

المبادئ التوجيهية بشأن المادة 14 من اتفاقية حقوق الأشخاص ذوي الإعاقة

حق الأشخاص ذوي الإعاقة في الحرية والأمان على شخصهم

اعتمدت في الدورة الرابعة عشرة للجنة المعنية بحقوق الأشخاص ذوي الإعاقة

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I. Introduction

1. Since the Committee on the Rights of Persons with Disabilities (hereinafter, the Committee) adopted a statement on article 14 of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter, the Convention), in September 2014, (CRPD/C/12/2, Annex IV), some United Nations bodies as well as inter-governmental processes have developed guidelines on the right to liberty and security as well as on the treatment of prisoners, which make reference to the deprivation of liberty of persons with disabilities. Some regional bodies have also considered adopting additional binding instruments which would allow for involuntary internment and forced treatment of persons with intellectual and psychosocial disabilities. The Committee, on the other hand, has further developed its understanding of article 14 while engaging in constructive dialogues with several States parties to the Convention.

2. The Committee, being the international monitoring body of the Convention, has adopted these guidelines to provide further clarification to States parties, regional integration organizations, National Human Rights Institutions and national monitoring mechanisms, organizations of persons with disabilities, civil society organizations as well as United Nations agencies, bodies, and independent experts about the obligation of States parties pursuant to the Convention on the Rights of Persons with Disabilities to respect, protect and guarantee the right of persons with disabilities to liberty and security. These guidelines replace the statement adopted by the Committee on article 14 of the Convention.

II. The right to liberty and security of persons with disabilities

3. The Committee reaffirms that liberty and security of the person is one of the most precious rights to which everyone is entitled. In particular, all persons with disabilities, and especially persons with intellectual disabilities and psychosocial disabilities are entitled to liberty pursuant to article 14 of the Convention.

4. Article 14 of the Convention is, in essence, a non-discrimination provision. It specifies the scope of the right to liberty and security of the person in relation to persons with disabilities, prohibiting all discrimination based on disability in its exercise. Thereby, article 14 relates directly to the purpose of the Convention, which is to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect of their inherent dignity.

5. This non-discrimination nature of article 14 provides evidence of the close interrelation with the right to equality and non-discrimination (article 5). Article 5(1) recognizes that all persons are equal before and under the law and are entitled to equal protection of the law. Article 5(2) prohibits all forms of discrimination on the basis of disability and guarantees to persons with disabilities equal and effective legal protection against discrimination on all grounds.

III. The absolute prohibition of detention on the basis of impairment

6. There are still practices in which States parties allow for the deprivation of liberty on the grounds of actual or perceived impairment.¹ In this regard the Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or others. This practice is incompatible with article 14; it is discriminatory in nature and amounts to arbitrary deprivation of liberty.

7. During the negotiations of the Ad Hoc Committee leading up to the adoption of the Convention there were extensive discussions on the need to include a qualifier, such as “solely” or “exclusively”, in the prohibition of deprivation of liberty due to the existence of an actual or perceived impairment in the draft text of article 14(1)(b). States opposed it, arguing that it could lead to misinterpretation² and allow deprivation of liberty on the basis of their actual or perceived impairment in conjunction with other conditions, like danger to self or others.³ Furthermore, discussions were held on whether to include a provision for periodic review of the deprivation of liberty in the text of draft article 14(2).⁴ Civil society also opposed the use of qualifiers and the periodic review approach.^{5,6} Consequently, article 14(1)(b) prohibits the deprivation of liberty on the basis of actual or perceived impairment even if additional factors or criteria are also used to justify the deprivation of liberty. The issue was settled in the seventh meeting of the Ad Hoc Committee.

8. The absolute ban of deprivation of liberty on the basis of actual or perceived impairment has strong links with article 12 of the Convention (equal recognition before the law). In its General Comment No. 1, this Committee has clarified that States parties should refrain from the practice of denying legal capacity of persons with disabilities and detaining them in institutions against their will, either without the free and informed consent of the persons concerned or with the consent of a substitute decision-maker, as this practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.⁷

9. Enjoyment of the right to liberty and security of the person is central to the implementation of article 19 on the right to live independently and be included in the community. This Committee has stressed this relationship with article 19. It has expressed its concern about the

¹ Impairment in these guidelines is understood as a physical, psycho-social, intellectual or sensory personal condition which may or may not come with functional limitations of the body, mind or senses. Impairment differs from what is usually considered the norm. Disability is understood as the social effect of the interaction between individual impairment and social and material environment as described in Art. 1 UNCRPD

² Ad Hoc Committee, Third Session, Daily summary of discussions, May 26, 2004; Fifth Session, Daily summary of discussions, January 26, 2005

³ Ibid. Fifth Session, Daily summary of discussions, January 26, 2005

⁴ Originally, the provision was in article was 10(2)(c)(ii) of the draft.

