



**Comments by Dunja Mijatović, Council of Europe Commissioner for Human Rights  
on the draft Additional Protocol to the Convention on Human Rights and Biomedicine  
concerning the Protection of Human Rights and Dignity of Persons with Mental Disorder  
with regard to Involuntary Placement and Involuntary Treatment**

Strasbourg, 8 November 2018

1. The Commissioner for Human Rights would like to thank the Committee on Bioethics (DH-BIO) for having invited her to provide comments on a draft Additional Protocol to the Convention on Human Rights and Biomedicine (Oviedo Convention) concerning “the Protection of Human Rights and Dignity of Persons with Mental Disorder with regard to Involuntary Placement and Involuntary Treatment” (hereinafter, “the draft Additional Protocol”).
2. The present comments are based on the extensive country and thematic work of the Commissioner’s Office on various issues relating to persons with disabilities, including legal capacity and the right to live in the community, as well as specific human rights implications of involuntary measures in psychiatric settings.
3. The Commissioner observes that this is the second time that her Office has been invited to comment on the draft Additional Protocol. She notes, in particular, that her predecessor sent detailed comments on a previous version of the draft Additional Protocol on 9 November 2015, raising numerous concerns of such a fundamental nature about the basic assumptions of the draft Additional Protocol that he called on the DH-BIO not to adopt it and to reprioritise its work concerning persons with psychosocial disabilities.<sup>1</sup> She fully endorses this position on the Draft Protocol and the present observations should be seen as complementing her predecessor’s comments. She further notes similar positions expressed, around that time or thereafter, by the Parliamentary Assembly which conveyed its opposition to that text, the United Nations Committee on the Rights of Persons with Disabilities,<sup>2</sup> the Office of the UN High Commissioner for Human Rights, the UN Special Rapporteurs on the rights of persons with disabilities and on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the UN Working Group on Arbitrary Detention, the Fundamental Rights Agency of the EU, as well as by numerous NGOs representing persons with disabilities.
4. The Commissioner would like to stress that she fully shares the concerns expressed in these earlier comments and finds that they continue to apply to the present draft. In the opinion of the Commissioner, the amendments to the previous version of the draft Additional Protocol have not resolved the fundamental problems surrounding the text. Certain changes, in particular the inclusion of its Chapter VI on specific situations, could even create further problems.
5. While noting that the DH-BIO started this work with the commendable intention of improving the protection of persons with psychosocial disabilities with regard to involuntary measures ordered in a medical context, she considers that the draft Additional Protocol, rather than satisfying that ambition, unfortunately risks provoking the opposite result. In the opinion of the Commissioner, this risk not only stems from the specific drafting choices concerning the different provisions of the text, but also from the general approach behind it. The Commissioner regrets, therefore, that she must again express opposition to this draft Additional Protocol and call on the DH-BIO not to adopt it.

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<sup>1</sup> Comments of the Council of Europe Commissioner for Human Rights on the “Working document concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment”, [CommDH\(2015\)28](#), 9 November 2015.

<sup>2</sup> See notably the “[Statement](#) by the Committee on the Rights of Persons with Disabilities calling States parties to oppose the draft Additional Protocol to the Oviedo Convention”, adopted during the Committee’s 20th session, held from 27 August to 21 September 2018 in Geneva.

6. The following comments should therefore be seen as a brief explanation of the reasons which brought the Commissioner to this conclusion. These concerns include the conflict this draft Additional Protocol would engender with the UN Convention on the Rights of Persons with Disabilities (hereinafter, “the CRPD”), its failure to address the source of the problem, as well as the insufficient consultation in the drafting of the draft Additional Protocol of the very persons which it purports to protect, and their opposition to this text.

***Conflict with the UN Convention on the Rights of Persons with Disabilities (CRPD)***

7. The Commissioner stresses that the Council of Europe should abstain from elaborating norms which are in conflict with global human rights standards or which could weaken the protections provided in those standards. In this respect, the Commissioner notes that the CRPD adopted in 2006 is one of the most widely ratified core human rights instruments of the United Nations and that it has been ratified by 46 of the 47 member states of the Council of Europe, as well as the European Union. For the Commissioner, the CRPD is the international benchmark and legal reference point in all matters pertaining to disability. She also notes that the Committee on the Rights of Persons with Disabilities, the authoritative treaty body set up under the CRPD, as well as many other UN human rights bodies, explicitly expressed the view that the draft Additional Protocol would be incompatible with this Convention.
8. The issues of incompatibility raised are not simply limited to whether involuntary measures are admissible under the CRPD. They also concern, inter alia:
  - stigmatising language used in the draft Additional Protocol to refer to persons with psychosocial disabilities, informed by an out-dated, medical model of disability;
  - the fact that the scope of application of the draft Additional Protocol and the criteria set out in the text are inherently discriminatory, in that they apply only to people with “mental disorder”;
  - a very narrow and inadequate approach to the crucial question of support needs of persons with psychosocial disabilities in order to be able to exercise their legal capacity and autonomy on an equal basis with others in mental health settings.
9. Given this context, the Commissioner thinks that any interpretation according to which the draft Additional Protocol is compatible with the letter or spirit of the CRPD is no longer tenable. She considers that the adoption of the draft Additional Protocol would on the contrary create a clear conflict between international standards. Such a situation could lead to confusion among relevant stakeholders and undermine the human rights protections to which persons living in Europe are entitled.
10. Under these circumstances, to continue work on this Additional Protocol would set a serious legal precedent where the Council of Europe would adopt a legally binding text which falls below UN and internationally agreed human rights standards.

***Failure to address the source of the problem***

11. The Commissioner notes that the decision to elaborate a legally binding instrument on this issue was taken in 2011 based on an examination of the implementation of the Committee of Ministers Recommendation Rec(2004)10 concerning the protection of human rights and dignity of persons with mental disorder, as this examination revealed at the time “legal gaps in certain Member States”. Considering that the great majority of the 46 Council of Europe member states who are parties to the CRPD ratified the Convention around or after that time, the relevance of this as a basis to justify the need for this draft Additional Protocol could be disputed. Nevertheless, the Commissioner would be interested in receiving detailed information from the DH-BIO on the legal gaps that it has identified in specific member states, as this would be useful in her country work to raise with the authorities of those states.
12. However, in the Commissioner’s view, the assessment that the lack of legal safeguards is a significant cause of the many abuses persons with psychosocial disabilities continue to suffer in medical settings in Europe is disputable. In the experience of her Office, the vast majority of Council of Europe member states already have similar or even more protective safeguards in place, which however fail on a regular basis to prevent needless involuntary placements and other serious abuses – a circumstance suggesting that the root causes of these abuses must be sought elsewhere. The Commissioner fully subscribes to the reasoning provided in her Office’s previous comments mentioned above which go into considerable detail as to why this is the case. One of

the main reasons is the inherently discriminatory nature of most legal systems when it comes to persons with psychosocial disabilities, such as their failure to take account of their support needs, the unpreparedness of judges to handle the human rights implications of involuntary measures, and the inbuilt inequality and biases when it comes to decisions on involuntary measures.

13. The Commissioner considers that, in the current context in Europe, what is necessary is guidance on how member states can avoid recourse to involuntary measures. In this respect, she notes that although the Additional Protocol encourages the use of involuntary measures as a last resort, it does not provide details, standards or guidance about what the alternatives to such measures should look like or at what stage they should be considered as insufficient. In the opinion of the Commissioner, the provisions of the Protocol encouraging member states to use alternative measures and to keep involuntary measures proportionate are too general and imprecise to lead to any concrete policy changes on the ground. The Protocol is therefore highly unlikely to lead to an improvement or a significant reduction of human rights violations suffered by persons with psychosocial disabilities in settings where they are already routinely and unnecessarily subjected to involuntary measures. Furthermore, by coming out with a binding legal instrument on a very narrow part of a multifaceted and complex question, the Council of Europe could be adding to the confusion and thereby delaying reforms, the necessity of which has been put in stark contrast by the CRPD.
14. In addition, the Commissioner notes that the legal terms used in the draft Additional Protocol are defined too broadly and imprecisely, leaving too much to the discretion of physicians. Rather than limiting involuntary measures to the strict minimum necessary, this situation could on the contrary lead to an increase, due to the appearance of legality an international binding instrument such as this Additional Protocol could grant to practices potentially causing human rights violations. While the Commissioner understands the difficulty of reaching a consensus in an international standard-setting context on the exceptional and precise situations and cases this draft Additional Protocol should apply to, she nonetheless considers that the danger posed by an overly broad interpretation of its provisions is very high and could lead to negative human rights implications.

***Lack of support and involvement of representative organisations of the persons most affected by the draft Additional Protocol***

15. The Commissioner stresses that the CRPD clearly provides, as a general obligation, the close consultation and active involvement of persons with disabilities, through their representative organisations, in any decision-making process concerning issues relating to persons with disabilities. As her Office has been advocating for a long time, the Commissioner considers that this obligation must also apply to decision-making processes within the Council of Europe, in particular to any standard-setting activity which could potentially have an impact on the implementation of the CRPD by member states.
16. The Commissioner notes that some of the most representative organisations of persons with disabilities (and in particular intellectual and psychosocial disabilities) in Europe, with whom her Office co-operates on a regular basis, sent an open letter to the Council of Europe on 14 May 2018 asking for the withdrawal of the Additional Protocol, stating that they would no longer attend the meetings of the DH-BIO as their inputs were “systematically ignored”, and claiming that their lack of inclusion in the decision-making process alone is not in line with Article 4.3 of the CRPD. The Commissioner notes that the consultation of these organisations occurred at a late stage of the drafting process and does not seem to have led to any significant change in the draft Additional Protocol, which continues to largely reflect the approach of the 2004 Recommendation of the Committee of Ministers “concerning the protection of the human rights and dignity of persons with mental disorder” predating the entry into force of the CRPD. Furthermore, the Commissioner understands that these organisations were not consulted on the crucial question of the actual need for this instrument and its general approach, which would have been appropriate before starting work of such a nature, and were only asked to submit drafting amendments on an existing text with which they had very fundamental disagreements.

## **Conclusion**

17. The Commissioner considers that the draft Additional Protocol, by not addressing the most crucial issues which could reduce recourse to involuntary measures, as well as the vagueness and imprecision of its definitions and standards, is unlikely to improve the human rights situation of persons with psychosocial disabilities. On the contrary, by going against views expressed by the persons concerned and creating confusion at the international level about hard-fought global standards, the adoption of this Additional Protocol would, in her opinion, ultimately be counterproductive for the protection of the rights of persons with psychosocial disabilities. Therefore, she calls on the DH-BIO not to adopt the draft Additional Protocol.
18. The Commissioner wishes to clarify that her position as outlined above should not be understood as a call for the immediate abolition of involuntary measures in psychiatry. It should be read as an appeal not to disrupt, by creating more legal uncertainty, the already on-going process of the reduction of such measures in many Council of Europe member states. What is needed instead is guidance and support to the reform process of mental health systems in order to ensure that the maximum number of persons with psychosocial disabilities would voluntarily seek treatment without the fear of losing their dignity and autonomy. Such guidance and support would not only avoid the serious incompatibility problem with the CRPD, it would also be a far more direct and useful way of dealing with the numerous human rights violations which regularly occur in the context of involuntary measures in Council of Europe member states, a situation which the DH-BIO acknowledges and rightly wants to improve.