International Disability Alliance (IDA)

Member Organisations:

Down Syndrome International, Inclusion International, International Federation for Spina Bifida and Hydrocephalus, International Federation of Hard of Hearing People, World Blind Union, World Federation of the Deaf, World Federation of the DeafBlind, World Network of Users and Survivors of Psychiatry, Arab Organization of Disabled People, African Disability Forum, ASEAN Disability Forum, European Disability Forum, Red Latinoamericana de Organizaciones no Gubernamentales de Personas con Discapacidad y sus familias (RIADIS), Pacific Disability Forum

IDA submission on the CAT Committee’s draft General Comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22

**A- INTRODUCTION**

The International Disability Alliance (IDA) is a unique, international network of global and regional organisations of persons with disabilities. Established in 1999, each IDA member represents a large number of national organisations of persons with disabilities (OPDs) from around the globe, covering the whole range of disability constituencies. IDA thus represents the collective global voice of persons with disabilities counting among the more than 1 billion persons with disabilities worldwide, the world’s largest – and most frequently overlooked – minority group. Currently comprising eight global and six regional OPDs, IDA’s mission is to advance the human rights of children and adults with disabilities as a united voice of organisations of persons with disabilities utilising the Convention on the Rights of Persons with Disabilities (CRPD) and other human rights instruments. IDA also aims to promote the effective implementation and compliance with the CRPD within the UN system and across the treaty bodies.

IDA welcomes the initiative of the Committee Against Torture (hereinafter CAT Committee or the Committee) to call for comments to its draft revised general comment No. 1 (2017) on the implementation of article 3 of the Convention in the context of article 22. We would highly encourage the CAT Committee to take into account the legal standards of the Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”), and related issues, particularly the pervasive practices of forced institutionalisation and treatment.

We argue that the risk of forced institutionalisation, which entails the risk of being subjected to torture and ill-treatment, should be explicitly considered when assessing the risk of being subjected to torture and ill-treatment in the context of the application of Article 3 of the Convention against Torture. In a first part, we will refer to key provisions of the CRPD, mainly Articles 14, 15 and 19, and current practices that violate them. In a second part, we will address directly the draft of revised general comment on Article 3 of CAT, to finish with our recommendation and a set of concrete drafting proposals.

**FORCED INSTITUTIONALISATION OF PERSONS WITH DISABILITIES AS A VIOLATION TO THE RIGHT TO LIBERTY AND SECURITY: THE ABSOLUTE BAN ON DEPRIVATION OF LIBERTY UNDER ARTICLE 14 OF THE CRPD**

Institutionalisation of persons with disabilities, particularly of persons with psychosocial or intellectual disabilities, continuous to be a persistent and widespread practice in most countries of the world, despite being contrary to international human rights standards, notably those emanating from the CRPD. The CRPD Committee has consistently upheld an absolute ban to forced placement on the basis of an actual or perceived impairment,[[1]](#footnote-1) throughout its vast jurisprudence adopted in almost all its concluding observations,[[2]](#footnote-2) general comment no. 1 (2014) on equal recognition as a person before the law,[[3]](#footnote-3) its interpretative statement on CRPD article 14 on liberty and security of the person,[[4]](#footnote-4) and views adopted regarding individual communications.[[5]](#footnote-5)

Despite this human rights standards, **laws and regulations** throughout the world still allow for deprivation of liberty of persons with disabilities on the basis of impairments, including in combination with other grounds such alleged dangerousness and alleged need for care. Forced institutionalisation also takes place when a person with disability is deprived of her legal capacity in application of national legislation, but in contradiction to CRPD Article 12.

In criminal legislation and practice, many persons with disabilities considered “unfit to stand trial” or “non-criminally responsible” are subjected to special procedures leading to deprivation of liberty without being declared guilty of a crime, in cases for undetermined period of time.[[6]](#footnote-6)

**TORTURE AND ILL-TREATMENT IN INSTITUTIONAL SETTINGS, AS VIOLATION OF THE PROHIBITION OF TORTURE AND ILL-TREATMENT UNDER CAT AND CRPD**

Persons with disabilities committed under institutional care are very frequently subjected to forced medical and psychiatric treatments and interventions, including electroconvulsive treatment (ECT), isolation, physical and chemical restraints, acts that may amount to, or be considered, as torture, cruel, inhuman or degrading treatment, according to the CRPD Committee’s interpretation of CRPD’s articles 14 and 15, as well as that of other UN mechanisms.[[7]](#footnote-7)

Among these practices that violate the rights to personal integrity, freedom from torture and ill-treatment and the principle of free and informed consent, **forced sterilizations and forced abortions** are still allowed by laws and regulations and practiced on women and girls with disabilities. In its report focused on health care settings, the former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez, has stressed that “forced abortions or sterilizations carried out by State officials in accordance with coercive family planning laws or policies may amount to torture.”[[8]](#footnote-8) This expert has called upon States to “Enforce the prohibition of torture in all health-care institutions, both public and private, by, inter alia, declaring that abuses committed in the context of health-care can amount to torture or cruel, inhuman or degrading treatment or punishment.”[[9]](#footnote-9)

**ARTICLE 19 OF THE CRPD: THE RIGHT TO LIVE INDEPENDENTLY AND BE INCLUDED IN THE COMMUNITY**

Article 19 of the CRPD is a key provision of the Convention and, to some extent, reflects the goal of the human rights based approach to disability. It requires States to ensure persons with disabilities the choice on where and with whom to live, to provide support services they request, including personal assistance services, and to make all services in the community accessible to and inclusive of persons with disabilities.

Most States parties to the CRPD are still very far from complying with CRPD article 19 on living independently and being included in the community, meaning there is no provision of community services allowing for persons with disabilities to have access to services and supports which they may require due to their disabilities. This lack of support services may result in institutionalization as the only alternative left to families and communities to “take care of” persons with disabilities.

**B- COMMENTS FOR INCLUDING RISK OF FORCED INSTITUTIONALISATION AS A GROUND FOR NON-REFOULEMENT IN CAT COMMITTEE’S REVISED DRAFT GENERAL COMMENT NO. 1 (2017)**

**ARTICLE 15 OF THE CRPD ON “FREEDOM FROM TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT”**

Footnote number 3 of the draft revised general comment refers to the definition of torture set out in article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT). Para 2 of Article 1 states: “This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”

In consequence, we would encourage the CAT Committee to consider article 15 of the CRPD on “Freedom from torture or cruel, inhuman or degrading treatment or punishment”[[10]](#footnote-10) and the jurisprudence established by the CRPD Committee.

Acts that might amount to torture, cruel, inhuman or degrading treatment against persons with disabilities happens more frequently within institutional placement or commitment, particularly in psychiatric facilities or similar institutions. For example, the CRPD Committee adopted in its concluding observations to Austria[[11]](#footnote-11), the following under articles 14 Liberty and Security of the Person, and 15 Freedom from Torture and other Cruel, Inhuman or Degrading Treatment:

29. The Committee is deeply concerned that Austrian laws allow for a person to be confined against his or her will in a psychiatric institution where they have a psychosocial disability and it is forecast that they might endanger themselves or other persons. The Committee is of the opinion that the legislation is in conflict with article 14 of the Convention because it allows a person to be deprived of their liberty on the basis of their actual or perceived disability.

32. The Committee notes with concern the continued use of net beds and other forms of non-consensual practices in the State party’s psychiatric hospitals and institutions where people with intellectual, mental and psychosocial disabilities are confined.

In CRPD Committee’s decision CRPD/C/16/D/7/2 adopted on the individual communication by *Marlon James Noble v. Australia*, the CRPD Committee decided that prolonged and indefinite deprivation of liberty could amount to torture or cruel, inhuman or degrading treatment when the person concerned is a person with disabilities provided the indefinite nature of the deprivation of liberty may cause severe strain and suffering.**[[12]](#footnote-12)**

In this sense, in line with paragraph 17 of the draft revised general comment, **the negative consequences of forced institutionalisation and consequent ill-treatment and torture must not be underestimated**. Complete segregation from society, isolation from family, friends and community life, psychological and physical harm caused by forced treatments, including forced sterilisations and abortions.

UNCLEAR DEFINITIONAL THRESHOLD BETWEEN ILL-TREATMENT AND TORTURE

Paragraphs 15, 16 and 29 of the draft revised general comment are especially relevant for duly protect persons with disabilities by applying the non-refoulement clause.

Indeed, the lack of clarity of the definitional threshold and the overlap between the obligation to prevent ill-treatment and to prevent torture call for strongly ensuring the non-refoulement of persons with disabilities who face a clear risk of for forced institutionalisation. This is so as many of the harmful practices to which persons with disabilities are typically subjected in institutions are undoubtedly considered ill-treatment and, as generally considered for now, might amount to torture.

In this sense, we would encourage the CAT Committee to consider establishing the following presumptions to ensure prevention of torture by application of the principle of non-refoulement:

1) whenever legislation of the State of deportation allows for forced institutionalisation of persons with disabilities, which entails risk of torture, non-refoulement should be applied.

