

# Third Party Intervention in relation to the European Court of Human Rights' Advisory Opinion on Oviedo Convention

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Written comments jointly submitted by: Autism Europe, European Disability Forum, Inclusion Europe, International Disability Alliance and Mental Health Europe

## I. Introduction

These written comments are submitted by Autism-Europe, the European Disability Forum, Inclusion Europe, the International Disability Alliance and Mental Health Europe, pursuant to leave granted by the President of the Grand Chamber on 22 October 2020 in the proceedings under the Oviedo Convention.

The present proceeding concerns the legal interpretation of Article 7 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (hereinafter "Convention on Human Rights and Biomedicine" or "Oviedo Convention") with a view of providing guidance for the current and future work of the Committee on Bioethics of the Council of Europe. The questions addressed to the European Court concern (1) the interpretation of the "protective conditions" Member States need to regulate to meet minimum requirements of protection under Article 7 of the Oviedo Convention, and (2) whether the same protective conditions apply "in case of involuntary treatment of a mental disorder to be given without the consent of the person concerned and with the aim of protecting others from serious harm" falling within the remits of Article 26(1) of the Oviedo Convention.

The proceeding provides the European Court of Human Rights (hereinafter the 'Court') with the opportunity to examine States' obligations to guarantee the rights of inherent dignity, non-discrimination and liberty and security of persons with mental health problems. While complex, the questions allow the Court to embrace a paradigm shift in the protection of the rights of persons with mental health problems and/or psychosocial disabilities, intellectual disabilities or autism in light of the most recent international human rights standards and developments at international and European levels.

This submission set forth the latest international human rights standards with respect to the rights of persons with mental health problems to non-discrimination and liberty and security, particularly regarding decisions of involuntary placement and involuntary treatment on the basis of a perceived or actual mental health problems. It is also based on documents adopted by United Nations bodies and experts, and organs of the Council of Europe. The submission also provides information on European policies and practices pertaining to ending coercion in mental health care, including involuntary placement and treatment.

## II. Interpretation in light of international human rights law and European instruments

In its decisions and judgments, the Court must pay due consideration to international human rights law, European instruments, and national consensus among States parties to the European Convention on Human Rights. This is based on the 1969 Vienna Convention on the Law of Treaties (VCLT) and the jurisprudence of the Court.

In ***Demir and Baykara***, the Court stated that it is "*guided mainly by the rules of interpretation provided for in articles 31 to 33 of the Vienna Convention on the Law of Treaties*".<sup>1</sup> Article 31(3)(c) of the VCLT requires that other rules of international law are taken into account when interpreting a treaty.

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<sup>1</sup> *Demir and Baykara v. Turkey* [GC] (2008) Application no. 34503/97, paragraphs 65–66.

Further, the **Opuz v Turkey** case established that in interpreting the provisions of the Convention of the European Convention of Human Rights and the scope of the States' obligations in specific cases, the Court will look “for any consensus and common values emerging from the practices of European States and specialised international instruments... as well as giving heed to the evolution of norms and principles in international law.”<sup>2</sup> This rule was confirmed in the **Tanase** case, where the Grand Chamber of the Court said that the Court “must take into account relevant international instruments and reports, and in particular those of other Council of Europe organs.”<sup>3</sup>

In considering issues relating to involuntary placement and treatment of people with mental health problems, the Court is encouraged to have regard to the most recent international standards on the human rights of persons with disabilities, in particular the provisions of the **United Nations Convention on the Rights of Persons with Disabilities** (CRPD) and its guiding principles, including respect for inherent dignity, non-discrimination and the right to liberty and security.<sup>4</sup>

To date, the CRPD counts 182 ratifications/accessions. Within the Council of Europe, 46 of the 47 members are States parties to the CRPD.<sup>5</sup> The European Union and all its member states have ratified or acceded to the CRPD.

The Court is also encouraged to have regard to other relevant international human rights treaties, resolutions and reports, in particular from the United Nations bodies and special mandate holders (including the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health), and to European instruments, reports and decisions of other organs of the Council of Europe, including the Council of Europe's Commissioner for Human Rights and Parliamentary Assembly.

### III. International standards prohibiting involuntary placement and treatment

#### A. UN Convention on the Rights of Persons with Disabilities

The CRPD represents a significant paradigm shift in the discourse on the rights of persons with disabilities, including persons with mental health problems. The CRPD moved from a medical and charity based approach to disability, in which persons with disabilities were considered as objects of treatment or charity, to a social model and human rights approach which recognises persons with disabilities as subjects of their own rights and focuses on the attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.<sup>6</sup> Importantly, the CRPD acknowledges that concerted steps and specific measures are necessary to accelerate or achieve *de facto* equality of persons with disabilities in society,<sup>7</sup> including persons with psychosocial disabilities,<sup>8</sup> persons with intellectual disabilities, autistic people, and/or persons mental health problems.