⁵ Ad Hoc Committee, Fifth Session, Daily summary of discussions, January 27, 2005

⁶ Ad Hoc Committee, Third Session, Daily summary of discussions, May 26, 2004

⁷ CRPD/C/GC/1, para.40

institutionalization of persons with disabilities and the lack of support services in the community,⁸ and it has recommended implementing support services and effective deinstitutionalization strategies in consultation with organizations of persons with disabilities.⁹ In addition, it has called for the allocation of more financial resources to ensure sufficient community-based services.¹⁰

IV. Involuntary or non-consensual commitment in mental health institutions

10. Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent of the person concerned for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments.¹¹ Involuntary commitment in mental health facilities carries with it the denial of the person's legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.

V. Non-consensual treatment during deprivation of liberty

11. The Committee has emphasized that States parties should ensure that the provision of health services, including mental health services, are based on free and informed consent of the person concerned.¹² In its General Comment No. 1, the Committee stated that States parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment. The Committee stated that, "in conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities."¹³

VI. Protection of persons with disabilities deprived of their liberty from violence, abuse and ill-treatment

12. The Committee has called on States parties to protect the security and personal integrity of persons with disabilities who are deprived of their liberty, including by eliminating the use of forced treatment¹⁴, seclusion and various methods of restraint in medical facilities, including physical, chemical and mechanic restrains.¹⁵ The Committee has found that these practices are not consistent with the prohibition of torture and other cruel, inhumane or

⁸ CRPD/C/ESP/CO/1, paras. 35-36; CRPD/C/CHN/CO/1, para. 26; CRPD/C/ARG/CO/1, para. 24; CRPD/C/PRY/CO/1, para. 36; CRPD/C/AUT/CO/1, para. 30; CRPD/C/SWE/CO/1, para. 36; CRPD/C/CRI/CO/1, para. 30; CRPD/C/AZE/CO/1, para. 29; CRPD/C/ECU/CO/1, para. 29; CRPD/C/MEX/CO/1, para. 30.

⁹ Ibid.

¹⁰ CRPD/C/CHN/CO/1, para. 26; CRPD/C/AUT/CO/1, para. 31; CRPD/C/SWE/CO/1, para. 36.

¹¹ CRPD/C/KOR/CO/1, para. 29; CRPD/C/DOM/CO/1, para. 27; CRPD/C/AUT/CO/1, para. 30.

¹² CRPD/C/ECU/CO/1, para. 29 d); CRPD/C/NZL/CO/1, para. 30; CRPD/C/SWE/CO/1, para. 36.

¹³ CRPD/C/GC/1, para. 41.

¹⁴ CRPD/C/PER/CO/1, paras. 30 and 31; CRPD/C/HRV/CO/1, para. 24; CRPD/C/TKM/CO/, para. 32; CRPD/C/DOM/CO/1, para. 31; CRPD/C/SLV/CO/1, paras. 33-34; CRPD/C/SWE/CO/1, paras. 37-38.

¹⁵ CRPD/C/NZL/1, para. 32; CRPD/C/AUS/CO/1, para. 36.

degrading treatment or punishment against persons with disabilities pursuant to article 15 of the Convention.

VII. Deprivation of liberty on the basis of perceived dangerousness of persons with disabilities, alleged need for care or treatment, or any other reasons.¹⁶

13. Throughout all the reviews of State party reports, the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.

14. Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and others when they do not consent to and/or resist medical or therapeutic treatment. All persons, including those with disabilities, have a duty to do no harm. Legal systems based on the rule of law have criminal and other laws in place to deal with the breach of this obligation. Persons with disabilities are frequently denied equal protection under these laws by being diverted to a separate track of law, including through mental health laws. These laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13 in conjunction with article 14 of the Convention.

15. The freedom to make one's own choices established as a principle in article 3(a) of the Convention includes the freedom to take risks and make mistakes on an equal basis with others. In its General Comment No. 1, the Committee stated that decisions about medical and psychiatric treatment must be based on the free and informed consent of the person concerned and respect the person's autonomy, will and preferences.¹⁷ Deprivation of liberty on the basis of actual or perceived impairment or health conditions in mental health institutions which deprives persons with disabilities of their legal capacity also amounts to a violation of article 12 of the Convention.

