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Third Party Intervention in relation to the European Court of Human Rights Advisory Opinion on the Oviedo Convention: interpretation of Article 7 of the Oviedo Convention which contains provisions relating to non-consensual interventions carried out on a person with a "mental disorder"

Introduction

1. In December 2019, the Court received a request for an Advisory Opinion from the Council of Europe's Committee on Bioethics under Article 29 of the Convention on Human Rights and Biomedicine ("the Oviedo Convention"). The request is comprised of two questions about the legal interpretation of Articles 7 and 26 of the Oviedo Convention relating to the conditions for permissibility of involuntary treatment of persons with a 'mental disorder'. The European Network of Users and Survivors of Psychiatry (ENUSP), as an organisation composed of persons who have been subject to such involuntary treatments, wishes to provide the Court with their views and expertise on the question in light of their experience and expertise.
2. The main goal of this submission is to challenge the assumption that forced interventions may be needed as a last resort for certain groups of the population. The claim is often made that, although coercion is painful to those subjected to it, it is in the interests of the population in the bigger picture because it supposedly provides safety, protection and improved health. This submission will point out why these assumptions are not only unfounded, but also why and how they lead to severe violations of international human rights law. Lastly, the submission contains our proposals on how the Court could elevate Europe to a higher standard of human rights protection by moving away from considering coercion as a 'solution', to regarding coercion as a problem per se.

A. NORMATIVE CONTENT OF UNIVERSAL HUMAN RIGHTS - permissibility of coercive treatment in international human rights law

3. Each person is unique. The richness of diversity is contained within each individual. The importance of valuing and respecting individual differences among all the citizens of the world and recognizing the unity of humankind cannot be stressed enough. The principle of respect for diversity is rooted in the recognition that all persons have their own identity. People are entitled to have their own perceptions, feelings, experiences, realities, character and so on. The firm belief that persons themselves are the experts about the choices and decisions they make in their own lives is reflected in the call to respect diversity. This core value is enshrined in the right to legal capacity, which also acknowledges that persons themselves are the experts about their own lives, by giving people the legal right to decide for themselves according to their own will, choices and preferences. Having independent authority over your own affairs and decisions is a core human right and principle.

4. This principle was translated into law via the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which incorporates the latest binding international standards for the rights of persons with disabilities. The CRPD was a long-awaited breakthrough that recognizes persons with disabilities, including persons with psychosocial disabilities, in all their diversity, as equal human beings with the same fundamental human rights as others. This includes the right to exercise legal capacity, to liberty, to physical and mental integrity, to be free of torture and ill treatment, and to health care on the basis of the individual's free and informed consent. Respect for these fundamental rights implies a ban on all forced treatments and involuntary confinement, which has also been explicitly stressed a number of times by various UN bodies, including the UN Special Rapporteur on Torture and Other Cruel Inhuman

or Degrading Treatment or Punishment[1]. The CRPD has provided us with a momentum for revolutionary changes in attitudes and practices towards persons with disabilities. The CRPD has been ratified globally by 182 countries, including 46 out of the 47 Member States of the Council of Europe, and ratified by the European Union itself, representing the first international human rights treaty to which an intergovernmental organisation is a party.

5. Both the CRPD and the European Convention on Human Rights (ECHR) are grounded in fostering equality and non-discrimination. Similarly, the purpose and object of the Convention on Human Rights and Biomedicine stipulates in Article 1 that *"parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine."*

6. Dignity and identity of all human beings are intimately related to their equal recognition before the law and their legal capacity. As emphasized by the UN CRPD Committee, legal capacity and mental capacity of an individual are separate concepts. CRPD General Comment no. 1 on article 12 applicable to equal recognition before the law[2] highlights under point 13 that *"legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. Legal instruments such as the Universal Declaration of Human Rights (art. 6), the International Covenant on Civil and Political Rights (art. 16) and the Convention on the Elimination of All Forms of Discrimination Against Women (art. 15) do not specify the distinction between mental and legal capacity. Article 12 of the Convention on the Rights of Persons with Disabilities, however,* ***makes it clear that 'unsoundedness of mind' and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency)****. Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity".*

