progress.

Organizations making this submission maintain that an equality-based paradigm is the only way forward that can satisfy both persons with disabilities and the demands of criminal justice based on the rule of law. Disability-based detention denominated as either a measure of security or a measure of protection violates the human dignity of persons with disabilities and amounts to an arbitrary standard of indefinite detention, whether it is imposed on a person subject to criminal proceedings or otherwise. Prisons and other places of detention, and legal proceedings related to such detention, must be made to accommodate persons with psychosocial disabilities, and if this is not possible in a particular case the option of compassionate release must be made available. While it is commonly believed that mental health institutions are a less harsh alternative than prison, this is belied by the findings of the Special Rapporteurs on Torture as to the

²¹ Often referred to as “insanity defence”.

²² A/HRC/10/48 para 47; See Appendix I.

²³ CRPD/C/PRY/CO/1 para 32.

²⁴ CRPD/C/CHN/CO/1 para 24.

suffering inflicted by such detention, by reports documenting horrific abuses in psychiatric institutions,²⁵ and by the testimonies of individuals incarcerated in psychiatric institutions after being adjudicated not guilty by reason of insanity.

Tristan Ajmone writes:

“My name is Tristano Jonathan Ajmone, I'm 34 years old, I live in Italy and, between 1998 and 2003, I have been subjected to a forensic-psychiatric regime for a period of five and a half years following a court sentence that declared me "partly incapable of intending and willing" - which is the juridical means by which an offender is denied moral agency for the acts of which he is accused. The court decided that I was mentally insane based on a five minute meeting with the court's psychiatric expert who visited me in prison. We didn't exchange many words, yet he decided that I was a psychotic and insane.

“After a few months, I left the facility asking to go back to ordinary prison, because I could no longer stand the working rhythms, the massive drugging, and the endless sequence of false promises they would feed me regarding my social rehabilitation program and its coming steps. Since they didn't allow us to use or possess phones, and I was denied access to a fax machine to contact the judge or phone the police, I climbed the fence and ran to the nearest police station and asked them to take me back to ordinary prison. For my leaving the facility I was further charged with jailbreaking.”

“One thing was clear: the fee we had to pay for all this "paradise as an alternative to hell" was to take all drugs without protesting. The institute did not tolerate any questioning about the drugs they gave us, we only had to swallow and "rest". We were not even allowed to ask the nurses what drugs we were given. I remember those 18 months as the period of my life in which I was most sedated. I gradually slipped in a state which was quite close to mental vegetation. Side effects were really harsh to cope with, my limbs would shiver all the time, and I got fatter and fatter, my mind confused, and I soon wasn't able to read a novel.”²⁶

4. Conclusion

The paradigm shift under CRPD Article 14 institutes a regime of equality for persons with disabilities with respect to the right to liberty and security of the person. This has two aspects: a prohibition of disability-based regimes of detention, which inherently disadvantage persons with disabilities and cannot be remedied by individualized risk assessment or by any procedural or substantive safeguards; and a guarantee of equal rights as others, along with reasonable accommodation and the right to be treated in accordance with objectives and principles of the CRPD when persons with disabilities are deprived of their liberty through any process such as criminal proceedings. The CRPD paradigm, which is articulated throughout that text including in Article 3 on general principles and Article 12 on equal recognition before the law, and which is developed further in the jurisprudence of the Committee on the Rights of Persons with Disabilities and of other human rights mechanisms including the Special Rapporteur on Torture, calls for formal equality as a matter of law plus access to accommodations and supports in order to ensure substantive equality; such accommodations and supports must in all cases respect the autonomy, will and preferences of the person.

This Committee has the opportunity to contribute to advancing the development of the CRPD paradigm by adopting standards coherent with those developed by the Committee on the Rights of Persons with Disabilities and other human rights mechanisms that have embraced this paradigm. Failure to do so in effect will result in the perpetuation of outdated and discriminatory standards authorizing detention regimes

²⁵ Townhill Report, <http://ubuntucentre.files.wordpress.com/2010/11/townhill-report.pdf>; Sir Louis Blom-Cooper, The Ashworth Hospital Inquiry: twenty years on, <http://www.lancs.ac.uk/cedr/publications/Distress%20and%20Detention%20proceedings.pdf>; Lifting the Lid on Special Hospitals, <http://www.revolutionarycommunist.org/index.php/prisoners-fightback/827-lifting-the-lid-on-special-hospitals-frfi-175-october-november-2003>.

that specifically target individuals for adverse treatment based on disability. Such detention regimes deprive persons with disabilities of equal enjoyment of their rights under the Covenant in violation of Article 2.

C. Additional issues to be addressed in the General Comment

Summary

1. Nonconsensual psychiatric interventions violate the right to security of the person and amount to ill-treatment or torture. The jurisprudence developed in support of this emerging norm by treaty bodies and by Special Rapporteurs on Torture provides compelling justification for this Committee to adopt a categorical standard prohibiting nonconsensual psychiatric interventions and requiring that all mental health services must be based on free and informed consent of the person concerned.

2. The right to liberty of movement and freedom to choose one's residence overlaps with the right to liberty of person. For persons with disabilities this entails the right to live independently and be included in the community, with the same choices as others, as provided for in CRPD Article 19. States must phase out and eliminate institutional systems of care and directly channel resources into community-based supports and services that meet expressed needs of persons with disabilities and that respect the person's autonomy, choices, dignity and privacy.

