



**WNUSP Comments on the Working Group on Arbitrary Detention’s
“Draft Principles and Guidelines on remedies and procedures on the right of anyone
deprived of his or her liberty by arrest or detention to bring proceedings before a
court without delay, in order that the court may decide without delay on the
lawfulness of his or her detention and order his or her release if the detention is not
lawful”**

World Network of Users and Survivors of Psychiatry (WNUSP) is a democratically structured organization of users and survivors of psychiatry and persons with psychosocial disabilities that represents this constituency at the global level. WNUSP is a non-governmental organization in special consultative status with UN ECOSOC, and a member of the International Disability Alliance as a global disabled people’s organization (DPO). WNUSP participated actively in the drafting and negotiation of the Convention on the Rights of Persons with Disabilities and continues to participate actively in its monitoring and implementation.¹

Overall points:

1. We are happy with the clear prohibition of involuntary committal and internment based on actual or perceived psychosocial disability in both the Principles and Guidelines, with the references to disability and persons with disabilities as a protected class, and with the strong and clear guidelines on implementation of the principles and guidelines as a whole.
2. The references to periodic review of detention in paragraphs 62 and 115(m) must be removed, because periodic review of disability-based detention is incompatible with prohibition of such detention. There is no reason to apply a specific requirement of periodic review to detention of persons with disabilities per se. If such a guarantee needs to be a feature of detention regimes in general it should be specified in the general principles and guidelines and not in relation to persons with disabilities in particular.
3. Disability, or persons with disabilities, is included in most of the enumerated lists of protected groups, but in two cases it is omitted and needs to be included (paragraph 22 and paragraph 49).
4. The Guidelines should differentiate between measures applicable to prevent and remedy detention that is absolutely prohibited because it is based in whole or in part on the person’s disability, and measures applicable to ensure equal rights of persons with disabilities in the context of detention that is not disability-based and that is potentially lawful, which like any detention must be evaluated on a case by case basis. We have made suggestions for changes to Guideline 20 for this purpose.

¹ For more information please see www.wnusp.net. Contact for this submission is Tina Minkowitz, tminkowitz@earthlink.net.

5. The Principles and Guidelines do not take account of all the relevant CRPD jurisprudence, and so we suggest additions to Guideline 20 that are helpful to clarify some details that have been significant in the monitoring and implementation of CRPD Article 14.
6. We make additional suggestions for improvement where it appears that greater rights protection could be incorporated or where inadvertent potential for discrimination could be avoided (and a few minor suggestions regarding apparent errors or sentence structure).

Paragraph 9

Apparent typographical error, should be “**persons with disabilities, including persons with psychosocial disabilities**” (comma rather than semi-colon).

We are happy with the inclusion of persons with disabilities, including persons with psychosocial disabilities, here and in paragraphs 11, 16, 54, 77(f), 107 (children with disabilities).

Paragraph 10

In beginning of paragraph 10, suggested addition “**Deprivation of liberty is without free consent.**”²

“Psychiatric facilities” is placed in odd position in the list, and at least should be separated out with commas “**, psychiatric facilities,**”

Paragraphs 11 and 13

We are happy that the definition of arbitrary detention refers to violations of international law for reasons of discrimination based on grounds including disability, and that incompatibility with international law is included in the the criteria for unlawful detention.

In some aspects the definition of arbitrary detention could be too narrow, and would like to have added and included some parts of the ICCPR General Comment 35 (para 12); “**An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality**”. If this is added in para 11bis, it also corresponds well with para 12 saying “deprivation of liberty requires a strict review of the lawfulness, necessity and proportionality of...”.

Paragraph 19

We are happy with the mention of application to non-state actors, which can include psychiatric facilities.

Paragraph 20

Suggest that in addition to deprivation of liberty “by or on behalf of any government authority at any level,” detention giving rise to governmental obligations can also take

² ICCPR General Comment No. 35, paragraph 6.

place when non-state actors are acting under color of law, i.e. when the detention by non-state actors is authorized by domestic legislation (as is the case in psychiatric detention governed by domestic mental health legislation, which is nevertheless contrary to international law).

Language to add: “**or when the detention is carried out by non-state actors under color of law**” or alternatively “**including detention by non-state actors that is authorized by domestic legislation.**”

In addition however, there needs to be some way to bring proceedings before a court to challenge detention that is entirely without basis in law and that may be carried out by non-state actors. The state has a positive duty to provide for remedies against such acts of arbitrary detention.

Suggested addition: “**The state has a positive duty to provide legal remedies whereby individuals who are detained by non-state actors whether or not acting under color of law can secure a court judgment ordering their release.**”

Paragraph 22

Disability needs to be mentioned here as a prohibited ground of discrimination

Add: “**disability;**”

Paragraph 23

Regardless of any other mechanisms, there needs to be a universally available remedy for any person who seeks to challenge any detention by a state or non-state authority as in the mechanisms of habeas corpus or amparo, and this should be organized under the country’s judicial authority.

Add: “**and shall be constituted under the state’s judicial power.**”

Paragraph 26

We are happy with the comprehensive time periods beginning with arrest or detention and with the right to claim remedies after release not being rendered ineffective by statutes of limitation.

Paragraphs 27 et seq

Suggest using a term such as “**legal counsel**” “**legal advocate**” or “**lawyer or other legal representative designated by the person**” rather than “legal representative” in paragraphs 27 through 34, and whenever it may arise. The reason is that “legal representative” has had other meanings, in particular to refer to adult guardianship, which is now prohibited under the CRPD.

Paragraph 37

We are concerned by the discretion allowed to diverge from equal procedural rights applied to all parties. CRPD jurisprudence on Articles 13 and 14 makes it clear that this is not permissible with respect to persons with disabilities, who must be afforded equal substantive and procedural guarantees as others. If the norm in other respects may be different it is suggested to clarify or at minimum to ensure that the principle and guidelines referring to persons with disabilities call for equal procedural rights.

Paragraph 41

We are happy with the mandate on courts to ensure that deprivation of liberty is lawful under both national and international law.

Paragraph 49

Should add “**disability**” as a prohibited ground of discrimination, given the protection by a core human rights treaty.

Paragraph 56

Suggested addition: “**Support shall be provided to children, including children with disabilities, for the exercise of their rights. Such support shall be disability- and age-appropriate**” as mandated by CRPD Article 7.3.

Paragraph 59

We are happy with the unequivocal prohibition of involuntary committal or internment on grounds of actual or perceived psychosocial or intellectual disability.

Paragraph 60

We suggest adding, after “international law,” “**offering the same substantive and procedural guarantees available to others,**” and continuing with the remainder of the sentence.

Paragraph 61

We are happy with the obligation of equality and non-discrimination.

Paragraph 62

Paragraph 62 is incompatible with the prohibition of involuntary committal or internment based on disability, and must be removed. Rather than calling for periodic review of detention that is arbitrary and unlawful under international law, it would be appropriate to say instead, “**Remedies must be provided by which persons who are involuntarily committed or interned on the basis of their actual or perceived disability can challenge the detention before a court at any time and secure their prompt release.**”

Paragraph 63

Suggest adding “**accommodations and**” before “support” so as to acknowledge the CRPD Article 13 requirement to provide accommodations for persons with disabilities (as well as the support required under Article 12) so as to ensure effective access to justice.

Paragraph 69

We are happy with the inclusion of “involuntary hospitalization” as a form of detention, and suggest adding “**or institutionalization**” or independently listing “**involuntary institutionalization**” or “**involuntary placement in residential facilities of any kind**”

Paragraph 72

We are happy that non-discrimination, and that the measures be consistent with international law, are included as criteria for determining the legitimacy of practical measures taken in situations of public emergency.

Paragraph 73

We are happy with the authority of the court to order release, the obligations of state officials to implement the court's orders, and the authority of the court to take measures against state authorities where the detention was found to be arbitrary or the treatment during the deprivation of liberty was abusive (paragraphs (g), (h) and (i)).