7. The CRPD specifically challenges previous notions of equality and inclusion which have become outdated in today's world. It has now been recognized that equality cannot be achieved purely by requiring the person with disabilities to fit in by providing them with some additional supports. Equality also requires structural change, which means that human society should be made more inclusive and able to accommodate diversity. Only such changes are capable of ensuring equal dignity and equal exercise of rights for all. In addition, this implies a shift from a model where persons with disabilities are viewed as objects of charity, to a model where they are equal citizens with the right to be included. The CRPD shifts our focus from fixing the individual to fixing society, and from uniformity to diversity. This is a paradigm shift. A failure to provide "reasonable accommodation" is discrimination. Rights are not an abstract concept, but need a social community response. States must take positive measures to realize equality and inclusion. The CRPD is both a shield and a sword, to protect and promote rights[3].

8. CRPD General Comment no. 6 on article 5 applicable to equality and non-discrimination mentions in point 30, *"States parties have an obligation to respect, protect and fulfil the right of all persons with disabilities to non-discrimination and equality. In that regard, States parties must refrain from any action that discriminates against persons with disabilities. In particular, States parties shall modify or abolish existing laws, regulations, customs and practices that constitute such discrimination. The Committee has often given examples in that regard including: guardianship laws and other rules infringing upon the right to legal capacity;[4] mental health laws that legitimize forced institutionalization and forced*

[1] A/HRC/22/53 Torture and Ill-treatment in Health Care Settings, Juan E Méndez, UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 4 March 2013.
[2] UN CRPD General Comment no.1 on Equal recognition before the law, Committee on the Rights of Persons with Disabilities, 11 April 2014.
[3] CRPD General Comment no. 6 on CRPD article 5 on Equality and Non-discrimination, point 10.
[4] See Committee on the Rights of Persons with Disabilities General Comment no. 1 (2014) on equal recognition before the law.

treatment, which are discriminatory and must be abolished;[5] *non-consensual sterilization of women and girls with disabilities; inaccessible housing and institutionalization policy;*[6] *segregated education laws and policies;*[7] *and election laws that disenfranchise persons with disabilities.*[8]*".* In relation to CRPD article 19 the Committee notes in point 58, *"Article 19 of the Convention recognizes the right not to be obliged to live in a particular living arrangement on account of one's disability.* ***Institutionalization is discriminatory as it demonstrates a failure to create support and services in the community for persons with disabilities****, who are forced to relinquish their participation in community life to receive treatment. The institutionalization of persons with disabilities as a condition to receive public sector mental health services constitutes differential treatment on the basis of disability and, as such, is discriminatory."*

9. Involuntary psychiatric interventions also violate the right to health. The right to health is recognized, either explicitly or implicitly, in several human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (art. 12), the Convention on the Rights of the Child (art. 24), the Convention on the Rights of Persons with Disabilities (art. 25) and the Convention on the Elimination of All Forms of Discrimination against Women (arts. 10 (h), 11 (1) (f), 11 (2), 12 and 14 (2) (b)). The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health notes[9] *The right to health contains freedoms (such as the freedom to control one's health and body and the right to be free from interference, torture and non-consensual medical treatment) and entitlements (such as the right to a health system that provides equality of opportunity for people to enjoy the highest attainable level of health).*[10] *While, in recognition of resource constraints, the right to health is subject to progressive realization, the freedom element in the right to health is subject to neither progressive realization nor resource availability.*[11]*"*

10. Coercive medical interventions constitute ill-treatment and torture. The right to Freedom from Torture and other Cruel Inhuman or Degrading Treatment or Punishment is recognized in ECHR article 3, the Convention Against Torture (CAT), and in CRPD article 15. Several UN bodies, such as the UN CRPD Committee[12],[13],[14],[15], UN Special Rapporteurs, on Torture and other Cruel, Inhuman or Degrading

