

27 May 2014

Dear Members of the Human Rights Committee,

**Re: Urgent request to amend the Human Rights Committee's draft version of General Comment No. 35 (CCPR/C/107/R.3) on Article 9 (Right to liberty and security of person) bringing it in line with the UN Convention on the Rights of Persons with Disabilities**

*Submitted by Mr Shuaib Chalklen, UN Special Rapporteur on Disability*

The Human Rights Committee's effort to revise the 1982 General Comment No. 8 on the Right to liberty and security of person is an important undertaking for the protection of human rights and a golden opportunity to bring outdated standards in line with evolving international human rights law.

While the Committee's valuable efforts to compile its jurisprudence are highly welcomed, I am concerned that the standards applied in the draft document with respect to mental health detention (paragraph 19) fail to uphold the right of persons with disabilities to liberty and security of the person under the Covenant on an equal basis with others. I further fear that these standards could be seen to legitimize acts of torture and cruel, inhuman or degrading treatment or punishment.

As a UN mandate holder whose work covers the rights of persons with disabilities, I consider the Convention on the Rights of Persons with Disabilities to be authoritative guidance on the rights of persons with disabilities supplementing the Covenant and other core human rights treaties.

The CRPD rejects the medical model approach of earlier non-binding standards such as the 1991 Principles for the Protection of Persons with Mental Illness, which had condoned coercive practices and detention in the field of mental health. The CRPD instead adopts a standpoint of equality and non-discrimination in all aspects of life, and provides that persons with disabilities, including persons with psychosocial disabilities, have the right to exercise legal capacity and decision-making, the right to be free from unwanted medical treatments, and the right to remain at liberty in the community so long as they do not infringe laws applicable to the population as a whole.

I therefore respectfully urge the Committee to revise its draft General Comment to ensure that it reflects the standards of the CRPD, in particular Article 14 on the right to liberty and security of the person, which corresponds to Article 9 of the Covenant.

Recent jurisprudence of the Committee on the Rights of Persons with Disabilities has settled any remaining doubt as to the meaning of CRPD Article 14.1(b), which states that "the existence of a disability shall in no case justify a deprivation of liberty." The CRPD Committee has found that national legislation which authorizes

mental health detention based on a standard of danger to self or others contravenes Article 14, and that such detention amounts to deprivation of liberty based on an actual or perceived disability. They furthermore urge the State Party to ensure that “no one is detained against their will in any kind of mental health facility.”<sup>1</sup>

It is also pertinent to consider CRPD Article 12 on equal recognition before the law (on the right to legal capacity), Article 15 on freedom from torture, Article 17 on integrity of the person, Article 19 on living independently in the community, and Article 25 on health. In its Concluding Observations under these provisions, as well as under Article 14, the CRPD Committee has condemned forced treatment and commitment in mental health services, and has articulated the principle that mental health services must be based on the free and informed consent of the person concerned.<sup>2</sup>

The CRPD Committee has also addressed the matter in its recently issued General Comment No. 1 on Article 12, which holds that institutionalization against a person’s will or without their free and informed consent constitutes arbitrary detention and violates Article 12 on equal recognition before the law, in addition to Article 14 on liberty and security of the person.<sup>3</sup> A person’s actual or perceived deficits in mental capacity or decision-making cannot justify a denial of legal capacity including the standing and agency to make decisions about medical (including psychiatric) treatment.<sup>4</sup> Support for decision-making must be made available based on the person’s will and preferences rather than a perception of their best interest.<sup>5</sup>

General Comment No. 1 characterizes forced psychiatric treatment as an infringement of the freedom from torture as well as a violation of the right to decide about medical treatment under Article 12, and urges its abolition.<sup>6</sup>

In accordance with the jurisprudence of the Committee on the Rights of Persons with Disabilities and with my own understanding of the right to liberty and security

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<sup>1</sup> CRPD/C/SWE/CO/1 paras 35-36; CRPD/C/AUT/CO/1 paras 29-30; CRPD/C/SLV/CO/1 para 32. See also CRPD/C/AZE/CO/1 paras 28-29; CRPD/C/CHN/CO/1 para 26; CRPD/C/HUN/CO/1 para 28; CRPD/C/PER/CO/1 para 29; CRPD/C/ESP/CO/1 para 36; CRPD/C/TUN/CO/1 para 25.