We urge the addition in (b) after "established by law" of "**under the country's judicial power.**"

Paragraphs 74-75

We are concerned that the permission to establish separate tribunals may result in confusion over the proper reviewing authority for involuntary committals based on disability (including committals authorized under mental health legislation). The pre-CRPD approach called for review tribunals to be established that could be administrative rather than based in the country's judicial branch, and that could be composed of personnel that include psychiatrists. There should be some way of indicating that the courts designated to review claims that a person is being detained in a mental health facility or otherwise interned based on disability cannot include medical personnel in their composition and they must have plenary judicial authority. This could be included in paragraph 74 or 75, or alternatively in the guidelines on persons with disabilities.

In addition, we are concerned about the existence of specialized courts in some countries that are called "mental health courts" or "treatment courts" and that often have the effect of supervising compulsory compliance with mental health treatment as a diversionary measure from the criminal justice system. This practice is contrary to CRPD jurisprudence, which calls for equal and substantive procedural guarantees for people with psychosocial disabilities subject to criminal proceedings.

Suggested addition: "**The determination of need for special protection of a vulnerable group shall not be made without full consultation with the affected group and its representative organizations, and measures taken must be consistent with applicable standards of international law.**"

Paragraph 80

We are happy with the provision that no waiting period will exist in the case of allegations of torture or ill-treatment or risk thereof, incommunicado detention or where the life or health of the detainee may be irreparably damaged.

Paragraph 81

We are happy with the guarantee of effective legal assistance from the time of deprivation of liberty, and other guarantees in the paragraph including confidentiality.

Paragraph 82

We agree that a wide range of people should be empowered to commence proceedings to challenge a detention. Suggested addition: "**When the proceeding is initiated by someone**

other than the detained person, the court shall make every effort to discover the detained person's will and preferences and shall provide needed accommodations and support for the detained person to participate effectively in his or her own behalf."

Paragraph 87

We do not agree that information can be withheld from a person based on protection of public order, health or morals, as these criteria are ill-defined and are often discriminatorily applied to people with psychosocial disabilities who are prejudicially perceived as being dangerous to self and others. If it is necessary for other reasons to retain this limitation, suggest adding, "so long as such restrictions are non-discriminatory and consistent with relevant standards of international law."

Paragraph 92(b)

Suggest clarifying that these factors are to be taken into consideration as potentially justifying release, and not as reasons for continued detention. (For example, a court should not be empowered to rule that detention is in the person's best interests given his or her health or family situation.)

Suggested change: after "justified" insert a comma, delete "in" and add "or whether release is warranted given" before continuing with the rest of the sentence.

Paragraph 94

It is unclear what is meant by "measures taken" – should be clarified as to whether this refers to detention in individual cases or something else.

Suggest clarification so as not to focus attention on individual needs and vulnerabilities as the primary concern in considering international standards, given that CRPD explicitly prohibits a form of detention and grounds for detention that are practiced on a widespread basis in domestic legislation.

Addition: after "international standards," insert: "the prohibition of particular grounds of detention or forms of detention must be complied with, and" before continuing with the remainder of the sentence.

Paragraphs 95-101

We are happy with the incorporation of comprehensive remedies and reparation as provided for under international law.

Paragraphs 102-105

We are concerned that persons with psychosocial disabilities may increasingly be accused of terrorist acts or otherwise caught up in armed conflict situations, both due to prejudiced perception of persons with psychosocial disabilities being dangerous to oneself and others, and due to increased conflict affecting all populations. Treating terrorist acts under special laws, in particular, is problematic and can give rise to all sorts of discrimination and abuse. We would like to see some provision in connection with each of these situations, on non-discrimination. It is addressed in principle 16 (paragraph 49) in connection with the right to bring proceedings, and we are happy that disability is included; also paragraph 105(c) incorporates the guarantees of international human rights law. But it would be helpful to mention, for example in the context of civilian internment

(paragraph 103), that “both determination of the need for internment and the conditions of internment must be free from discrimination of any kind based on ... disability”

Paragraphs 106-109

We are happy that children with disabilities are mentioned in 107, but there is a need to address accessibility of information and the provision of disability- and age-appropriate support to exercise rights.

