

Annex

Guidelines on the right to liberty and security of persons with disabilities*

A. Introduction

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

2. The Committee, as the international body responsible for monitoring implementation of the Convention, has adopted the present guidelines to provide further clarification to States parties, regional integration organizations, national human rights institutions and national monitoring mechanisms, organizations of persons with disabilities and civil society organizations, as well as United Nations agencies, bodies and independent experts, about the obligation of States parties pursuant to the Convention to respect, protect and guarantee the right of persons with disabilities to liberty and security. The present guidelines replace the statement adopted by the Committee on article 14 of the Convention.

B. 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, 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 the exercise of that right. Article 14 thus relates directly to the purpose of the Convention, which is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

5. The non-discriminatory nature of article 14 provides evidence of the close interrelation with the right to equality and non-discrimination (art. 5). In article 5 (1), States parties recognize that all persons are equal before and under the law and are entitled to the equal protection of the law. Article 5 (2) provides that States parties shall prohibit all forms of discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

C. 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. Impairment in the present guidelines is understood as a physical, psychosocial, intellectual or sensory personal condition that may or may not come with functional limitations of the body, mind or senses. Impairment

* Adopted by the Committee at its fourteenth session (17 August-4 September 2015).

differs from what is usually considered the norm. Disability is understood as the social effect of the interaction between individual impairment and the social and material environment, as described in article 1 of the Convention. 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, the legislation of several States parties, including mental health laws, still provide for 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. That 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 on Disability leading up to the adoption of the Convention, there were extensive discussions on the need to include in the draft text of article 14 (1) (b) a qualifier, such as “solely” or “exclusively”, in the prohibition of deprivation of liberty owing to the existence of an actual or perceived impairment. States opposed the inclusion, arguing that it could lead to misinterpretation^a and could allow deprivation of liberty on the basis of actual or perceived impairment in conjunction with other criteria, such as posing a danger to oneself or to others.^b Furthermore, discussions were held on whether to include a provision concerning the periodic review of deprivation of liberty in the text of draft article 14 (2).^c Civil society opposed the use of qualifiers and the inclusion of a provision concerning periodic review.^d 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.^e

8. The absolute ban on deprivation of liberty on the basis of actual or perceived impairment has strong links with article 12 of the Convention, on equal recognition before the law. In its general comment No. 1 (2014) on equal recognition before the law, the Committee has clarified that States parties should refrain from the denial of the legal capacity of persons with disabilities and their detention 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 that practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention (para. 40).

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. The Committee has stressed the relationship with article 19. It has expressed concern about the institutionalization of persons with disabilities and the lack of support services in the community, and has recommended implementing support services and effective deinstitutionalization strategies in consultation with organizations of persons with disabilities.^f In addition, it has called for the allocation of more financial resources to ensure sufficient community-based services.^g

^a See daily summary of discussion at the third session of the Ad Hoc Committee, 26 May 2004, vol. 4, No. 3. Available from www.un.org/esa/socdev/enable/rights/ahc3sum10.htm. See also daily summary of discussion at the fifth session of the Ad Hoc Committee, 26 January 2005, vol. 6, No. 3. Available from www.un.org/esa/socdev/enable/rights/ahc5sum26jan.htm.

^b See daily summary of discussion at the fifth session of the Ad Hoc Committee, 26 January 2005.

^c Originally, the provision was in art. 10 (2) (c) (ii) of the draft convention.

^d See daily summary of discussion at the fifth session, 27 January 2005, vol. 6, No. 4. Available from www.un.org/esa/socdev/enable/rights/ahc5sum27jan.htm. See also daily summary of discussion at the third session of the Ad Hoc Committee, 26 May 2004, vol. 4, No. 3.

^e See daily summary of discussion at the seventh session, 18 January 2006, vol. 8, No. 3. Available from www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm. See also daily summary of discussion at the seventh session, 19 January 2006, vol. 8, No. 4. Available from www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm.

^f See CRPD/C/ESP/CO/1, paras. 35-36; CRPD/C/CHN/CO/1 and Corr.1, paras. 25-26; CRPD/C/ARG/CO/1, paras. 23-24; CRPD/C/PRY/CO/1, paras. 35-36; CRPD/C/AUT/CO/1, paras.

D. 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 impairment (art. 14 (1) (b)) and the principle of free and informed consent of the person concerned for health care (art. 25). The Committee has repeatedly stated that States parties should repeal provisions that allow for the involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairment.^h 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.

E. 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, is based on the free and informed consent of the person concerned.ⁱ 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 (para. 41).

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

12. The Committee has called upon 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 treatment,^j seclusion and various methods of restraint in medical facilities, including physical, chemical and mechanical restraints.^k The Committee has found that those practices are not consistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment of persons with disabilities, pursuant to article 15 of the Convention.

G. 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

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

29-30; CRPD/C/SWE/CO/1, paras. 35-36; CRPD/C/CRI/CO/1, paras. 29-30; CRPD/C/AZE/CO/1, paras. 28-29; CRPD/C/ECU/CO/1, paras. 28-29; CRPD/C/MEX/CO/1, paras. 29-30.