**Article 14(1)** of the CRPD establishes an obligation for States parties to ensure that persons with disabilities “(a) enjoy the right to liberty and security of persons;” and “(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.” Article 14 CRPD is closely linked to the rights of equality and non-discrimination (**article 5 CRPD**), equality before the law and

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<sup>2</sup> *Opuz v Turkey*, Application no 33401/02, judgment of 9 June 2009, para 164.

<sup>3</sup> *Tanase v. Moldova*, [GC], Application no. 7/08, paragraph 176.

<sup>4</sup> Convention on the Rights of Persons with Disabilities, adopted Jan. 24, 2007, art. 3, G.A. Res. 61/106, U.N. Doc. A/RES/61/106.

<sup>5</sup> Liechtenstein has neither signed nor ratified the CRPD.

<sup>6</sup> See CRPD, Preamble, para e.

<sup>7</sup> See CRPD, Article 5(4).

<sup>8</sup> Persons with psychosocial disabilities have been defined as “persons who, regardless of self-identification or diagnosis of a mental health condition, face restrictions in the exercise of their rights and barriers to participation on the basis of an actual or perceived impairment.” Resolution adopted by the Human Rights Council on 28 September 2017 (A/HRC/RES/36/13).

legal capacity (**article 12 CRPD**), freedom from torture or cruel, inhuman or degrading treatment or punishment (**article 15 CRPD**) and living in the community (**article 19 CRPD**).

The United Nations Committee on the Rights of Persons with Disabilities (the Committee) has clarified the **absolute prohibition of involuntary placement and treatment** of persons with disabilities under the Convention in its Guidelines on the right to liberty and security of persons with disabilities<sup>9</sup> and recommendations to States parties. The Committee emphasised that the Convention establishes an absolute prohibition of detention on the basis of actual or perceived impairment, including commitment in mental health institutions.<sup>10</sup> The Convention requires States parties to “*repeal provisions that allow for the involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairment*”.<sup>11</sup> The Committee found that the use of forced treatment, seclusion and various methods of restraint in medical facilities, including physical, chemical and mechanical restraints are not consistent with the prohibition of **torture and other cruel, inhuman or degrading treatment or punishment** of persons with disabilities (**article 15 CRPD**).<sup>12</sup>

Deprivation of liberty on the basis of perceived danger allegedly posed by persons with disabilities, alleged need for care or treatment, or any other reasons is also prohibited under the Convention. In its guidelines, the Committee states that:

Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and to others when they do not consent to 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 breaches of that obligation. Persons with disabilities are frequently denied equal protection under those laws by being diverted to a separate track of law, including through mental health laws. Those 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.<sup>13</sup>

The absolute prohibition of involuntary placement and treatment in psychiatry was reiterated in the Statement by the Committee calling States parties to oppose the draft Additional Protocol to the Oviedo Convention adopted during the Committee’s 20th session, held, from 27 August 21 September 2018 in Geneva. The Committee indicated that the draft additional protocol to the Oviedo Convention “*violates particularly article 5 on equality and non-discrimination in conjunction with articles 12 on the right of equal recognition before the law, article 14 on the right to liberty and security, article 17 on the right to physical and mental integrity, and article 25 on the right to health.*”

## B. United Nations

Several bodies and special mandate holders of the United Nations hold a position against involuntary placement and treatment in psychiatry.

### Human Rights Council’s resolution

In a resolution on mental health and human rights adopted in March 2020,<sup>14</sup> the **UN Human Rights Council** expressed deep concerns that persons with mental health problems and/or psychosocial disabilities, including persons using mental health services, continue to be subject to a variety of human rights violations, including over-medicalisation and treatment practices that fail to respect their

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<sup>9</sup> Guidelines on article 14 of the Convention on the right to liberty and security of persons with disabilities (A/7255, annex).

<sup>10</sup> The Committee stated that “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.” Guidelines on article 14 of the Convention on the right to liberty and security of persons with disabilities (A/7255, annex), paragraph 10.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid paragraph 12.

<sup>13</sup> Ibid paragraph 14.

