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ENUSP calls on the Council of Europe to ban coercion

Advocacy overview on the continuing fight against the Draft Additional Protocol to the Oviedo Convention

Since 2014 the Council of Europe Bioethics Committee has been working on the Draft Additional Protocol to the Oviedo Convention. In response, the European Network of (Ex-)Users and Survivors of Psychiatry (ENUSP) repeatedly expressed concerns to this Committee, emphasizing that all forced psychiatric interventions violate the UN Convention on the Rights of Persons with Disabilities (CRPD). So far, the Bioethics Committee has not stopped developing the draft. This advocacy overview will shed light on this deeply concerning situation, and after an introduction of the legal background and an overview of advocacy undertaken, it will become clear how change can be achieved to end the highly problematic situation of human rights violations in mental health care throughout Europe and how important it is to unweave the chain of these instruments.

Introduction to the Council of Europe

The Council of Europe, founded in 1949, is currently composed of 47 Member States, and is unified by its aim to achieve greater unity between its Members to safeguard and realize the ideals and principles which are our common heritage, and to maintain and further realize human rights and fundamental freedoms. The European Convention on Human Rights and Fundamental Freedoms (ECHR) was signed a year later in 1950 and binds all Member States of the Council of Europe.

Yet a worrying derogation from human rights in today's world

In view of these ideals, it may seem surprising that the Council of Europe has failed to evolve in line with the highest international human rights standards since, as accepted and enshrined for example in the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) dating from 2008 and ratified globally by 182 countries, including 46 of the 47 Member States of the Council of Europe.

Nowhere is this more evident than in the current plans of the Bioethics Committee of the Council of Europe for a ***“Draft Additional Protocol to the Oviedo Convention concerning the protection of human rights and dignity of person with regard to involuntary placement and involuntary treatment within mental health care services”***. Obviously, the very title of this proposed instrument is an oxymoron itself, which unfortunately is symbolic of the European culture of human rights violations found in mental health care systems.

The reasons behind the Draft Additional Protocol to the Oviedo Convention

The idea of such a protocol is based on a resolution of the Committee of Ministers dating back to 2004 (prior to the UN CRPD) instructing the Council of Europe to begin work on a protocol regarding “the protection of the human rights and dignity of persons with mental disorder”. In 2011, the assignment to draft a text for such an additional protocol was forwarded to the Council of Europe’s Bioethics Committee, and for many years since then, its members have compiled the “draft” additional protocol, which provides for a number of procedural methods allowing and condoning the use of coercion and force in mental health care in Council of Europe Member States.

In a 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".

HOW DID WE GET TO THIS POINT? A DIVE INTO EUROPE'S PAST

Legislative background

Underlying this plan for the Draft Additional Protocol and at its core are two previous instruments of the Council of Europe, which have been defining the approach to mental health care within the Council of Europe:

- the 1950 [European Convention on Human Rights \(ECHR\)](#), binding all 47 of the Council of Europe Member States, which under Article 5.1.e. still allows for "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" and
- the 1997 [Oviedo Convention on Human Rights and Biomedicine](#), ratified by only 29 of the 47 Council of Europe Member States, which under Article 7 on the "Protection of persons who have a mental disorder" states: "Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, a person who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where, without such treatment, serious harm is likely to result to his or her health."

These two Conventions have set the tone of the European interpretation of human rights and mental health for too many years, by legitimizing widespread detention and coercion and presenting these harmful methods as supposed solutions under the "right to health".

Results of the past century: Increasing detention and coercion under ECHR 5.1.e and Oviedo articles 6 and 7

Impunity

These European standards pose significant barriers for anyone submitting complaints about deprivation of their liberty or harm by coercion under mental health laws, because detention based on a psychosocial disability or mental health problem is then perceived as "lawful", and subsequently the courts would not find that the law was violated or that a breach of their own interpretation of human rights has been committed. Impunity at the European level solidifies impunity at the national level.

The excuse of "Lack of alternatives"

Since coercion has gone hand in hand with impunity at all levels for decades, States have been allowed leeway to use cheap and harmful measures of social control and avoid investments in the development of supportive mental health services based solely on free and informed consent. Legislation seeks to justify coercion "in the absence of alternatives". Yet, the absence of alternatives appears to dominate the current situation in most countries, which has made the supposed "last resort option" of involuntary treatment a widespread default practice, causing thousands of people to suffer. The claimed "absence of alternatives" has become an excuse which stymies all further efforts.