Detailed argument

1. Security of the person

The Committee has signaled its intention to address security of the person, as an aspect of Article 9 that has often been neglected.²⁷ Security of the person refers to freedom from bodily injury, and is violated when state officials unjustifiably inflict such injury on a person who is detained or non-detained, or when a State fails to take appropriate measures to protect individuals, whether detained or non-detained, from known risks to bodily integrity proceeding from any source.²⁸

The paradigm shift of the CRPD applies to security of the person as well as to liberty, and persons with psychosocial disabilities are entitled to enjoy security of the person on an equal basis with others. The Committee on the Rights of Persons with Disabilities addresses this consistently in its jurisprudence, calling on States to “ensure that all health care services, including all mental health care services, are based on the free and informed consent of the person concerned.”²⁹ In addition, the Committee has characterized “the individual's right, on their own, to give and withdraw informed consent for medical treatment,” as an aspect of the right to enjoy legal capacity under CRPD Article 12.³⁰

Special Rapporteurs on Torture have spoken out strongly against nonconsensual psychiatric interventions, developing detailed jurisprudence in an area directly within their mandate. As pointed out by Manfred Nowak in his 2008 report, human rights law had documented and condemned the use of psychiatry as torture or ill-treatment for purposes of political repression, but had given insufficient attention to the “abuse of psychiatry and forcing it upon persons with disabilities.”³¹ He continued:

Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject

²⁷ Draft General Comment No. 35, paras 1, 3, 8, 58, 60, 61, 66.

²⁸ Draft General Comment No. 35, para 8.

²⁹ CRPD/C/HUN/CO/1 para 28 and CRPD/C/ESP/CO/1 para 29 (under Article 14 on liberty and security of the person); CRPD/C/CHN/CO/1 para 38 (under Article 25 on the right to health).

³⁰ CRPD/C/HUN/CO/1 para 26 and CRPD/C/PRY/CO/1 para 30.

³¹ A/63/175 para 62.

apathetic and dull his or her intelligence, has been recognized as a form of torture.^{32 33} [Internal footnote renumbered]

Rather than disability being a factor that warrants a more permissive attitude towards forced psychiatric drugging, disability-based discrimination makes a violation more egregious. As Juan E. Méndez in this year's report summarized his predecessor's conclusions:

The mandate has held that the discriminatory character of forced psychiatric interventions, when committed against persons with psychosocial disabilities, satisfies both intent and purpose required under the article 1 of the Convention against Torture, notwithstanding claims of "good intentions" by medical professionals.³⁴

Méndez went on to urge States to impose an absolute ban, saying that such abuses "always amount at least to inhuman and degrading treatment, often they arguably meet the criteria for torture, and they are always prohibited by international law".³⁵

The Special Rapporteur calls upon all States to:

Impose an absolute ban on all forced and non-consensual medical interventions against persons with disabilities, including the non-consensual administration of psychosurgery, electroshock and mind-altering drugs such as neuroleptics, the use of restraint and solitary confinement, for both long- and short- term application. The obligation to end forced psychiatric interventions based solely on grounds of disability is of immediate application and scarce financial resources cannot justify postponement of its implementation.

This Committee has found a violation of Article 7 of the Covenant based on ill-treatment that included psychiatric experiments and injection of tranquilizers against the will of the complainant.³⁶ The Committee on the Rights of Persons with Disabilities has also addressed "continuous forcible medication with neuroleptics" as a violation of the freedom from torture and ill-treatment, and has required the legal abolition of treatment without free and informed consent, including in mental health services, under Article 17 on integrity of the person.³⁷ The Committee on Economic, Social and Cultural Rights has recommended the legal abolition of "violent and discriminatory practices against children and adults with disabilities in the medical setting, including deprivation of liberty, the use of restraint and the enforced administration of intrusive and irreversible treatments as neuroleptic drugs and electroconvulsive therapy (ECT)."³⁸

The emerging norm categorically condemns nonconsensual psychiatric interventions as a violation of several rights under international law, including the right to security of the person, providing ample justification for this Committee to do the same, and to adopt the standard that mental health services must be based on the free and informed consent of the person concerned.

2. Liberty of movement and freedom to choose one's place of residence/ Living independently and being included in the community

This Committee recognizes that "the liberty of movement protected by article 12 of the Covenant overlaps with the liberty of person protected by article 9," and that "in some circumstances both articles may come into play together."³⁹ Article 12 includes "freedom to choose [one's] residence." This right is elaborated

³² E/CN.4/1986/15, para. 119.

³³ A/63/175 para 63.

³⁴ A/HRC /22/53 para 32.

³⁵ A/HRC/22/53 para 81.

³⁶ Human Rights Committee, views on communication No. 110/1981, *Viana Acosta v. Uruguay*, adopted on 29 March 1984 (CCPR/C/21/D/110/1981), paras. 2.7, 14 and 15.

³⁷ CRPD/C/PER/CO/1 para 30, and CRPD/C/TUN/CO/1 paras 28-29; See Appendix I.

³⁸ E/C.12/MDA/CO/2 para 24.

³⁹ Draft GC No. 35 para 63.

with respect to persons with disabilities in CRPD Article 19, on living independently and being included in the community.

Article 19 adds value by ensuring that supports and services are provided to persons with disabilities in their own homes and communities, and by emphasizing that persons with disabilities are entitled to choose where and with whom to live rather than be compelled to live in any particular living arrangement. The Committee on the Rights of Persons with Disabilities interprets Article 19 to require the elimination of institutional systems of care for persons with disabilities.⁴⁰ Article 19 provides as follows:

States Parties to the present Convention recognize 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-home, 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.

While the obligation to cease all disability-based detention (involuntary institutionalization) is of immediate application and cannot be delayed due to resource limitations,⁴¹ shifting of resources is required under both Articles 14 and 19 of the CRPD in order to provide for appropriate supports to be made available in communities, so that no one need comply with institutionalization for lack of alternatives.

The Committee asks the state party to allocate more financial resources to persons with intellectual and psychosocial disabilities who require a high level of support, in order to ensure social support and medical treatment outside their own home when necessary.⁴²

The Committee further calls upon the State party to re-examine the allocation of funds, including the regional funds obtained from the EU, dedicated to the provision of support services for persons with disabilities, and the structure and functioning of the small community living centres, and ensure the full compliance with the provisions of article 19 of the Convention⁴³.

