

IN THE EUROPEAN COURT OF HUMAN RIGHTS

(APPLICATION No. 35939/10)

GENADIJS MIHAILOVS

APPLICANT

AGAINST

LATVIA

RESPONDENT

WRITTEN COMMENTS SUBMITTED JOINTLY

BY

EUROPEAN DISABILITY FORUM

EUROPEAN NETWORK OF (EX-)USERS AND SURVIVORS OF PSYCHIATRY

INTERNATIONAL DISABILITY ALLIANCE

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13 FEBRUARY 2012

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I Introduction

1. These written comments are jointly submitted by the World Network of Users and Survivors of Psychiatry (WNUSP), the European Disability Forum (EDF), the European Network of (ex-)Users and Survivors of Psychiatry (ENUSP, a member of the first two organisations), and the International Disability Alliance (IDA) pursuant to leave granted by the President of the Third Section on 19 December 2011 in accordance with Rule 44(3)(a) of the Rules of Court.
2. These comments set forth the latest standards of international human rights law concerning the rights of persons with disabilities. They demonstrate that practices of forced institutionalisation, forced treatment, and mechanisms of substituted-decision making to which persons with psychosocial disabilities are subjected continue to entrench their marginalisation in society and violate their fundamental human rights including non-discrimination, right to legal capacity, right to private life, right to liberty, and right to be free from torture, cruel, inhuman and degrading treatment or punishment.
3. The European Convention on Human Rights adopted in 1950, like all human rights instruments, has invited dynamic interpretation¹. Issues and concerns which were not in contemplation at the time of adoption, have been read into the open textured language of the Convention, so that the commitments of the text stay in tune with the human quest for justice. Such dynamic interpretation is a useful way of achieving the seemingly opposed objectives of stability and change. An unchanging text is altered by interpretation to meet the needs of changing times.
4. Universality has been acknowledged as an inextricable component of human rights, whether such rights find expression in national, regional or international instruments. Yet both feminist thought² and postmodern theory³ have demonstrated that very often norms claimed to be universal only express the perspectives and concerns of the dominant majority. In order to make human rights instruments truly universal, it has been necessary to formulate constituency specific norms and then to use the specific norms to deepen the universal component of general human rights instruments. It is this desire to reach true universality that has caused conventions on women, children and persons with disabilities to be adopted by the United Nations.
5. The European Convention on Human Rights (hereinafter “ECHR”) was formulated in the context of exclusion of persons with disabilities and in the absence of any informed empathetic and non-paternalistic understanding of their views within political and legal discourse. The ECHR, thus, referred to disability conditions such as “*unsoundness of mind*” as a basis for excluding rights. It is therefore necessary for the inclusion of persons with disabilities in the ECHR that the interpretation of the articles of the Convention be informed by norms of disability rights. The United Nations Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”) was adopted

¹ Michael V Alstine. “Dynamic Treaty Interpretation” 146(3), *University of Pennsylvania Law Review* 687 (March 1998); William N Eskridge *Dynamic Statutory Interpretation*, Harvard University Press (1994).

² Iris Marion Young. *Justice and the Politics of Difference*. Princeton University Press (1990); Catherine Mackinnon. “Mainstreaming Feminism in Legal Education” 53(2) *Journal of Legal Education* 199(2003).

³ Jean –Francois Lyotard. *The Postmodern Condition A Report on Knowledge*. Trans. G. Bennington and B. M. Massumi. Manchester University Press (1984).

by the world body in March, 2007 and came into force from May, 2008. This Convention was drafted with the active participation of persons with disabilities informed by the ethic of “*nothing about us without us*”.