Decades of torture instead of dignity

The European assumption that forced interventions would "protect dignity and human rights" do not correspond at all with the lived experience of those subjected to these practices and detained on this basis.

In many places in our “developed” countries, there are still horrible and unacceptable situations in institutions. Persons with disabilities report that coercion causes fear and trauma which is recognized by the United Nations. Their testimonies and research 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. Forced interventions do not truly protect the human rights of those concerned, but amount to torture and ill-treatment and have nothing to do with dignity.

In conclusion, it has never been about us and our needs.

ECHR article 5.1.e and Oviedo 6 and 7 were drafted and ratified in the past century and are not informed by the CRPD. These European provisions have maintained the large-scale harmful institutionalization and forced psychiatric interventions as a default practice in Europe by allowing for the “lawful detention of persons of unsound mind” and “intervention without consent”. This approach has resulted in gross and systemic human rights violations throughout Europe.

The Draft Additional Protocol is in line with this ancient European mind set and as such is unlikely to result in any motivation to change or to change in practice. The Draft Additional Protocol presents a further tunnel vision on repressive approaches and ignores the overwhelming evidence from lived experience and professional studies on the adverse effects of detention and coercion on wellbeing and mental health of the person concerned.

A NEW PARADIGM EMERGED IN THE 21st CENTURY

The UN CRPD counters the tide

As most of you know, new hope emerged throughout the world in the 21st century, when the UN Convention on the Rights of Persons with Disabilities (UN CRPD) entered into force in 2008, reinforcing the principle that all universal human rights and fundamental freedoms are applicable to all people, including people with disabilities on an equal basis with others. The UN CRPD stipulates that there can be no discrimination and no deprivation of liberty or coercion exercised on the basis of disability, including on the grounds of psychosocial disability or a mental health problem. The CRPD Committee has stated repeatedly that: **“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”**. Furthermore, any support or health care must be based on free and informed consent of the person concerned.

Through the development of these human rights principles, mental health based coercion is now recognized as torture and ill-treatment by an increasing number of UN bodies, and this recognition has brought the European challenges regarding human rights and mental health to the spotlight.

The UN 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. Ratification of the UN CRPD creates an obligation for State Parties to refrain from acts that would defeat the purpose or object of the UN Convention.

The Council of Europe fails to implement the UN CRPD

Clearly, the UN CRPD calls for abolition of forced treatment, which makes the sequence of legislation based on the doctrine of detention and coercion under ECHR 5.1.e, Oviedo 6 and 7, and found as well in the draft additional protocol a violation of international human rights law. Yet, so far, the European set of damaging

provisions based on ECHR 5.1.e. and Oviedo 6 and 7, has not been repealed. The *Draft Additional Protocol to the Oviedo Convention* shows a further move drifting in the opposite direction of the UN CRPD.

A two-track human rights system?

In respect of universal human rights, the mechanisms approved by the Council of Europe must now set course towards abolition of coercion in health care. There should not be a “two-track” human rights system of conflicting standards, which would create a difference between European and universal human rights. The draft additional protocol would create an option to use lower standards and undermine the full implementation of the UN CRPD in Europe. This will lead to confusion among policymakers and significant delay if not the full stop of CRPD-informed mental health reforms that are underway. It is essential to guide the implementation of the UN CRPD with unified standards, and to respect the basic principles of justice, i.e. respecting human rights enshrined in UN Conventions.

Universal human rights

As a crucial fact, the Council of Europe explicitly committed itself to uphold the human rights and principles of the United Nations, e.g. by references under the European Convention on Human Rights, and by article 53 of the Vienna Convention (1980). Therefore the leading authoritative interpretation of human rights must be that of the United Nations framework, which actually gave birth to the European Convention on Human Rights (ECHR, 1950). This implies that the UN standards must supersede any conflicting European standards. Moreover, the UN framework contains universally applicable standards in itself, since the cornerstone of human rights is an inclusive application of the fundamental values and principles without derogation for anyone. All UN member states (including all Council of Europe member states) agreed to commit themselves to these universally applicable standards. Yet, the Draft Additional Protocol clearly presents lower and other standards, including promoting practices that amount to torture and ill-treatment, which is incompatible with the UN CRPD.