This Committee can contribute to the paradigm shift with respect to persons with disabilities by acknowledging that attention to resource allocation is needed to shift services from institutional-based care to supports and services made available to meet expressed needs of persons with disabilities in the community, which fully respect the person's autonomy, choices, dignity and privacy.⁴⁴

D. Conclusion

The Convention on the Rights of Persons with Disabilities, as a core human rights treaty elaborating the obligations of governments to ensure that all persons with disabilities enjoy all human rights and fundamental freedoms on an equal basis with others, constitutes authoritative guidance for all human rights mechanisms. Not only the CRPD text, but also the interpretations made by the Committee on the Rights of Persons with Disabilities and by experts who have developed standards based on the CRPD in thematic areas such as the freedom from torture and ill-treatment, form part of the relevant authoritative guidance. In addition, following the directive under CRPD Article 4.3 to “closely consult” and actively involve

⁴⁰ CRPD/C/CHN/CO/1 para 32; See Appendix II.

⁴¹ CRPD Article 4.2 ; A/HRC/22/53 para 89(b).

⁴² CRPD/C/CHN/CO/1 para 26 (under CRPD Article 14); See Appendix II.

⁴³ CRPD/C/HUN/CO/1 paras 34-35 (under CRPD Article 19); See Appendix II.

⁴⁴ See CRPD/C/CHN/CO/1 para 38 in Appendix II.

persons with disabilities through their representative organizations, human rights mechanisms applying the CRPD should carefully consider the positions of organizations of persons with disabilities, which reflect expertise in the subject matter as well as the concerns of those whose human rights are directly affected.

Draft paragraph 19 of the General Comment is inconsistent with the standards of the CRPD, including CRPD Article 14, which directly elaborates on the right of persons with disabilities to enjoy liberty and security of the person on an equal basis with others. The CRPD unlike earlier non-binding declarations prohibits detention on mental health grounds, including when additional factors or motivations, such as prevention of harm to the person or others, are added. As the negotiating parties rejected amendments to the text that would have permitted such detention, it is highly improper to reinterpret the CRPD as reverting to the older, discriminatory standard.

In the following sections of this paper, WNUSP has commented in detail on paragraph 19 and has suggested alternative language that would comply with the CRPD.

II. Detailed commentary on paragraph 19

19. [States parties should explain in their reports what they have done to revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention.⁴⁵ [Note that all internal footnotes are retained and renumbered]

First sentence is not objectionable in itself.

Any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question or preventing injury to others, must take into consideration less restrictive alternatives, and must be accompanied by adequate procedural and substantive safeguards established by law.⁴⁶

This sentence reflects outdated standards that have been superseded by the Convention on the Rights of Persons with Disabilities. While earlier standards such as the non-binding Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (46/119) accepted detention on mental health grounds subject to procedural and substantive safeguards, CRPD Article 14 prohibits detention based on the existence of a disability, and makes no exception for detention in the mental health field based on a motivation to protect the safety of the person or others. See Appendices I and II.

In order to avoid arbitrary detention in the field of mental health, detention on mental health grounds or in mental health facilities must be prohibited by law and abolished in practice.

The procedures should ensure respect for the views of the patient, and should ensure that any guardian or representative genuinely represents and defends the wishes and interests of the patient.⁴⁷

This sentence fails to reflect the standard of full and equal legal capacity that is guaranteed to persons with psychosocial disabilities under the CRPD. The Committee on the Rights of Persons with Disabilities holds that mental health services must be based on the free and informed consent of the person concerned; this standard is also reflected in the jurisprudence of two Special Rapporteurs on Torture. The Committee on the Rights of Persons with Disabilities furthermore holds that guardianship must be abolished and replaced by supported decision-making, which respects the person's autonomy as well as his or her will and preferences. See Appendices I and II.

States parties must provide programmes for institutionalized persons that serve the purposes that are asserted to justify the detention.⁴⁸

This sentence assumes the legitimacy of mental health detention, contrary to its prohibition under the CRPD. It should be noted that the programs typically provided in psychiatric institutions to serve purposes such as "care and treatment" or "protection of the person or others" are measures such as restraint, solitary confinement, and non-consensual administration of electroshock, mind-altering drugs such as neuroleptics, or psychosurgery, which amount at least to inhuman or degrading treatment and arguably meet the criteria for torture, according to Special Rapporteur on Torture Juan E. Méndez. See Appendix I.

Deprivation of liberty must be reevaluated at appropriate intervals with regard to its continuing necessity.⁴⁹

This sentence assumes the legitimacy of detention in the field of mental health, contrary to its prohibition under the CRPD. It should be noted that indefinite detention, far from being conducive to mental health,

⁴⁵ See Concluding observations Estonia 2003, para. 10.

⁴⁶ 1062/2002, *Fijalkowska v. Poland*, para. 8.3; 1629/2007, *Fardon v. Australia*, para. 7.3; Concluding observations Canada 2006, para. 17; Russian Federation 2010, para. 19; Bulgaria 2011, para. 17.

⁴⁷ Concluding observations Czech Republic 2007, para. 14; Bulgaria 2011, para. 17; see also Committee on the Rights of the Child, General comment No. 9, para. 48.

⁴⁸ Concluding observations Bulgaria 2011, para. 10, Germany 2012, para. 14.

⁴⁹ 754/1997, *A. v. New Zealand*, para. 7.2; Concluding observations Canada 2006, para. 17; Committee on the Rights of the Child, General comment No. 9, para. 50.

produces fear and anxiety, is linked to self-harm and suicidality as well as trauma, and constitutes a factor that warrants the characterization of mental health detention as ill-treatment or torture. See Appendix I.

Patients should be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to ensure conditions of detention consistent with the Covenant.⁵⁰]

This sentence assumes that mental health detention can be considered lawful, contrary to the CRPD which requires the repeal of legal provisions that authorize such detention. See Appendix II.