6. The CRPD is the most contemporary articulation of disability rights formulated with the active participation of people with disabilities to render human rights truly universal. It is therefore imperative that the interpretation of the ECHR be informed by the CRPD. There cannot be a European enunciation of disability human rights which is different and distinct from the international discourse, especially when the regional instrument has significant restrictive interpretations and exceptions and thereby contradicts the international one. The validity of this argument has been acknowledged by the European Court of Human Rights (hereinafter “the Court”) when in *Glor v Switzerland*,⁴ the Court rightly turned to the CRPD in a disability case in order to get guidance on what constitutes discrimination based on disability. This was done even when the concerned country was not party to the CRPD.
7. Further, *Alajos Kiss v Hungary*⁵ required measures regarding groups which have been marginalized historically to be subject to stricter scrutiny; in these cases, the State has less discretion and is required to yield to human rights concerns. This marginalization, the Court acknowledged, was especially experienced by persons with psychosocial disabilities⁶. Insofar as discrimination is not just a historical fact but a contemporary reality, there is a need for continuous interrogation and weeding out of discriminatory provisions, practices and judgments. The CRPD, which empowers persons with disabilities, thus, becomes an indispensable frame of reference to highlight the human rights concerns of persons with psychosocial disabilities.
8. When the Court highlighted certain classifications as per se suspect in *Alajos Kiss v Hungary*, it did so to guard against “prejudice (which) may entail legislative stereotyping which prohibits ... individualized evaluation of ... capacities and needs”⁷. Insofar as such stereotyping is not restricted to legislation alone, the *Alajos Kiss* insight on prejudicial stereotyping would need also to be extended to judicial decisions. For example, in *Shtukurov v Russia*,⁸ the Court adopted a functional approach to legal capacity, meaning by this that a person with a disability would not be denied legal capacity per se but only if he or she was unable to perform a particular legal function. Insofar as this question of functional competence is not raised against all persons but is only restricted to persons with disabilities, the Court in *Shtukurov* has constructed a judicial stereotype. For persons with disabilities to assert their human rights on an equal basis with others, it is essential that such judicial decisions are also reconsidered. A CRPD-informed jurisprudence would necessarily require this to happen.
9. In interpreting and determining the scope of States’ obligations, the Court gives heed to the evolution of norms and principles in international law, including specialised international instruments. It is respectfully submitted that the CRPD should, thus, inform

⁴ *Glor v Switzerland*, Application no 13444/04, judgment of 30 April 2009.

⁵ *Alajos Kiss v Hungary*, Application no 38832/06, judgment of 20 May 2010.

⁶ *Ibid*, para 42.

⁷ *Idem*.

⁸ *Shtukurov v Russia*, Application no 44009/05, judgment of 27 March 2008.

disability rights adjudication under the European Convention on Human Rights with due regard of the following:

- The text of the CRPD in its plain and ordinary meaning;
- The Concluding Observations and General Comments of the Committee on the Rights of Persons with Disabilities (the treaty body established to undertake international monitoring under the CRPD) as well as also pronouncements of special rapporteurs appointed under the UN system;
- Academic writings from experiential and subject experts⁹.

II Right to Legal Capacity and Right to Private Life

10. The ECHR does not explicitly guarantee the right to legal capacity. This silence may be prompted by the fact that persons with disabilities were in no manner engaged in the formulation of the Convention. Insofar as the right to legal capacity is at the root of all other rights, its existence was presumed and its explicit guarantee was not considered necessary. Evidently, if persons who are denied this right had participated in the settlement of the ECHR text, the outcome may have been different. Even so, this Court has read the right to legal capacity into Article 8 of the ECHR.¹⁰ Article 8 adopts a liberal perspective towards a person's private choices and protects against arbitrary State interference. Since the right to legal capacity has been connected via this provision to the right to respect for private and family life, home and correspondence, if State interference does not impinge upon these areas, then no infringement of the right to legal capacity is seen. Consequently, the manner in which the presence or absence of legal capacity impacts on other rights has not been exposed and recognised. Thus, for example, in *Stanev v Bulgaria*,¹¹ when the Court found that the petitioner was placed in a social care home subsequent to a finding of legal incapacitation, the Court only pronounced upon the impact of the decision on the right to liberty alone and did not consider how the loss of liberty was connected with the finding of incapacity. To that extent, the Court in *Stanev v Bulgaria* took a step back from their line of Article 8 jurisprudence. In order to appreciate the limited understanding of legal capacity in the ECHR, it is important to present how legal capacity has been addressed in the CRPD.
11. Henry Shue holds that "a moral right provides the rational basis for a justified demand that the actual enjoyment of a substance¹² be socially guaranteed against standard threats". He then goes on to distinguish between basic and non-basic rights¹³. A basic right is a right whose enjoyment is essential to the enjoyment of all other rights. This distinction is being introduced in order to underscore the basic nature of the right to legal