New paradigm

The CRPD approach is focussing on inclusion whereas the Draft Additional Protocol is focussing on exclusion. Receiving coercion and detention is actually the full opposite to true support for psychosocial wellbeing and the journey of recovery. Instead of deprivation of liberty, it is needed to create a variety of options for support in the community which respects the will and preferences of the person concerned and is based on the free and informed consent of the person concerned. With the right kind of support everyone can flourish. Adequate supportive systems in the community still need development across all Member States of the Council of Europe, and action needs to be taken to realize the right to liberty and security of persons with psychosocial disabilities and to prevent deprivation of liberty. Ending institutionalization and ending coercion are key priorities for change, and significant investments and changes need to be made to enable a culture shift in the mental health care system, from exclusion to support in the community, and based on the free and informed consent of the person concerned.

ADVOCACY

The European Network of (Ex-)Users and Survivors of Psychiatry (ENUSP) has been advocating against forced psychiatric violence since it was founded in 1991, informed by the testimonies and lived experience of our members. See for example the [Declaration of Dresden Against Coerced Psychiatric Treatment, 7 June 2007](#)¹. ECHR Article 5.1.e has always been highly problematic for us.

¹ <http://enusp.org/wp-content/uploads/2016/06/ddec.pdf>

To further spark the view on transforming mental health support services, a number of practical illustrations of Good Practices recommended by ENUSP are listed at ENUSP website:

<https://enusp.org/2020/01/05/updated-list-of-good-practices-recommended-by-enusp/>

In regards to the Draft Additional Protocol, ENUSP has expressed these deep concerns to the Council of Europe Bioethics Committee repeatedly over the last six years during which the draft protocol has been in the drafting stage, emphasizing that forced psychiatric interventions violate the UN CRPD, which contains the latest and highest human rights standards which apply to all persons with disabilities, including psychosocial disabilities.

As history with the ECHR 5.1.e. has already shown us, the provisions entailed by the draft additional protocol would only be leading to forced hospitalization and treatment, community treatment orders, guardianship and institutionalization in Europe. At present, the UN CRPD provides a solution, and brings binding momentum to change this horrific situation, so as to ensure a future with human rights for all persons with disabilities.

What is needed

Immediate abolition of torture and ill-treatment

It must be recalled 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, and a transformation must be made urgently to scale up supportive systems which ensure all fundamental human rights and freedoms on an equal basis with others. Only good, non-coercive practices should be legal in Europe.

Moratorium on forced treatments, institutionalization and guardianship

In light of the Council of Europe Member States' human rights obligations under the UN CRPD, Council of Europe instruments should no longer be used as grounds for detention of persons with disabilities. Instead, a moratorium on forced admissions, on the use of seclusion and restraint, the administration of forced medication, forced interventions of all types and substitute decision-making must be instituted with due urgency.

Replace discriminatory laws, including ECHR 5.1.e, by CRPD-based legislation

In spite of the current insights to human rights and mental health, many members of the Bioethics Committee still seem to believe that coercion is a "necessary evil" which they intend to "regulate" in an attempt to bring more unity and make it "less worse" for some States – levelling down standards in an outdated approach in contradiction with the UN CRPD.

In 2014, the Bioethics Committee launched a public consultation on the draft. Since then, in numerous correspondence and statements ENUSP explained its opposition to the draft, demanding the Bioethics Committee to drop the draft and put an end to coercive psychiatric practices in Europe.

A long list of attempts to engage with the Bioethics Committee:

2014

- ENUSP letter to the Bioethics Committee to oppose the draft additional protocol