The proper standard would be that any person subjected to mental health detention must have a remedy to secure their immediate release along with compensation and other forms of reparation for the unlawful detention.

⁵⁰ 1062/2002, *Fijalkowska v. Poland*, para 8.3-8.4; 754/1997, *A. v. New Zealand*, para. 7.3; Concluding observations Russian Federation 2010, para. 19; Bulgaria 2011, para. 17; General Comment No. 31, para. 15.

III. Recommendation for alternative language to substitute outdated standards in draft paragraph 19 of General Comment No. 35:

States parties should explain in their reports what they have done to revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention.⁵¹ [Original footnote renumbered]

Rationale: the first sentence of draft paragraph 19 is acceptable and sets out the topic under discussion.

Persons with psychosocial and intellectual disabilities have the right to liberty and security of the person on an equal basis with others.⁵² This includes the right to live independently and be included in the community, with choices equal to those of others,⁵³ and the right to be free from detention that is unlawful, arbitrary, or based on the existence of a disability.⁵⁴

Rationale: this proposal substitutes language based on the text of the CRPD, which is equality-based and focuses on persons with disabilities as rights-holders and full members of society.

Detention based on a disability constitutes discrimination.⁵⁵ However, persons with disabilities remain subject to detention on grounds unrelated to the disability itself, such as criminal arrest or conviction.⁵⁶ Legislation must provide for the same penalties, under the same guarantees and conditions, for persons with disabilities as are applied to others who are the subject of criminal proceedings.⁵⁷ Any security measures applied to persons with disabilities must not be based on the existence of a disability but instead must be based on disability-neutral grounds and procedures.⁵⁸ Persons with disabilities have the right to be provided with reasonable accommodation in proceedings related to detention and in the conditions of detention, including support for the exercise of legal capacity and other desired supports and services related to the disability.⁵⁹

Rationale: CRPD does not exempt persons with disabilities from detention or security measures, but requires that any detention be based on grounds and procedures that apply to the population as a whole, rather than disability-specific ones. Mental health professionals can have no role in determining the application of detention or security measures to any individual; such involvement means that disability is being used as a factor to justify the detention, contrary to CRPD Article 14.

Persons with disabilities are entitled to respect for their physical and mental integrity on an equal basis with others,⁶⁰ both when detained and when not detained.⁶¹ Forced and nonconsensual psychiatric interventions are prohibited under international law and must be eliminated.⁶²

Rationale: this proposal gives full effect to the right of persons with psychosocial disabilities to security of the person.

⁵¹ See Concluding observations Estonia 2003, para. 10.

⁵² CRPD Article 14.1(a).

⁵³ CRPD Article 19.

⁵⁴ CRPD Article 14.1(b).

⁵⁵ CRPD Article 2, definition of “discrimination based on disability”.

⁵⁶ CRPD Article 14.2; see also Article 12.2 and Article 13; OHCHR study A/HRC/10/48, para 49. See also OHCHR Information Note No. 4 on Detention and Persons with Disabilities.

⁵⁷ Adaptation of CRPD/C/PRY/CO/1 para 32; OHCHR study A/HRC/10/48, para 47; see also OHCHR Information Note No. 4 on Detention and Persons with Disabilities.

⁵⁸ CRPD Article 14.

⁵⁹ CRPD Article 14.2.

⁶⁰ CRPD Article 17.

⁶¹ Draft GC No. 35 para 8.

⁶² A/HRC/22/53 para 89(b).

States must eliminate institutional systems of care for persons with disabilities,⁶³ and must make available community-based supports and services that meet needs expressed by persons with psychosocial disabilities and that respect the person's autonomy, choices, dignity and privacy.⁶⁴ While there is an immediate obligation to refrain from disability-based detention and institutionalization, re-allocation of resources may be needed in order to prevent institutionalization that is caused by lack of available services in the community.⁶⁵

Rationale: this proposal complements the prohibition of disability-based detention with a positive obligation to eliminate institutional systems of care and make services available that fulfill human rights requirements in the community.

⁶³ CRPD/C/CHN/CO/1 para 26.

⁶⁴ CRPD/C/CHN/CO/1 para 38.

⁶⁵ CRPD Article 4.2; CRPD/C/CHN/CO/1 para 26; CRPD/C/HUN/CO/1 paras 34-35; A/HRC/22/53 para 89(b).

Appendix I: Jurisprudence interpreting CRPD and other international human rights law as prohibiting detention on mental health grounds

Deprivation of liberty on grounds of mental illness is unjustified. Under the European Convention on Human Rights, mental disorder must be of a certain severity in order to justify detention. **I believe that the severity of the mental illness cannot justify detention nor can it be justified by a motivation to protect the safety of the person or of others. Furthermore, deprivation of liberty that is based on the grounds of a disability and that inflicts severe pain or suffering falls under the scope of the Convention against Torture. In making such an assessment, factors such as fear and anxiety produced by indefinite detention, the infliction of forced medication or electroshock, the use of restraints and seclusion, the segregation from family and community, should be taken into account.**

- Juan E. Méndez, Special Rapporteur on Torture, Statement to Human Rights Council 4 March 2013.

The Special Rapporteur calls upon all States to:

Safeguard free and informed consent on an equal basis for all individuals without any exception, through legal framework and judicial and administrative mechanisms, including through policies and practices to protect against abuses. **Any legal provisions to the contrary, such as provisions allowing confinement or compulsory treatment in mental health settings, including through guardianship and other substituted decision-making, must be revised.**

Impose an absolute ban on all forced and non-consensual medical interventions against persons with disabilities, including the non-consensual administration of psychosurgery, electroshock and mind-altering drugs such as neuroleptics, the use of restraint and solitary confinement, for both long- and short- term application. The obligation to end forced psychiatric interventions based solely on grounds of disability is of immediate application and scarce financial resources cannot justify postponement of its implementation.⁶⁶

Replace forced treatment and commitment by services in the community. Such services must meet needs expressed by persons with disabilities and respect the autonomy, choices, dignity and privacy of the person concerned, with an emphasis on alternatives to the medical model of mental health, including peer support, awareness-raising and training of mental health-care and law enforcement personnel and others.