[5] See Committee on the Rights of Persons with Disabilities, Guidelines on article 14, paras. 6 and 14. Available from the Committee's web page (www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx).
[6] See, for example, General Comment No. 5 (2017) on Living independently and being included in the community, para. 46.
[7] See General Comment no. 4 (2016) on the Right to inclusive education, para. 24.
[8] See *Bujdosó et al v. Hungary* (CRPD/C/10/D/4/2011).
[9] A/HRC/34/32 Mental Health and Human Rights, para 6,7,8, Mr. Dainius Puras, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 31 January 2017.
[10] See Committee on Economic, Social and Cultural Rights, General Comment No. 14, para. 8.
[11] See E/CN.4/2005/51, para. 41.
[12] UN CRPD Guidelines on UN CRPD article 14, Committee on the Rights of Persons with Disabilities, see Annex (p38-50) to the Bi-Annual report of 2015/2016 A/72/55.
[13] UN CRPD General Comment no. 1 on Equal recognition before the law, Committee on the Rights of Persons with Disabilities, 11 April 2014.
[14] UN CRPD General Comment no. 5 on Living independently and being included in the community, Committee on the Rights of Persons with Disabilities, 27 October 2017.
[15] UN CRPD Concluding Observations, including CRPD/EU/CO1 para 36-47, 50-51, and Annex with Guidelines on UN CRPD article 14, 2 October 2015.

Treatment or Punishment [16],[17],[18], on the Rights of Persons with Disabilities[19],[20],[21], and on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health[22],[23], have stated repeatedly that practices without consent should not be characterized as treatment, but rather constitute forms of ill-treatment and torture, which is also applicable to developed countries[24].

11. Several Council of Europe mechanisms, such as the Court and the Committee for the Prevention of Torture (CPT), use other definitions of torture and ill-treatment which now run contrary to the CRPD, since they use standards based on the Council of Europe´s directives, and continue to allow forced interventions based on psychosocial disability, contrary to the CRPD. A unified **definition of torture and ill-treatment** in line with the CRPD across the Council of Europe has become needed to ensure that violations of the right to be free from torture and other cruel, inhuman, degrading treatment or punishment on persons with psychosocial disabilities as the world understands it today are recognized, prohibited and remedied in Council of Europe Member States.

12. Involuntary hospitalizations of persons with "mental disorders" impact directly their right to liberty. Regarding the right to liberty, CRPD article 14.1.b emphasizes that *"the existence of a disability shall in no case justify a deprivation of liberty".* In the Guidelines on CRPD article 14 on liberty and security of the person[25], the CRPD Committee further stipulates *"Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent of the person concerned for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments. 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."* (…) *"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,[26] seclusion and various methods of restraint in medical facilities, including physical, chemical and mechanical restraints.[27] 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."* (…) *"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*

[16] A/63/175, Protecting Persons with Disabilities from Torture, Manfred Nowak, UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 28 July 2008.
[17] A/HRC/22/53, Torture in Health Care Settings, Juan E Méndez, UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 4 March 2013.
[18] A/HRC/43/49, Psychological Torture, para 36, 37, 40, 45, 68-70, 78, 84 (e), 86. Nilz Melzer, UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 14 February 2020.
[19] A/HRC/40/54, Deprivation of liberty of persons with disabilities, Catalina Devandas-Aguilar, UN Special Rapporteur on the Rights of Persons with Disabilities, 11 January 2019.
[20] A/73/161, Right to health of persons with disabilities, Catalina Devandas-Aguilar, UN Special Rapporteur on the Rights of Persons with Disabilities, 16 July 2018.
[21] A/HRC/37/57, Legal capacity and supported decision-making, Catalina Devandas-Aguilar, UN Special Rapporteur on the Rights of Persons with Disabilities, 12 December 2017.
[22] A/HRC/35/21, Right to mental health, Dainius Puras, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 28 March 2017.
[23] A/HRC/38/36, Deprivation of liberty and the right to health, Dainius Puras, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 10 April 2018.
[24] AL Health (2002-7) G/SO 214 (53-24) NLD 2/2013, letter sent to the Netherlands by the UN Special Rapporteur on Torture and UN Special Rapporteur on the Right to Health. https://spdb.ohchr.org/hrdb/24th/public_-_AL_Netherlands_08.10.13_(2.2013).pdf
[25] UN CRPD Guidelines on UN CRPD article 14, Committee on the Rights of Persons with Disabilities, see Annex (p38-50) to the Bi-Annual report of 2015/2016 A/72/55.
[26] 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.
[27] See CRPD/C/NZL/1, para. 32; CRPD/C/AUS/CO/1, para. 36.

*the perceived danger of persons to themselves or to others**. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty".*** (…) *"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"*. (…)*"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,*[28] *as well as procedural accommodations to ensure fair trial and due process."*[29]

13. The right to personal liberty is also protected in Article 5 of the European Convention on Human Rights (ECHR, 1950), which states: *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (…) ECHR art 5.1.e: the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."*

14. ENUSP submits that the grounds for deprivation of liberty listed under letter e) of Article 5 of the Convention clashes with the global discourse of interpretation of the right to liberty as provided for under CRPD article 14.

15. Regarding the rights of persons with disabilities, the authoritative interpretation of human rights standards is established by the UN CRPD Committee which is democratically elected by UN Member States. The global discourse of dynamic interpretation of the human rights of persons with disabilities is defined through the CRPD, by its principles and its text, the concluding observations and the general comments. The Vienna Convention on the Law of Treaties Article 53 provides that: *"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".* This means that, in light of other international human rights obligations, the Court should not apply Article 5.1 e) of the Convention as grounds for detention of persons with disabilities, because that would de facto derogate from the human rights ensured under the CRPD and thus contravene Article 53. To align the Council of Europe's human rights standards with the current international human right standards on the right to liberty and freedom from torture, ECHR article 5.1.e **must be amended in compliance with the CRPD**, as the Court has been informed by others. Consequently, this means that a sequence of ensuing provisions also needs to be amended. In the same vein, the conditions for involuntary treatment laid out in Articles 6 and 7 of the Oviedo Convention, and the revised standards on Means of restraint in psychiatric establishments for adults of the Committee on

[28] See CRPD/C/AUS/CO/1, para. 30.
[29] 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.

Prevention of Torture (CPT) of 21 March 2017[30], and naturally the Draft Additional Protocol to the Oviedo Convention are an impermissible derogation on the rights of persons with disabilities enshrined in the CRPD, which can no longer remain unremedied.

B. EUROPEAN PRACTICES - Article 7 (and 6) and the protection paradigm

16. Both Articles 6 and 7 of the Oviedo Convention contain provisions on involuntary treatment relating to "the protection of persons" with a "mental disorder" or "mental disability". The assumption has been that provisions on involuntary interventions such as in Articles 6 and 7, ECHR 5.1.e, the CPT-standards and the Draft Additional Protocol would "protect dignity and human rights". These claims do not correspond at all with the lived experience of those subjected and detained on this basis[31]. In practices of non-consensual treatment, such as those which Article 7 (and 6) authorizes, the biomedical explanation of the word 'dignity' is misused against persons with psychosocial disabilities in order to promote non-consensual, invasive and irreversible interventions aimed at repairing, correcting or alleviating a psychosocial disability without the free and informed consent of the person concerned, instead of the human rights based approach to dignity with respect for the lived experience of the person. In this way, the right to respect and protection of physical and mental integrity of persons with psychosocial disabilities on an equal basis with others is violated and even nullified on the basis of the existence of a psychosocial disability or diagnosis, which is a clear form of discrimination. To actually protect the dignity and human rights of any person, the human rights based concept of dignity must be pursued and the outdated and damaging biomedical paradigm of 'dignity' depending on health status eliminated. The right to integrity under CRPD article 17 implies that all non-consensual invasive and irreversible interventions aimed at repairing, correcting or alleviating a psychosocial disability without the free and informed consent of the person concerned must be prohibited. Article 7, as well as the other instruments of the Council of Europe mentioned, including the Draft Additional Protocol, are not based on the human rights approach to dignity and integrity, and run counter to the norms of globally-accepted and binding human rights treaties, such as the CRPD. As this Court is well aware, the CRPD Committee has explicitly called on States to oppose the Draft Additional Protocol[32], which further illustrates that any recourse to involuntary placement or involuntary treatment is prohibited under the current standards of international law. ENUSP respectfully suggests that the Court's Advisory Opinion on the protection of human rights under Article 7 recognize the need for an absolute prohibition of involuntary interventions, and a unified **definition of dignity** in line with the CRPD across the Member States of the Council of Europe.