2015

- ENUSP raised the issue of large-scaled detention and coercion in Europe, and the problematic position of the Council of Europe mechanisms to the CRPD Committee through the [shadow report on the EU, 14 July 2015](#)² and the [List of Issues on EU](#)³, 4 March 2015.
 - [ENUSP submission to the public consultation on the draft additional protocol](#), 15 November 2015⁴
- 2016
- [ENUSP Video message](#) on 23 May 2016⁵ (input to Council of Europe’s Disability Strategy 2017-2023)
- 2017
- [Joint Statement of ENUSP and MHE](#) against draft additional protocol⁶
 - Oral statement of ENUSP at Bioethics Committee meeting on 7 June 2017⁷,
 - [ENUSP news message “the way to hell is paved with good intentions”](#)⁸
 - Oral Statement of ENUSP at Bioethics Committee meeting on 17 October 2017
 - [Submission of ENUSP to the public consultation on the draft additional protocol](#), 6 December 2017⁹
- 2018
- [Public campaign](#) to address decision makers launched by ENUSP on 11 April 2018¹⁰ including Model letters and Resources to campaign
 - [Open letter of EDF, including ENUSP and others, to the Secretary General of the Council of Europe, Bioethics Committee and the Human Rights Commissioner: “disability organization urging to withdraw the draft additional protocol”](#), 14 May 2018¹¹
 - [Launch of video \(MHE\) compilation of statements of ENUSP and others against Draft Additional Protocol at UN Consultation on Human Rights and Mental Health](#), 26 May 2018¹²
 - Oral statement of ENUSP at the PACE meeting in Strasbourg, 9 October 2018 and lobbying of permanent representatives
 - [Handouts distributed](#) by ENUSP at the PACE-meeting in Strasbourg on 9 October 2018 and the Global Ministerial Mental Health Summit London on 10 October 2020¹³
- 2019
- Oral Statement of ENUSP at Bioethics Committee meeting on 6 June 2019¹⁴
 - Oral Statement of ENUSP at Bioethics Committee meeting on 19 November 2019
 - Oral statements of ENUSP at Bioethics Committee Roundtable on 26 November 2019 (Stakeholder consultation meeting for the scoping of a study on Good Practices in Mental Health Care).
- 2020
- [Open letter by EDF, ENUSP and others to Bioethics Committee and Committee of Ministers](#) on 15 September 2020¹⁵

² <https://enusp.org/2016/09/07/enusp-shadow-report/>

³ <https://enusp.org/2016/09/04/enusp-raises-questions-for-eu-review-by-crpd-committee-2/>

⁴ http://enusp.org/wp-content/uploads/2016/03/ENUSP_response-to-draft-Protocol-Oviedo_involuntary-2015.pdf

⁵ <https://youtu.be/UIJpFjLbuqI>

⁶ http://enusp.org/wp-content/uploads/2016/03/Statement-Oveido-Convention-ENUSP-MHE_Final.pdf

⁷ <https://punkertje.waarbenjij.nu/reisverslag/4982459/coe-meeting-on-draft-additional-protocol>

⁸ <https://enusp.org/2017/06/11/additional-protocol-the-way-to-hell-is-paved-with-good-intentions/>

⁹ http://enusp.org/wp-content/uploads/2016/03/ENUSP_response-to-draft-Protocol-Oviedo_2017.pdf

¹⁰ <https://enusp.org/2018/04/18/enusp-started-campaign-against-the-draft-additional-protocol-to-the-oviedo-convention/>

¹¹ <http://www.edf-feph.org/newsroom/news/disability-organisations-urge-council-europe-withdraw-addition-protocol-oviedo>

¹² <https://youtu.be/cHMQq7eyvYE>

¹³ https://www.internationaldisabilityalliance.org/sites/default/files/handout_ap_oviedo_final_en.pdf

¹⁴ <https://punkertje.waarbenjij.nu/reisverslag/5055646/dh-bio-meeting-on-draft-additional-protocol>

¹⁵ <http://edf-feph.org/newsroom/news/open-letter-council-europes-committee-ministers-and-committee-bioethics-regarding>

- Oral statement at Bioethics Committee meeting on 4 November 2020

“Superior orders of the Committee of Ministers”

the Bioethics Committee claims they are not in a position to change anything to the scope of the assignment, since the Bioethics Committee was simply requested by the Committee of Ministers through Rec(2004)10¹⁶ to produce a *Draft Additional Protocol to the Oviedo Convention* with the scope of regulating involuntary placements and treatment. In 2014 the Bioethics Committee started a public consultation, yet, they systematically ignored the many responses that called for dropping the draft, by claiming it is the Committee of Ministers who decides on the scope. The debate is rigidly limited to the predefined margins of the paternalistic medical model approach and its impure scope and inappropriate concept of mental health care, such as allowing for substitute decision-making, forced institutionalization and forced treatments. This makes meaningful participation as stakeholders in the debate with a different view de facto impossible.

Various Open Joint Letters to highest authorities

Since 2014, ENUSP has not only targeted the Bioethics Committee, but also other authorities within the Council of Europe, to alert them on the clash of standards between the UN CRPD and the Draft Additional Protocol. A number of Open Letters to the Committee of Ministers and the Secretary General of the Council of Europe have been sent by European disability organizations, amongst others:

- [Open letter by EDF ENUSP and others to Bioethics Committee and Committee of Ministers](#) on 15 September 2020¹⁷
- [Open letter of EDF, including ENUSP and others, to the Secretary General of the Council of Europe, Bioethics Committee and the Human Rights Commissioner: “disability organization urging to withdraw the draft additional protocol”](#), 14 May 2018¹⁸

Also other bodies of the Council of Europe were informed by joint letters on the matter, such as the Conference of INGOs, the Commissioner for Human Rights, and various Committees.

Not giving up

Despite the lack of change coming from the Bioethics Committee, ENUSP, together with the European Disability Forum (EDF), Mental Health Europe (MHE), Inclusion Europe, Autism Europe, EASPD, Human Rights Watch and others have continuously made efforts to engage with the Bioethics Committee and other bodies of the Council of Europe, to stop the draft additional protocol to the Oviedo Convention. At stake is the future quality of mental health care across Europe. Political willingness to respect the global discourse of human rights could change the situation for millions of people in Europe.

ENUSP is not the only organisation to hold strong to this position. This Draft Additional Protocol has been rejected by many experts, including:

United Nations experts calling to withdraw the draft additional protocol

- September 2018, Statement by the [UN Committee on the Rights of Persons with Disabilities calling States parties to oppose the draft Additional Protocol to the Oviedo Convention](#)¹⁹.

¹⁶ Recommendation No. Rec(2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder and its Explanatory Memorandum

¹⁷ <http://edf-feph.org/newsroom/news/open-letter-council-europes-committee-ministers-and-committee-bioethics-regarding>

¹⁸ <http://www.edf-feph.org/newsroom/news/disability-organisations-urge-council-europe-withdraw-addition-protocol-oviedo>

¹⁹ <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx>

- 9 October 2018, Statement by the [UN Special Rapporteur on the Rights of Persons with Disabilities](#) at PACE’s joint hearing on protecting the rights of people with psychosocial disabilities with regard to involuntary measures in psychiatry ([DOC](#))²⁰
- 29 september 2017, [Joint Communication from UN Special Procedures](#), from the mandates of the Working Group on Arbitrary Detention; the Chair of the Committee on the Rights of Person with Disabilities; the Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, sent to the Council of Europe Secretary General concerning the draft additional protocol to the Oviedo Convention ²¹
- 7 June 2017, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, [Report on the Right to mental health, “World needs “revolution” in mental health care – UN rights expert”](#)²²
- 10 October 2015, UN Special Rapporteur on Disability and UN Special Rapporteur on the Right to Health: [“Dignity must prevail” – An appeal to do away with non-consensual psychiatric treatment - World Mental Health Day 2015](#)²³

High level opposition to the draft

Statements against the draft additional protocol were also made by other high level experts, such as the [European Union Agency for Fundamental Rights \(FRA\)](#)²⁴ in response to the public consultation on the Draft additional protocol in 2015, and by the [European Network of National Human Rights Institutions \(ENNHRI\) on 20 November 2018](#)²⁵, [French Ombudsman \(Défenseur des droits\) on 5 December 2018](#)²⁶, and the [Equality and Anti-Discrimination Ombud of Norway in 2015](#)²⁷

Opposition within the Council of Europe itself

The Council of Europe Commissioner for Human Rights, Dunja Mijatović, also repeatedly raised her concerns and said **“the Council of Europe is going the wrong direction with the drafting of an Additional Protocol”** and stressed that “the Council of Europe should abstain from elaborating norms which are in conflict with global human rights standards or which could weaken the protections provided in those standards”.