Revise the legal provisions that allow detention on mental health grounds or in mental health facilities, and any coercive interventions or treatments in the mental health setting without the free and informed consent by the person concerned. Legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished.

- Report of Special Rapporteur on Torture Juan E. Méndez, A/HRC/22/53, 1 Feb 2013, paras 85(e) and 89 (b), (c) and (d).

The Special Rapporteur notes that in relation to persons with disabilities, the Convention on the Rights of Persons with Disabilities complements other human rights instruments on the prohibition of torture and ill-treatment by providing further authoritative guidance. For instance, article 3 of the Convention proclaims the principle of respect for the individual autonomy of persons with disabilities and the freedom to make their own choices. Further, article 12 recognizes their equal right to enjoy legal capacity in all areas of life, such as deciding where to live and whether to accept medical treatment. In addition, article 25 recognizes that medical care of persons with disabilities must be based on their free and informed consent. **Thus, in**

⁶⁶ Convention on the Rights of Persons with Disabilities, art. 4, para. 2.

the case of earlier non-binding standards, such as the 1991 Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (resolution 46/119, annex), known as the MI Principles,⁶⁷ the Special Rapporteur notes that the acceptance of involuntary treatment and involuntary confinement runs counter to the provisions of the Convention on the Rights of Persons with Disabilities.

Many States, with or without a legal basis, allow for the detention of persons with mental disabilities in institutions without their free and informed consent, on the basis of the existence of a diagnosed mental disability often together with additional criteria such as being a “danger to oneself and others” or in “need of treatment”.⁶⁸ **The Special Rapporteur recalls that article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty.**⁶⁹

In certain cases, arbitrary or unlawful deprivation of liberty based on the existence of a disability might also inflict severe pain or suffering on the individual, thus falling under the scope of the Convention against Torture. When assessing the pain inflicted by deprivation of liberty, the length of institutionalization, the conditions of detention and the treatment inflicted must be taken into account.

- Report of Special Rapporteur on Torture Manfred Nowak, A/63/175, 28 July 2008, paras 44, 64, 65.

In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.⁷⁰ Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant. Procedural accommodations both during the pre-trial and trial phase of the proceedings might be required in accordance with article 13 of the Convention, and implementing norms must be adopted.

A particular challenge in the context of promoting and protecting the right to liberty and security of persons with disabilities is the legislation and practice related to health care and more specifically to institutionalization without the free and informed consent of the person concerned (also often referred to as involuntary or compulsory institutionalization). **Prior to the entrance into force of the Convention, the existence of a mental disability represented a lawful ground for deprivation of liberty and detention under international human rights law.**⁷¹ **The Convention radically departs from this approach by forbidding deprivation of liberty based on the existence of any disability, including mental or intellectual, as discriminatory.** Article 14, paragraph 1 (b), of the Convention unambiguously states that

⁶⁷ See the International Disability Alliance position paper on CRPD and other instruments of April 2008, available at: www.psychrights.org/Countries/UN/IDACRPDpaperfinal080425.pdf.

⁶⁸ See HRI/GEN/1/Rev.8, sect. II, Human Rights Committee, general comment No. 8 (1982) on the right to liberty and security of the person, para. 1, where the Committee clarifies that article 9 applies “whether in criminal cases or in other cases such as, for example, mental illness ...”. See also the report of the Working Group on Arbitrary Detention (E/CN.4/2005/6), para. 58. See further the discussion by the European Court of Human Rights in *Shtukaturov v. Russia*, application No. 44009/05, judgement of 27 March 2008.

⁶⁹ **During the convention-making process, some States (Canada, Uganda, Australia, China, New Zealand, South Africa and the European Union) supported deprivation of liberty based on disability being permitted when coupled with other grounds. Finally, at the seventh session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Japan, with the support of China, sought to amend the text of article 14 to read “in no case shall the existence of a disability ‘solely or exclusively’ justify a deprivation of liberty”. However, the proposal was rejected.** See daily summary of discussion at the seventh session, on 18 and 19 January 2006, available at www.un.org/esa/socdev/enable/rights/ahc7summary.htm.

⁷⁰ Often referred to as “insanity defence”.

⁷¹ See for reference the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, A/RES/46/119, available at: <http://www.un.org/documents/ga/res/46/a46r119.htm>.

“the existence of a disability shall in no case justify a deprivation of liberty”. **Proposals made during the drafting of the Convention to limit the prohibition of detention to cases “solely” determined by disability were rejected.**⁷² As a result, unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person’s disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by article 14.

Legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished. This must include the repeal of provisions authorizing institutionalization of persons with disabilities for their care and treatment without their free and informed consent, as well as provisions authorizing the preventive detention of persons with disabilities on grounds such as the likelihood of them posing a danger to themselves or others, in all cases in which such grounds of care, treatment and public security are linked in legislation to an apparent or diagnosed mental illness. This should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.

- OHCHR Thematic Study on CRPD, A/HRC/10/48, 26 January 2009, paras 47, 48-49.

The existence of a disability shall in no case justify a deprivation of liberty.

Persons with disabilities have the right to live in the community. In violation of relevant international standards, in many legal systems persons with disabilities, and especially persons with mental and intellectual disabilities, are deprived of their liberty simply on the grounds of their disability. **Such disability is sometimes used to justify preventive detention measures on the grounds that the person with a disability might cause harm to himself or to others.**

In other cases, persons with disabilities are deprived of their liberty for their care and treatment. All such practices, policies and laws are in contravention of existing international standards.