<sup>14</sup> Human Rights Council resolution on Mental health and human rights (A/HRC/43/L.19).

autonomy, will and preferences.<sup>15</sup> It called on States to promote a paradigm shift in mental health, “through the promotion of community-, evidence- and human rights-based and people-centred services and supports that protect, promote and respect the enjoyment of the rights, autonomy, will and preferences of all persons”<sup>16</sup> and through the involvement of persons with mental health problems or persons with psychosocial disabilities and their organisations.<sup>17</sup>

## UN Treaty Bodies’ recommendations

Many United Nations Treaty Bodies and special procedures of the Human Rights Council have endorsed the standards of the CRPD developed by the Committee on the Rights of Persons with Disabilities regarding the absolute prohibition of deprivation of liberty on the basis of impairment (Article 14(1)(b) of the CRPD).

For instance, the **Committee on the Elimination of All Forms of Discrimination against Women** has urged States to “repeal laws regarding and prohibit disability-based detention of women, including involuntary hospitalization and forced institutionalisation”,<sup>18</sup> as well as “to ensure that women and girls with disabilities are not subjected to mandatory institutionalisation.”<sup>19</sup> The **Committee on Economic, Social and Cultural Rights** has also recommended States to “incorporate into the law the 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.”<sup>20</sup> In the same vein, the **Working Group on Arbitrary Detention** endorses the rule binding States “to prohibit involuntary committal or internment on the ground of the existence of an impairment or perceived impairment, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability.”<sup>21</sup> Additionally, these and other Bodies have also repeatedly called States for the deinstitutionalisation of persons with disabilities and the adoption of community-based alternatives to deprivation of liberty.<sup>22</sup>

## UN special mandate holders’ reports

In various reports adopted between 2018 and 2020, the **UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health** spoke out against the involuntary placement of persons with intellectual and psychosocial disabilities to mental health facilities,<sup>23</sup> and excessive medicalisation<sup>24</sup> and discriminatory mental health laws that deprive people of liberty and their autonomy, often based on the myth that “individuals with certain diagnoses are at high risk of perpetuating violence and posing a threat to the public.”<sup>25</sup> He called on “a paradigm shift in the field of mental health, which abandons outdated measures resulting in the forced confinement of persons with intellectual and psychosocial disabilities in psychiatric institutions.”<sup>26</sup> In its 2020 report on ‘Mental Health and Human Rights: Setting a Rights-based Global Agenda’, the Rapporteur called States to “undertake the legislative, policy and other measures

<sup>15</sup> Ibid, preamble, page 2.

<sup>16</sup> Ibid, paragraph 7.

<sup>17</sup> Ibid, paragraph 15.

<sup>18</sup> [CEDAW/C/IND/CO/4-5](#), para. 37(a)

<sup>19</sup> [CEDAW/C/TJK/CO/6](#), para. 44(e);

<sup>20</sup> [E/C.12/MDA/CO/2](#), para. 24.

<sup>21</sup> WGAD, Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court, Principle 20. Also see WGAD Opinion No. 70/2018 concerning Ms. H (Japan) ([A/HRC/WGAD/2018/70](#)).

<sup>22</sup> [E/C.12/SVK/CO/3](#), para. 17; [E/C.12/ARG/CO/4](#), para. 54(e); [E/C.12/IRL/CO/3](#), para. 13; [E/C.12/CZE/CO/2](#), para. 18(b); [E/C.12/MDA/CO/2](#), para.15; [E/C.12/LVA/CO/1](#), para. 54; [E/C.12/MNE/CO/1](#), para. 23(c); [E/C.12/NOR/CO/5](#), para. 19

<sup>23</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on “Deprivation of liberty and the right to health” (A/HRC/38/36), paragraphs 49-51.

<sup>24</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on “The role of the determinants of health in advancing the right to mental health” (A/HRC/41/34), paragraph 21.

<sup>25</sup> Ibid, paragraph 50.

<sup>26</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on “Deprivation of liberty and the right to health” (A/HRC/38/36), paragraph 51.

required to fully implement a human rights-based approach to mental health with the inclusive participation of those with lived experience.”<sup>27</sup>

In a report of March 2020, the **UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** recognised that “*psychiatric intervention based on ‘medical necessity’ or the ‘best interests’ of the patient, (...) generally involve highly discriminatory and coercive attempts at controlling or “correcting” the victim’s personality, behaviour or choices and almost always inflict severe pain or suffering*” and “*may well amount to torture.*”<sup>28</sup>