17. Articles 6 and 7 of the Oviedo Convention are giving States leeway to commit human rights violations, through provisions which legitimize the deprivation of fundamental rights though involuntary interventions, including the right to liberty, integrity, legal capacity and the right to be included in the community. Further authorization of these practices through the suggested Draft Additional Protocol, based on Article 7, runs counter to the CRPD and the Vienna Convention. Although the intention may be to protect human rights and dignity, the means and methods suggested under Article 7, on which the Draft Additional Protocol relies, entail procedural safeguards which do not offer the actual protection of dignity and human rights in practice. In many countries there are still horrible and unacceptable

[30] Means of restraint in psychiatric establishments for adults of the Committee on Prevention of Torture (CPT) of 21 March 2017 https://rm.coe.int/16807001c3.
[31] See points 17 and 21.
[32] Statement by the Committee on the Rights of Persons with Disabilities calling States parties to oppose the Draft Additional Protocol to the Oviedo Convention, adopted during the Committee's 20th session, held, from 27 August to 21 September 2018 in Geneva.

situations in institutions, such as the degrading conditions in Ukraine[33], Czech Republic[34], Lithuania[35],[36], Georgia[37] or Romania[38], but severe violations also occur in countries like France[39], Norway[40] and the Netherlands[41], and this is being done under the pretext of care. This discriminatory European and domestic legislation not only authorizes harmful practices against persons with psychosocial disabilities, but it also poses insurmountable barriers to effective access to justice for persons with psychosocial disabilities who have been harmed, ill-treated, tortured or even killed by forced psychiatric interventions, and the perpetrators are generally treated with impunity, since these violations can be considered as legal under these outdated standards. By allowing practices which have been recognized as human rights violations internationally, Article 7 (and 6) is part of the problem, and not part of the solution for the protection of human rights. Continuing along this line, with an attempt by way of the Draft Additional Protocol to make the situation "less worse" in certain countries will only lead to a levelling down of standards throughout all of the Council of Europe Member States rather than a move ahead in Europe to reach and respect the highest international human rights standards.

18. Moreover, the current legislation encompassing the sequence of ECHR 5.1.e. and Oviedo Articles 6 and 7 (as well as the Draft Additional Protocol), seeks to justify coercion "in the absence of alternatives". The absence of alternatives appears to dominate the current situation in most countries, which has made this supposed "last resort option" of involuntary treatment a widespread default practice, causing thousands of people to suffer. It must be recalled that coercion amounts to torture and ill-treatment, and that the abolition of torture is not subject to progressive realization, but requires **immediate realization**. The abolition of coercion in mental health care must be prioritized. Only good, non-coercive practices should be legal.

19. Despite monitoring bodies and protocols being in place in many countries for decades, these types of human rights violations in mental health care continue to exist across Europe up until today. The UN Principles for the Protection of Persons with Mental Illness of 1991 were already offering an approach comparable to the Draft Additional Protocol back then, and have since been replaced by the CRPD. Similarly, the outdated WHO document with ten basic principles of mental health care law (1996) and the WHO Resource Book on Mental Health, Human Rights and Legislation (2005) have been withdrawn by the WHO[42] and replaced by the CRPD and the WHO Quality Rights Initiative[43]. The highly problematic CPT standards on which the Draft Additional Protocol relies allow for physical restraints without actual time-limits, scaling up restraint with sedation, leaving monitoring pointless because it cannot provide a solution to the existing application of coercion, since there is no clear prohibition of these practices in the legal frameworks, and very little solution for the lack of alternatives which need to be established. Continuing with procedures of the same kind under Article 7 is unlikely to result in any motivation to change or to change in practice.

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[33] Press release ENUSP and EDF condemn the appalling human rights violations in the Pliskiv Psychoneurological Institution in Vinnytsia, Ukraine, November 15, 2019

[34] MDAC (Mental Disability Advocacy Centre, now Validity): Cage Beds (in Czech Republic, Hungary, Slovakia, Slovenia) http://www.mdac.org/sites/mdac.org/files/English_Cage_Beds.pdf

[35] Lithuania: http://www.liberties.eu/en/news/psychiatric-patients-exploited

[36] Lithuania: https://www.lrt.lt/en/news-in-english/19/1112028/doctor-suicide-bares-deep-rooted-problems-in-lithuania-s-top-hospitals

[37] Georgia: http://ombudsman.ge/eng/190307075330spetsialuri-angarishebi/fsiqiatriuli-dawesebulebebis-monitoringis-angarishi

[38] Romania: https://www.romania-insider.com/romania-psychiatrists-using-patients-guinea-pigs

[39] French Controlleur general for places of deprivation of liberty, see reports: https://www.cglpl.fr/

[40] Norway: https://www.rt.com/news/405471-electroshock-mental-hospital-norway/

[41] Netherlands: https://news.blogs.cnn.com/2011/01/22/case-of-young-man-tied-to-wall-stirs-national-debate-in-netherlands/comment-page-2/

[42] See WHO website, second paragraph: https://www.who.int/mental_health/policy/legislation/en/

[43] WHO Quality Rights Initiative, https://www.who.int/mental_health/policy/quality_rights/en/

20. In the Reply of the Committee of Ministers (adopted on 9 November 2016 at the 1270th meeting of the Ministers' Deputies), the Committee of Ministers observed 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"*. Yet, there is a discrepancy between ECHR article 5.1.e and CRPD article 14.1.b., and 46 out of 47 CoE Member States are bound by both treaties. This means that in the spirit of Article 53 of the Vienna Convention on the Law of Treaties, they cannot apply Article 5 of the Convention in a way that contravenes the CRPD. For the majority of European countries, the Draft Additional Protocol would not add any valuable components to the existing frameworks, and worse, the persistence of this outdated approach in spite of the CRPD would lead to a contradiction between human rights standards. To prevent Europe from heading in the wrong direction, ENUSP respectfully suggests that an Advisory Opinion on the protection of human rights under Article 7 recognize the CRPD, and stipulate that **the CRPD provisions constitute amendments to the human rights standards used by the Council of Europe**, and hence advise that the doctrine of ECHR 5.1.e. and Oviedo Articles 6 and 7 be put to a stop and as a result, recommend the withdrawal of the Draft Additional Protocol due to this fact. Over the last six years that ENUSP has been attempting to engage with the DH-Bio Committee, we have had the impression of a trifold perpetuum mobile, where: A. the Committee of Ministers and the Bioethics Committee refer to the Court's jurisprudence. B. the Court's jurisprudence refers to the European Conventions and protocols and C. the European Conventions and protocols are dependent upon the Committee of Ministers and the Bioethics Committee. The Court can put a stop to the isolation of the Council of Europe from the global discourse on the rights of persons with disabilities, by embracing the CRPD and the Vienna Convention, and by applying the provisions of the CRPD as amendments to the existing legislation within the Council of Europe. ENUSP respectfully suggests that the Court declare that **Oviedo Article 7 (and 6) is in violation of international law, and therefore its ensuing provisions, including the Draft Additional Protocol, are not permissible**, through which the Court would align itself with the view of the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe.

21. Of course, people with psychosocial disabilities have the right to care and support, and legal protection to prevent the deprivation of their human rights, and to realize the same right of everyone to the enjoyment of the highest attainable standard of physical and mental health. But the Draft Additional Protocol itself is not about providing care and support. It is not oriented towards methods to foster recovery or well-being, and is not offering protection. It is about coercive measures that are more of a criminal law nature, including deprivation of liberty, exclusion and control. Persons with disabilities report that these experiences of coercion cause fear and trauma. Testimonies and research[44], [45], [46], [47], [48], [49], [50] show that coercion does not result in safety or wellbeing, but brings suffering without support, and therefore the risk of problems and escalation only increases. Coercion can therefore never be considered as an appropriate part of health care.