The Convention on the Rights of Persons with Disabilities (CRPD) states clearly that deprivation of liberty based on the existence of a disability is contrary to international human rights law, is intrinsically discriminatory, and is therefore unlawful. Such unlawfulness also extends to situations where additional grounds—such as the need for care, treatment and the safety of the person or the community—are used to justify deprivation of liberty,

Under international human rights law, persons with disabilities are entitled to enjoy their rights to liberty and security on an equal basis with others, and can be lawfully deprived of their liberty only for the reasons, and in accordance with the procedures, that are applicable to other persons in the same jurisdiction. Articles 2, 3 and 9, Universal Declaration of Human Rights (UDHR); Article 9, International Covenant on Civil and Political Rights (ICPR); Article 14, CRPD; and the Human Rights Council (HRC), General Comment No. 8.

Persons with disabilities are recognized to have legal capacity on an equal basis with others in all aspects of life.

All too often persons with disabilities have their legal capacity lifted or restricted because of their disability, in violation of international law. In many of today’s legal systems, a diagnosis of mental

⁷² In the course of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, proposal were made to add the word “solely” to then draft article 10, para.1(b), so it would read “any deprivation of liberty shall be in conformity with the law and in no case shall be based solely on disability”.

disability automatically deprives a person of decision-making autonomy and leads to the appointment of a legal guardian to make and express legally binding decisions for that person. The incapacitated person can access justice only through an action initiated by the guardian.

The recognition of the legal capacity of persons with disabilities enshrined in Article 12 of the CRPD is a prerequisite to the full enjoyment by them of all human rights, including the right to liberty and security of the person.

In the case of persons with disabilities who are detained, recognition of their legal capacity enables them to access justice and enjoy their rights in the administration of justice, such as the right to be informed about the reasons for detention, to challenge the lawfulness of detention, to periodic review in the case of administrative detention, and to a fair trial.

Article 12 of the CRPD also recognizes that persons with disabilities might require appropriate support to exercise their legal capacity. Supported decision making might take many forms, including access to counsel in detention-related procedures.

The concept of legal capacity recognizes that (1) persons can be the bearers of rights, as discussed above; and (2) **that persons are the bearers of obligations and responsibilities. It must be noted here that the recognition of the legal capacity of persons with disabilities on an equal basis with others in all aspects of life has a bearing on the issue of criminal responsibility and the insanity defence clauses in many legal systems.** *Articles 2, 6, 7, 8 and 10, UDHR; Articles 14 and 16, ICCPR; Articles 12 and 13, CRPD; HRC, General Comment No. 32; Working Group on Arbitrary Detention, Deliberation No. 7.*

- OHCHR Information Note No. 4 for Dignity and Justice for Detainees Week, 6-12 October 2008.

**Appendix II:
Selected Concluding Observations of the Committee on the Rights of Persons with Disabilities
Relevant to Liberty and Security of the Person**

Equal recognition before the law (CRPD art. 12)

The Committee urges the State party to repeal the legal provisions of the Civil Code governing the procedure for declaring legal incapacity on grounds of disability and to set up an independent review mechanism with the aim of fully restoring the rights of those who have been declared legally incapable. It also recommends that the State party set up safeguards for persons with disabilities and develop a model for support in the decision-making process that takes due account of the individual's autonomy, free will and preferences, and of their rights, including the right to free and informed consent to medical treatment, the right of access to justice, and the rights to vote, to marry and to choose their place of residence.

CRPD/C/PRY/CO/1 para 30

The Committee urges the state party to adopt measures to repeal the laws, policies and practices which permit guardianship and trusteeship for adults and take legislative action to replace regimes of substituted decision-making by supported decision making, which respects the person's autonomy, will and preferences, in the exercise of one's legal capacity in accordance with Article 12 of the CRPD. In addition, the Committee recommends the state party in consultation with DPOs to, prepare a blueprint for a system of supported decision-making, and legislate and implement it which includes:

**Recognition of all persons' legal capacity and right to exercise it;
Accommodations and access to support where necessary to exercise legal capacity;
Regulations to ensure that support respects the person's autonomy, will and preferences and establishment of feedback mechanisms to ensure that support is meeting the person's needs;
Arrangements for the promotion and establishment of supported decision-making;**

CRPD/C/CHN/CO/1 para 22

The Committee recommends that the State party use effectively the current review process of its Civil Code and related laws to take immediate steps to derogate guardianship in order to move from substitute decision-making to supported decision-making, which respects the person's autonomy, will and preferences and is in full conformity with article 12 of the Convention, including with respect to the individual's right, on their own, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work, and to choose their place of residence. The Committee further recommends the State party to provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges, and social workers on the recognition of the legal capacity of persons with disabilities and on mechanisms of supported decision-making.

CRPD/C/HUN/CO/1 para 26

El Comité urge al Estado parte a la inmediata revisión de toda la legislación vigente que, basada en la sustitución de la toma de decisiones, priva a la persona con discapacidad de su capacidad jurídica. **Al mismo tiempo, lo insta a que tome medidas para adoptar leyes y políticas por las que se reemplace el régimen de sustitución en la adopción de decisiones por el apoyo en la toma de decisiones que respete la autonomía, la voluntad y las preferencias de la persona.** El Comité le recomienda además la puesta en marcha de talleres de capacitación sobre el modelo de derechos humanos de la discapacidad dirigida a jueces con la finalidad de que estos adopten el sistema de apoyo en la toma de decisiones en lugar de la tutela y la curatela.

CRPD/C/ARG/CO/1 para 20

El Comité insta al Estado parte a que el Proyecto de Reforma y Unificación del Código Civil y Comercial elimine la figura de la interdicción judicial y que garantice en dicho proceso de revisión la participación efectiva de las organizaciones de personas con discapacidad.