VIII. Detention of persons unfit to stand trial in criminal justice systems and/or incapable of criminal liability

16. The Committee has established that declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant. The Committee has also called for States parties to remove those declarations from the criminal justice system. The Committee has recommended that "all persons with disabilities who have been accused of crimes and... detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with

¹⁶ For example, severity of impairment, observation, or prevention as a form of long-term detention

¹⁷ CRPD/C/GC/1, para. 21 and 42

required support and accommodation to facilitate their effective participation”¹⁸, as well as procedural accommodations to ensure fair trial and due process.¹⁹

IX. Conditions of detention of persons with disabilities

17. The Committee has expressed its concerns for the poor living conditions in places of detention, particularly prisons, and has recommended that States parties ensure that places of detention are accessible and provide humane living conditions. More recently, it recommended “that immediate steps are [to be] taken to address the poor living conditions in institutions.”²⁰ This Committee has recommended that States parties establish legal frameworks for the provision of reasonable accommodation that preserve the dignity of persons with disabilities, and guarantee this right for those detained in prisons.²¹ It has also addressed the need to “[p]romote training mechanisms for justice and prison officials in accordance with the Convention’s legal paradigm”.²²

18. While developing its jurisprudence under the Optional Protocol to the Convention²³, the Committee has affirmed that, under article 14(2) of the Convention, persons with disabilities deprived of their liberty have the right to be treated in compliance with the objectives and principles of the Convention, including conditions of accessibility and reasonable accommodation. The Committee has recalled that States parties must take all relevant measures to ensure that persons with disabilities who are detained may live independently and participate fully in all aspects of daily life in their place of detention, including ensuring their access, on an equal basis with others, to the various areas and services, such as bathrooms, yards, libraries, study areas, workshops and medical, psychological, social and legal services. The Committee has stressed that a lack of accessibility and reasonable accommodation places persons with disabilities in sub-standard conditions of detention that are incompatible with article 17 of the Convention and may constitute a breach of article 15(2).

X. Monitoring of detention facilities and review of detentions

19. The Committee has stressed the necessity to implement monitoring and review mechanisms in relation to persons with disabilities deprived of their liberty. Monitoring existing institutions and review of detentions do not entail the acceptance of the practice of forced institutionalization. Article 16(3) of the Convention explicitly requires monitoring of all facilities and programmes that serve persons with disabilities in order to prevent all forms of exploitation, violence and abuse, and article 33 requires that States parties establish a national independent monitoring mechanism and ensure civil society participation in monitoring (paras. 2 and 3). Review of detentions must have the purpose of challenging the arbitrary detention and obtain immediate release, in no case it should allow for the extension of the arbitrary detention.²⁴

¹⁸ CRPD/C/AUS/CO/1, para. 30.

¹⁹ CRPD/C/MNG/CO/1, para. 25, CRPD/C/DOM/CO/1, para. 29 a), CRPD/C/CZE/CO/1, para. 28, CRPD/C/HRV/CO/1, para. 22, CRPD/C/DEU/CO/1, para. 32, CRPD/C/DNK/CO/1, para. 34 and 35, CRPD/C/ECU/CO/1, para. 29 b), CRPD/C/KOR/CO/1, para. 28, CRPD/C/MEX/CO/1, para. 27, CRPD/C/NZL/CO/1, para. 34

²⁰ CRPD/C/HRV/CO/1, para. 24

²¹ CRPD/C/COK/CO/1, para. 28 b), CRPD/C/MNG/CO/1, para. 25, CRPD/C/TKM/CO/1 para. 26 b), CRPD/C/CZE/CO/1, para. 28, CRPD/C/DEU/CO/1, para. 32 c), CRPD/C/KOR/CO/1, para. 29, CRPD/C/NZL/CO/1, para. 34, CRPD/C/AZE/CO/1, para. 31, CRPD/C/AUS/CO/1, para. 32 b), CRPD/C/SLV/CO/1, para. 32

²² CRPD/C/MEX/CO/1, para. 28

²³ CRPD/C/11/D/8/2012

²⁴ CRPD/C/KOR/CO/1, para. 26

XI. Security measures

20. This Committee has addressed security measures imposed on persons found not responsible due to “insanity” and incapacity to be held criminally responsible. This Committee has also recommended eliminating security measures,²⁵ including those which involve forced medical and psychiatric treatment in institutions.²⁶ It has also expressed concern about security measures that involve indefinite deprivation of liberty and absence of regular guarantees in the criminal justice system.²⁷

XII. Diversion mechanisms and restorative justice schemes

21. The Committee has stated that deprivation of liberty in criminal proceedings should only apply as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime.²⁸ Diversion programmes must not involve a transfer to mental health commitment regimes or require an individual to participate in mental health services; such services should be provided on the basis of the individual's free and informed consent.²⁹

XIII. Free and informed consent in emergency and crisis situations

22. In its General Comment No. 1, the Committee states that States parties must respect and support the legal capacity of persons with disabilities to make decisions at all times, including in emergency and crisis situations. States parties must ensure that support is provided to persons with disabilities, including in emergency and crisis situations, and “accurate and accessible information is provided about service options and that non-medical approaches are made available”.³⁰ The Committee also states that, “States parties must abolish policies and legislative provisions that allow or perpetrate forced treatment”, and that “decisions relating to a person’s physical or mental integrity can only be taken with the free and informed consent of the persons concerned.”³¹ In paragraph 41 of its General Comment No. 1, the Committee states that, “in conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities”.³²

23. The Committee has also called for States parties to ensure that persons with disabilities are not denied the right to exercise their legal capacity on the basis of a third party’s analysis of their “best interests”, and that when after significant efforts have been made it is impracticable to determine a person’s will and preferences, practices associated with “best interests” determinations should be replaced by the standard of “best interpretation of the will and preferences” of the person.³³

²⁵ CRPD/C/BEL/CO/1, para. 28.