- [Comments by Dunja Mijatović, Council of Europe Commissioner for Human Rights](#) on the draft Additional Protocol, on 8 November 2018²⁸
- [Speech by Dunja Mijatović, Council of Europe Commissioner for Human Rights at PACE’s joint hearing on protecting the rights of people with psychosocial disabilities with regard to involuntary measures in psychiatry, on 9 October 2018](#)²⁹

On top of all that, the Parliamentary Assembly of the Council of Europe (PACE) has taken also a stance against the draft additional protocol, with the [Resolution and recommendation on ending coercion in](#)

²⁰ http://www.edf-feph.org/sites/default/files/oviedo_protocol_hearing_4_oct.docx

²¹ <https://rm.coe.int/letter-un-bodies-to-sg/16808e5e28>

²² <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21689&LangID=E>

²³ <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16583&LangID=E>

²⁴ <https://rm.coe.int/16805ab6fe>

²⁵ <http://ennhri.org/news-and-blog/ennhri-statement-on-the-draft-additional-protocol-to-the-oviedo-convention/>

²⁶ https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=18202

²⁷ <https://rm.coe.int/16805ab6fe>

²⁸ <https://rm.coe.int/comments-by-dunja-mijatovic-council-of-europe-commissioner-for-human-r/16808f1111>

²⁹ <https://rm.coe.int/16808ee5fb>

[mental health: the need for a human rights-based approach, June 2019](#)³⁰- unanimously adopted by PACE plenary, [26 June 2019](#)³¹

In addition, the Council of Europe's [Committee on Equality and Non-Discrimination and Committee on Social Affairs, Health and Sustainable Development](#) provided comments on the draft Additional Protocol to the Oviedo Convention, concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment (2018) and actually cited ENUSP.

Amongst many other civil society organizations, Human Rights Watch has also repeatedly warned against the draft additional protocol:

- [“What does the Council of Europe have against persons with disabilities?”](#)³² November 2020
- [“Council of Europe: A Threat to Rights of People With Disabilities”](#)³³ 21 November 2018
- [“Bulgaria stands up for human rights”](#)³⁴, 6 September 2018
- [Human Rights Watch Letter to Mr. Jagland on the Additional Protocol to the Oviedo Convention](#)³⁵, 4 September 2018

Widespread opposition

The above is only a selection of the communications that took place over the past years concerning the clash between the draft additional protocol and the UN CRPD. On the website of the European Disability Forum (EDF) a list is provided with comments and correspondence sent by a number of organisations, see: <http://www.edf-feph.org/withdraw-additional-protocol-oviedo-convention>

WHAT IS NEXT AHEAD WITH THE DRAFT AND WHAT CAN BE DONE ABOUT IT?

The Bioethics Committee still maintains a derogation from the provisions of the UN CRPD.

In spite of such widespread opposition, the Bioethics Committee has still decided to proceed with the finalization of the draft additional protocol to the Oviedo Convention, in violation of the UN CRPD and in total disregard of the opinion of representative civil society and disability organisations, human rights bodies, and high level experts who have expressed their opposition.

“Compendium of Good Practices”

In May 2019, the Bioethics Committee announced a study on Good Practices in mental health care to compile a “Compendium of Good Practices”. The Bioethics Committee Secretariat prepared a “Concept note on a study on good practices in mental health care – How to promote voluntary measures” (sic). At a first glance, this seems like progress, since it is a first crack in the tunnel vision on coercion in mental health at the Council of Europe, for the first time opening up to a human rights based approach to mental health.

However, this decision to compile a “Compendium of Good Practices” of no binding legal value seems simply an effort to appease civil society, with a draft additional protocol remaining alongside that would still allow for coercion. The doctrine under ECHR article 5.1.e shows clearly that any leeway for coercion and detention leads to increasing use thereof. Adding a document with theoretical Good Practices, without

³⁰ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27701&lang=en>

³¹ <https://pace.coe.int/en/news/7545>

³² <https://www.hrw.org/news/2020/11/04/what-does-council-europe-have-against-people-disabilities>

³³ <https://www.hrw.org/news/2018/11/21/council-europe-threat-rights-people-disabilities>

³⁴ <https://www.hrw.org/news/2018/09/06/bulgaria-stands-rights-people-disabilities>

³⁵ <https://www.hrw.org/news/2018/11/21/human-rights-watch-letter-mr-jagland-additional-protocol-oviedo-convention>

providing resources or implementation guidance, while leaving the option to cover up a lack of support by coercion and detention, is unlikely to bring any change in actual practices. Maintaining the draft with procedures on coercion, and issuing a Compendium of Good Practices in parallel, rather seems like an attempt to take the discussion away from the controversial issue on “regulating coercion when coercion needs to be banned”. Yet first and foremost, as long as the draft additional protocol still attempts to authorize coercive practices, it is unacceptable to ENUSP, regardless of the amount of ‘pleasant theories’ or human rights rhetoric they use for the decoration of these blatant human right violations.

Overall, the question is: How much difference will this guidance paper on Good Practices actually make, as it will not be a binding standard, not give resources, and there are other bodies such as the CRPD Committee and WHO Quality Rights team that are already setting CRPD-informed standards nowadays, along with our representative organisations. Conflicting standards must be avoided. And other bodies such as WHO have already revoked outdated standards such as the MI-principles of 1991 (superseded by the UN CRPD, see WHO Quality Rights) and are in fact already compiling a similar yet global compendium on Good Practices. ENUSP remains very critical to the role of the study undertaken by the Council of Europe. Our offer and the offer of other representative organisations to be involved in determining criteria of “good practices” and in an advisory and scientific role were left unanswered by the Bioethics Committee.

In November 2020, Dr. Piers Gooding was contracted to collect the Good Practices and compile a compendium, which is expected to be published in early 2021. ENUSP counts on the UN CRPD be taken into account in the study and the envisioned Compendium.

Advisory Opinion of the European Court of Human Rights

The latest ploy of the Bioethics Committee has been to petition the European Court of Human Rights for an Advisory Opinion regarding the planned draft, while the opposition to the draft additional protocol keeps on increasing, including in the mentioned Council of Europe PACE resolution to end coercion, and by the statements by the Council of Europe High Commissioner for Human Rights.

In June 2019³⁶, the Bioethics Committee announced to prepare a requested for an Advisory Opinion from the European Court of Human Rights (ECtHR) as provided for under Article 29 of the Oviedo Convention to obtain the Court’s view on the interpretation of Article 7 of the Oviedo Convention which contains the provisions relating to non-consensual interventions carried out on a person with a “mental disorder”. The request was sent in December 2019, and its receipt by the Court was announced in their press release of 23 June 2020.

This “Oviedo Article 29” procedure is an unprecedented procedure, and the procedural aspects never used before were unclear and were not communicated to the public.

“Article 29 – Interpretation of the Convention

The European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the present Convention at the request of:

- the Government of a Party, after having informed the other Parties;
- the Committee set up by Article 32, with membership restricted to the Representatives of the Parties to this Convention, by a decision adopted by a two-thirds majority of votes cast. “

The request for an Advisory Opinion of the European Court of Human Rights is a concerning development, since the Court’s jurisprudence reflects the old paradigm composed of old standards such as ECHR 5.1.e,

³⁶ See report of DH Bio meeting, 5-6 June 2019, by Jolijn Santegoeds, ENUSP Board member, <https://punkertje.waarbenijj.nu/reisverslag/5055646/dh-bio-meeting-on-draft-additional-protocol>

dating from far before the UN CRPD came into existence. It is unlikely that a new paradigm will emerge through their lens, where the doctrine of detention as a response to psychosocial support needs has still been present.

However, the Court also has the power to depart from the course of history at this very moment, by deciding to invoke Article 53 of the Vienna Convention on the Law of Treaties (VCLT, 1980), which stipulates that any regulation may be “void when it conflicts with a peremptory norm of general international law”. This would result in the provisions under ECHR Article 5.1.e, Oviedo 6 and 7, being rendered ineffective and amended with the provisions of the CRPD. Subsequently any ensuing provisions such as the draft additional protocol would have to be seen as in violation of international human rights law, and need to be withdrawn.

ENUSP submitted a request for leave to intervene to the European Court of Human Rights

ENUSP has thus been forced to engage with the European Court to again make our opinion known. ENUSP first submitted a **Request for leave to intervene** on 2 October 2020, which was rejected by the Court on 22 October 2020 on the grounds of an unclear and uncommunicated procedural time limit. ENUSP nevertheless submitted a **Request to the Court to reconsider the decision** and simultaneously submitted a **Third Party intervention on the Advisory Opinion** on 18 November 2020.

ENUSP’s recent Third Party Intervention on the Advisory Opinion to the European Court of Human Rights puts forward the above arguments on how the existing Council of Europe legislative system fails to protect human rights, and offers the Council of Europe a way out of this contradiction by using the CRPD provisions as amendments to the outdated parts of the European Convention on Human Rights and the Oviedo Convention.