CRPD/C/ARG/CO/1 para 22

The Committee recommends the State party to abolish the practice of judicial interdiction and review the laws allowing for guardianship and trusteeship to ensure their full conformity with article 12 of the Convention and to take action to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will, and preferences.

CRPD/C/PER/CO/1 para 25

The Committee recommends that the State party review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to **replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences.** It further recommends that training be provided on this issue to all relevant public officials and other stakeholders.

CRPD/C/ESP/CO/1 para 34

The Committee recommends that the State party review the laws allowing for guardianship and trusteeship and take legal and policy action to replace those regimes of substitute decision-making by supported decision-making. It further recommends that training be provided on this issue to all relevant public officials and other stakeholders.

CRPD/C/TUN/CO/1 para 23

Access to justice (CRPD art. 13)

The Committee recommends that the State party amend its criminal legislation in order to make penalties applicable to persons with psychosocial or intellectual disabilities subject to the same guarantees and conditions as those applicable to any other person who is the subject of criminal proceedings, making provision as necessary for reasonable accommodation and procedural adjustments.

CRPD/C/PRY/CO/1 para 32

The Committee suggests that the state party allocate the necessary human and financial resources to the legal aid service centres. It asks the state party to ensure that these centres safeguard the access to justice of persons with disabilities independently and in practice, also below the county level. **The Committee suggests that the state party reviews its procedural civil and criminal laws in order to make mandatory the necessity to establish procedural accommodation for those persons with disabilities who intervene in the judicial system can do it as subject of rights and not as objects of protection.**

CRPD/C/CHN/CO/1 para 24

Liberty and security of the person (CRPD art. 14)

The Committee recommends the abolishment of the practice of involuntary civil commitment based on actual or perceived impairment. In addition, the Committee asks the state party to allocate more financial resources to persons with intellectual and psychosocial disabilities who require a high level of support, in order to ensure social support and medical treatment outside their own home when necessary.

CRPD/C/CHN/CO/1 para 26

The Committee recommends that the State party review provisions in legislation that allow for the deprivation of liberty on the basis of disability, including mental, psychosocial or intellectual disabilities, and adopt measures to ensure that health care services, including all mental health care services, are based on the free and informed consent of the person concerned.

CRPD/C/HUN/CO/1 para 28

The Committee calls upon the State party to eliminate Law 29737 which modifies article 11 of the General Health Law, in order to prohibit the deprivation of liberty on the basis of disability, including psychosocial, intellectual or perceived disability.

CRPD/C/PER/CO/1 para 29

The Committee recommends that the State party: review its laws that allow for the deprivation of liberty on the basis of disability, including mental, psychosocial or intellectual disabilities; **repeal provisions which authorise involuntary internment linked to an apparent or diagnosed disability; and adopt measures to ensure that health care services including all mental health care services are based on informed consent of the person concerned.**

CRPD/C/ESP/CO/1 para 36

The Committee recommends that the State party repeal legislative provisions which allow for the deprivation of liberty on the basis of disability, including a psychosocial or intellectual disability The Committee further recommends that until new legislation is in place, all cases of persons with disabilities who are deprived of their liberty in hospitals and specialized institutions be reviewed and that the review also include a possibility of appeal.

CRPD/C/TUN/CO/1 para 25

Freedom from torture or cruel, inhuman or degrading treatment (CRPD art. 15)

For those involuntarily committed persons with actual or perceived intellectual and psychosocial impairments, the Committee is concerned that the “correctional therapy” offered at psychiatric institutions represents an inhuman and degrading treatment. Further, the Committee is concerned that not all medical experimentation without free and informed consent is prohibited by Chinese law.

The Committee urges that the state party cease its policy of subjecting persons with actual or perceived impairments to such therapies and abstains from involuntarily committing them to institutions. Further it urges the state party to abolish laws which allow for medical experimentation on persons with disabilities without their free and informed consent.

CRPD/C/CHN/CO/1 paras 27-28

The Committee is concerned at consistent reports of the use of continuous forcible medication, including neuroleptics, and poor material conditions in psychiatric institutions, such as the hospital Larco Herrera, where some persons have been institutionalized for more than ten years without appropriate rehabilitation services.

The Committee urges the State party to promptly investigate the allegations of cruel, inhuman or degrading treatment, or punishment in psychiatric institutions, to thoroughly review the legality of the placement of patients in these institutions, as well as to establish voluntary mental health treatment services, in order to allow the persons with disabilities to be included in the community and release them from the institutions.

CRPD/C/PER/CO/1 paras 30-31

Integrity of the person (CRPD art. 17)

The Committee is concerned about the lack of clarity concerning the scope of legislation to protect persons with disabilities from being subjected to treatment without their free and informed consent, including forced treatment in mental health services.

The Committee recommends that the State party incorporate into the law the abolition of surgery and treatment without the full and informed consent of the patient, and ensure that national law respects especially women’s rights under article 23 and 25 of the Convention.

CRPD/C/TUN/CO/1 paras 28-29

Living independently and being included in the community (CRPD art. 19)

The Committee recommends to take immediate steps to phase out and eliminate institutional-based care for people with disabilities. Further, the Committee recommends to State party to consult with organisations of persons with disabilities on developing support services for persons with disabilities to live

independently in accordance with their own choice. Support services should also be provided to persons with a high level of support needs. In addition, the Committee suggests that the state party undertake all necessary measures to grant people with leprosy the medical treatment needed and to reintegrate them into the community, thereby eliminating the existence of such lepers' colonies.

CRPD/C/CHN/CO/1 para 32

The Committee calls upon the State party to ensure that an adequate level of funding is made available to effectively enable persons with disabilities to: enjoy the freedom to choose their residence on an equal basis with others; access a full range of in-home, residential and other community services for daily life, including personal assistance; and enjoy reasonable accommodation with a view to supporting their inclusion in their local communities.

