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Dr Ms Elina Steinerte, Vice Chair of UN Working
Group on Arbitrary Detention
Ms Theresia Degener, Chair of the Committee on
the Rights of Persons with Disabilities
Ms Catalina Devandas-Aguilar, Special
Rapporteur on the Rights of Persons with
Disabilities
Mr Dainius Pūras, Special Rapporteur on the right
of everyone to the enjoyment of the highest
attainable standard of physical and mental health
Office of the High Commissioner For Human
Rights
Palais des Nations
CH-1211 Geneva 10

Strasbourg, 8 December 2017

Dear Ms Steinerte,
Dear Ms Degener,
Dear Ms Devandas-Aguilar,
Dear Mr Pūras,

Thank you for your letter expressing your concerns on the draft Additional Protocol to the Convention on Human Rights and Biomedicine, which is currently being prepared by the Committee on Bioethics (DH-BIO) of the Council of Europe.

To put this work in its broader context, I would like to refer to the position adopted on this issue on 9 November 2016 by the Council of Europe's Committee of Ministers - the Organisation's statutory decision-making body (decision CM/AS(2016)Rec2091¹), appended for ease of reference). This position is based on our member states' legal obligation to respect the rights enshrined in the European Convention on Human Rights, as interpreted in the European Court of Human Rights' case-law.

The Committee of Ministers underlined that "the utmost should be done to promote alternatives to involuntary measures".

In line with the European Convention on Human Rights, it nevertheless recalled that "in exceptional situations where there is risk of serious harm to the health of the person concerned or to others, and in the absence of alternatives, involuntary measures could be justified subject to strict protective conditions".

¹ Reply to Parliamentary Assembly of the Council of Europe's Recommendation 2091 (2016) "The case against a Council of Europe legal instrument on involuntary measures in psychiatry".

The Committee of Ministers further observed the number of cases regularly brought before the European Court of Human Rights relating to violations as a result of involuntary measures.

Bearing in mind this reality, the Committee considered that "an Additional Protocol to the Oviedo Convention could be an effective tool to ensure that in all circumstances, involuntary measures are embedded with the guarantees required by the European Convention on Human Rights", thus contributing "to prevention of abuses and (to) encourage the progressive transition to a more uniform application of voluntary measures in psychiatry by the member States, in accordance with the spirit of the United Nations Convention on the Rights of Persons with Disabilities".

It was on this basis that the DH-BIO resumed work on the Additional Protocol during its 10th plenary session (Strasbourg, 5-8 December 2016). Following backing by the Committee of Ministers, the DH-BIO also decided, further to the already existing participation of the Conference of INGO's, to directly involve disability rights organisations, inviting them to participate as observers in the relevant sessions of its meeting.

The DH-BIO has carefully examined all comments received during the public consultation, which reflected a diversity of opinions, including those questioning the compatibility of the Draft with the Convention on the Rights of Persons with Disabilities (CRPD), as interpreted by the CRPD-Committee.

It also considered other relevant UN work, in particular the UN Human Rights Committee's General Comment no. 35 on the right to liberty and security of person(s).

The DH-BIO continues to actively seek input from relevant actors in the field, as is demonstrated by the recent exchange of views between the Chair of DH-BIO with the Ad Hoc Committee of experts on the Rights of Persons with Disabilities (CAHDPH) during their 6th plenary meeting (29 September 2017). Furthermore, the CAHDPH, in which the Office of the UN High Commissioner for Human Rights (OHCHR) holds participant status, is invited to participate in the work of the DH-BIO and to send a representative to its meetings.

For further information on the drafting process, I would invite you to consult the DH-BIO's website (<http://www.coe.int/en/web/bioethics/psychiatry/about>).

Please be assured that I fully share your commitment to the principles of transparency, mutual respect and meaningful dialogue to reach a common consensus. It is in this spirit that the Council of Europe, including the DH-BIO, will continue work in this area.

Yours sincerely,



Christos Giakoumopoulos

Appendix: CM reply to Parliamentary Assembly Recommendation 2091 (2016) "The case against a Council of Europe legal instrument on involuntary measures in psychiatry" [CM/AS\(2016\)Rec2091](#)

“The case against a Council of Europe legal instrument on involuntary measures in psychiatry” –

Parliamentary Assembly Recommendation 2091 (2016)

Reply of the Committee of Ministers

(adopted on 9 November 2016 at the 1270th meeting of the Ministers' Deputies)

1. The Committee of Ministers has carefully examined Parliamentary Assembly Recommendation 2091 (2016) on “The case against a Council of Europe legal instrument on involuntary measures in psychiatry” and has forwarded it to the relevant committees and bodies for information and comments.¹
2. The Committee of Ministers agrees with the Assembly that the utmost should be done to promote alternatives to involuntary measures. It nevertheless considers that in exceptional situations where there is risk of serious harm to the health of the person concerned or to others, and in the absence of alternatives, involuntary measures could be justified subject to strict protective conditions. The Court has said that “*a mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary as the person needs therapy, medication or other clinical treatment to cure or alleviate his/her condition, but also where the person needs control and supervision to prevent him/her from, for example, causing harm to him/herself or other persons.*”² For this reason, involuntary measures in psychiatry continue to be provided for in the laws of member States and regularly applied.
3. The Committee of Ministers observes, however, that there is a wide variation in the application of such measures and notes in this context the number of cases regularly brought before the European Court of Human Rights that relate to violations as a result of involuntary measures. Bearing in mind this reality, the Committee considers that an Additional Protocol to the Oviedo Convention could be an effective tool to ensure that in all circumstances, involuntary measures are embedded with the guarantees required by the European Convention on Human Rights so as to (i) safeguard the human rights of the person concerned,³ and in particular provide the possibility for the right to an effective remedy against such a measure and (ii) prevent violations of the Convention similar to those already found by the European Court of Human Rights. Better protecting the rights of the persons concerned both in law and in practice and strengthening the necessary safeguards would be essential to ensure that involuntary measures are exceptional and used as a last resort in the absence of alternatives.
4. The Committee of Ministers agrees on the importance of information exchange and sharing of best practices with a view to the complementary development of guidelines to reduce the use of involuntary measures and that the CAHDPH has a particularly important role to play in this context.
5. With regard to paragraph 12 of the Assembly recommendation, the Committee of Ministers notes that for the purpose of the preparation of the draft protocol, several consultation procedures have taken place, including with international non-governmental organisations (representing patients and their families, health professionals, human rights defenders and advocacy groups). However, as has been suggested by the Assembly, it would encourage the DH-BIO to directly involve disability rights organisations to participate in the work still to be undertaken.

¹ Steering Committee for Human Rights (CDDH), Committee on Bioethics (DH-BIO), Ad hoc Committee of Experts on the Rights of Persons with Disabilities (CAHDPH).

² *Bergmann v. Germany*, No. 23279/14, judgment of 7 January 2016, § 97.

³ Involuntary measures, in particular placement, raise important human rights questions especially concerning Article 5 §1(e) (right to liberty and security), but also in some cases Articles 3 (prohibition of torture and inhuman or degrading treatment) and 8 (protection of private and family life) of the European Convention on Human Rights.

6. Finally, the Committee of Ministers reiterates that involuntary measures should be exceptional and only be envisaged in the absence of alternatives. It is convinced that the possible drawing up of a legal instrument to lay down the necessary framework for such measures within the Council of Europe would not diminish in any way the credibility of the Organisation, but would on the contrary contribute to prevention of abuses and encourage the progressive transition to a more uniform application of voluntary measures in psychiatry by the member States, in accordance with the spirit of the United Nations Convention on the Rights of Persons with Disabilities.