The **UN Special Rapporteur on the Rights of Persons with Disabilities** also stated that following the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment a broad range of actions committed against persons with disabilities may constitute torture or other forms of ill treatment, including “*electroconvulsive therapy and the administration of psychotropic medication; the use of chemical, physical or mechanical restraints; and isolation or seclusion.*”<sup>29</sup> In a previous report, the Special Rapporteur declared that “*mental health legislation, as long as it authorises and regulates the involuntary deprivation of liberty and forced treatment of persons based on an actual or perceived impairment (i.e. diagnosis of ‘mental health condition’ or ‘mental disorder’), must be abolished.*”<sup>30</sup>

In the European context, the **UN Working Group on Arbitrary Detention, the Chair of the Committee on the Rights of Person with Disabilities, the Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on the right to the enjoyment of the highest attainable standard of physical and mental health** sent a joint letter to the Secretary General of the Council of Europe opposing the draft Additional Protocol to the Oviedo Convention.<sup>31</sup> The annex of the letter indicate that “*the reductionist biomedical model of psychiatry, heavily reliant on coercion and medicalisation in everyday practice, is under increased scientific critique that is backed up by sturdy research.*”

### C. World Health Organisation

The World Health Organisation (WHO), specialised UN agency for public health, recognises the CRPD as leading human rights standard in relation to the rights of users of mental health services. The organisation has withdrawn its Resource Book on Mental Health, Human Rights and Legislation because it was drafted prior to the coming into force of the CRPD and therefore was not compliant with the latest human rights norms and standards.<sup>32</sup>

The WHO QualityRights guidance documents<sup>33</sup> adopted in 2019 make specific reference to the CRPD and recognise that “*involuntary admission and treatment in mental health and social services denies people the right to exercise free and informed consent to health care and therefore denies them the right to legal capacity.*”<sup>34</sup> The course guide on Course Guide on Freedom from coercion, violence and abuse explicitly states that “*law that allows for involuntary admission and treatment in mental health and social services largely contributes to power imbalance and are not compliant with the CRPD.*”<sup>35</sup>

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<sup>27</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on “Mental Health and Human Rights: Setting a Rights-based Global Agenda” (A/HRC/44/48), paragraph 86(a).

<sup>28</sup> Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/43/49), paragraph 37.

<sup>29</sup> Report of the Special Rapporteur on the Rights of Persons with Disabilities on “The impact of ableism in medical and scientific practice” (A/HRC/43/41), paragraph 50.

<sup>30</sup> Report of the Special Rapporteur on the Rights of Persons with Disabilities on “Deprivation of liberty of persons with disabilities” (A/HRC/40/54), paragraph 64.

<sup>31</sup> Office of the High Commissioner for Human Rights, REFERENCE: OL OTH 23/2017 (29 September 2017).

<sup>32</sup> WHO’s website: [https://www.who.int/mental\\_health/policy/legislation/en/](https://www.who.int/mental_health/policy/legislation/en/)

<sup>33</sup> <https://www.who.int/publications/i/item/who-qualityrights-guidance-and-training-tools>

<sup>34</sup> WHO QualityRights Course Guide on Legal Capacity and the Right to Decide, page 7.

<sup>35</sup> WHO QualityRights Course Guide on Freedom from coercion, violence and abuse, page 22.

## IV. European development on involuntary placement and treatment

European Courts and members of the Council of Europe have been open to development in interpreting the norms within their legislations and policies on mental health. This section illustrates the emerging consensus on a human rights-based approach to mental health care, complying from the CRPD, and moving away from coercion.

### A. Jurisprudence of the European Court of Human Rights

As stated above, 46 of the 47 members of the Council of Europe are States parties to the CRPD.<sup>36</sup> The European Union, as a regional integration organisation, and all its member states have ratified or acceded to the CRPD. This reflects the willingness and commitment of almost the unanimity of European States to abide by CRPD standards.

Already in 2009, the Court had detected such unanimous commitment and recognised in ***Glor v. Switzerland*** that the CRPD reflects “an European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.”<sup>37</sup> More recently, in ***Enver Şahin v. Turkey***,<sup>38</sup> the Court reiterated that the Convention and Protocol No 1 had to be interpreted in the light of relevant international law, including the CRPD.<sup>39</sup> Such positive concepts led this Court to enrich its jurisprudence on the rights of persons with disabilities, endorsing and adopting in its case law several CRPD standards. In this vein, it has endorsed the right to non-discrimination on the basis of disability,<sup>40</sup> as well as the States’ obligation to provide reasonable accommodation appropriate to individual circumstances.<sup>41</sup> More recently, it has upheld the right of a child with disability to receive reasonable accommodation and support to access inclusive education.<sup>42</sup>

