**COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES**

**GENERAL COMMENT NO. 6 ON ARTICLE 5**

**“Institutionalization of persons with disabilities around the world constitutes a severe form of discrimination”**

**Submitted by Disability Rights International**

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*This submission can be posted on the CRPD website for public information purposes*

**Reporting Organization**

Disability Rights International was established in 1993. Based in Washington DC, Disability Rights International documents human rights abuses, publishes reports on human rights enforcement, and promotes international oversight of the rights of people with disabilities.[[1]](#footnote-1)

Drawing on the skills and experience of attorneys, mental health professionals, human rights advocates, people with disabilities and their family members, Disability Rights International trains and supports advocates seeking legal and service system reform and assists governments in developing laws and policies to promote community integration and human rights enforcement for people with disabilities. DRI is forging new alliances throughout the world to challenge the discrimination and abuse faced by people with disabilities, as well as working with locally based advocates to create new advocacy projects and to promote citizen participation and human rights for children and adults.

1. **SUMMARY**

Depriving a person of his/her liberty on the basis of a disability is a violation of his/her right to personal liberty (Article 14) and the right to community living (Article 19), recognized by the Convention on the Rights of Persons with Disabilities (CRPD). Institutionalization on the basis of disability is also one of the most severe forms of discrimination given the devastating consequences it has on a person’s life. Once a person is segregated in an institution, that person is deprived of his/her legal capacity and, as such, impeded to make decisions over his/her life and to challenge his/her detention.[[2]](#footnote-2) The person is also subjected to abuses that may amount to torture including inhuman and degrading treatment, sexual and physical abuse, forced sterilization, use of isolation rooms and prolonged restraints, lack of treatment and rehabilitation and trafficking.[[3]](#footnote-3)

States must adopt deinstitutionalization policies as part of their anti-discrimination efforts. Countries that have started deinstitutionalization processes of children in orphanages must ensure that these efforts prioritize children with disabilities. DRI has found that too often children with disabilities are left behind as they are not included in these processes, which also constitutes discrimination. In order for deinstitutionalization to be successful, it must be accompanied by the creation of services and supports in the community for children and adults with disabilities.

While some obligations are subjected to the principle of progressive realization, “some obligations are not […] and must be implemented immediately, including […] core obligations.”[[4]](#footnote-4) Core obligations include non-discriminatory access to services.[[5]](#footnote-5) In terms of the obligation to create community supports and to deinstitutionalize children and adults with disability, it is not subject to the principle of progressive realization as it relates to non-discriminatory access to services and thus, it must be a priority for the State and be done immediately.

1. **INTRODUCTION**
	1. **Institutionalization and lack of community services are in violation of Article 19 and are discriminatory**

Historically, persons with disabilities -especially persons with psychosocial and intellectual disabilities, have been segregated in abusive institutions under the pretense of affording them ‘care’ and ‘protection.’ DRI’s documentation in several countries has shown that once a person is admitted to an institution, they are segregated completely from society; stripped of their legal capacity; neglected, abused, trafficked and tortured and subjected to *indefinite* institutionalization.[[6]](#footnote-6) In several countries, legislation allows for indefinite detention in institutions of people with psychiatric disabilities who have been abandoned, are homeless or are in a crisis.[[7]](#footnote-7) People with psychosocial disabilities who have been abandoned, are homeless or in a crisis, need support. Yet, the only option in several countries is to be detained at a psychiatric hospital.

The lack of community services, supports and alternatives means that, if a persons with a psychosocial disability needs support, the only response available from the State is to institutionalize him/her. It is the States’ failure to implement supports and services in the community for people with disabilities that underlies their continued institutionalization.[[8]](#footnote-8) The former European Union Commissioner on Human Rights has stated that provision of mental health services should never be conditioned on forfeiting one’s right to live in society and relinquishing participation in community life. As established in his 2012 report “The Right of People with Disabilities to live independently and be included in the community”:

“[The right to community integration] is violated when people with disabilities who need some form of support in their everyday lives are required to relinquish living in the community in order to receive that support [and] when support is provided in a way that takes away people’s control from their own live […].”[[9]](#footnote-9)

In this regard, the Supreme Court of United States has ruled that segregation of a person with a disability as a condition to receive public-sector mental health services constitutes differential treatment on the basis of disability, and as such, is discriminatory. In the case *Olmstead v. L.C.*, the States Supreme held that:

“[T]he dissimilar treatment arises from the fact that, in order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.”[[10]](#footnote-10)

Under Article 19 States have the obligation to create services and supports to ensure that *all* people with disabilities can exercise their right to community life, with equal opportunities to others. As stated by the EU Commissioner on Human Rights:

“The right to live in the community applies to *all* people with disabilities.  No matter how intensive the support needs, everyone, without exception, has the right and deserves to be included and provided with opportunities to participate in community life.  Time and time again it has been demonstrated that people who were deemed too “disabled” to benefit from community integration thrive in an environment where they are valued, where they partake in the everyday life of their surrounding community, where their autonomy is nurtured and they are given choices. Programs from around the world have shown that all types of support needs can be answered, and are better answered, in community settings, which allow for expression of individuality and closer scrutiny to prevent abuse.”[[11]](#footnote-11)

While some obligations are subjected to the principle of progressive realization, “some obligations are not […] and must be implemented immediately, including […] core obligations.”[[12]](#footnote-12) Core obligations include non-discriminatory access to services.[[13]](#footnote-13) Core obligations would thus include a deinstitutionalization plan with clear objectives and a timeframe and the elaboration of a national public health strategy and non-discriminatory access to services. In terms of the right to mental health, that translates into the development of a national mental health strategy with a road map leading away from coercive treatment and towards equal access to rights-based mental health services, including the equitable distribution of services in the community.[[14]](#footnote-14)

* 1. **Detention of children in institutions**

The detention of children in orphanages and other non-penal health or social care institutions is a problem that is both widespread and dangerous.[[15]](#footnote-15) The vast majority of children placed in institutions are not actually orphans - 80 to 98% of these children have a living parent. The main reasons for placement have to do with the disability of the child or the parent and lack of community-based services and supports to keep the family together.[[16]](#footnote-16) Both of these reasons –disability and lack of supports in the community for parents or children with disabilities- are, as discussed above, discriminatory. Placing a child in an institution as a result of disability or lack of supports has a deeply damaging impact on the development of the child and can lead to disability.

All children need to grow up with a family and not in institutions.[[17]](#footnote-17) Once a child is separated from his or her family and placed in an institution, he or she is subjected to an array of dangers that can be irreversible: psychological damage from being raised in congregate care without stable emotional attachments, developmental delays and permanent intellectual disability caused by neglect and a lack of social stimulation, as well as violence, abuse, and exploitation that are known to be higher in institutions.[[18]](#footnote-18) In his report on the protection of children from torture, Special Rapporteur on Torture Juan Mendez, noted that “even very short periods of detention can undermine a child’s psychological and physical well-being and compromise cognitive development.”[[19]](#footnote-19) The former Special Rapporteur on Torture further noted the “heightened risk of violence, abuse and acts of torture or cruel, inhuman or degrading treatment or punishment”[[20]](#footnote-20) created by placing any child in an institution.

Article 23 of the CRPD explicitly applies to all *“children”* whether or not they have a disability.[[21]](#footnote-21) This is because it protects against the separation of children from their families based on the disability of the child *or* the parent. Article 23(4) of the CRPD requires governments to “ensure that a child shall not be separated from his or her parents against their will” and “[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.” To do so would be a form of discrimination.

CRPD article 23(5) establishes the most important protection of the right to grow up in a family, stating that governments shall “where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care *within the wider family, and failing that, within the community in a family setting*.” That Article 23(5) **never allows for the possibility of placing a child in an institution or in any form of residential care**.[[22]](#footnote-22) This includes group homes. In its most recent General Comment, the CRPD Committee also found group homes and small institutions to be an inadequate substitute for a family, as harmful as large institutions.[[23]](#footnote-23) Instead, states must provide supports to parents and children with disabilities to ensure that they are not separated on the basis of a disability.

States must also start a deinstitutionalization process that includes children with disabilities and place a moratorium on new placements in institutions. In relation to the former, deinstitutionalization processes must include children with disabilities and the creation of the services and supports they need to remain in the community. DRI has documented how children with disabilities are left behind in deinstitutionalization processes, which is discriminatory. In the case of Republic of Georgia, reforms have been cited as examples of a “promising practice” of deinstitutionalization in a manual on the application of the Guidelines for Alternative Care.[[24]](#footnote-24) At the start of the reform, there were thought to be 2,500 children in institutions. All of the orphanages in the country were closed down except two facilities for children with disabilities. DRI’s 2013 investigation brought to light that, in addition to leaving out children with disabilities, children in religious facilities were overlooked.[[25]](#footnote-25)

With regards to a moratorium, both UNICEF[[26]](#footnote-26) and WHO[[27]](#footnote-27) have called for a moratorium on the detention of children (ages 0-3) in institutions within Europe. In its mental health report presented to the Human Rights Council (HRC) the UN Office of the High Commissioner for Human Rights (OHCHR) has also called for an “end the institutionalization of all children, with and without disabilities.”[[28]](#footnote-28) The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) has made a strong statement in this area. In May 2016, the Committee called on the Czech Republic to “abolish” institutionalization for children with disabilities.[[29]](#footnote-29) In September 2016, the Committee asked Guatemala to “abolish institutionalization” of children (without limiting it to children with disabilities).[[30]](#footnote-30)

1. **PROPOSED THEMES AND PARAGRAPHS TO BE ADDED TO THE CURRENT DRAFT**
	1. **Article 19. Theme: failure to provide services in the community is discriminatory**

Article 19 of the CRPD recognizes the right not to be “obliged to live in a particular living arrangement” on account of one’s disability.[[31]](#footnote-31) People with disabilities that are institutionalized are forced to remain in an institution indefinitely because there are no alternatives, supports and services in the community where they can go. The failure to create supports and services in the community for people with disabilities is what makes the institutionalization discriminatory given that people are forced to relinquish their participation in community life to receive treatment.[[32]](#footnote-32) Institutionalization of a people with a disabilities as a condition to receive public-sector mental health services constitutes differential treatment on the basis of disability, and as such, is discriminatory.[[33]](#footnote-33)

The obligations for States under Article 19 are irreconcilable with a state policy that restricts available care options to involuntary and unnecessary commitment within a closed and segregated facility. Under Article 19, States must take the necessary and appropriate measures to promote the full integration of persons with mental disabilities into society by creating a range of community-based mental health services and supports. People detained in institutions are being subjected to one of the most severe forms of discrimination that affects the exercise of all of their rights and as such, it must be a priority to reintegrate them to the community through the creation of community services.

While some obligations are subjected to the principle of progressive realization, “some obligations are not […] and must be implemented immediately, including […] core obligations.”[[34]](#footnote-34) Core obligations include non-discriminatory access to services.[[35]](#footnote-35) In terms of the obligation to create community supports and to deinstitutionalize people with disability, it is not subject to the principle of progressive realization as it relates to non-discriminatory access to services and thus, it must be a priority for the State and be done immediately.

* 1. **Article 23: Institutionalization of children is discriminatory and a violation of their right to a family**

Article 23 of the CRPD *explicitly applies to “children”* whether or not they have a disability. This is because it protects against the separation of children from their families based on the disability of the child *or* the parent. Parents with disabilities are often seen as inadequate or unable to take care of their children. They are also not provided with the necessary supports and instead, their children are removed from them.[[36]](#footnote-36) Separation of a child from his parents based on the disability of the child, the parents or both, is in violation of the right to a family (Article 23)[[37]](#footnote-37) but also of the right to be free from discrimination (Article 5).

The placement of children in institutions on the basis of their disability is also a form of discrimination that the CRPD prohibits. CRPD article 23(5) establishes the most important protection of the right to grow up in a family, stating that governments shall “where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care *within the wider family, and failing that, within the community in a family setting*.” That Article 23(5) **never allows for the possibility of placing a child in an institution or in any form of residential care**.[[38]](#footnote-38) It is worth nothing that in its most recent General Comment, the CRPD Committee also found group homes and small institutions to be an inadequate substitute for a family, as harmful as large institutions.[[39]](#footnote-39)

States must ensure that parents with disabilities and parents of children with disabilities have the necessary supports in the community to care for their children. Where this supports are non-existent, it must create them together with substitute family programs and alternatives in the community for the children that are currently in institutions. States must place a moratorium on new admissions of children and adopt a deinstitutionalization plans with clear objectives and deadlines. Deinstitutionalization processes must put children with disabilities at the forefront and ensure that they are not discriminated against and left behind.

* 1. **Article 14. Theme: detention of children in institutions**

Children with disabilities that are separated from their parents are often sent to institutions. The former Rapporteur on Torture found that almost all States have legislation that permits the detention of children for psychiatric health purposes.[[40]](#footnote-40) He has also documented in practice the “involuntary commitment of children with mental disabilities, including those who have long-term intellectual or sensory impairments, to psychiatric and social care institutions, psychiatric wards […].”[[41]](#footnote-41) These children are likely to remain detained their whole lives in such psychiatric or social care institutions.[[42]](#footnote-42) Segregation of children on the basis of their disability constitutes arbitrary detention and is discriminatory.

1. Disability Rights International, 1666 Connecticut Avenue NW, Suite 325, Washington, DC 20009, USA info@driadvocacy.org [↑](#footnote-ref-1)
2. Disability Rights International, *Abandoned and Disappeared* (2010); *No Justice* (2015). Available at www.driadvocacy.org [↑](#footnote-ref-2)
3. Disability Rights International, *Abandoned and Disappeared* (2010); *No Justice* (2015); *Left Behind* (2013); *International Collaboration for Inclusion* (2014) Available at www.driadvocacy.org [↑](#footnote-ref-3)
4. Special Rapporteur on the Right to Health A/HRC/35/21 para. 37 [↑](#footnote-ref-4)
5. *Ibidem.* [↑](#footnote-ref-5)
6. Disability Rights International, *Abandoned and Disappeared* (2010); *No Justice* (2015); *Left Behind* (2013); *International Collaboration for Inclusion* (2014) Available at www.driadvocacy.org [↑](#footnote-ref-6)
7. For instance, in the case of Guatemala, Articles 520 and 522 of the CCCG state that judges may “dictate, with the intervention of the Public Prosecutor, the necessary measures for the protection and representation” of any incapacitated person who has been “abandoned” by “any circumstances”. The consequence is that any time a person with a psychiatric disability is brought before a judge for “protection measures” by the state or a private individual, the relevant question for judicial decision is reduced to whether the person is “abandoned.” Where no identifiable family member is in a position to provide completely and exclusively for the mental health service needs of the individual (i.e., through privately resourced health interventions or supports), the person is deemed “abandoned” and the judge designates the “place” to which they will be transferred for their “protection.” They only place available is the psychiatric hospital so they are referred there. [↑](#footnote-ref-7)
8. US Supreme Court of Justice, *Olmstead v. L. C*., 527 U.S. 581, Judgment June 22, 1999, p. 583. [↑](#footnote-ref-8)
9. EU Commissioner for Human Rights, 12 March 2012, “The Right of People with Disabilities to Live Independently and be Included in the Community.” p. 5 [↑](#footnote-ref-9)
10. *Olmstead v. L.C* , *supra* note XXX, p. 583. [↑](#footnote-ref-10)
11. EU Commissioner for Human Rights, 12 March 2012, “The Right of People with Disabilities to Live independently and be Included in the Community.” [↑](#footnote-ref-11)
12. Special Rapporteur on the Right to Health A/HRC/35/21 para. 37 [↑](#footnote-ref-12)
13. *Ibidem.*  [↑](#footnote-ref-13)
14. *Ibidem.*  [↑](#footnote-ref-14)
15. The United Nations has estimated that there are 8 million children in orphanages, while other estimates place the number of children in institutions around the world at 10 million or more. In addition to the population of orphanages, Disability Rights International (DRI) has found children detained in adult institutions, psychiatric facilities, hospitals, maternity wards, nursing homes, residential schools, vocational schools, convents, monasteries, emergency relocation facilities, and other specialized programs for children with disabilities—often uncounted, unregulated, or operated entirely off the public record.” Eric Rosenthal, “A Mandate to End Placement of Children in Institutions and Orphanages: The duty of governments and donors to prevent segregation and torture” p. 314. Available at <https://www.driadvocacy.org/wp-content/uploads/Rosenthal-Torture-seg-Feb16.pdf> [↑](#footnote-ref-15)
16. *Ibid.*  [↑](#footnote-ref-16)
17. A/HRC/28/68 para 55. In relation to the impact that detention has on a child, regardless of the conditions in the institution, the former Special Rapporteur on Torture found that: “One of the most egregious forms of abuse in health and social care settings is unique to children. Numerous studies have documented that a child’s healthy development depends on the child’s ability to form emotional attachments to a consistent care-giver.[…] Unfortunately, this fundamental need for connection is consistently not met in many institutions, leading to self-abuse, including children banging their head against walls or poking their eyes. In reaction, care-givers use physical restraints as a long-term solution, or hold the children in cages or their beds, practices that have been linked to muscular atrophy and skeletal deformity,” which can lead to a disability. [↑](#footnote-ref-17)
18. A/HRC/28/68 para 16 and 33. The Rapporteur found that children deprived of liberty are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder. Healthy development “can be derailed by excessive or prolonged activation of stress response systems in the body, with damaging long-term effects on *learning, behaviour and health*.” When detention is compounded with abuse and ill-treatment, in children it “may cause even greater or irreversible damage than for adults.”Reports on the effects of depriving children of liberty have found “higher rates of suicide and self-harm, mental disorder and developmental problems,” which may lead to disability. [↑](#footnote-ref-18)
19. A/HRC/28/68 para 17 [↑](#footnote-ref-19)
20. *Ibid.* para 16 [↑](#footnote-ref-20)
21. Eric Rosenthal, *supra* nota XX [↑](#footnote-ref-21)
22. *Ibidem.* p. 325 [↑](#footnote-ref-22)
23. CRPD, “General comment on article 19: Living independently and being included in the community” CRPD/C/GC/5 para. 16 c) [↑](#footnote-ref-23)
24. Nigel Cantwell, Jennifer Davidson, Susan Elsley, Ian Mulligan, and Neill Quinn, Moving Forward:

Implementing The ‘Guidelines for the Alternative Care of Children” Centre for Excellence for

Looked After Children in Scotland (2012). [↑](#footnote-ref-24)
25. DRI, Left Behind: The Exclusion of Children and Adults from Reform and Rights Protection in the Republic of Georgia (2013) p. 22. Available at <https://www.driadvocacy.org/media-gallery/our-reports-publications/> [↑](#footnote-ref-25)
26. A moratorium on new placements is the 4th of UNICEF’s top 9 recommendations for children in the Executive Summary of the 2013 State of the World’s Children Report. Recommendation #4 is: “End the institutionalization of children with disabilities, starting with a moratorium on new admissions. This should be accompanied by the promotion of and increased support for family based care and community-based rehabilitation.” UNICEF, State of the World’s Children 2013: Executive Summary, http://www.unicef.org/ sowc2013/files/SOWC2013\_Exec\_Summary\_ENG\_Lo\_Res\_24\_Apr\_2013.pdf [↑](#footnote-ref-26)
27. World Health Organization Regional Office for Europe, “European Declaration on the Health of Children and Young People with Intellectual Disabilities and their Families” (known as the Bucharest Declaration) para. 5. [↑](#footnote-ref-27)
28. A/HRC/34/32 para 58. [↑](#footnote-ref-28)
29. CRPD/C/CZE/CO/1 [↑](#footnote-ref-29)
30. CRPD/C/GTM/ CO/1 para. 54 [↑](#footnote-ref-30)
31. CRPD, Article 19. [↑](#footnote-ref-31)
32. EU Commissioner for Human Rights, 12 March 2012, “The Right of People with Disabilities to Live Independently and be Included in the Community.” p. 5 [↑](#footnote-ref-32)
33. The U.S. Supreme Court has held in this regard that “[u]njustified placement or retention of persons in institutions severely limits their exposure to the outside community, and therefore constitutes a form of discrimination based on disability”. Olmstead v. L.C. p. 583. [↑](#footnote-ref-33)
34. Special Rapporteur on the Right to Health A/HRC/35/21 para. 37 [↑](#footnote-ref-34)
35. *Ibidem.* [↑](#footnote-ref-35)
36. DRI, Abuse and Denial of Sexual and Reproductive Rights of Women with Psychosocial Disabilities in Mexico (2015), available at <https://www.driadvocacy.org/media-gallery/our-reports-publications/> [↑](#footnote-ref-36)
37. Article 23(4) of the CRPD requires governments to “ensure that a child shall not be separated from his or her parents against their will” and “[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.” [↑](#footnote-ref-37)
38. Eric Rosenthal, *supra* nota XX p. 325 [↑](#footnote-ref-38)
39. CRPD/C/GC/5 para. 16 c) [↑](#footnote-ref-39)
40. Carolyn Hamilton et al., “Administrative detention of children: a global report”, UNICEF and the Children’s Legal Centre, February 2011, p. 140. [↑](#footnote-ref-40)
41. A/HRC/28/68 para 55 [↑](#footnote-ref-41)
42. A/HRC/22/53, paras. 57 and 68 [↑](#footnote-ref-42)