²⁶ CRPD/C/ECH/CO/1, para. 29 c)

²⁷ CRPD/C/DEU/CO/1, para. 31

²⁸ CRPD/C/NZL/CO/1, para. 34

²⁹ CRPD/C/AUS/CO/para.29

³⁰ CRPD/C/GC/1, para. 42

³¹ *Ibid.*, para. 42

³² *Ibid.*, para. 41

³³ *Ibid.*, para. 21

XIV. Access to justice, reparation and redress to persons with disabilities deprived of their liberty in infringement of article 14 taken alone, and taken in conjunction with article 12 and/or article 15 of the Convention.

24. Persons with disabilities arbitrarily or unlawfully deprived of their liberty are entitled to have access to justice to review the lawfulness of their detention, and to obtain appropriate redress and reparation. The Committee calls States parties' attention to Guideline 20 of the "United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court", adopted by the Working Group on Arbitrary Detention on 29 April 2015, during its 72th session. Guideline 20 contains specific measures for persons with disabilities, including the following:³⁴

"126. The following measures shall be taken to ensure procedural accommodation and the provision of accessibility and reasonable accommodation for the exercise of the substantive rights of access to justice and equal recognition before the law:

(a) Persons with disabilities shall be informed about, and provided access to, promptly and as required, appropriate support to exercise their legal capacity with respect to proceedings related to the detention and in the detention setting itself.ⁱ Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substituted decision-making;ⁱⁱ

(b) Persons with psychosocial disabilities must be given the opportunity to promptly stand trial, with support and accommodations as may be needed, rather than declaring such persons incompetent;

(c) Persons with disabilities can access, on an equal basis with other persons subject to detention, buildings in which law-enforcement agencies and the judiciary are located. The jurisdictional entities must ensure that their services include information and communication that is accessible to persons with disabilities.ⁱⁱⁱ Appropriate measures shall be taken to provide signage in Braille and in easy to read and understand forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to communication in the facilities of jurisdictional entities;^{iv}

(d) Individuals who are currently detained in a psychiatric hospital or similar institution and/or subjected to forced treatment, or who may be so detained or forcibly treated in the future, must be informed about ways in which they can effectively and promptly secure their release including injunctive relief;

(e) Such relief should consist of an order requiring the facility to release the person immediately and/or to immediately

³⁴ A/HRC/30/36

cease any forced treatment, as well as systemic measures such as requiring mental health facilities to unlock their doors and inform persons of their right to leave, and establishing a public authority to provide for access to housing, means of subsistence and other forms of economic and social support in order to facilitate de-institutionalization and the right to live independently and be included in the community. Such assistance programs should not be centred on the provision of mental health services or treatment, but free or affordable community-based services, including alternatives that are free from medical diagnosis and interventions. Access to medications and assistance in withdrawing from medications should be made available for those who so decide;^v

(f) Persons with disabilities are provided with compensation, as well as other forms of reparations, in the case of arbitrary or unlawful deprivation of liberty.^{vi} This compensation must also consider the damage caused by the lack of accessibility, denial of reasonable accommodation, lack of health care and rehabilitation, which have affected the person with disability deprived of liberty.”

Geneva, September 2015

ⁱ See also, Human Rights Committee General Comment no. 35, para. 18: “The individuals must 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 prevent conditions of detention incompatible with the Covenant.” Oxford Pro Bono Public study: In regard to preventive detention proceedings, there is a very strong trend toward guaranteeing the right to be heard and to legal representation (p. 97). Further, there is a significant trend in the practice of States toward guaranteeing the right to information and to legal representation to a person with a mental illness during detention proceedings (p. 99).

ⁱⁱ Committee on the Rights of Persons with Disabilities, General Comment No. 1, para. 17: “Support” is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication. Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences.

ⁱⁱⁱ Committee on the Rights of Persons with Disabilities, General Comment No. 2, para. 37

^{iv} Committee on the Rights of Persons with Disabilities, General Comment No. 2, para. 20.

^v HRC General Comment no. 35, para. 19: “States parties should make available adequate community-based or alternative social care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement”.

^{vi} This includes deprivation of liberty based on disability or perceived disability, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability.