



President of the Court  
European Court of Human Rights  
Council of Europe  
67075 Strasbourg-Cedex  
France

29 September 2020  
*By registered mail*

**Re: Request for leave to submit written comments, pursuant to Articles 47 and 36 § 2 of the Convention, and Rules 82 and 44 of the Rules of Court in the proceedings related to the request for an advisory opinion by the Council of Europe Committee on Bioethics under Article 29 of the Oviedo Convention**

Dear Mr. President,

1. I am writing on behalf of the European Network of (ex-)Users and Survivors of Psychiatry (ENUSP) to request leave to submit written comments as a third party intervener in the above advisory opinion proceedings. I submit this request pursuant to Articles 47 and 36 § 2 of the European Convention on Human Rights (“the ECHR”) read in conjunction with Rules 82 and 44 of the Rules of Court.
  - i. *The Court has discretion to grant permission to third party intervenors when applying Article 47, ECHR*
2. According to the press release issued by the Court on 23 June 2020 (ECHR 185 (2020)), in December 2019, the Court received a request for an advisory opinion from the Council of Europe’s Committee on Bioethics (DH-BIO) under Article 29 of the Convention on Human Rights and Biomedicine (“the Oviedo Convention”). The request comprises two distinct questions relating to the legal interpretation of Article 7 of the Oviedo Convention. The Grand Chamber will examine the request and has decided to do so in application, by analogy, of Chapter IX of the Rules of Court concerning advisory opinions under Article 47 of the ECHR. This is the first time that the Court has received a request for an advisory opinion under Article 29 of the Oviedo Convention and there is, therefore, no precedent under the procedure, including for the submission of third party interventions.
3. The Bioethics Committee was set up “under the direct authority of the Committee of Ministers” under Article 17 of the Statute of the Council of Europe and is a subordinate Committee to the Committee of Ministers. As such, it is arguable that Article 47, ECHR applies, not by analogy but directly to these proceedings.



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4. In any event, Rule 82 of the Rules of Court applies to proceedings under Articles 47, 48 and 49, ECHR. Rule 82 states clearly that the Court shall apply other provisions of the Rules “to the extent to which it considers this to be appropriate”. This confers on the Court the discretion to apply Rule 44 on third party interventions to proceedings under Article 47 if “appropriate”.
5. ENUSP submits that it is not only appropriate but essential that the Court grant permission to intervene in this hitherto unused procedure which brings before the Court questions of vital importance relating to the scope and interpretation of Articles 7 and 26, Oviedo Convention *per se* and in light of other prevailing international law on the rights of persons with disabilities, notably but not limited to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), to aid the Court in resolving the questions posed in the request from DH-BIO.

### II. Time limit

6. Rule 44 § 4(a) of the Rules of Court, with reference to Rule 44 § 3, stipulates that, in cases to be considered by the Grand Chamber, requests to intervene must be submitted by a person concerned who is not the applicant not later than twelve weeks from the notification to the parties of the decision of the Chamber to relinquish jurisdiction in favour of the Grand Chamber or the decision of the panel of the Grand Chamber to accept a request by a party for referral of the case to the Grand Chamber. Rule 85 entitles the President of the Court to lay down the time-limits for filing written comments or other documents in proceedings under Article 47. Furthermore, Rule 44 § 4(b) allows the President of the Chamber to exceptionally extend the time limit “if sufficient cause is shown”. In relation to the new advisory opinion procedure under Protocol No. 16, Rule 44 § 7 of the Rules of Court states that the President of the Court shall determine the time limits for third party interveners.
7. In the instant case, ENUSP submits that the rules on time limits set out in Rule 44 cannot be applied by analogy with any degree of legal certainty for persons wishing to intervene. Potential intervenors have no clear date when the Grand Chamber decided to accept the request to provide the opinion and there was no public information made available which would have enabled concerned persons to submit a request to intervene until, at the earliest, publication of the press release on 23 June. ENUSP therefore requests the President of the Grand Chamber to exercise his discretion to accept this request to intervene without reference to a specific time limit or to determine a specific, reasonable time limit in the interests of the proper administration of justice.