⁹ The writings of jurists are an acknowledged source of international law. The disability-linked change being sought is the recognition of the experiential expert. The subject expert is not being eliminated as, in accordance with the theory put forth by Adam Smith and endorsed by Amartya Sen. both the stakeholder and the impartial spectator must inform deliberation for justice to happen. See Adam Smith "The Theory of Moral Sentiments" http://www.ibiblio.org/ml/libri/s/SmithA_MoralSentiments_p.pdf and Amartya Sen. *The Idea of Justice*. Belknap Press (2009)

¹⁰ *Shtukaturov v Russia*, Application no. 44009/05, judgment of 27 March 2008, para 90

¹¹ *Stanev v Bulgaria*, Application no 36760/06, judgment of 17 January 2012

¹² Shue uses the neutral term 'substance' to emphasize that a right refers to the enjoyment of a thing, whatever that thing may be.

¹³ Henry Shue. *Basic Rights Subsistence Affluence and US Foreign Policy*. 2nd ed. Princeton University Press (1996).

capacity. The right to legal capacity is both a right in itself and a right which must be guaranteed to realize all other rights. Thus, for example, a person who is found to lack legal capacity could have his or her decision to live in the community overruled by others on whom the law reposes the authority to make decisions for him or her. A denial of the exercise of the right of franchise cannot be questioned in an adjudicative forum when the person denied is seen to lack legal capacity. Once a person is adjudicated as incapable and a guardian appointed to manage her and her affairs, then even the replacement of the substituted management requires the intervention of another. The incapacitated person can in no way seek legal enforcement of his or her preference. As things stand, there is a movement in this Court and elsewhere to allow persons with psychosocial and persons with intellectual disabilities to be able to move courts to seek redress against the deprivation of their civil rights, be these to franchise or property management. Even as this movement is welcome, it makes the assertion of these rights dependent upon adjudicative approval. For persons with disabilities to enjoy these rights on an equal basis with others, it is therefore crucial that there be legislative and administrative measures which enforce and secure their right to franchise, and their right to manage their own affairs.

12. Article 12 of the CRPD seeks to modify this situation by putting in place the paradigm of universal legal capacity with support.¹⁴ The construction of this paradigm of legal capacity is initiated by Article 12 (1) of CRPD, which reaffirms that all persons with disabilities are persons before the law. This reaffirmation is aimed to assert that persons with disabilities were within the purview of Article 16 of the International Covenant on Civil and Political Rights when it declared that “everyone shall have the right to recognition everywhere as a person before the law”¹⁵. Article 12 (2) of the CRPD then requires State Parties to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. It is pertinent to note that the article uses the verb ‘enjoy’, and in so doing requires that States ensure a real and not just a textual recognition of legal capacity. In order to socially guarantee this right to legal capacity, State Parties are obliged by Article 12 (3) to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
13. Insofar as Article 12 recognizes the provision of support, an oft-asked question is whether guardianship can be perceived as that support. The system of guardianship which prevails at present allows for a guardian to be appointed upon a finding of incapacity. Due to both legislative and adjudicative stereotyping, such findings of incapacity are easily returned for persons with psychosocial and persons with intellectual disabilities. Once a person is found to be incapable, further legal determinations on continued confinement or guardianship often happen in the absence of the person pronounced incapable. In general, legal incapacitation creates a state of profound powerlessness as the incapacitated person is totally at the mercy of the will and preference of others. This powerlessness was recognized by the UN Special Rapporteur on Torture in his 2008 report in which he states that torture presupposes a situation whereby the victim is under the total control of another person, and adds that “persons with disabilities often find themselves in such situations [...] when they are

¹⁴ Amita Dhanda. “Legal Capacity in the Disability Rights Convention; Stranglehold of the Past or Lodestar for the Future.” 34(2) Syracuse Journal of International Law and Commerce 429 (Spring 2007).