The Committee further calls upon the State party to re-examine the allocation of funds, including the regional funds obtained from the EU, dedicated to the provision of support services for persons with disabilities, and the structure and functioning of the small community living centres, and ensure the full compliance with the provisions of article 19 of the Convention.

CRPD/C/HUN/CO/1 paras 34-35

El Comité insta al Estado parte a que ponga en marcha, cuanto antes, el Programa Servicio y Apoyo a la Vida Autónoma (SAVA) y que desarrolle e implemente programas integrales para que las personas con discapacidad tengan acceso a una amplia gama de programas de rehabilitación domiciliaria, residencial, comunitaria o de otro tipo y a la libre autodeterminación sobre dónde y cómo vivir.

CRPD/C/ARG/CO/1 para 34

The Committee urges the State party to initiate comprehensive programs to enable persons with disabilities to access a whole range of in-home, 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, especially in rural areas.

CPRD/C/PER/CO/1 para 33

The Committee encourages the State party to ensure that an adequate level of funding is made available to effectively enable persons with disabilities to: enjoy the freedom to choose their residence on an equal basis with others; access a full range of in-home, residential and other community services for daily life, including personal assistance; and so enjoy reasonable accommodation so as to better integrate into their communities.

CRPD/C/ESP/CO/1 para 40

Right to health (CRPD art. 25)

The Committee advises the state party to adopt measures to ensure that all health care and services provided to persons with disabilities, including all mental health care and services, is based on the free and informed consent of the individual concerned, and that laws permitting involuntary treatment and confinement, including upon the authorisation of third party decision-makers such as family members or guardians, are repealed. It recommends the state party to develop a wide range of community-based services and supports that respond to needs expressed by persons with disabilities, and respect the person's autonomy, choices, dignity and privacy, including peer support and other alternatives to the medical model of mental health

CRPD/C/CHN/CO/1 para 38

Appendix III: Information about submitting organizations

The **World Network of Users and Survivors of Psychiatry (WNUSP)** is an international organisation of users and survivors of psychiatry, advocating for human rights of users and survivors, and representing users and survivors worldwide.⁷³ The organisation has expertise on the rights of children and adults with psychosocial disabilities, including on the latest human rights standards set by the CRPD, which it played a leading role in drafting and negotiating. WNUSP is a member organisation of IDA and has special consultative status with ECOSOC. WNUSP supports its members to advocate before UN treaty bodies, and has provided expertise to UN bodies including the Special Rapporteur on Torture, the Subcommittee on Prevention of Torture and the Committee on the Rights of Persons with Disabilities. WNUSP is currently engaged with processes for review of the Standard Minimum Rules on the Treatment of Prisoners and for the development of an instrument on the rights of older persons.

Jolijn Santegoeds and Salam Gomez, Chairs

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The **Center for the Human Rights of Users and Survivors of Psychiatry (CHRUSP)** provides strategic leadership in human rights advocacy, implementation and monitoring relevant to people experiencing madness, mental health problems or trauma. In particular, CHRUSP works for full legal capacity for all, an end to forced drugging, forced electroshock and psychiatric incarceration, and for support that respects individual integrity and free will. CHRUSP regularly provides technical support to the World Network of Users and Survivors of Psychiatry (WNUSP) through the work of the CHRUSP President as WNUSP International Representative.

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The **Pan African Network of People with Psychosocial Disabilities (PANUSP)** is a continental organisation established in 2005 to represent the legitimate voice of people with psychosocial disabilities and users and survivors of psychiatry in Africa. PANUSP aims to increase continental solidarity. PANUSP functions as an advocacy mechanism that is dedicated to social justice, human rights, empowerment, social development and the full participation and inclusion of all people with psychosocial disabilities in Africa.

Robinah Alambuya, Chairperson

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The **European Network of (Ex-) Users and Survivors of Psychiatry (ENUSP)** is the grassroots, independent representative organisation of mental health service users and survivors of psychiatry at a European level. ENUSP's members are regional, national and local organisations and individuals across 39 European countries. Since its foundation in 1991, ENUSP has campaigned for the full human rights and dignity of mental health service users and survivors of psychiatry and the abolition of all laws and practices that discriminate against us. ENUSP is currently a consultant to the European Commission, the European Union Fundamental Rights Agency, and the World Health Organization-Europe. ENUSP is a member of European Disability Forum (EDF) and European Patients' Forum (EPF) and part of the World Network of Users and Survivors of Psychiatry (WNUSP). Through WNUSP, our members were active in the drafting

⁷³ In its statutes, "users and survivors of psychiatry" are self-defined as people who have experienced madness and/or mental health problems, or who have used or survived mental health services.

and negotiation of the CRPD.

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PAIIS (Programa de Acción por la Igualdad y la Inclusión Social - Action Program for Equality and Social Inclusion) is a human rights clinic of the Law School at the University of Los Andes in Bogotá, Colombia. Founded in 2007, it seeks to advance the rights of historically marginalized groups and engages in actions on behalf of people discriminated based on their disability status, age, sexual orientation or gender identity. It played a key role in the advocacy efforts to push the Colombian government to ratify the UN Convention of the Rights of People with Disabilities. It engages in direct representation of people with disabilities and their families including those deprived of their liberty in prisons and other institutions, conducts human rights trainings and strategic litigation. PAIIS regularly submits briefs to national courts and international bodies and it is currently engaged in the submission of a shadow report before the CEDAW Committee for Colombia's periodic report, and a submission for the review process of the Minimum Standard Rules for Prisoners.

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The **International Disability Alliance (IDA)** is the international network of global and regional organisations of persons with disabilities (DPOs), currently comprising eight global and four regional DPOs. Each IDA member represents a large number of national DPOs from around the globe, covering the whole range of disability constituencies. IDA's mission is to advance the human rights of persons with disabilities as a united voice of DPOs utilising the CRPD and other human rights instruments, and to promote the effective implementation of the CRPD, as well as compliance within the UN system and across the treaty bodies.

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