Suggest adding, in paragraph 109(d) after “culture-sensitive,” “and accessible to children with diverse disabilities.”

Suggest adding a new paragraph 109bis, to read, “Children with disabilities have the right to express their views and to have their will and preferences taken into account on an equal basis with other children. All children, including children with disabilities, must be provided with accommodations and support that is age- and disability-appropriate in order to exercise their rights both in the context of proceedings to challenge any detention, and to exercise rights they retain as detainees.”

Paragraphs 112-115

We are happy with the unequivocal prohibition of involuntary committal or internment based on actual or perceived disability.

While we are happy with much of the content of paragraph 115, it does not clearly differentiate between measures applicable to prevent detention that is absolutely prohibited because it is based in whole or in part on disability, and measures applicable to ensure the rights of persons with disabilities on an equal basis with others when subjected to detention that is not per se discriminatory and thus needs to be tested on a case by case basis (such as detention as a criminal suspect).

In a few respects, the stated standards are unclear or inconsistent with the most recent CRPD jurisprudence, and we indicate suggested changes. The requirement of periodic review, as mentioned in comments on paragraph 62, is in particular inconsistent with the prohibition of involuntary committal and must be removed.

In addition, there is relevant CRPD jurisprudence that has not been taken into account and that would enhance and improve the guideline and promote full compliance.

We have copied the entire text of Guideline 20 here with our suggested changes and additions:

112. The involuntary committal or internment on the grounds of disability or perceived disability, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, is prohibited.

112bis. In particular:

(a) No one shall be detained against his or her will in any kind of a mental health facility;³

(b) Criteria such as “danger to self or others” or “need for care and treatment” cannot legitimize a detention that is based on disability or perceived disability, in particular detention based on categorizations such as “mental disorder” or “mental illness”;⁴

(c) The denial of legal capacity of persons with disabilities and detention in institutions against their will, without their consent or with the consent of a substitute decision-maker, constitutes arbitrary deprivation of liberty in violation of international law; [moved from 115(c)]

(d) No one shall be detained in a psychiatric hospital or similar institution as a security measure applied to persons with disabilities who are subject to criminal proceedings.⁵

112ter. Persons with disabilities may only be lawfully deprived of their liberty on grounds that are applicable to the population as a whole, and subject to the same substantive and procedural guarantees. Detention that has the purpose or effect of discriminating based on disability is prohibited.⁶

113. Where persons with disabilities are deprived of their liberty through any process,¹⁴³ they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law, necessarily including the right to liberty and security of the person, **reasonable accommodation, and humane treatment in accordance with the objectives and principles of the highest standards of international law pertaining to the rights of persons with disabilities.**

³ CRPD Concluding Observations on Austria, paragraph 30; CRPD Concluding Observations on Australia, paragraph 34; CRPD Concluding Observations on Sweden, paragraph 36.

⁴ CRPD Statement on Article 14; CRPD Concluding Observations on El Salvador, paragraph 32; CRPD Concluding observations on Austria, paragraph 29; CRPD Concluding Observations on Sweden, paragraph 35; Concluding Observations on Denmark, paragraph 36.

⁵ CRPD Statement on Article 14; CRPD Concluding Observations on Australia, paragraph 30; CRPD Concluding Observations on New Zealand, paragraph 33; CRPD Concluding Observations on Mexico, paragraph 30(a); CRPD Concluding Observations on Ecuador, paragraph 29(c); CRPD Concluding Observations on Denmark, paragraph 34; CRPD Concluding Observations on Belgium, paragraphs 27 and 34.

⁶ This is a statement of the relationship between the two primary obligations of CRPD Article 14, to prohibit the deprivation of liberty based on disability, and to provide for equal guarantees in situations of deprivation of liberty. See CRPD Negotiation Archives, Chair’s remarks on Article 14.1(b) concluding the discussion of Article 14, in UN Convention on the Rights of People with Disabilities Ad Hoc Committee – Daily Summaries 8(4) (19 January 2006)

<<http://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm>>.