¹⁵ Article 16, International Covenant on Civil and Political Rights 1966.

under the control of their caregivers or legal guardians. In a given context, the particular disability of an individual may render him or her more likely to be in a dependent situation and make him or her an easier target of abuse. However, it is often circumstances external to the individual that render them “powerless”, such as when one’s exercise of decision making and legal capacity is taken away by discriminatory laws and practices and given to others”.¹⁶

14. It is also important to appreciate that subsequent to the appointment of a guardian, the will and preference of the person with a disability are rendered irrelevant. The guardian continues to wield authority even in situations of conflict of interest. Thus, for example, even after suing for divorce, a husband can keep making decisions for his wife with a disability. The existence of a guardian operates as a barrier preventing the person with a disability from obtaining support in accordance with her or his will and preference. It operates as a barrier because the guardian has been appointed due to the deprivation of capacity, and whilst this deprivation continues, the person with a disability cannot on her or his own, without the intervention of others, remove the guardian and seek any other support.
15. The Committee on the Rights of Persons with Disabilities has recognized this distinction between substituted and supported decision-making. In its Concluding Observations on Spain, it required the State Party “to develop laws and policies to replace regimes of substitute decision making by supported decision making, which respects the person’s autonomy, will and preferences”. In the wake of the Committee’s pronouncement, it cannot be contended that providing for a regime of substituted decision making amounts to fulfilling the duty to provide support placed on State Parties.
16. Since the Committee has expressly ruled against substitution as support, it cannot be contended that such substitution is permissible because the safeguards mentioned in Article 12 (4) have been provided. The safeguards have to be tailored to the regime of support and cannot be the basis for permitting deprivation. Further, a thorough analysis of the Article 12 shows that certain kinds of measures for the exercise of legal capacity would be impermissible. For example, Article 12 (4) requires that measures relating to the exercise of legal capacity “respect the rights, will and preferences of the person, are free of conflict of interest and undue influence...” Any support measure which is in breach of these safeguards would be in infringement of the right to legal capacity with support, as enunciated in the CRPD.
17. There is a clear duty under the CRPD to provide access to support. It must be stressed, however, that the failure to fulfill this duty cannot then be used as a basis to deny persons with disabilities the rights to legal capacity and liberty and to live independently and in the community. The existence of these rights raises a correlative duty on the State. Its failure to fulfill its duty with respect to support in no way negates the existence of the rights of persons with disabilities to legal capacity and liberty and to live independently and in the community.
18. This belief that persons with disabilities should determine their own lives, and can do so with access to support, has prompted the setting up of different kinds of support

¹⁶ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/63/175, 28 July 2008, para 50.*

networks and services. Many of these services have been pioneered and are run by persons with disabilities themselves:

Personal Ombudsperson Service¹⁷

19. The personal ombudsperson service in Sweden is based on the development of trust within the individual relationship between the client with a psychosocial disability and his/her Personal Ombudsman (PO). The trust between these persons must be gradually developed through a procedure of: 1. making contact, 2. developing communication, 3. establishing a relationship, 4. starting a dialogue, and 5. taking instructions. The PO is only responsible to the person with a disability and is his or her representative vis-a-vis authorities. The PO performs the services required by the client in accordance with confidentiality norms settled by the client.

Self-Directed Model

20. This model operates on the philosophy that risk is an acceptable and necessary part of life. Consequently persons with disabilities should have the freedom to determine the risk and protection regime by which they live their lives. It is to that end that persons with disabilities spell out their self-determination preferences in a customized document. This customized document sets out the various decisions that the person with a disability needs to make. It next outlines the kind of involvement that he or she desires in the making of these decisions. The document also clearly states who shall make the final decision on each issue. The idea is that the person with a disability has the freedom, if he or she so chooses, to delegate the making of a final decision to his or her named delegate. Such delegation can be accompanied with a specification of the decisions that must only be made by the person with a disability¹⁸.

Advance Directives

21. By these directives, any person, including a person with a disability, can stipulate how major life decisions and especially treatment decisions are to be made about his or her life, at any time when he or she is unable to communicate such decisions. To date, this instrument has been primarily utilized to make advance decisions about treatment, however its scope goes beyond this. In the commonly available format, both positive and negatives directives are incorporated. The instrument provides information about what the person in question wants to be done and what he or she prohibits, and as such both the preferences and the aversions of the director stand recorded. A person or an organization may be named to execute the will of the director¹⁹.

III Right to Liberty

22. Article 5 of the ECHR recognizes that everyone has the right to liberty and security of person. The article, however, permits deprivation of liberty in specified cases, provided this happens in accordance with a procedure prescribed by law. For the purposes of this petition, it is necessary to point out that under Article 5 (1) (e) the lawful detention of

¹⁷ "Swedish user-run service with Personal Ombud (PO) for psychiatric patients <http://www.ppskane.org/ombudsman-for-psychiatric-patients-30.php>.