Nevertheless, while having decided on several case on the issue throughout the last years,<sup>43</sup> **this Court refrains from fully following its assertions regarding the CRPD when it comes to the deprivation of liberty of persons with disabilities and its interpretation of Article 5 of the ECHR.** In one case, this Court even refers to Article 14 of the CRPD and relevant guidance by the UN Committee on the Rights of Persons with Disabilities, but it does not refer to it at all in the consideration of the merits.<sup>44</sup>

Four decades ago, back in 1979, this Court established the so-called *Winterwerp* test, under which ‘persons of unsound mind’ shall only be detained where it is reliably shown that they are of “unsound mind”, the disability is of a degree warranting compulsory confinement, and the validity of such confinement depends upon the persistence of the disability.<sup>45</sup> With few variations concerning the second element, the Court continues to apply this analysis in its latest jurisprudence.<sup>46</sup> This Court latest developments in this area stem from the decisions in the cases ***N. v Romania***<sup>47</sup> and ***Rooman v. Belgium***.<sup>48</sup> These cases related to the detention of persons with psychosocial disabilities involved as accused and convicted, respectively, in a criminal procedure. In both cases, deprivation of liberty

<sup>36</sup> Liechtenstein has neither signed nor ratified the CRPD.

<sup>37</sup> *Glor v Switzerland*, Application no 13444/04, 30 April 2009, para 53. The Court made explicit reference to the CRPD in the *Glor* case even though Switzerland had not ratified the CRPD at that time.

<sup>38</sup> *Enver Şahin v. Turkey* (application no. 23065/12), 30 January 2018.

<sup>39</sup> *Enver Şahin v. Turkey* (application no. 23065/12), 30 January 2018, paras. 19 and 60. See also *Çam v. Turkey*, (51500/08), ECHR 2016, paras. 53 and 65; *Guberina v Croatia*, (23628/13), ECHR 2016, paras. 34, 35; *Ivinovic v Croatia*, (13006/13), ECHR 2014, para. 21.

<sup>40</sup> See e.g. *Guberina v Croatia*, (23628/13), ECHR 2016, paras. 79 and 92; *Kiyutin v Russia*, (2700/10), ECHR, 2011, paras. 57 and 71; *Glor v Switzerland*, (13444/04), ECHR 2009, paras. 53 and 98

<sup>41</sup> *Çam v. Turkey*, (51500/08), ECHR 2016, paras. 65-69; *Guberina v Croatia*, (23628/13), ECHR 2016, para. 92.

<sup>42</sup> *G.L. c. Italy* (59751/15), ECHR, 2020, para. 70.

<sup>43</sup> See e.g. *Mihailovs v Latvia*, (3539/10), ECHR 2013, para 62; *Stanev v Bulgaria* (367760/06), ECHR 2012, para. 72; *D.D. v Lithuania*, (13469/06), ECHR 2012, para. 84; *Plesó v Hungary*, (41242/08), ECHR 2012, para. 37; *N v Romania*, (59152/08), ECHR 2017, para. 147.

<sup>44</sup> See e.g. *N v Romania*, (59152/08), ECHR 2017, para. 147.

<sup>45</sup> See *Winterwerp v. the Netherlands*, (6301/73) ECHR, 1979

<sup>46</sup> See e.g. *Rooman v Belgium* (18052/11), ECHR 2019, para. 192; *N v Romania* (59152/08), ECHR 2017, para. 144

<sup>47</sup> *N v Romania*, (59152/08), ECHR 2017.

<sup>48</sup> *Rooman v Belgium* (18052/11) ECHR 2019

was carried out (after the mere accusation, and after the full execution of the criminal sentence) on the account of the applicant's mental health conditions.

The undersigned organisations would like to point out that these cases are specific to the criminal system and do not cover the full scope of application of Article 14 of the CRPD.<sup>49</sup> In addition, while the ECHR refers briefly to the CRPD and to the CRPD Committee guidelines, these cases do not elaborate on nor discuss its standards. Further, they did not offer a scenario to discuss properly the justification of deprivation of liberty based on impairments, simply because, as described in the decisions, the applicants, even if referring to the CRPD, are forced to challenge their deprivation of liberty by discussing under the standards of the ECHR, and not based on CRPD standards of non-discrimination.<sup>50</sup>

**All that stated, and while still not in line with CRPD standards or the principle of non-discrimination of persons with disabilities**, it is important to note that, in *Rooman v. Belgium*, the Grand Chamber considered that “the deprivation of liberty contemplated by Article 5 § 1 (e) has a dual function: on the one hand, the social function of protection, and on the other a therapeutic function that is related to the individual interest of the person of unsound mind in receiving an appropriate and individualised form of therapy or course of treatment.”<sup>51</sup> In this manner, the concern on the health of the person concerned gains relevance vis-à-vis the previous jurisprudence of the ECHR.