^e See CRPD/C/CHN/CO/1 and Corr.1, para. 26; CRPD/C/AUT/CO/1, para. 31; CRPD/C/SWE/CO/1, para. 36.

^h See CRPD/C/KOR/CO/1, para. 29; CRPD/C/DOM/CO/1, para. 27; CRPD/C/AUT/CO/1, para. 30.

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

^j See CRPD/C/PER/CO/1, paras. 30-31; CRPD/C/HRV/CO/1, para. 24; CRPD/C/TKM/CO/, para. 32; CRPD/C/DOM/CO/1, para. 31; CRPD/C/SVK/CO/1, paras. 33-34; CRPD/C/SWE/CO/1, paras. 37-38.

^k See CRPD/C/NZL/1, para. 32; CRPD/C/AUS/CO/1, para. 36.

perceived danger they allegedly pose to themselves or to others. The involuntary detention of persons with disabilities based on risk or danger, alleged need for care or treatment or other reasons relating to impairment or health diagnosis, such as severity of impairment, or for the purpose of observation, 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 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.

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 must respect the person's autonomy, will and preferences (paras. 21 and 42). 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.

H. Detention of persons who are unfit to stand trial in criminal justice systems 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 they deprive the person of his or her right to due process and safeguards that are applicable to every defendant. The Committee has called for States parties to remove those declarations from the criminal justice system. It has recommended that all persons with disabilities who have been accused of crimes and detained in jails and institutions without trial be allowed to defend themselves against criminal charges, and be provided with the support and accommodation required to facilitate their effective participation,¹ as well as procedural accommodations to ensure fair trial and due process.^m

I. Conditions of detention of persons with disabilities

17. The Committee has expressed its concern about 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. It has recommended that immediate steps be taken to address the poor living conditions in institutions.ⁿ It has also recommended that States parties establish legal frameworks for the provision of reasonable accommodation that preserve the dignity of persons with disabilities, and that they guarantee that right for those detained in prisons.^o In addition, it

¹ See CRPD/C/AUS/CO/1, para. 30.

^m See 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, paras. 34-35; 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.

ⁿ See CRPD/C/HRV/CO/1, para. 24.

^o See 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;

has addressed the need to promote training mechanisms for justice and prison officials in accordance with the Convention's legal paradigm.^p

18. While developing its jurisprudence under the Optional Protocol to the Convention,^q 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 can 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 substandard conditions of detention that are incompatible with article 17 of the Convention and may constitute a breach of article 15 (2).

J. Monitoring of detention facilities and review of detentions

19. The Committee has stressed the need to implement monitoring and review mechanisms in relation to persons with disabilities who are 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. 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 arbitrary detentions and obtaining the immediate release of persons found to have been arbitrarily detained; under no circumstances should it allow for the extension of arbitrary detention.^r

K. Security measures

20. The Committee has addressed security measures imposed on persons who are found not criminally responsible owing to "insanity" or incapacity. It has recommended eliminating security measures,^s including those that involve forced medical and psychiatric treatment in institutions.^t It has expressed concern about security measures that involve indefinite deprivation of liberty and absence of regular guarantees in the criminal justice system.^u

L. Diversion mechanisms and restorative justice schemes

21. The Committee has stated that deprivation of liberty in criminal proceedings should apply only as a matter of last resort and when other diversion programmes, including restorative justice, are insufficient to deter future crime.^v Diversion programmes must not involve a transfer to mental health commitment regimes or require an individual to

CRPD/C/NZL/CO/1, para. 34; CRPD/C/AZE/CO/1, para. 31; CRPD/C/AUS/CO/1, para. 32 (b); CRPD/C/SVK/CO/1, para. 32.

^p See CRPD/C/MEX/CO/1, para. 28.

^q See CRPD/C/11/D/8/2012.

^r See CRPD/C/KOR/CO/1, para. 26.

^s See CRPD/C/BEL/CO/1, para. 28.

^t See CRPD/C/ECU/CO/1, para. 29 (c).

^u See CRPD/C/DEU/CO/1, para. 31.

^v See CRPD/C/NZL/CO/1, para. 34.

participate in mental health services; such services should be provided on the basis of the individual's free and informed consent.^w

M. Free and informed consent in emergency and crisis situations

22. In its general comment No. 1, the Committee stated 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 that accurate and accessible information is provided about service options and that non-medical approaches are made available (para. 42). The Committee also stated that States parties must abolish policies and legislative provisions that allow or perpetrate forced treatment, and ensure that decisions relating to a person's physical or mental integrity can be taken only with the free and informed consent of the persons concerned (para. 42). It also 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 (para. 41).

23. In that general comment, the Committee 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 (para. 21).

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

24. Persons with disabilities who are 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. In that regard, the Committee draws 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, which contains specific measures concerning persons with disabilities (see A/HRC/30/37, para. 107).

^w See CRPD/C/AUS/CO/1, para. 29.