C. COVID-19: STATE OF EMERGENCY – institutionalization versus true protection

22. The allowance of coercive interventions under Article 7 (and 6) carries a wrong signal to Council of Europe Member States. The number of preventable deaths of persons with psychosocial disabilities in

[44] "16 years old, depressed and tortured in psychiatry" A testimony on forced psychiatric interventions constituting torture and ill-treatment, 10 December 2014, Jolijn Santegoeds, the Netherlands
[45] WHO Quality Rights Initiative
[46] EU FRA: Legal capacity of persons with intellectual disability and mental health problems, 2013 https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf
[47] LUMOS – transforming care systems around the world: https://www.wearelumos.org/what-we-do/
[48] MHE Mapping and Understanding exclusion https://mhe-sme.org/wp-content/uploads/2018/01/Mapping-and-Understanding-Exclusion-in-Europe.pdf
[49] Peter Stastny, Peter Lehmann, Alternatives beyond Psychiatry, 2007, Peter Lehmann Publishing
[50] Morrison, L. J., Talking back to psychiatry: The psychiatric consumer/survivor/ex-patient movement, 2005, Routledge

hospitals, prisons and institutions due to coercion, violence and neglect, have always been strikingly high[51],[52],[53],[54], even before the recent Covid-19 pandemic. Currently, this emergency crisis situation clearly shows that institutions are not safe places. On the contrary, they are places of isolation, loneliness, risk and death where approximately 1.3 percent of the European population currently lives, i.e., far over 9 million people. The number of COVID-related deaths in institutions is many times higher than the number of COVID-related deaths among the population in the community[55],[56],[57], which points to the unequal protection of life of persons with psychosocial and other disabilities. In addition, the lockdown measures have impacted the people in institutions far more than the average population, and has sharpened and exacerbated the existing injustices in all layers of the community[58],[59], including increased marginalization, poverty and suffering. The call for deinstitutionalization by the PACE and the CRPD Committee reflects the need to take urgent action to save lives, and this leading example of making efforts to promote the highest standard of human rights protection should be recommended by this Court. All citizens, including all persons with disabilities, have an equal right to safety, liberty, support, inclusion, respect. Every person has the right to life. The horrible impact of the COVID 19 pandemic on the population of institutions, combined with the lessons we ought to have learned from European history necessitate taking action, and the only right response now is to stop segregating people in institutions against their will, where they are at higher risk of violence, abuse, and death.

23. **What is needed is a moratorium on forced admissions, on the use of seclusion and restraint, the administration of forced medication and other forced interventions, to be instituted with due urgency.**

D. HUMAN RIGHTS BASED APPROACH – recovering rights

24. The impact of the COVID-19 pandemic on people in institutions proves that the first part of ECHR article 5.1.e regarding the *"lawful detention of persons for the prevention of the spreading of infectious diseases"* cannot be maintained since it does not protect the human rights of those concerned. The second part of ECHR 5.1.e concerning detention "*of persons of unsound mind"* is countered and superseded by the CRPD. The third part of ECHR 5.1.e on detention of *"drug addicts, alcoholics and vagrants"* should be dealt with under regular civil and criminal law, and the provision of shelter and support should be provided in line with the CRPD. Therefore, article 5.1.e is outdated and obsolete, and must be repealed and amended in compliance with the provisions of the CRPD. Articles 6 and 7 of the Oviedo Convention are similarly outdated and have also been superseded by the CRPD. The vicious sequence of existing discriminatory policies and practices contained in Article 7, 6, and article 5.1.e. must be repealed, and the Draft Additional Protocol must be considered as an action that would defeat the purpose of the CRPD. Considering the active duty of States to prevent torture and ill-treatment, active guidance is needed to bring Europe closer to the realization of the abolition of practices that amount to torture and ill-treatment here. The Court has an active role in ensuring respect for human rights, and should **lead by example and implement the CRPD in full** in all its work.

