

# IDA

## INTERNATIONAL DISABILITY ALLIANCE

### Member organizations:

Disabled Peoples' International, Inclusion International,  
International Federation of Hard of Hearing People,  
Rehabilitation International, World Blind Union,  
World Federation of the Deaf, World Federation of the DeafBlind,  
World Network of Users and Survivors of Psychiatry  
European Disability Forum  
Arab Organization of Disabled People

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### **Position Paper on the Convention on the Rights of Persons with Disabilities (CRPD) and Other Instruments**

#### Introduction

The International Disability Alliance upholds the Convention on the Rights of Persons with Disabilities as the universal standard for the human rights of all persons with disabilities that takes precedence over previous instruments. It is a binding treaty that will enter into force for States Parties on May 3, 2008, together with its Optional Protocol authorizing individual complaints, and it reflects the most recent consensus of the United Nations General Assembly on the subject matter of the human rights of persons with disabilities. As such, it is relevant as a guide to interpretation of other treaties and obligations under international law, all of which must be applied without discrimination based on disability.

There exist many disability-related declarations of the UN General Assembly, disability-related provisions in other UN General Assembly declarations, disability-related treaties or other instruments of regional organizations, disability-related provisions in other treaties or other instruments of regional organizations, general comments by treaty bodies and jurisprudence of regional courts bearing on disability

issues. The provisions in these standard-setting documents demonstrate an evolution of the norms that have now found legal expression in the Convention on the Rights of Persons with Disabilities. In some cases, this evolution has benefited from the leadership of persons with disabilities to reject derogatory language and limitations on the exercise of rights that reflected the level of public awareness at the time earlier instruments were drafted. The Convention on the Rights of Persons with Disabilities represents a shift in the understanding of disability from a medical to a social model that recognizes the limitations created by a disability not as a problem of the person but rather a problem of barriers in society.

The United Nations Secretariat for the Convention on the Rights of Persons with Disabilities has called attention to criticisms of one earlier document, the “Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,” and noted that the Convention now supersedes the earlier standards to the extent of any conflict. In this paper, we aim to provide guidance on particular areas in which the Convention supersedes earlier standards contained in that document as well as others. It is a preliminary exploration and is not intended to be exhaustive.

### Equal exercise of human rights

The principle of non-discrimination in the exercise and enjoyment of human rights is fundamental, and applies to all persons with disabilities.

The UN Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care contains a general limitations clause that qualifies the exercise of all rights by persons labeled with mental illness, including rights guaranteed under the International Covenant on Civil Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture and other universally applicable human rights instruments. This is superseded by CRPD Article 4, in which governments "undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination", and is best

understood as being void ab initio since it cannot be reconciled with general principles of non-discrimination and the universality of human rights.

### Legal Capacity

Legal capacity is an inherent right that is fundamental to the dignity of persons with disabilities and the exercise and enjoyment of all other rights. Legal measures such as interdiction and guardianship that prevent persons with disabilities from acting on their own behalf must be replaced by provision of support that does not have the power to override a person's will but facilitates the exercise of autonomy, as provided by CRPD Article 12.

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities states that determinations of incapacity do not constitute discrimination. This is inconsistent with CRPD Article 12, which requires states parties to recognize that persons with disabilities "enjoy legal capacity on an equal basis with others, in all aspects of life."

The UN Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care states that it is permissible to deprive an individual of legal capacity by reason of mental illness, and authorize a personal representative to make decisions in his or her place. This is superseded by CRPD Article 12, which furthermore requires governments to provide access to support in exercising legal capacity and establish safeguards to prevent abuse of such measures, in particular to ensure respect for the rights, will and preferences of the person.

The UN Standard Minimum Rules on the Treatment of Prisoners states that persons found to be "insane" should not be held in prison, but removed to a mental institution. To the extent this refers to insanity as a defense to imputability of a criminal offense, it is superseded by CRPD Article 12, which requires the recognition of legal capacity in all aspects of life, and is not limited to civil matters. (In doing away with the insanity defense, it is important to simultaneously abolish the death penalty and other harsh measures

that have traditionally been avoided by means of this defense, at least by some defendants). The provision on removing persons found to be "insane" to a mental institution is also superseded by Articles 14 and 19, which do not permit compulsory institutionalization based on disability.

### Liberty

Liberty is a fundamental right that must be recognized and enforced without discrimination. When separate standards or procedures are used to deprive people with disabilities of their liberty (such as compulsory institutionalization or hospitalization) this violates the equal enjoyment of human rights. CRPD Articles 3, 14, 19 and 25 are relevant.

The European Convention on Human Rights states in Article 5.1(e) that "unsound mind" is a permissible ground for deprivation of liberty. This is inconsistent with CRPD Article 14, which requires states parties to ensure that "the existence of a disability shall in no case justify a deprivation of liberty" and by CRPD Article 19, which guarantees the right to live in the community and to choose where and with whom to live, on an equal basis with others.

Human Rights Committee General Comment No. 8 recognizes involuntary commitment to psychiatric institutions as a form of detention for which court control is required. While this was a useful advance at the time, it assumes that disability is a legitimate ground for deprivation of liberty, and this is inconsistent with CRPD Article 14. Rather than requiring court control of the detention, it should be considered unlawful per se.

The UN Declaration of Principles for the protection of Persons with Mental Illness and for the Improvement of Mental Health Care states that a person may be admitted involuntarily to a mental health facility if certain criteria are met. This is superseded by CRPD Article 14, as well as CRPD Article 25(d), which requires that health care be provided to persons with disabilities equally with others, "including on the basis of free and informed consent."

The UN Standard Minimum Rules on the Treatment of Prisoners states that prisoners with "mental diseases and abnormalities" must be placed in special institutions under medical management, and during their stay in prison must be under medical supervision. This is superseded by CRPD Articles 14 and 25(d). It also conflicts with Article 3, in particular the principle of "acceptance of persons with disabilities as part of human diversity and humanity".

### Physical and mental integrity

People with disabilities have the right to refuse medical or other interventions that they consider harmful or do not want for any reason. It is a human right to preserve one's physical and mental integrity, irrespective of the opinions of medical professionals about the desirability of an intervention. Intentional interventions that disrespect this right may amount to torture or cruel, inhuman or degrading treatment or punishment. CRPD Articles 3, 12, 15, 16, 17 and 25 are relevant.

The European Court of Human Rights held in *Herczefalvy v. Austria* that forcible administration of mind-altering drugs cannot be torture or inhuman and degrading treatment if it is a "medical" or "therapeutic necessity," exercising some judicial oversight but deferring to medical authorities including their use of forcible measures on "patients who are entirely incapable of deciding for themselves." This holding is inconsistent with CRPD Articles 12, 15, 17 and 25(d). As noted above, Article 12 recognizes the right of all persons with disabilities to make their own decisions, and to have those decisions respected by others. This precludes the use of forcible means to carry out health care decisions contrary to the person's will. Article 15 obligates governments to protect persons with disabilities from torture and cruel, inhuman or degrading treatment, on an equal basis with others. There is growing evidence that nonconsensual administration of psychiatric drugs and procedures is a form of torture or cruel, inhuman or degrading treatment, which cannot exclude its application to persons with disabilities. Furthermore, Article 17 obligates governments to respect the physical and mental integrity of the person on an equal basis with others; and Article 25(d) requires that health care be provided to persons with disabilities equally as with

others, including on the basis of free and informed consent. These two norms interrelate, as shown in the EU Charter of Fundamental Rights (not yet entered into force), Article 3, which highlights free and informed consent in the biological and medical contexts as an aspect of the right to respect for physical and mental integrity.

Human Rights Committee General Comment No. 20 states that the ICCPR Article 7 prohibition of torture applies to "patients in medical institutions," and also that "persons incapable of giving consent" and those under any form of detention may not be subjected to medical or scientific experimentation that may be detrimental to their health. This was an important step forward and remains valid, with the exception that protection against nonconsensual experimentation can no longer be premised on incapacity but needs to be addressed in a framework of supported decision-making and possibly stronger protections for all.

Committee on Economic, Social and Cultural Rights General Comment No. 14 states that coercive medical treatments may be applied for the treatment of mental illness. This is inconsistent with CRPD Article 25(d), which requires health care to be provided to persons with disabilities equally with others on the basis of free and informed consent.

The UN Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care endorses numerous exceptions to the general principle that such care is to be provided on the basis of free and informed consent. This is superseded by CRPD Article 25(d) and by Article 12, which requires states to recognize that persons with disabilities enjoy legal capacity on an equal basis with others (and thus the right to personally exercise free and informed consent, rather than have it exercised on their behalf by a substitute decision-maker).

The UN Standard Minimum Rules on the Treatment of Prisoners allows for restraints to be used on prisoners "on medical grounds," which are not further described. To the extent this refers to medical labeling and management of prisoners based on disability, it is superseded by CRPD Articles 14, 15, 17 and 25(d).

## Right to live in the community

The right to live in the community regardless of the degree of support a person needs is fundamental to inclusion and participation in society and necessary to the exercise of other rights.

The UN Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care recognizes a right to live in the community but only "to the extent possible". No such limitation is envisioned by CRPD Article 19, which guarantees the right to live in the community with choices equal to those of others, including the right to choose where and with whom to live and the right to not be compelled to live in any particular living arrangement. The principle of "full and effective participation and inclusion in society" in CRPD Article 3 and the reference to people with disabilities who need more intensive support in CRPD preambular paragraph (j) reinforce the unequivocal nature of this right.

## Braille

The only script that could be read by blind persons independently and with symbols of the language in question, which is applicable to all languages in the world, is Braille. The use of Braille is the only tool that allows blind persons to realize literacy skills on an equal basis with others.

The UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities refers to Braille only once, in Rule 5.6 among other means to give persons with visual impairments access to written information and documents. The CRPD mentions the need of recognizing Braille in several places, particularly in Articles 2, 9, 21 and 24, in language that stresses the use of Braille as the means of communication for blind persons and their social integration. The CRPD also goes further than the Rules with respect to audio, large print and ICT technology.

## Education

Previous commitments such as the Declaration of Salamanca and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities moved towards guaranteeing education to children with disabilities. However, the CRPD clarifies previous documents and how the needs of different students are to be met. The CRPD stipulates that children with disabilities are not to be excluded from the general education system on the basis of disability; that they have the same right to free primary education and to secondary education on an equal basis with others, as well as a right to general tertiary education, vocational training, adult education and lifelong learning.

The CRPD further guarantees the right to be included and to receive the individual support required, within the general education system, to facilitate their effective education. However, the CRPD also requires that effective individualized support measures be provided in environments that maximize academic and social development, consistent with the goal of full inclusion. Among other things, this means: facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development. This means for deaf and blind children a learning environment where Sign language or Braille, the principles of bilingual education to Deaf students and learning methods adapted to blind people, as well as teachers who use sign language, are part of the learning environment in a natural way; and a recognition of the need for supports for hard of hearing students with disabilities to be full participants in the learning environment which includes the need for assistive listening devices, captioning, a good acoustical environment, effective communication and instruction strategies and a welcoming attitude.

For deaf, blind and deafblind students, and in some cases for hard of hearing students as well, the option for separate learning environments must be understood as necessary to “maximize academic and social development”. The Standard Rules supported separate learning environments for these students under the rubric of “special education,” but “special education” also implied separation from the general educational system of the country and resulted in segregation and deprivation of the right to education for many students with disabilities. In contrast to this, CRPD Article 24 keeps all students within the general education system and allows for diverse ways of meeting their needs.

### Other Issues

Other areas that have been suggested for further analysis where the CRPD may supersede earlier instruments are in relation to definition of disability; women with disabilities; children with disabilities; accessibility; habilitation and rehabilitation; and employment.

There are also areas where the Convention needs to be read in conjunction with previous instruments where they do not conflict, and earlier instruments may be more precise.

### Sign language

The convention is highly relevant for Deaf persons as it recognizes sign languages as languages and considers them equal to spoken languages (Article 2) and guarantees a right to get professional sign language interpreters (Article 9). It also guarantees a right to interact in sign languages, to get information and to express oneself in sign languages, including in official interactions (Article 21b).

Furthermore, it urges governments to recognize sign languages (Article 21e) and to facilitate the use of sign languages and learning in sign languages (Article 24.3b) as well as promote the linguistic identity and deaf culture of the Deaf community (Article 30.4).

In most cases the Convention on the Rights of Persons with Disabilities goes slightly further into details than the Standard Rules

on the Equalization of Opportunities for Persons with Disabilities (1993) or the Salamanca Statement and Framework for action on Special Needs Education (1994). However, in some cases the wording can be more precise in the Standard Rules than in the new Convention and therefore should be read together with the CRPD.

Rules 6.8 and 6.9 of the Standard Rules place importance on the education of children in a Sign Language environment and the need for education in their own groups. This is less clear in the CRPD.

Rule 5.7 of the Standard Rules states that sign language should be used in educating Deaf children in their families and communities. The CRPD does not mention that the family of a Deaf child should receive teaching in sign language. However, CRPD Article 24 on Education is clearer than Rule 6 of the Standard Rules on learning sign languages and the right to use sign language at school.

The Salamanca Statement and Framework for Action on Special Needs Education also remains highly relevant for the teaching of Deaf children.

## Conclusion

This summary has only addressed selected issues where international treaties or other instruments have spoken on the human rights of persons with disabilities, where there is a substantial discrepancy between the earlier instrument and the Convention on the Rights of Persons with Disabilities, or where the earlier instrument remains relevant to the concerns of persons with disabilities and does not conflict with the new obligations. It is a preliminary assessment and has not addressed every issue that might be included here. It also has not addressed the many areas where the Convention has developed in a positive way standards that already existed in the international human rights regime, or has clarified for the first time the specific obligations in a disability context. It is intended as a preliminary indication of areas where the international human rights regime needs to be aware of a shift in the relevant norms as a result of the new Convention. We hope it will be of assistance to those

interested in how the Convention impacts on pre-existing standards and look forward to more comprehensive work on its full implications.