2) whenever there is no legal entitlement and/or a lack of appropriate support services to ensure the right to live independently and be included in the community in the State of deportation, making institutionalisation the only option available (and thus coerced), non-refoulement should be applied.[[13]](#footnote-13)

**C- RECOMMENDATIONS**

In view of the previous considerations, IDA encourages the CAT Committee to:

- Ensure, within the context of Article 22 of CAT, that the “non-refoulement” principle is also applied when there is enough evidence that the person concerned may be in risk of being forced into an institution for the placement of persons with disabilities, and consequently be subjected to torture or cruel, inhuman or degrading treatment, when deported to a State where there is enough evidence substantiating this is a widespread practice, whether legal or not, or when the State has no provisions for community services or supports required by persons due to their disabilities.

- In particular, to establish the following presumptions in the context of Article 22 of CAT:

1) whenever legislation of the State of deportation allows for forced institutionalisation of persons with disabilities (e.g. under mental health law, criminal law, civil law, etc.), which always entails risk of torture, non-refoulement should be applied.

2) whenever there is no legal entitlement and/or a lack of appropriate support services to ensure the right to live independently and be included in the community in the State of deportation, making institutionalisation the only option available (and thus coerced), non-refoulement should be applied.

- Consider adopting concrete drafting proposals included in Annex I.

- To call on States Parties to abide by the principle of non-refoulement in accordance with previous recommendations in line with the revised general comment.

**ANNEX I - Amendments suggested for draft Revised General Comment no. 1 (2017). Suggestions are found in bold type letter.**

**Para 11:**

Consider when there are “substantial grounds” for believing that the person concerned would be in danger of being subjected to torture in a State to which he or she is facing deportation, **if institutional commitment is the only alternative for persons with disabilities in the State of deportation**. The Committee’s practice has been to determine that “substantial grounds” exist whenever the risk of torture is “personal, present, foreseeable and real ». As the Committee has found, « the risk of torture must be assessed on grounds that go beyond suspicion ».

**Para 17:**

The Committee considers that severe pain or suffering cannot objectively be measured. It depends on the negative physical or mental repercussions that the infliction of violent acts has on each individual, taking into account all relevant circumstances of each case, including the duration of the treatment, the physical and/or mental effects, the sex, age and state of health and vulnerability of the victim. **For instance, cases of forced institutionalisation of persons with disabilities followed by torture are always likely to cause severe pain and suffering.**

**Para 18:**

**Subpara a):**

(a) Ensuring the right of each person concerned to have his/her case examined individually and not collectively, and to be fully informed**, in the language and/or accessible format the person requires,** of the reasons why he/she is the subject of a procedure which may lead to a decision of deportation;

**Subpara b):**

Providing access of the person alleging previous torture that might be deported to a lawyer and free legal aid when necessary; **legal capacity of persons with disabilities should be fully recognized in compliance with CRPD’s article 12 and general comment no. 1 (2014). However, in those States where regimes still allow for the partial or full restriction of a person’s legal capacity, the right to be assisted by a lawyer and have access to free legal aid should be upheld.**

**Subpara c):**

The development of an administrative or judicial procedure concerning the person in question in a language that he/she understands or with the assistance of interpreters and translators; **including sign language interpretation or other forms of languages used by persons with disabilities, and should also be provided for regardless of the legal capacity status.**

**Subpara g):**

(g) An effective training of medical and other personnel dealing with detainees, migrants and asylum seekers in identifying and documenting signs of torture, taking into account the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol). **Trainings should also consider the definition of torture and other cruel, inhuman or degrading treatment set forth by CRPD article 15 and the related CRPD Committee`s jurisprudence.**

**Para. 21**

States parties should take into account that victims of torture and other cruel, inhuman or degrading treatment or punishment suffer physical and psychological traumas which may require sustained specialized rehabilitation treatment. Once their health fragility and need for treatment has been medically certified, they should not be removed to a State where adequate medical services for their rehabilitation linked to their torture-related trauma are not available or not guaranteed. **Legal capacity and free and informed consent of persons with disabilities should be explicitly recognised and upheld.**

**Paragraph 30:**

Add between current subparagraphs f and g, the following:

**Whether the person with disabilities concerned would be exposed to forced institutionalisation, either because it is foreseen by legislation or because there is no legal entitlement and/or a lack of appropriate support services to ensure the right to live independently and be included in the community in the State of deportation, making institutionalisation the only option available (and thus coerced)**

**Subpara b):**

Whether the person has been a victim of brutality or excessive use of force by public officials based on any form of discrimination, **including disability based discrimination**, in the State of origin or would be exposed to such brutality in the State of deportation;