<sup>2</sup> CRPD/C/AZE/CO/1 paras 32-33; CRPD/C/CRI/CO/1 paras 22, 33-34, 40; CRPD/C/SWE/CO/1 paras 34, 37-40; CRPD/C/AUT/CO/1 paras 28, 31, 33, 39; CRPD/C/SLV/CO/1 paras 32, 33-34, 37-38, 42, 52; CRPD/C/CHN/CO/1 paras 22, 26, 28, 32, 36; CRPD/C/HUN/CO/1 para 26, 28, 34; CRPD/C/PER/CO/1 paras 25, 31; CRPD/C/ESP/CO/1 para 34, 36, 38; CRPD/C/TUN/CO/1 paras 28-29.

<sup>3</sup> CRPD/C/GC/1 (advance unedited edition) paras 8 and 36.

<sup>4</sup> CRPD/C/GC/1 (advance unedited edition) paras 7, 8, 12, 12bis, 13, 16, 25(f), 27, 37, 38.

<sup>5</sup> CRPD/C/GC/1 (advance unedited edition) para 25(b); see also para 17.

<sup>6</sup> CRPD/C/GC/1 (advance unedited edition) para 38.

of the person, it is my opinion that that mental health detention is never justified and must be abolished, and that laws permitting such detention, including laws that authorize institutional confinement or treatment based on the consent of a substitute decision-maker, must be repealed.

Having prohibited disability-based detention in Article 14.1(b), CRPD Article 14.2 guarantees non-discrimination, including reasonable accommodation, when persons with disabilities are subjected to criminal arrest or detention or to any other kind of lawful arrest or detention. The two parts of Article 14 function together to prohibit two kinds of discrimination in enjoyment of the right to liberty and security of the person: detention regimes that by their own terms discriminate based on disability and thus constitute arbitrary detention; and discrimination that people with disabilities may encounter in situations of detention that applies to the population as a whole.

In the criminal law context, it should be emphasized that involuntary transfer to mental health facilities within or outside of a prison, or the imposition of mental health treatment as a condition of probation or parole, violates CRPD Article 14 and cannot be considered a reasonable accommodation for disability. As addressed by the CRPD Committee under Article 13 on access to justice, such measures violate the right to be treated equally without any discrimination based on disability in the context of arrest and detention.<sup>7</sup> The Special Rapporteur on Torture, in a report on revision of the Standard Minimum Rules on the Treatment of Prisoners, has similarly called for replacement of Rules 82 and 83, which mandate such transfers to mental health facilities and placement under medical supervision, with a provision articulating specific guarantees of equality and non-discrimination for all persons with disabilities.<sup>8</sup> This proposal, which I also endorse, is based on CRPD Article 14 and takes other provisions of the CRPD as guidance for the content of particular obligations.

Measures required to implement the right of persons with disabilities to enjoy liberty and security of the person on an equal basis with others include:

Repealing legal provisions that authorize detention of any person in any kind of mental health facility or that authorize the subjection of any individual to forcible medication or electroshock, restraint or seclusion in the context of mental health services. This includes legal provisions that authorize consent to institutionalization or treatment by guardians or other substitute decision-makers, and it includes legal provisions authorizing the involuntary transfer to mental health facilities of individuals subject to criminal proceedings.

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<sup>7</sup> CRPD/C/AUS/CO/1 paras 29-30; see also CRPD/C/CRI/CO/1 paras 27-28; CRPD/C/PRY/CO/1 para 32.

<sup>8</sup> A/68/295 para 72.

Ensuring that laws and policies are put in place and enforced, to guarantee that all mental health services are provided based on the free and informed consent of the person concerned.

Ensuring that persons with disabilities are accorded the same legal capacity as others in all aspects of life, and that substituted decision-making and guardianship are abolished and replaced by support in decision-making, which respects the autonomy, will and preferences of the person.

Ensuring that persons with psychosocial disabilities have access to a range of supports and services in the community based on the free and informed consent of the person concerned, to include support for independent living as well as alternatives to the medical model of mental health such as peer support, trauma counseling and non-judgmental support for dealing with phenomena such as hearing voices. Similar supports must be made available in prison and other detention settings so that persons who are detained receive quality care and services comparable to those to which they are entitled in the community.

Mental health detention and compulsory treatment are serious human rights violations that cannot be condoned under any circumstances. These violations must be ended so that a substantial sector of the population can reclaim its full human rights and participate on an equal basis with others in society.

### Conclusion

I strongly urge the Human Rights Committee to join the effort to ensure that the right to liberty and security of persons with disabilities, as enshrined in the Covenant and other human rights instruments, is upheld on an equal basis with others, and to amend its draft General Comment accordingly.

Shuaib Chalklen

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