25. It must be recalled that the existence of support needs should not result in the deprivation of rights. Assessment of mental capacity with a focus on "deficiencies" and the exclusion which follows constitute

[51] WHO Information sheet on premature death of people with severe mental disorder
[52] UK: NHS to look into deaths of 100,000 mental health patients a year, 27 November 2018, the Guardian https://www.theguardian.com/society/2018/nov/27/nhs-deaths-mental-health-patients-england
[53] Czech Republic: Mortality Gap associated with mental disorders in the Czech Republic https://www.nudz.cz/files/pdf/protocol_mortality_final.pdf
[54] Denmark: Død i Psykiatrien (Death in Psychiatric Care)
[55] COVID-19 Disability Rights Monitor report https://www.covid-drm.org/statements/covid-19-disability-rights-monitor-report-highlights-catastrophic-global-failure-to-protect-the-rights-of-persons-with-disabilities
[56] European Disability Forum: COVID-19 resources http://www.edf-feph.org/covid19
[57] OHCHR COVID-19 and the Rights of Persons with Disabilities https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25942&LangID=E
[58] UN: A disability-inclusive response to COVID-19 https://www.un.org/en/coronavirus/disability-inclusion
[59] Joint statement: COVID-19 and persons with psychosocial disabilities http://www.chrusp.org/home/covid19

de facto disability based deprivation of rights, since the person's symptoms and personal needs are interpreted to justify a loss of rights. The CRPD requires the development of a support system with a focus on inclusion, well-being and recovery and not on risks, control and security measures. In accordance with the CRPD, mental health support should be based on respect for all human rights, including legal capacity, liberty and freedom from torture and abuse, and focus on supported decision making instead of substitute decision making.

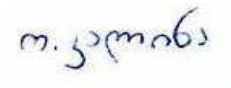
26. For centuries, as European citizens we have been facing a situation where our rights are systematically violated in the most repugnant and unacceptable way, and where the current systems of protections, including national legislation based on the old paradigm of protection and charity serve as a wide gate to human rights violations. The CRPD provides us with the opportunity to eliminate the coercive "last resort measures" which in fact have ended up becoming common practices.[60] It also gives us the opportunity to transform the system into one which ensures inclusion and respects the human rights and dignity of all. The issue of resources must not serve as justification to allow current violations of human rights in the mental health system. Too many people continue to suffer from unlawful detention in psychiatric facilities and institutions, from abuse and deprivation of their legal capacity and liberty, including torture and systematic rape[61]. This cannot continue in the 21st century, when humanity has come to a much better understanding of the meaning of human rights and their application to vulnerable groups. The CRPD serves as the foremost protection of our rights, and we ask the Court to acknowledge this and work to align the instruments of the Council of Europe with the latest human rights international standards. A proper administration of justice is needed to actively remedy and prevent these gross and systemic human rights violations, provide reparation to victims, and shift the paradigm in mental health care in order to end exclusion and discrimination. The Court should lead the way for the Member States of the Council of Europe, and beyond, to ensure no one is left behind in the enjoyment of human rights.

E. REQUEST TO THE COURT – regarding Oviedo Article 7 in light of international law

27. In order to actually realize the protection of the dignity and human rights of all persons in Council of Europe Member States, ENUSP respectfully requests the Court issue an Advisory Opinion on the protection of human rights under Article 7 recognizing the need for:
    a. Full implementation of the UN Convention on the Rights of Persons with Disabilities,
    b. Absolute prohibition of involuntary interventions of persons with psychosocial disabilities or so-called "mental disorders",
    c. A unified definition of dignity in line with the CRPD across the Council of Europe,
    d. A unified definition of torture in line with the CRPD across the Council of Europe,
    e. Acceptance of the provisions of the CRPD to amend the human rights standards within the Council of Europe and its Member States, based on the Vienna Convention,
    f. Acknowledgement that ECHR 5.1.e, and Oviedo Article 7 (and 6) are in violation of international law, and therefore any ensuing provisions, including the Draft Additional Protocol, are not permissible.

It is less a question of legal competence, but rather it is a question of willingness to truly respect the rights of persons with psychosocial disabilities through European mechanisms applicable in the Council of Europe's Member States. With that willingness, the Court could make a difference in the lives of millions of persons and their families by making this real change happen.

Yours respectfully,



Olga Kalina
Chair

[60] A/HRC/40/54, Deprivation of liberty of persons with disabilities, Catalina Devandas-Aguilar, UN Special Rapporteur on the Rights of Persons with Disabilities, 11 January 2019.
[61] https://validity.ngo/2019/12/09/moldova-doctor-guilty-of-raping-18-women-compensation-ordered/