~~114. A mechanism shall be established, replete with due process of law guarantees, to review cases of placement in any situation of deprivation of liberty without specific, free and informed consent.¹⁴⁴~~

Admission of persons with disabilities to any hospital, institution or residential facility shall only be made with the person's free and informed consent. The standard of "best interpretation of will and preferences" rather than "best interests" applies in cases where, after significant efforts have been made, it has not been practicable to determine the will and preferences of the person.⁷ In such cases, there must be prompt and periodic review to seek a determination with greater accuracy as to the person's will and preferences and to assist them in obtaining the living arrangements and supports of their own choosing.⁸

115. States shall take all necessary legislative, administrative and judicial measures to prevent and remedy involuntary committals or internments based on disability,⁹ as follows:

[Note we suggest to address prohibited detention first and then as 115bis to address substantive and procedural guarantees in lawful forms of detention.]

(a) Legislative provisions that authorize involuntary committal and involuntary treatment, including provisions found in mental health legislation and incapacity legislation, shall be repealed;¹⁰

(b) Legal rights and remedies shall be enacted and enforced to ensure that all mental health services are provided based on the free and informed consent of the person concerned, and that any form of support respects the will and preferences of the rights holder;

[renumbered and adapted from 115(c) and 115(e)]

⁷ CRPD General Comment No. 1, paragraph 19.

⁸ This change is suggested to more faithfully capture the standard for what is to happen when a person has been placed in an institution without expressing either clear consent or objection.

⁹ CRPD Concluding Observations on Austria, paragraph 30; CRPD Concluding Observations on Sweden, paragraph 36; CRPD Concluding Observations on Azerbaijan, paragraph 29; CRPD Concluding Observations on New Zealand, paragraph 30.

¹⁰ CRPD Statement on Article 14; CRPD Concluding Observations on Tunisia, paragraph 25; CRPD Concluding Observations on Spain, paragraph 36; CRPD Concluding Observations on Peru, paragraph 29; CRPD Concluding Observations on El Salvador, paragraph 32; CRPD Concluding Observations on Australia, paragraphs 32(e) and 34; CRPD Concluding Observations on Mexico, paragraph 30(b); CRPD Concluding Observations on Republic of Korea, paragraph 26; CRPD Concluding Observations on Belgium, paragraph 26.

(c) Legislation, policies and programs shall be enacted to eliminate institutional care for persons with disabilities,¹¹ and to ensure that living arrangements acceptable to persons with disabilities as well as desired supports are available in the community and respect the person's autonomy, will and preferences;¹²

(d) Persons with disabilities shall be provided with legal or other appropriate support, including interpretation and peer support mechanisms so ~~detainees~~ **that individuals receiving services in mental health facilities or residential facilities of any kind** can be educated about their rights **and remedies under domestic and international law, including those contained in these Principles and Guidelines**, and organizations may act on behalf of those detained against their will;

[adapted and renumbered from 115(j)]

(e) Individuals who are currently detained in mental health facilities and/or subjected to forced treatment, or who may be so detained or forcibly treated in the future, must be informed about ways in which they can effectively and promptly secure their release ~~including~~ **injunctive relief**;

[renumbered from 115(k)]

(e) Such relief should consist of **an order requiring the facility to release the person immediately and/or to immediately cease any forced treatment, as well as systemic** measures such as requiring mental health facilities to unlock their doors and inform people of their right to leave, and establishing a public authority to provide for access to housing, means of subsistence and other forms of economic and social support in order to facilitate de-institutionalization and re-entry into the community. Such assistance programs should not be centred on the provision of mental health services or treatment, but free or affordable mental health services and treatment, including alternatives that are free from medical-model diagnosis and interventions, as well as both access to medications and assistance in withdrawing from medications, should be made available for those who desire them;¹⁴⁶

[renumbered from 115(l)]

(f) **Individuals who are currently detained in a psychiatric hospital or similar institution as a result of criminal proceedings have a right to be released from disability-based detention and to have their status determined according to substantive and procedural guarantees on an equal basis with others, with reasonable accommodation for disability.**

~~(m) Deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continuing necessity.¹⁴⁷~~

¹¹ CRPD General Comment No. 1 paragraph 46; CRPD Concluding Observations on China, paragraph 32; CRPD Concluding Observations on Paraguay, paragraph 48; CRPD Concluding Observations on El Salvador, paragraph 42; CRPD Concluding Observations on Austria, paragraph 37; CRPD Concluding Observations on Australia, paragraph 42, among others.