**Subpara c):**

Whether, in the State of origin or in the State of deportation, the person has been or would be victim of violence including gender based/ sexual violence, **and disability based violence**, in public or in private, or gender-based persecution, genital mutilation, amounting to torture without intervention of the competent authorities of the State concerned for the protection of the victim;

**Subpara d):**

Whether the person has been judged in the State of origin or would be judged in the State of deportation by a judicial system which does not guarantee the right to a fair trial, **including by denial of his or her legal capacity**;

**Subpara e):**

Whether the person concerned has been previously detained deprived of his or her liberty or imprisoned in the State of origin or would be **~~detained~~ deprived of liberty** or imprisoned, if deported to a State, in conditions amounting to torture or cruel, inhuman or degrading treatment or punishment;

1. CRPD Committee, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities*, para. 8, available at [www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc](https://www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc) [↑](#footnote-ref-1)
2. See e.g. CRPD/C/TUN/CO/1, para. 25; CRPD/C/PER/CO/1, para. 29; CRPD/C/HUN/CO/1, para. 28; CRPD/C/CHN/CO/1, para. 26; CRPD/C/PRY/CO/1, para. 36; CRPD/C/AUT/CO/1, para. 30; CRPD/C/AUS/CO/1, para. 32; CRPD/C/SWE/CO/1, para. 36; CRPD/C/NZL/CO/1, para. 30; CRPD/C/MEX/CO/1, para. 30; CRPD/C/KOR/CO/1, para. 26; CRPD/C/DNK/CO/1, para. 37; CRPD/C/NZL/CO/1, para. 30; CRPD/C/TKM/CO/1, para. 30(a); CRPD/C/HRV/CO/1, para. 20; CRPD/C/COK/CO/1, para. 28(a); CRPD/C/UKR/CO/1, para. 31; CRPD/C/QAT/CO/1, para. 28; CRPD/C/MUS/CO/1, para. 25; CRPD/C/KEN/CO/1, para. 27-28(a); CRPD/C/GAB/CO/1, para. 33; CRPD/C/BRA/CO/1, para. 29. [↑](#footnote-ref-2)
3. [CRPD/C/GC/1](http://daccess-ods.un.org/access.nsf/Get?Open&DS=CRPD/C/GC/1&Lang=E), para. 40, 41 and 46. [↑](#footnote-ref-3)
4. See [http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E](https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E) [↑](#footnote-ref-4)
5. See CRPD Committee, [Marlon James Noble v. Australia](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTwAcLKUFW9%2fIJBNclMnXbcbVk%2fRELn%2btrW%2fwB58PNpopz2WSsUPxJCkXFabBOn5nL0%3d). [↑](#footnote-ref-5)
6. See CRPD Committee, [Marlon James Noble v. Australia](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTwAcLKUFW9%2fIJBNclMnXbcbVk%2fRELn%2btrW%2fwB58PNpopz2WSsUPxJCkXFabBOn5nL0%3d). [↑](#footnote-ref-6)
7. See among many others. [CRPD/C/ETH/CO/1](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsp2gZdYXWBKA18z%2fSv%2f6lkjfDqI9zs5hd5%2bUAXK5vbPAJ7j6jyrAv5vGf3%2bKDAISC4b6HZ89os5fSRy3geaPEuDxcZbiRH2FXgRCn4lQqq%2b0), para. 34; [CRPD/C/CHL/CO/1](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCHL%2fCO%2f1&Lang=en), para. 34; [CRPD/C/SRB/CO/1](http://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/SRB/CRPD_C_SRB_CO_1_23689_E.doc), para 28. [↑](#footnote-ref-7)
8. [A/HRC/22/53](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf), para 48. See also paras. 45 to 50 on Reproductive rights violations. [↑](#footnote-ref-8)
9. [↑](#footnote-ref-9)
10. Para 1 of CRPD article 15: “1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.” [↑](#footnote-ref-10)
11. CRPD/C/AUT/CO/1, adopted 13 September 2013. [↑](#footnote-ref-11)
12. See CRPD Committee, [Marlon James Noble v. Australia](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTwAcLKUFW9%2fIJBNclMnXbcbVk%2fRELn%2btrW%2fwB58PNpopz2WSsUPxJCkXFabBOn5nL0%3d), para 8.9. [↑](#footnote-ref-12)
13. This is a similar concern to the one expressed in paragraph 21 of the draft revised general comment: lack of support services in the community to prevent institutionalisation can be equated to lack of medical services required by the person who has already been a victim of torture in the State of deportation. [↑](#footnote-ref-13)