

Global Consultation on the Right to Challenge the Lawfulness of Detention before Court

Presentation of OHCHR's Human Rights and Disability Advisor, Facundo Chávez Penillas

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Excellencies,

Members of the Working Group on Arbitrary Detention,

Ladies and gentlemen,

I am honoured for the invitation of the Chair to participate in this very important discussion, and I welcome the consideration of including the rights of persons with disabilities in your discussions on arbitrary detention given that the legal framework on the rights of this particular group is the latest advancement in international human rights law when it comes to this topic.

Persons with disabilities and the international human rights community have come a long way in the recognition of the rights of persons with disabilities; nevertheless, much is left to do.

During the past day and a half you have heard the considerations and recognitions of the right to challenge unlawful detention and how this right applies to all, including persons with disabilities, even in the most extreme circumstances.

International human rights law has unveiled the rights contained in the Universal Declaration of Human Rights and the two International Covenants for different groups. The coming into existence of the Convention on the Rights of Persons with Disabilities - or CRPD - is based on the fact that while human rights instruments use terms such as "anyone", "all", "everyone", "no one" to refer to the universality of human rights; when translated into national legislation these do many times not include persons with disabilities. The CRPD clarifies the scope of all existing human rights to ensure the rights of persons with disabilities.

The right to live free of arbitrary detention is not the only right that is conditioned for persons with disabilities. The right to vote, the right to hold office, the right to choose where and with whom to live with, the right to form a family, and other rights are also universally recognized for "all", but often not recognized for persons with disabilities.

I will not do an extensive analysis of the evolution of the right to challenge arbitrary or unlawful detention, as it is well developed in the report prepared by this Working Group pursuant to Human Rights Council resolution 20/16. Instead, I will limit myself to present the specific nuances that apply to persons with disabilities.

Let me in this context commend the excellent work undertaken by the Working Group on Arbitrary Detention in its report, in which it has given due consideration to the jurisprudence of the

Committee on the Rights of Persons with Disabilities on detention on the basis of disability, and the Committee's General Comment No. 1 on equal recognition before the law.

From the practice of the CRPD Committee and the terms of Convention on the Rights of Persons with Disabilities we can say that:

1. Deprivation of liberty based on the existence of an impairment is unlawful;
2. Deprivation of liberty of persons with disabilities in psychiatric institutions against their will, that is without free and informed consent from the person concerned or with the consent provided by a third party is unlawful; and
3. Persons with disabilities are, on an equal basis with others, entitled to proceedings to challenge their unlawful detention.

Despite the international legal framework in place, the right to live free of arbitrary detention is still not recognized for persons with disabilities in most of the countries in the world and even questioned by many within the international human rights system.

Persons with psychosocial and intellectual disabilities are stigmatized as dangerous (to self and others) and preventively detained without other cause than having an impairment, actual or perceived.

Civil and criminal procedures are in place all over the world allowing detention on the basis of the existence of a diagnosis of mental or intellectual or other cognitive impairments. Certain legislations allow for detention in case of possible future, so called, mental illness.

Deprivation of liberty on the basis of the existence of an impairment is as discriminatory as if it were based on gender, sex, race or any other ground for discrimination under human rights law.

Persons with disabilities are deprived of their most basic rights every day in their real lives and this is enabled by legislation: civil laws, criminal laws, and mental health laws among others. The international human rights system must provide for a framework that deals with this reality in a way that the dignity of persons with disabilities as human beings is duly ensured. No another option is available, at least not under human rights law.

It is neither equitable nor efficient that the international human rights framework allows for detention on the basis of an impairment and, later, that same framework rightfully ensures persons with disabilities the right to access justice and adequate proceedings to challenge that detention in court. If this same principle is applied in other areas of the law we would jeopardize the entire international legal system.

The adoption of the CRPD brought about innovative changes in many areas. In terms of the right to education and work and employment, the CRPD provides for the end to segregation. On the right to equal recognition before the law, it mandates the abolishment of substitute decision-making systems and provides for the right to make their own choices, including the right to refuse institutionalization in psychiatric institutions. The international human rights community is now faced with the challenge of making these provisions effective in order to ensure that persons with disabilities enjoy human rights on equal terms with others. In the same vein, it is not unexpected

that under the right to liberty and security, the reaching of full equality will pose new challenges associated with the end of detaining persons with disabilities on the basis of their impairment.

The CRPD puts in place the applicability of the law in terms of detention, refraining States parties from implementing discriminatory measures that may lead to arbitrary and unlawful decisions. We are, at this point, in the need of posing difficult questions to our civil and criminal systems. How will the legal frameworks deal with the responsibility of persons with disabilities? What will be the non-repressive procedure to contain a person in a moment of crisis?

It is important that we have in mind these questions when we move into discussing adequate proceedings to challenge unlawful and arbitrary detention by persons with disabilities. If not, we may risk trying to solve a substantive issue with a procedural measure that will not be a solution, but may even legitimize an arbitrary detention.

Ladies and gentlemen,

The ability of persons with disabilities to challenge arbitrary detention is widely recognized in human rights law. Nevertheless, persons with disabilities face legal barriers that deprive them from this right. Deprivation of liberty of persons with disabilities in psychiatric or other institution may derive both from civil and criminal law.

Deprivation of legal capacity and the consequent use of substitute decision-making is the main barrier to challenge arbitrary detention. All of the civil laws to which our office have had access, present either full or partial deprivation of legal capacity with some kind of substitute decision-making entity providing consent, which replaces the will of the person concerned and decides on institutionalization. As the Working Group on Arbitrary Detention states in its report, all persons, including those with disabilities must have an avenue to challenge this decision. Nevertheless, given the substitution that it is taking place, the person concerned is also banned from expressing his or her will regarding the detention impeding access to adequate defence.

The CRPD Committee's General Comment No. 1 clearly states that "mental capacity" (that is, the decision-making skills of a person that naturally vary from one to another) cannot be ground for depriving legal capacity, understood as the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). Ensuring legal capacity allows for ensuring legal standing in court. Some persons with disabilities may request support to exercise their legal capacity. Article 12 of the CRPD guarantees such support that can take various forms, including recognition of diverse communication methods, allowing video testimony in certain situations, procedural accommodation, the provision of professional sign language interpretation and other assistive methods. Importantly, as underlined by the CRPD Committee, any form of support must always take place in respect of the will and preference of the rights-holder.

Article 13 of the CRPD provides for the right to access to justice, an important resource to challenge unlawful detention on any grounds. Accommodation must be provided for persons with disabilities to stand in trial, including augmentative and alternative means of communication, plain language, and other similar means that allow for understanding and actively act in such circumstances. I referred extensively to persons with psychosocial and intellectual impairments, but these constituencies are not the only affected populations. Deaf, blind and deaf-blind persons are

denied of their right to stand in equal terms with others because of the lack of communicational accessibility, persons with physical impairments are also excluded because of inaccessible court facilities.

Honourable members of the Working Group on Arbitrary Detention, Ladies and gentlemen,

To conclude: historical prejudices and outdated legal systems restrict persons with disabilities from challenging their unlawful detention, and have given effect to restrictions in accessing justice through the following combination of factors: (i) deprivation of liberty on the basis of disability as legal ground under national civil, criminal and mental health laws; (ii) deprivation of legal capacity; (iii) accessibility restrictions. International human rights law should acknowledge these restrictions and tackle the conflict in as structural manner. This is a process that has just begun, and one in which we are bound by the CRPD and the broader human rights framework to guarantee the human rights of persons with disabilities.

Thank you.