Regarding the “social function of protection” (related to Article 26 of the Oviedo Convention), such ground should not pass an analysis of human rights restrictions. A “democratic society” requires that “a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.”<sup>52</sup> In addition, as much as it is the case for other grounds of discrimination, upholding non-discrimination on the basis of disability requires to combat the ableism<sup>53</sup> implied in the medical approach to disability, in order to reinforce “democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.”<sup>54</sup> The deprivation of liberty based on disability constitutes in itself a discriminatory practice and therefore should not find its place in a democratic and inclusive society.

When highlighting the “therapeutic function”, the Court demonstrates its concern with the health of persons with mental health conditions (or psychosocial disabilities). The undersigned submit that some concern should guide further reflection by the Court. Abundant evidence throughout the last decades has shown that deprivation of liberty and forced treatment are harmful for persons with psychosocial disabilities.<sup>55</sup> That is why the reflection and the even policy guidance by the World Health Organization goes in that direction.<sup>56</sup> We refer to sections III.C on this regard.

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<sup>49</sup> In this regard, note that the Draft Protocol to the Oviedo Convention, as updated in October 2020, provides, in its Article 2, para. 3, that “This Protocol does not apply to placement and treatment ordered in the context of a criminal law procedure”.

<sup>50</sup> *N v Romania*, (59152/08), ECHR 2017. In para 127, it is stated that the applicant invoked the CRPD and its Article 14. However, in paras. 128 to 137 show that the discussion was more focused on domestic procedures, proofs and grounds of detention accepted by the Court (alleged dangerousness and the social function of protection).

<sup>51</sup> *Rooman v Belgium* (18052/11), ECHR 2019.

<sup>52</sup> *S.A.S. v France*, (43835/11), ECtHR 2014, para. 128

<sup>53</sup> See A/HRC/43/41, para. 9 and 10.

<sup>54</sup> *D.H. and others v The Czech Republic*, (57325/00) ECtHR 2007, para. 176.

<sup>55</sup> See e.g. A/HRC/34/32, 30 and 31; A/HRC/35/21, para. 64, citing Steve R. Kisely and Leslie A. Campbell, “Compulsory community and involuntary outpatient treatment for people with severe mental disorders”, Cochrane database system (December 2014); and Hans Joachim Salize and Harald Dressing, “Coercion, involuntary treatment and quality of mental health care: is there any link?”, *Current Opinion in Psychiatry*, vol. 18, No. 5 (October 2005). See also A/HRC/35/21, para. 19, in connection with the wide spread use of psychotropic medications, highlighting that “psychotropic medications, in spite of accumulating evidence that they are not as effective as previously thought, that they produce harmful side effects”

<sup>56</sup> See The WHO QualityRights Initiative has developed a comprehensive package of training and guidance materials, available at <https://www.who.int/publications/i/item/who-qualityrights-guidance-and-training-tools>.

## B. Recommendations within the Council of Europe

The Commissioner for Human Rights and the Parliamentary Assembly of the Council of Europe have raised strong concerns regarding legislation on involuntary placement and treatment of persons with mental health problems.

In a statement on 8 November 2018, the **Commissioner for Human Rights** stressed that “*the Council of Europe should abstain from elaborating norms which are in conflict with global human rights standards or which could weaken the protections provided in those standards,*” making specific reference to the CRPD.<sup>57</sup> In a joint hearing, the Commissioner explicitly took a stand against coercion stating that “*safeguards for involuntary measures are not the issue and (...) our member states urgently need clearer guidance on minimum standards concerning alternatives to involuntary measures.*”<sup>58</sup> In 2019, the **Parliamentary Assembly**’s unanimously adopted Resolution 2291<sup>59</sup> that recognises that coercive measures, including involuntary treatment “*such as forced medication and forced electroshocks*”<sup>60</sup> constitute a form of discrimination<sup>61</sup> and can cause irreversible damage to health.<sup>62</sup> The resolution explains that “*the notion of risk of harm to oneself or others remains a strong focus in justifications for involuntary measures across Council of Europe member States, despite the lack of empirical evidence regarding both the association between mental health conditions and violence, and the effectiveness of coercive measures in preventing self-harm or harm to others.*”<sup>63</sup> The Parliamentary Assembly urged Member States of the Council of Europe “*to immediately start to transition to the abolition of coercive practices in mental health settings.*”<sup>64</sup>