¹⁸ <http://www.aboutlearningdisabilities.co.uk/about-self-directed-support.html> (last visited 13 February 2012).

¹⁹ Samples of various kinds of forms can be found at <http://www.oag.state.md.us/Healthpol/adirective.pdf> (last visited 13 February 2012; http://www.viha.ca/advance_care_planning/ (last visited 13 February 2012).

“persons of unsound mind” has been permitted. As already stated, the political silencing of persons with psychosocial disabilities has allowed for this routine inclusion of the category of “persons of unsound mind”. This Court has not viewed psychiatric detention as impermissible per se, but it has examined the circumstances around psychiatric labels to determine the lawfulness of the confinement. Thus, recently, in the case of *Stanev v Bulgaria*, this Court found the placement of the psychiatrically labelled complainant in a social care home after his legal incapacitation to amount to deprivation of liberty.

23. In contrast with the ECHR text and jurisprudence, Article 14 of the CRPD requires States Parties to ensure that persons with disabilities enjoy the right to liberty and security of person on an equal basis with others. Further, in opposition to the “unsoundness of mind” exception, Article 14 (1) (b) lays down that “the existence of a disability shall in no case justify a deprivation of liberty”. Article 14 (2) requires States Parties to ensure that if persons with disabilities are deprived of their liberty through any process, they are entitled to guarantees in accordance with international human rights law on an equal basis with others. The Committee on the Rights of Persons with Disabilities and the Special Rapporteur on Torture have interpreted any denial of liberty where disability is a factor to be a deprivation of the right to liberty and thus in conflict with Article 14 of the CRPD. In its Concluding Observations, the Committee on the Rights of Persons with Disabilities recommended to States Parties that they repeal any legislative provisions which allow for the deprivation of liberty on the basis of a disability, including a psychosocial or intellectual disability.²⁰
24. In light of these developments in international law, there is a need to reexamine the implementation of Article 5 (1) (e) of the ECHR. Article 5 (1) permits the lawful detention of only “persons of unsound mind”. Human rights are non-derogable, indivisible and universal. Consequently, all human rights instruments need to be in consonance, and any textual conflict should be resolved through harmonious construction of the conflicting text with such instruments. Insofar as the CRPD is the latest human rights instrument, formulated with the active participation of persons with disabilities, it should guide the interpretation of the lawfulness of Article 5 (1) (e) of the ECHR. Since Article 5 (1) (e) singles out “persons of unsound mind”, it allows for discrimination on the basis of a disability, an allowance which has been rendered impermissible by the CRPD.
25. This Court has considered the objective as well as subjective aspects of an alleged deprivation of liberty in order to determine if the breach has in fact happened. The inextricable connection between the objective and subjective factors needs to be especially emphasized when determining the rights to liberty of persons with disabilities. For example, a person with a disability should be judged to have been deprived of the right to liberty even if he or she has consented to live in degrading, unhygienic, restricted living conditions. Similarly, the compulsory housing of persons with disabilities in hygienic, comfortable premises will still constitute a loss of liberty as it is forced and without consent.
26. The right to liberty of all persons with disabilities, and particularly persons with psychosocial and intellectual disabilities, is a crucial concern because it has repeatedly

²⁰Concluding Observations of the Committee on the Rights of Persons with Disabilities on Tunisia, CRPD/C/TUN/CO/1, 13 May 2011, para 25.

been found that forced treatment almost always accompanies a loss of liberty. In recognition of this consequence, the Committee on the Rights of Persons with Disabilities required in its Concluding Observations that States Parties ensure that health care services, including all mental health care services, be based on the informed consent of the person concerned.²¹ The Special Rapporteur on Torture has pointed out that “arbitrary or unlawful deprivation of liberty based on the existence of a disability might also inflict severe pain or suffering on the individual thus falling under the scope of the Convention against Torture”²². These links between loss of liberty and forced treatment and torture necessitate rigorous scrutiny of any deprivation of liberty of persons with disabilities.

