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HAUT-COMMISSARIAT

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

TÉLÉCOPIE • FACSIMILE TRANSMISSION

DATE: 29 September 2017

A/TO: Mr. Thorbjørn Jagland
Secretary General of the Council of Europe
Council of Europe
Avenue de l'Europe
67075 Strasbourg Cedex - France
FAX: +33 (0)388 41 27 99 or +33 (0)388 41 27 40
EMAIL: thorbjorn.jagland@coe.int

DE/FROM: Beatriz Balbin
Chief
Special Procedures Branch
OHCHR
FAX: +41 22 917 9008
TEL: +41 22 917 9359 / +41 22 917 9543
E-MAIL: registry@ohchr.org

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OBJET/SUBJECT: **JOINT COMMUNICATION FROM SPECIAL PROCEDURES**

Please find attached a joint communication sent by the Working Group on Arbitrary Detention; the Special Rapporteur on the rights of persons with disabilities; the Chair of the Committee on the Rights of Person with Disabilities and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

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HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND
www.ohchr.org • TEL: +41 22 917 9359 / +41 22 917 9543 • FAX: +41 22 917 9008 • E-MAIL: registry@ohchr.org

**Mandates of the Working Group on Arbitrary Detention; the Chair of the Committee on the Rights of Person with Disabilities; the Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health**

REFERENCE:
OL OTH 23/2017

29 September 2017

Dear Mr. Jagland,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on the rights of persons with disabilities; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, pursuant to Human Rights Council resolutions 33/30, 35/6, and 33/9; and Chair of the Committee on the Rights of Person with Disabilities.

In this connection, we would like to bring to your attention information we have received concerning the **draft Additional Protocol to the Convention on Human Rights and Biomedicine** (hereinafter referred to as the Additional Protocol), elaborated by the Committee on Bioethics of the Council of Europe (DH-BIO). The draft Additional Protocol is purportedly aimed at protecting the rights of all persons with "mental disorders" with regard to the use of involuntary placement and involuntary treatment.

In June 2015, a draft version was put for open consultations and, according to the compilation of the comments, the Secretariat of the Committee has received some 40 submissions from different stakeholders (see DH-BIO/INF (2015) 20), including contributions from the United Nations Committee on the Rights of Persons with Disabilities, and the Special Rapporteur of the United Nations Human Rights Council on the Rights of Persons with Disabilities. Most of those submissions were converging around the issues of: stigmatizing language used in reference to persons with psychosocial disabilities; breach of the fundamental principle of non-discrimination; and legitimization of the use of force and arbitrary deprivation of liberty. Furthermore, the Commissioner for Human Rights and the Parliamentary Assembly of the Council of Europe called for the withdrawal of the draft Additional Protocol as it was blatantly conflicting with the human rights standards set by the United Nations Convention on the Rights of Person with Disabilities.

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Mr. Thorbjørn Jagland
Secretary General of the Council of Europe

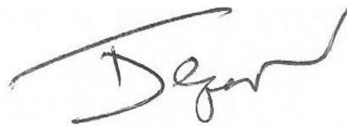
After the consultations, the Drafting Group continued their work in closed sessions. According to the Abridged Report on the 11th meeting of the Committee on Bioethics, which took place from 6 to 8 June 2017, a revised text has been put forward. However, there is no publicly available information regarding the new content of the draft Additional Protocol, the further organisation of the working process, and the tentative deadlines for finalization.

Ahead of the upcoming plenary session of the Committee on Bioethics, we would like to reiterate our concerns that the draft Additional Protocol openly contradicts the human rights standards set by the United Nations Convention on the Rights of Person with Disabilities. Furthermore, we would like to draw your Excellency's attention that the adoption of such an instrument, which falls below the binding international human rights standards, would reflect in a negative way on the role of the Council of Europe as a prominent guardian of human rights.[1] It is important to recall that 44 out of the 47 member States of the Council of Europe are also States Parties to the United Nations Convention on the Rights of Person with Disabilities, and that all 29 States Parties to the Oviedo Convention are also States Parties to the Convention on the Rights of Person with Disabilities.

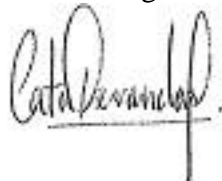
In the exercise of our mandated responsibilities, we stand ready to provide further advice and technical assistance in support of the efforts of the Committee on Bioethics to ensure that the current law reform process respects the standards put forward by the Convention on the Rights of Persons with Disabilities.

Please accept, Excellency, the assurances of our highest consideration.

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention



Theresia Degener
Chair of the Committee on the Rights of Person with Disabilities



[1] A previous letter on the potentially harmful outcomes of the Additional Protocol was addressed to the Secretariat of the Committee on 15 November 2015. The Chair of the CRPD Committee Theresia Degener (then Vice Chair) also addressed the issue during her meeting with the Steering Committee for Human Rights at its 84th session from 7-11 December 2015, See Report CDDH(2015) R84 pg. 46 et seq

Catalina Devandas-Aguilar
Special Rapporteur on the rights of persons with disabilities

Dainius Pūras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

## Annex
## Reference to international human rights law

In connection with above concerns, we would like to make reference to the applicable international human rights norms and standards relevant to the full enjoyment and realisation of human rights by persons with disabilities.