¹² These are obligations flowing from CRPD Article 19.

115bis. In all forms of detention provided for by law, Measures shall be taken to ensure the provision of reasonable accommodation, procedural and substantive due process, for persons with disabilities, including the following guarantees:

(a) Every person with a physical, mental, psychosocial, intellectual or sensory disability deprived of his or her liberty is treated with humanity and respect, and in a manner that takes into account their needs, including by provision of reasonable accommodation;¹³

~~(b) This includes persons with disabilities who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. It also includes anyone confined by a court order, administrative decision or otherwise in a psychiatric hospital or similar institution on account of his mental impairment, including persons which have been declared exempt from criminal responsibility.¹⁴~~

(b) Persons with disabilities shall be informed about, and provided access to, promptly and as required, appropriate support to exercise their legal capacity with respect to proceedings related to the detention and in the detention setting itself, including through the provision of interpreters, information in accessible formats and/or independent third parties who are not employed by the law enforcement authority and who are appropriately qualified;¹⁴⁵

~~(c) All health and support services, including all mental health services, are provided based on the free and informed consent of the person concerned. The denial of legal capacity of persons with disabilities and detention in institutions against their will, without their consent or with the consent of a substitute decision-maker, constitutes arbitrary deprivation of liberty in violation of international law;~~

(d) Housing arrangements in places of detention shall afford the same opportunities to persons with disabilities as to others, and shall provide reasonable accommodation for disability.¹⁵ No one shall be transferred without his or her free and informed consent to a mental health facility or mental health unit in the place of detention. Diversion programs,

¹³ It is best to include psychosocial disability specifically (and not only implicitly as a type of mental disability) as that is the preferred terminology.

¹⁴ Further specification can result in unduly narrowing the scope of who is included. CRPD jurisprudence does not specify the limitation of “long-term” impairment for example, in obligations under Article 14. In addition, since detention based on psychosocial disability is prohibited, it can be confusing to define who is included as a person with disability with reference to such detention. A better approach is to simply use the term psychosocial disability and to clarify substantive obligations as needed.

¹⁵ This follows from CRPD Article 19, and from application of the principle of full inclusion and participation (CRPD Article 3(c)) to the context of detention, as required by CRPD Article 14.2 (persons with disabilities deprived of their liberty must be treated in accordance with objectives and principles of the Convention).

probation and parole, and eligibility for programs and services within the detention setting, shall not require compliance with mental health services.¹⁶

(e) Any form of support must always take place in respect of the will and preference of the rights-holder;

(f) Persons with disabilities can access, on an equal basis with other persons subject to detention, the physical environment, information and communications, and other **services and** facilities provided by the detaining authority;

(g) Accessibility should also take into account the gender and age of persons with disability, and equal access should be provided regardless of the type of impairment, legal status, social condition, gender and age of the detainee;

(h) Persons with psychosocial disabilities must be given the opportunity to promptly stand trial, with support and accommodations as may be needed, rather than declaring the person incompetent;

(i) Accommodation must be provided for persons with disabilities, including those with psychosocial and intellectual ~~impairments~~ **disabilities**, deaf, blind and deaf-blind persons, and persons with physical impairments, to appear before the court. This may include physically accessible court facilities, augmentative and alternative means of communication, plain language, and other similar means that allow for understanding and actively act in such circumstances;

(j) Persons with disabilities shall be provided with legal or other appropriate support, including interpretation and peer support mechanisms so detainees can be educated about their rights, and organizations may act on behalf of those detained against their will.

Paragraphs 117-122

We are happy with the implementation measures which are comprehensive and provide clear guidance as to states' obligations.

¹⁶ Concluding Observations on Australia, paragraph 30.