27. Lastly, this scrutiny is also compelled by the fact that the persons in question more than any other persons require the succour of human rights protections. Their extreme disempowerment requires that the rights to liberty and freedom from coercive treatment become operative rights and facts. In a powerful testimony before the Ad Hoc Committee during the negotiations of the CRPD, it was stated:

“All over the world millions of people live in long term mental institutions. Most of them did not choose that way of living. Many of them are de facto and de jure arbitrarily detained in those places. The living conditions may vary from place to place, nevertheless the majority, if not all of the „residents” of these facilities face neglect, physical, sexual and verbal abuse, forced drugging, inhuman and degrading treatment. The conditions are often life-threatening. These institutions are generally located in the middle of nowhere. People living there are the most invisible human beings on the Earth. Many of them are, in fact, not citizens either, as inhuman guardianship laws deprive them of exercising their citizens’ rights.

Who are they? The „lucky outsider” could think that they are insane, brain diseased, dangerous or fully incapable. Campaigns led in the spirit of the medical model could reinforce that view.

You can meet – among other deprived persons – refugees, trauma survivors, homeless people, children, women and men who ended up there because of poverty. People with physical disabilities, persons belonging to marginalized ethnic, racial, religious, sexual or other minorities. Human beings who have had social, emotional, traumatic crises, who faced social exclusion. And who have been offered a place in an institution and coercive medical treatment to „fix” them, or rather, to make them invisible”²³.

²¹ Concluding Observations of the Committee on the Rights of Persons with Disabilities on Tunisia, CRPD/C/TUN/CO/1, 13 May 2011, paras 28-29; Concluding Observations of the Committee on the Rights of Persons with Disabilities on Spain CRPD/C/ESP/1, 19 October 2011, para 36.

²² Supra, nr 16, para 65.

²³ <http://www.wnusp.net/wnusp%20evas/Dokumenter/Gabor%20Gombos'%20intervention.html>.

IV Right to be Free from Torture and III Treatment as Freedom from Forced Treatment

28. Article 3 of the ECHR imposes a prohibition on torture, inhuman or degrading treatment or punishment. Article 15(1) of the CRPD contains a similar prohibition with an additional explicit embargo on subjecting anyone to medical or scientific experimentation without his or her free consent. Further, Article 15(2) of the CRPD requires States Parties to take all effective legislative, administrative, judicial or other measures to ensure that persons with disabilities are prevented from being subjected to torture, inhuman or degrading treatment or punishment on an equal basis with others.
29. The mandate of equality has special significance due to the findings returned by the Special Rapporteur of Torture. The Rapporteur recorded that “persons with disabilities are exposed to medical experimentation and intrusive and irreversible medical treatments without their consent (e.g. sterilization, abortion and interventions aimed to correct or alleviate a disability, such as electroshock treatment and mind-altering drugs including neuroleptics).” The Rapporteur also expressed concern at the fact “that in many cases such practices when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognized as torture...”. He thereupon points out that the entry into force of the CRPD and its Optional Protocol “provides a timely opportunity to review the anti-torture framework in relation to persons with disabilities”. This call for review may have a bearing in the wake of this Court’s ruling in *Selmouni v France* (2000) 29 EHHR 403 at para 101 wherein this Court stated that the ECHR is a “living instrument” and treatment which it had previously characterized as inhuman or degrading treatment might in the future be regarded as torture. In this context we wish to draw the attention of the Court to the manner in which torture has been understood by the Special Rapporteur on Torture and the worldwide community of users and survivors of psychiatry.
30. According to Article 1 of the Convention Against Torture, for an act or omission with respect to persons with disabilities to constitute torture, it must contain the four elements of the definition: severe pain or suffering, intent, purpose and state involvement. Applying this definition to persons with disabilities, the Rapporteur opines that “medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, or aim at correcting or alleviating a disability, may constitute torture...”. The Rapporteur holds that intent can be effectively implied when a person has been discriminated against on the basis of a disability. It is this singling out which he finds determinative, especially since many serious violations and acts of discrimination against persons with disabilities may be masked as “good intentions” on the part of health professionals.
31. WNUSP International Representative, Tina Minkowitz, in her exposition differs from the Rapporteur in that she holds that medical treatments of an intrusive and irreversible nature aimed at correcting or alleviating a disability is torture. Amplifying on the discriminatory intent implied by the special Rapporteur, in her view it is the intention which makes the interventions torture. The intention, she holds, is to correct or alter the architecture of the mind for persons with psychosocial disabilities and this forcible alteration is inflicting a sanist identity on persons with psychosocial disabilities which is

torture²⁴. This experientially informed academic opinion has been endorsed by the World Network and European Network of (ex-)Users and Survivors of Psychiatry as it accords with their lived experience.