### III. It is “appropriate” and in the interests of the proper administration of justice to grant this request to intervene

8. It is clear that, while advisory opinions under Article 29, Oviedo Convention are not binding on States Parties (of the ECHR or the Oviedo Convention), they are “highly authoritative”



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(Convention on Human Rights and Biomedicine, Preparatory Work on the Convention, CDBI/INF (2000) 1, Strasbourg, 28 June 2000, at pg. 119) and therefore of significant importance.

9. Both Article 36, ECHR on third party interventions and Rule 44 § 3 stipulate that the President of the Court (or Chamber) may grant leave to intervene “in the interests of the proper administration of justice”. The recently adopted Protocol 16 to the ECHR on advisory opinions, while not directly applicable in the present proceedings, nonetheless recognises the importance of comments by third parties in advisory opinion proceedings by including an explicit jurisdiction in Article 3 for the Court to permit interventions “in the interest of the proper administration of justice”.
10. The Court has a history of granting leave to non-governmental organisations to intervene in advisory opinion proceedings under Protocol No. 16: for example, Advisory Opinion of 29 May 2020 concerning the use of the “blanket reference” or “legislation by reference” technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court (*Request no. P16-2019-001*) and Advisory Opinion of 10 April 2019 concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation (*Request no. P16-2018-001*).
11. Under Protocol No. 16, advisory opinions are sought in the course of existing proceedings which form the context for the request. The Court has access to a summary of the arguments of the parties as well as a statement of the requesting court’s own views and any analysis it has made. Further, submissions may be received from the various parties involved (as well as third party intervenors). The Court thus has a rounded view of the arguments, facts, context and implications of its opinion on the exercise of the rights engaged.
12. The request from DH-BIO utilises a procedure before the Court which has never before been used. In this respect, it is a novel and unique development in the functioning of the Court and the Court should benefit from the perspective of civil society on the implications of the application of this procedure for the protection of human rights in the Council of Europe. In this procedure, there are no parties or courts to provide the Court with alternative or additional context and information. Opposing arguments or points of view are not only helpful in adversarial proceedings but can provide essential context to assist in the provision of a meaningful outcome. Civil society rely on the Court for the protection of their rights and the rights of individuals whom they represent before the Court. Permitting civil society organisations, such as ENUSP, to intervene can provide the Court with an important perspective on how the exercise of its advisory jurisdiction under the Oviedo Convention can affect their work and the protection of the rights of people we represent.



13. In addition, the request concerns the 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”. The non-consensual treatment of persons with psychosocial disabilities (including those referred to as having a “mental disorder”) is dealt with in detail by the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), the interpretative guidance provided by the Committee in its General Comments, and the concluding observations of the Committee since its adoption in 2010, including the Guidelines on UN CRPD article 14 which were issued to the European Union in 2015<sup>1</sup>. Every Council of Europe Member State bar one has ratified the UN CRPD and is bound by its provisions in parallel with their obligations under the ECHR and the Oviedo Convention. Any interpretation of Article 7 of the Oviedo Convention will require the Court to carefully consider the relation between the Oviedo Convention and the UN CRPD (as well as the ECHR), the question of hierarchy of norms and conflicts between international treaties. ENUSP submits that it is imperative that disability-rights organisations, including ENUSP, be permitted to provide information to the Court on the status of the UN CRPD in international law and its interaction with other human rights instruments, including Article 7 of the Oviedo Convention.
14. The European Convention on Human Rights adopted in 1950, like all human rights instruments, has invited dynamic interpretation<sup>2</sup>. 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. ENUSP has expertise on interpreting the human rights enshrined in the United Nations Convention on the Rights of Persons with Disabilities and the relation to articles of the ECHR, and can provide detailed information on dynamic interpretation, to further ensure proper administration of justice.
15. This request has been submitted to the Court during the course of negotiations on the drafting of an Additional Protocol to the Oviedo Convention on forced treatment and detention which intimately engages the provisions of Article 7. The drafting process has been the subject of prolonged and heated debate in DH-BIO, the Committee of Ministers, the Parliamentary Assembly of the Council of Europe, and with the active participation of a wide range of academics, experts and civil society. The drafting of the Protocol and its proposed content has generated significant concern among disability rights advocates, as well as from the UN CRPD

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<sup>1</sup> See Annex (p38-50) to the Bi-Annual report of 2015/2016 A/72/55.