## C. Comparative law

Regulation of involuntary placement and treatment varies greatly across Europe. Two countries, Finland and Germany, reported a decrease following legislative changes and targeted programmes to reduce the use of coercion in psychiatry.<sup>65</sup>

In relation to equal recognition before the law, several countries have taken steps to fulfil their obligation not to deprive persons of the right to make and pursue their own decisions, nor to permit substitute decision-makers to provide consent on their behalf. This is the outcome of implementation of article 12 of the CRPD.

In July 2020 the **Romanian Constitutional Court** noted the breach of constitutional provisions of article 1 paragraph (3), article 16 and article 50, interpreted according to article 20 of the Constitution, and through the perspective of article 12 of the CRPD. In motivating its decision to allow the unconstitutionality exception, the Court noted, in essence, that the legal guardianship measure foreseen by article 164 paragraph (1) of the Civil Code is not accompanied by sufficient guarantees to ensure the respect of fundamental human rights and freedoms. Any person must be free to act in view of developing his or her own personality, while the state, by virtue of its social character, has the obligation to create a normative framework that ensures the respect of the individual, the full expression of the personality of citizens, of their rights and freedoms, of equal opportunities, resulting in the respect of human dignity.<sup>66</sup>

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<sup>57</sup> Comments by Dunja Mijatović, Council of Europe Commissioner for Human Rights on the draft Additional Protocol to the Convention on Human Rights and Biomedicine concerning the Protection of Human Rights and Dignity of Persons with Mental Disorder with regard to Involuntary Placement and Involuntary Treatment (Strasbourg, 8 November 2018), paragraph 7.

<sup>58</sup> 25 CommDH-Speech(2018)10.

<sup>59</sup> Resolution on Ending coercion in mental health: the need for a human rights-based approach

<sup>60</sup> Ibid paragraph 3.

<sup>61</sup> Ibid paragraph 2.

<sup>62</sup> Ibid paragraph 3.

<sup>63</sup> Ibid paragraph 2.

<sup>64</sup> Ibid paragraph 7.

<sup>65</sup> Mental Health Europe. Promising practices in prevention, reduction and elimination of coercion across Europe (2019).

<sup>66</sup> Plenul Curții Constituționale. Comunicat de presa, 16 iulie 2020 (2020)



The 2015 amendment of the **Civil Code in Georgia** includes a reform of legal capacity provisions. Plenary guardianship has been abolished and supported decision-making established. Persons, their relatives or social services, can now address the court with the request to declare them 'beneficiaries of support'. The court needs to take into account the 'the interest and will of a beneficiary of support' and mention the specific areas for which support is required. Support frameworks can be broadened or narrowed and are overseen by a supervisory body. Despite the positive steps in legislation, the shift towards supported decision-making has not yet been fully adopted by courts and implementation of the reform is insufficient.<sup>67</sup>

In 2020, the **German Ministry of Justice and Consumer Protection** proposed a reform of the civil code with regards to legal guardianship. Legal support should primarily ensure a support of the person of concern in the provision of its affairs by own, self-determined, acting and the person of concern may use the means of the agency only, as far as it is necessary. The precedence of the wishes of the person being cared for is standardized as the central standard of the law of trust, which applies equally to the actions of the person being cared for, the suitability of the person being cared for and the exercise of judicial supervision, in particular also in the case of asset management and within the framework of approval procedures.<sup>68</sup> While the draft law received positive replies, the German Institute for Human Rights outlines the necessity to further anchor the provisions in the context of the CRPD.<sup>69</sup>

#### **D. Policies and practices to end involuntary placement and treatment**

Policies and practices to end involuntary placement and treatment are growing in number over time, resulting from the CRPD and other progress in advancing the human rights of person with disabilities, and can be found in several European countries. These measures reflect a strengthening of the human rights based approach, and an improvement in quality of care.