We would like to emphasize that the issues addressed by the draft Additional Protocol fall within the scope of the Convention on the Rights of Person with Disabilities, which is the most authoritative instrument to guide the formulation of any standards, laws or guidelines related to the rights of persons with disabilities. Therefore, as UN experts mandated to assist States in understanding what are their obligations under the Convention and to engage in constructive dialogue with the authorities on how to accelerate its domestic implementation, we are highly concerned that the proposed text does, prima facie, fall below the human rights standards set by the Convention.

Article 12 of the Convention on the Rights of Persons with Disabilities states that all persons with disabilities, including those with psychosocial disabilities, have the right to equal recognition before the law and should enjoy legal capacity on an equal basis with others. It sets forth two positive aspects of personal autonomy: the respect for one's own choices shaped by individual will and preferences, and the promotion of personal autonomy through supported decision-making. In this regard, States parties have an obligation not to deprive persons with disabilities of the right to make and pursue their own decisions, nor to permit substitute decision-makers to provide consent on their behalf. Instead, States parties must provide persons with disabilities with access to different forms of support arrangements for the exercise of their legal capacity, including the provision of consent (see General comment No 1 (2014) CRPD/C/CG/1).

Article 14 of the Convention on the Rights of Persons with Disabilities prohibits all unlawful or arbitrary deprivation of liberty of persons with disabilities, clarifying that the existence of a disability cannot justify a deprivation of liberty. Prevalent mental health laws nowadays justify detention on the grounds of actual or perceived mental impairment, or based on potential dangerousness to themselves or others. While the criteria purport to be objective and reasonable, in practice they have the effect of targeting persons with disabilities, in particular persons with psychosocial and persons with intellectual disabilities who are commonly considered as being dangerous and in need of treatment or care. Hence, such measures are discriminatory and in contradiction of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by Article 14 (see Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, para. 6; A/HRC/34/32, para. 29-32). States have an obligation to replace the use of coercive psychiatry with support in decision making on health related matters and alternative service models that are respectful of the will and preferences of the person (see A/HRC/34/58 , para. 85; A/HRC/35/21, para. 29).

Article 25 of the Convention on the Rights of Persons with Disabilities expressly requires states to provide health care to persons with disabilities on the basis of free and informed consent. Health professionals are therefore obliged to ensure that consent is always provided before any medical intervention can be performed. On the basis of respect for a person's consent, people are also entitled to refuse treatment, even when there is ground to believe that treatment would benefit their health (see E/CN.4/2006/120, para. 82). Persons with psychosocial disabilities should be treated no differently and as a result they enjoy the same right to accept or refuse medical treatment.

Furthermore, involuntary placement and treatment represent also a threat to the right to physical integrity, as secured by Article 17 of the Convention on the Rights of Persons with Disabilities. In practice these non-consensual interventions entail the use of force, chemical or physical restraints, isolation, seclusion, or sedation. Such practices exceed the scope of the right to health and may amount to torture or cruel, inhuman or degrading treatment (see A/63/175, paras. 55-56).

Scientific and experiential research, which is available today, shows that persons with psychosocial disabilities can live independently when empowered through appropriate legal protection and support (see A/HRC/35/21, para. 25). Furthermore, it must be mentioned that the reductionist biomedical model of psychiatry, heavily reliant on coercion and medicalization in everyday practice, is under increased scientific critique that is backed up by sturdy research (see A/HRC/35/21). In this context, it is worth noting that the Resource Book on Mental Health, Human Rights and Legislation, developed by the World Health Organization to guide States on the procedures and safeguards related to involuntary treatment, has been withdrawn. This document, drafted prior to the coming into force of the Convention on the Rights of Persons with Disabilities, was deemed incompatible with the latest human rights standards. The World Health Organization resolved to abide by the Convention on the Rights of Persons with Disabilities and ground their future work on the formulation of rights-based guidance (see http://www.who.int/mental_health/policy/legislation/en/).

We would like, therefore, to encourage the Council of Europe to take into consideration all these recent developments within the international human rights law framework and the compelling body of evidence on the detrimental social and individual effects of coercion during the debate of the proposals for an Additional Protocol. Non-discrimination as a principle and a right must be a central feature of any human rights instrument. The Additional Protocol risks to fragment the corps of international human rights law of which its own legitimacy rests upon its coherence. By creating divergent and contradictory standards, it is less likely that States will be drawn to implement provisions, thus leaving a gap in rights protection and impeding current reform initiatives giving effect to the Convention on the Rights of Persons with Disabilities.

Finally, we would like to remind you the obligation set forth by the Convention on the Rights of Person with Disabilities to closely consult with and actively involve persons with disabilities, in particular persons with psychosocial disabilities, through their representative organizations, in the development and implementation of any mental

health legislation or policy (Article 4(3)). Good faith should be a foundation stone of this process, and consultations must embrace transparency, mutual respect, meaningful dialogue and a sincere desire to reach consensus.

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.