<sup>2</sup> 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).



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Committee itself, which calls on States to oppose the Draft<sup>3</sup>. The opinion requested from the Court would have compelling influence on this debate of which the Court should be aware.

16. Finally, a denial of the opportunity to gather input from civil society organisations, including ENUSP, on each of these weighty considerations would greatly impede the proper administration of justice in this matter and result in the Court providing an opinion on the basis of incomplete and *parti pris* information.

#### IV. Relevant expertise and experience of the European Network of (Ex-)users and Survivors of Psychiatry (ENUSP)

17. ENUSP is the sole European independent federation exclusively composed of and representing (ex)users and survivors of psychiatry in 32 Member States of the Council of Europe, people who have a unique view of the mental health system based on their experience. ENUSP was founded in 1991 and has been officially registered as an NGO since 1998. ENUSP works regularly with other NGOs, such as the World Network of (Ex)Users and Survivors of Psychiatry (WNUSP), the European Disability Forum (EDF), Mental Health Europe (MHE) and the European Patients' Forum (EPF). Since its foundation in 1991, ENUSP has campaigned for the full human rights and dignity of mental health service users, ex-users and survivors of psychiatry and advocated for the abolition of laws and practices that discriminate against persons with psychosocial disabilities. 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. ENUSP has expertise in the European state of affairs regarding human rights protection of persons with psychosocial disabilities. As an independent representative organisation of mental health service users, ex-users and survivors of psychiatry at European level, ENUSP represents a traditionally marginalized group in society – people with psychosocial disabilities – whose voices are routinely silenced by the views of mental health professionals and the dominant majority. ENUSP represents people who would be directly affected by the Draft Additional Protocol to the Oviedo Convention and with our lived experience of actual practices across Europe that are currently in debate, ENUSP has valuable expertise to offer on current practices and their implications. Furthermore, ENUSP can provide information on fostering true universality of human rights in regards to both the UN CRPD and ECHR, as well as how they cannot be ensured through the Draft Additional Protocol to the Oviedo Convention. ENUSP has experience on matters of forced treatments and forced institutionalization including guardianship regimes, community treatment orders, involuntary placement, forced and coerced administration of medication, forced electroshock treatment, seclusion, isolation and restraint practices including net beds, cage beds, plastic cages and binding with belts, forced anti-conception and sterilization and other non-consensual interventions practiced today throughout the world

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<sup>3</sup> 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 at the CRPD 20th session (27 August - 21 September 2018)



under the pretext of mental health care. ENUSP also has expertise on the effectiveness and ineffectiveness of various procedures surrounding the topic, including diagnostics, assessments, evaluations, monitoring and the use of safeguards, comprising *inter alia* applicable minimal standards, customs, time frames, the vulnerability to abuse, violence and exploitation, the barriers posed to access to justice or right to remedy, and barriers to the realization of equal enjoyment of human rights on an equal basis with others. The voice of persons with lived experience cannot be substituted by health care providers, family members or others who speak for us and thus it is ENUSP before anybody else that should be able to express our representative opinion before the Court on this important matter.

V. ENUSP's interest in the present case

18. ENUSP's advocacy is informed by lived experience and motivated by collective awareness on the fundamental difference between experiencing coercion and experiencing care. ENUSP raises awareness on the need to combat the misclaimed beneficence of harmful practices. ENUSP advocates against discriminatory and harmful practices which cause severe pain and suffering, as well as deep fear and trauma in victims, including deprivation of legal capacity, exclusion from the community, deprivation of liberty, indefinite detention, intrusive medical interventions such as forced drugging, irreversible interventions such as forced electroshock treatment (ECT), and other disabling practices such as restraint and solitary confinement, which are all commonly practiced against persons with psychosocial disabilities in mental health settings. Several UN bodies, such as the UN CRPD Committee<sup>4, 5, 6, 7</sup>, UN Special Rapporteurs, on Torture and other Cruel Inhuman or Degrading Treatment or Punishment<sup>8, 9, 10</sup>, on the Rights of Persons with Disabilities<sup>11, 12, 13</sup>, and on the Right of Everyone to the

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<sup>4</sup> 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.