**In Finland, the National Mental Health Strategy and Programme for Suicide Prevention 2020–2030**, among others, aims *to reform legislation on self-determination and involuntary treatment to ensure that it safeguards the right to self-determination within services for people with mental health disorders, and continue existing programmes for reducing the use of involuntary treatment and coercive measures within psychiatric care and strengthening the national network for reduced use of coercion.*<sup>70</sup>

In 2014, the **Danish Ministry of Health**, in collaboration with regional authorities, decided that the use of mechanical restraint must be reduced by 50% by 2020. Courses in de-escalation techniques and conflict resolution were provided to staff members on psychiatric wards, more leisure activities were introduced for users, and architectural changes were introduced. As a result, in January 2017 the Psychiatric Centre in Ballerup (Copenhagen region) had been free from the use of mechanical restraint for at least 100 days, without having increased the use of medication.<sup>71</sup>

**In Sweden, the Human Rights Committee of the region of Västra Götaland** introduced a human rights-based approach in a psychiatric ward (of the Sahlgrenska Hospital) for people experiencing psychosis. The pilot project involved the training of service users, as well as their representative organisations, staff members, hospital managers and human rights experts in the field of human rights. The aim is to eliminate the use of restraint beds, to implement person-centred and recovery-oriented care and to promote human rights compliant services in the community. Evaluation of the project demonstrated a strong decrease in the use of restraint, fewer forced injections, more user-satisfaction with the service and user empowerment. In this regard, a 2017-2020 Action Plan on

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<sup>67</sup> Public Defender (Ombudsman) of Georgia. legal capacity: reform without implementation (2016).

<sup>68</sup> Bundesministerium für Justiz und Verbraucherschutz. Entwurf eines Gesetzes zur Reform des Vormundschafts- und Betreuungsrechts (2020).

<sup>69</sup> Deutsches Institut für Menschenrechte, Monitoring-Stelle UN-Behindertenrechtskonvention. Stellungnahme. Zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz „Entwurf eines Gesetzes zur Reform des Vormundschafts- und Betreuungsrechts“ (2020).

<sup>70</sup> Finnish institute for health and welfare. National Mental Health Strategy 2020-2030 (2020).

<sup>71</sup> Mental Health Europe. Promising practices in prevention, reduction and elimination of coercion across Europe (2019).

Human Rights was adopted by the Regional Council including 'a vision for zero coercion in psychiatric care' as a core objective.<sup>72</sup>

The **Spanish region of Andalusia** adopted a strategy to reduce restraint with a view to its complete elimination. The values underpinning this initiative are the rights of persons with mental health problems and the promotion of their autonomy. The strategy includes the implementation of anticipated treatment plans (advance directives), the need to register data on the use of mechanical restraint, and the provision of training in de-escalation techniques to prevent the use of restraint. In addition, a Protocol on the use of physical and /or mechanical restraint has been developed, aiming to reduce the use of restraint by addressing its legal aspects and using preventive measures and process.<sup>73</sup>

In addition to practices within mental health care settings, multiple promising examples can be found within **peer-support initiatives such as Intentional Peer Support or peer respite houses**. Such houses have been founded in the United States, but have been established in **Switzerland, Germany** (for example the Bochum Crisis Rooms), **Sweden, Hungary, Denmark, the Netherlands and France**.<sup>74</sup> Respite houses are characterised by non-medical staff, peer support, empowerment of residents and 'being with' residents in times of crisis, social networking, and mutual responsibility. They tend to involve a minimal use of psychotropic medication based on personal choices of each resident and mental health services are usually dispensed outside of the respite house. Respite houses aim to increase meaningful choices for recovery and decrease the health system's reliance on costly, coercive and less person-centred modes of mental health services.

## V. Conclusions

The Vienna Convention on the Law of Treaties and the Court's own jurisprudence requires the Court take into account relevant international human rights law and reports, and decisions and positions of other Council of Europe organs. **Autism-Europe, the European Disability Forum, Inclusion Europe, the International Disability Alliance and Mental Health Europe respectfully calls on the Court to specifically consider the international convention, reports and decisions referred in this submission, and to ensure its advisory opinion aligns with those instruments .**

The latest developments of international human rights law and within the Council of Europe demonstrate that States cannot evade nor delay their duties to prohibit involuntary placement and treatment in psychiatry in Europe. Such coercive measures have been recognised to constitute forms of discrimination and violate the rights of persons with perceived or actual mental health problems, including persons with psychosocial disabilities, persons with intellectual disabilities and autistic people, of equal recognition before the law, liberty and security, freedom from torture and ill-treatment, and living in the community. **Autism-Europe, the European Disability Forum, Inclusion Europe, the International Disability Alliance and Mental Health Europe undersigned organizations request Court to move beyond its current jurisprudence and endorse CRPD standards under Article 14 of the CRPD, in line with the 46 ratifications by members of the Council of Europe and other process at the European level.**

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Die Bochumer Krisenzimmer. Hilfe jenseits der Psychiatrie (2020).