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"Of Unsound Mind":
Convention-compliant approaches to the execution of judgments concerning involuntary detention and treatment on mental health grounds.

Urgent need for effective remedies and reparations

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Thank you for inviting me to speak on this important topic.

1. First, I will give a few thoughts on the overall theme of the Conference

a) "Of unsound mind"

«Of unsound mind» - what associations do we get? Stigmatizing? Prejudiced? Arbitrary? Oppressive? How come we still have such an unacceptable language and basis for detention in a human rights treaty?

I think we can all agree that the term "unsound mind" is hopelessly outdated. Also, the UN Convention on the Rights of Persons with Disabilities (the CRPD) requires that deprivation of liberty is not based on disability. "Unsound mind" targets people with psychosocial disabilities for detention, thus leading to disability-specific and discriminatory deprivation of liberty for this group.

b) "Convention-compliant approaches to execution of judgments"

Convention-compliant approaches need to not only be in line with the European Convention but also in compliance with the applicable norms of international law. The CRPD, as the latest, most specialized international treaty on the rights of persons with disabilities, legally binding in 191 countries, gives authoritative guidance on the standards to be applied. All 46 Member States of the Council of Europe, and the European Union, are parties to the CRPD. States should implement the European Convention and the jurisprudence of the Court in a way that ensures no breach of their CRPD obligations.

c) "Involuntary detention and treatment on mental health grounds"

Persons with psychosocial disabilities have been particularly exposed to paternalistic legislation and practices restricting the right to self-determination. This includes legislation authorizing forced treatments, mental health detention and other non-consensual practices. Such interventions violate the equal right to legal capacity, to liberty and security, to respect for physical and mental integrity, to free and informed consent to medical procedures, and to be free from ill-treatment. The CRPD sets forth the right of all persons with disabilities to make their own decisions and to control their own lives on an equal basis with others.

2. Second, I will comment on best practice of the European Court and the Council of Europe, as well as the potential for needed development

In 2015, judge Paulo Pinto de Albuquerque gave a progressive and important (partly) dissenting opinion in the European Court on the right to liberty, in the case Kuttner v. Austria. Judge Pinto identifies the international standards applicable;

“Disability-based arrest, detention or imprisonment is in breach of Article 14 § 1 (b) of the CRPD.” “Deprivations of liberty based on the existence of a disability are intrinsically discriminatory. Detention regimes which by their own terms discriminate on the basis of disability constitute arbitrary detention. The involuntary detention of persons with disabilities based on presumptions of risk or dangerousness linked to disability labels is contrary to the right to liberty.”

Judge Pinto concludes that it is now high time to take action and reform the deficient legal and institutional framework in accordance with the State’s international obligations.

In 2019, in the Grand Chamber decision of Rooman v. Belgium the Court considers that “Article 5, **as currently interpreted**, does not contain a prohibition on detention on the basis of impairment”. This leaves an opening for needed development. Moving away from the medical model of disability and aligning with the CRPD will change the “current interpretation”. Article 5 should be interpreted to contain a prohibition of detention based on impairment, deeming such detention unlawful, arbitrary and discriminatory.

In both Rooman v. Belgium (2019) and the later M.B v Poland in 2021, the Court acknowledges the standards of the CRPD and quotes the Guidelines on CRPD Article 14 and its absolute prohibition of detention based on impairment or health conditions.

In 2019, a significant development signaling the beginnings of a paradigm-shift within the Council of Europe was taken by the Parliamentary Assembly with the unanimous adoption of a Resolution which calls on member states to end coercion in mental health and to immediately start the transition to the abolition of coercive practices (..).

In 2021, the Council of Europe Commissioner for Human Rights summarized her position in a Human Rights Comment and gave a groundbreaking third-party intervention in the case Clipea and Iapara v. the Republic of Moldova. The case concerns the alleged ill-treatment of persons with psychosocial disabilities at a psychiatric hospital.

In the amicus to the Court, the Human Rights Commissioner states that successive Commissioners have consistently pointed to institutionalization and coercion in mental health services as a persistent source of human rights violations and urged member states to eliminate these practices in favor of community-based mental health services based on consent. The Commissioner advocates for the elimination of involuntary admission, involuntary treatment, seclusion and restraints.

The CRPD Committee recognizes no exception from the absolute ban on forced treatment, including on grounds such as “risk of harm to oneself” or “danger to others”. The Commissioner points to the fact that other key actors at the UN level endorse and support the same approach, including the Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on the right to health. These experts have stressed that “forced admission to medical institutions and coercive treatments in institutions will bring harmful effects such as pain, trauma, humiliation, shame, stigmatization and fear to people with psychosocial disabilities”.

The Human Rights Commissioner considers that the traditional understanding according to which forced treatment and coercion are inevitable as a “last resort”, provided that there are a number of legal safeguards surrounding these measures, is no longer tenable.