<sup>5</sup> UN CRPD General Comment no.1 on Equal recognition before the law, Committee on the Rights of Persons with Disabilities, 11 April 2014.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.



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Enjoyment of the Highest Attainable Standard of Physical and Mental Health<sup>14,15</sup>, have stated repeatedly that these practices should not be characterized as treatment, but rather constitute forms of ill-treatment and torture, a position which ENUSP supports. ENUSP has expertise to offer which can contribute to banning torture and ill-treatment from Europe, which is being committed against persons with psychosocial disabilities throughout the Member States of the Council of Europe. Considering the importance of ending torture and ill-treatment, ENUSP requests leave to intervene.

19. ENUSP particularly has a history in advocating against involuntary placement and involuntary treatment, which affects the most fundamental of rights, including the right to legal capacity, respect for physical and mental integrity, liberty and the right to freedom from torture. The fact that forced institutionalization and forced treatment of persons with psychosocial disabilities is still currently authorized under the laws of all European countries to various degrees, and under certain binding Council of Europe instruments, such as the European Convention on Human Rights article 5.1.e, and the Oviedo Convention, while running contrary to the UN CRPD<sup>16</sup>, illustrates gross and systemic human rights violations, which cannot be left unremedied<sup>17</sup> but require active prevention. The discriminatory international and domestic legislation does not only authorize 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. 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. Civil society, including ENUSP, has crucial expertise to offer to expose, stop and further prevent these gross and systemic human rights violations in Europe, and therefore ENUSP requests leave to intervene.

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<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> EU FRA report: Involuntary placement and involuntary treatment of persons with mental health problems (2012)

<sup>17</sup> [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#)



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20. In the past ENUSP has submitted and supported several third party interventions to the Court<sup>18, 19, 20</sup>, which illustrates our interest in the topic.
21. In addition, ENUSP has actively commented on and opposed the Draft Additional Protocol together with many other representative organisations at various stages of the process, which further illustrates our active engagement in the topic.
22. Pending permission to intervene, if the Court permits, ENUSP first and foremost requests the Court to refrain from issuing an Advisory Opinion on the scope and interpretation of Articles 7 and 26, Oviedo Convention, since in the current scenario this would be seen as constituting an attempt to undermine the efforts of the UN CRPD Committee to ensure that States Parties to the Convention which are Council of Europe Member States fully implement their treaty obligations under the UN CRPD.
23. As a human rights NGO with particular expertise in mental health practices as well as alternatives to forced interventions, ENUSP respectfully requests leave to assist the Court by providing information on the following issues:
  - A. The implementation of the UN CRPD with regards to the rights of persons with psychosocial disabilities in Europe
  - B. Banning torture, ill-treatment and any form of coercion
  - C. The rights-based approach to mental health support, based on freedom of choice and self-determination.
24. On the issues outlined above, and in view of its mission, objectives and experience, ENUSP has a clear and compelling interest and concern pursuant to Article 36(2) of the European Convention on Human Rights and Rule 44 of the Rules of Court. ENUSP believes that submitting a third-party intervention in this case it will provide valuable assistance to the Court “in the interests of the proper administration of justice”. We would be pleased to provide the Court with any further information it may find useful relating to ENUSP’s proposed intervention.

Yours sincerely,

Olga Kalina  
Chair

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<sup>18</sup> Third Party Intervention by ENUSP, EDF, WNUSP & IDA Koroviny V Russia, APPLICATION NO. 31974/11, 18 March 2013.

<sup>19</sup> Third Party Intervention by ENUSP, EDF, WNUSP & IDA on Stankov v Bulgaria, APPLICATION NO. 25820/07, 8 March 2013

<sup>20</sup> Third Party Intervention by ENUSP, EDF, WNUSP & IDA on Mihailovs v Latvia, APPLICATION NO. 35939/10, 13 February 2012