V Conclusion

32. Summary of Contentions :

- i. The Court should interpret the ECHR in a dynamic manner in accordance with the latest international human rights of persons with disabilities
- ii. The United Nations Convention on the Rights of Persons with Disabilities should guide the Court in interpreting the rights of persons with disabilities under the ECHR.
- iii. The right to legal capacity is a basic right which needs to be guaranteed on its own and to ensure the realization of all other rights to persons with disabilities.
- iv. Guardianship regimes cannot be viewed as fulfilling the duty to provide support placed on States Parties in the CRPD.
- v. The provision of safeguards does not allow for the deprivation of rights. The safeguards are only to assist in the exercise of the right to legal capacity.
- vi. The use of disability as a factor in any process causing loss of liberty is a deprivation of the right to liberty.
- vii. The deprivation of liberty may result in forced interventions and such forced interventions may constitute torture.
- viii. The provision of medical or mental health treatment to alleviate or correct disability without the consent of the person with disability is torture.

33. The mechanisms and practices conducted by the State which permit force institutionalisation, forced treatment, deprivation of legal capacity and discrimination of persons with psychosocial disabilities represent grave violations of fundamental human rights. The latest developments in international law reflect the need for States to eliminate these practices and the legal constructions which support them in order to ensure in principle and in practice the enjoyment and exercise of rights by persons with disabilities on an equal basis with others.

²⁴ Tina Minkowitz, The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions, *Syracuse Journal of International Law & Commerce* Vol. 34 No. 2 (2007).

ANNEX - INTEREST OF INTERVENERS

The European Disability Forum (EDF) is an independent non-governmental organisation which represents the interests and defends the rights of 80 million people with disabilities in the European Union, and is a member of IDA. EDF is the only European pan-disability platform run by persons with disabilities and their families. Created in 1996 by its member organisations, EDF ensures that decisions concerning persons with disabilities are taken with and by persons with disabilities.

The International Disability Alliance (IDA) is a unique, international network of global and regional organisations of persons with disabilities. Established in 1999, each IDA member represents a large number of national disabled persons' organisations (DPOs) from around the globe, covering the whole range of disability constituencies, including persons with intellectual disabilities. IDA thus represents the collective global voice of persons with disabilities counting among the more than 1 billion persons with disabilities worldwide, the world's largest – and most frequently overlooked – minority group. Currently comprising eight global and four regional DPOs,²⁵ IDA's mission is to advance the human rights of persons with disabilities as a united voice of organisations of persons with disabilities utilising the Convention on the Rights of Persons with Disabilities and other human rights instruments.

The World Network of Users and Survivors of Psychiatry (WNUSP) is a democratic organization of users and survivors of psychiatry that represents this constituency at the global level. In its Statutes, "users and survivors of psychiatry" are self-defined as people who have experienced madness and/or mental health problems, or who have used or survived mental health services. WNUSP had its beginnings in 1991 and became a full-fledged organization with a democratic global structure on adopting its statutes in 2001. Currently, WNUSP has members in over 50 countries, spanning every region of the world. WNUSP has Special Consultative Status with the Economic and Social Council of the United Nations (ECOSOC), is represented on the Panel of Experts of the UN Special Rapporteur on Disability, and is a member of the International Disability Alliance (IDA).

The European member of WNUSP, the *European Network of (ex-)Users and Survivors of Psychiatry (ENUSP)* is also a member of EDF. ENUSP is the independent, democratic organization of mental health service users and survivors of psychiatry at a European level. ENUSP's members are regional, national and local organisations and individuals across 39 European countries. Since its foundation in 1991, ENUSP has campaigned for the full human rights and dignity of mental health service users and survivors of psychiatry and the abolition of all laws and practices that discriminate against them. ENUSP is currently a consultant to the European Commission, the European Union Fundamental Rights Agency, the World Health Organization-Europe and other major public and non-profit bodies.

²⁵ IDA members are: Disabled Peoples' International, Down Syndrome International, Inclusion International, International Federation of Hard of Hearing People, World Blind Union, World Federation of the Deaf, World Federation of the DeafBlind, World Network of Users and Survivors of Psychiatry, Arab Organization of Disabled People, Pacific Disability Forum, Red Latinoamericana de Organizaciones no Gubernamentales de Personas con Discapacidad y sus familias (RIADIS), and the European Disability Forum.