Several other organizations also submitted Third Party Interventions to the European Court of Human Rights, including: CHRUSP, EDF (together with the International Disability Alliance, Mental Health Europe, Inclusion Europe, EASPD and Autism Europe), and Validity. The Advisory Opinion of the European Court of Human Rights is expected to be issued in the first half of 2021.

Hope

The vicious sequence of existing discriminatory policies and practices allowed by these European instruments being continued now with 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, 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 a role in ensuring respect for human rights, and should lead by example and implement the CRPD in full in all its work.

ENUSP has hope that the Court will make the right decision, and turn the tide in Europe.

Bioethics Committee to proceed with voting

The Bioethics Committee “finalized” the draft at the end of 2020 and is expected to vote on approval of the final draft among the Committee members in June 2021. After this approval by the Bioethics Committee, the text of the Draft Additional Protocol to the Oviedo Convention would be sent to various bodies for final comment and to the Committee of Ministers.

The current website of the Council of Europe Bioethics Committee does provide some general information, including the Draft version of 2018, see <https://www.coe.int/en/web/bioethics/psychiatry>

Final decision to be made by the Committee of Ministers

The final decision on the Draft Additional Protocol to the Oviedo Convention will be taken by way of a vote by the Committee of Ministers of the Council of Europe, comprising the Ministers of Foreign or European Affairs of the various Member States, whose names are listed here:

<https://www.coe.int/en/web/cm/members-cm>

It is unpredictable what the various Ministers will do. On the one hand is the Parliamentary Assembly of the Council of Europe (PACE) which recently adopted the Resolution to end coercion in mental health unanimously <https://pace.coe.int/en/news/7545>. That is hopeful.

On the other hand, the Ministers of Foreign Affairs also have to deal with their respective States, and many states are not yet at the forefront of the UN CRPD and are just beginning to implement this international Convention. The human rights based vision under national policies may be lacking, with mental health laws still common in Europe, despite States Parties' obligations under the UN CRPD. It is therefore unpredictable which position the various Ministers will take: will they be in favour or against the involuntary confinement of persons with disabilities who need support?

Public pressure, and especially publicity are necessary to make it known that these Ministers are responsible for the future of mental health care in Europe, and that it is now important to be loyal to the UN treaty. Will we finally build a caring system based on respect and support for well-being and for our basic rights? Or is the only thing people in crisis can hope for is "a procedure to deprive them of their rights and freedoms"?

How you can support this cause:

You can help by joining ENUSP's campaign to reach out to your Minister of Foreign or European Affairs, the Minister of Health who has an influence, the Ombudsman and the National Prevention Mechanism against Torture in your country, your National Disability Council, National Human Rights Council, other NGOs or associations of lawyers or working in the mental health field, rights of LGBTI persons or vulnerable groups and the members of the Bioethics Committee from your country to oppose the Draft Additional Protocol to the Oviedo Convention and convince the Ministers to vote against it in the future.

ENUSP invites you to use the materials available on our web site for this purpose:

<https://enusp.org/2018/05/29/draft-additional-protocol-to-the-oviedo-convention-related-materials/>

The model advocacy letters in various languages (April 2018) can be found here:

<https://enusp.org/2018/04/18/enusp-started-campaign-against-the-draft-additional-protocol-to-the-oviedo-convention/>

Also the Open letter by EDF, ENUSP and others to the Committee of Ministers and Bioethics Committee on 15 September 2020³⁷ can be used as an inspiration to communicate to government officials.

A new wave of our public advocacy campaign on #WithdrawOviedo and #EndForcedTreatment is on its way. Please visit www.enusp.org regularly to stay informed.

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³⁷ <http://edf-feph.org/newsroom/news/open-letter-council-europes-committee-ministers-and-committee-bioethics-regarding>

A final urgent appeal

In 2020, the Covid-19 virus hit the world hard, requiring Europe take action urgently to truly protect the lives of persons with disabilities.

Burning issue: COVID 19 and the right to life

The number of preventable deaths of persons with psychosocial disabilities in hospitals, prisons and institutions due to coercion, violence and neglect, has always been strikingly high 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. The Covid-19 pandemic sharpens the need for deinstitutionalization and true protection of the human rights of persons with psychosocial and other disabilities, as opposed to the widespread deprivation of rights and liberties through institutionalization and forced treatments under the pretext of health care.

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.

Efforts must be made to end institutionalization, and governments must take action, now.

The need for change of the paradigm of protection and dignity is evident.
Please help us raise awareness.