3. Third, I will talk about the urgent need for effective remedies and reparations

Grave human rights violations happen in mental health settings. Deprivation of liberty can in itself be harmful. Indefinite detention is especially harsh, and commonly practiced against persons with psychosocial disabilities. Violent medical practices like forced electroshock, forced drugging, restraint and solitary confinement do not constitute help or care, nor do they have any legitimate purpose. They constitute discriminatory and harmful practices that can cause severe pain and suffering, as well as deep fear and trauma, in its victims. These forced psychiatric interventions meet international definition of torture standards and can cause irreparable damage to life and health.

In a report presented in 2020, the UN Special Rapporteur on torture stated that: "it must be stressed that purportedly benevolent purposes cannot, per se, vindicate coercive or discriminatory measures. For example, practices such as involuntary […] psychiatric intervention based on "medical necessity" of the "best interests" of the patient, generally involve highly discriminatory and coercive attempts at controlling or "correcting" the victim's personality, behavior or choices and almost always inflict severe pain or suffering. In the view of the Special Rapporteur, therefore, if all other defining elements are given, such practices may well amount to torture".

The Council of Europe Human Rights Commissioner considers that the use of coercion in psychiatry, including the use of mechanical or chemical restraints, confinement, isolation and forced medication, should always be considered to reach the minimum level of severity to fall within the scope of Article 3 of the European Convention, considering the severe fear, anguish, feelings of helplessness, loss of dignity and other mental suffering they invariably cause. The Commissioner states that persons with psychosocial disabilities routinely suffer some of the most egregious human rights violations on our continent, including violations of Article 3.

There is an urgent need for recognizing the severity of the harm done and the suffering inflicted on the victims, and for this knowledge and awareness to be implemented in all judicial systems. These forced interventions, which always carry a factor of disability-based discrimination, need to be recognized as ill-treatment, and be abolished. Taking into account the serious and systematic violations of human rights, there is an urgent need for providing the victims with effective remedies and reparations. But there are obstacles;

We know the human rights framework regarding torture and other ill-treatment; the absolute prohibition, the states obligation to protect against it, the obligation to investigate allegations, and to give redress to victims. But when ill-treatment is carried out in the name of medical treatment, authorised by domestic legislation and enforced by national law, then there are no real protection or access to justice. Domestic remedies are systematically failing and are unlikely to bring effective relief. There is no redress for victims, no accountability for perpetrators. The ill-treatment goes with impunity. We are rendered powerless in the hands of medical professionals who have been given the authority to define us out of our fundamental human rights. That is the situation that survivors of forced psychiatry are facing in Europe today.

According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law adopted by the UN General Assembly in resolution 60/147 (2005) redress includes five forms of reparation; restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. All of which are of great importance for victims of ill-treatment in the mental health system.

Restitution, a form of redress designed to re-establish the victim's situation before the violation was committed, should include restoration of liberty, freedom from forced treatment, enjoyment of family life and citizenship, return to one's place of residence, and restoration of employment.

Compensation should be provided for any economically assessable damage, such as physical or mental harm; lost opportunities, including employment and education; material damages and loss of earnings; moral damage; and costs required for legal assistance, medical and social services.

Rehabilitation for victims of forced psychiatry should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and their full inclusion and participation in society.

Satisfaction should include effective measures aimed at the cessation of violations; verification of the facts and public disclosure of the truth; an official declaration or judicial decision restoring the rights of the victim; sanctions against persons liable for the violations; investigation and criminal prosecution, public apologies, including acknowledgement of the facts and acceptance of responsibility.

The right to truth is especially important for victims of forced psychiatry, where ill-treatment for so long, and on such a large scale, has been carried out under the guise of medical treatment. We need truth about what happened to us, truth about the consequences, public recognition and apologies, as a first step in a process of social reintegration, justice and healing. Since coercive mental health practices represent patterns of violence against persons with psychosocial and other disabilities, there is a need for reparation on a collective, as well as an individual level. State parties should develop procedures for redress covering **all** victims of forced psychiatric interventions.

Guarantees of non-repetition should include taking measures to combat impunity, prevent future acts, as well as reviewing and reforming laws contributing to or allowing these violations. States parties should recognize the immediate obligation to stop ill-treatment from being carried out through forced psychiatric interventions, undertake necessary action to repeal legislation that authorizes forced psychiatric treatment and detention, and develop laws and policies that replaces coercive regimes with services that fully respect the autonomy, will and equal rights of persons with disabilities.

Valuable resources on reparations can be found in the CRPD Committee Guidelines on De-Institutionalization, and in Tina Minkowitz' article on Deinstitutionalization as Reparative Justice.

4. Lastly, I will say a bit about the way forward and how non-discrimination principles and the standards of the CRPD can, and must, guide our way in all implementation work

The way forward cannot be occupied with superficial reforms that do not tackle the core problem of disability-based discrimination and medicalization of psychosocial disabilities. There is no need to give any more time and thought to "precision and nuance" in matters such as the "meaning of unsound mind", requirements of "least restrictive options", "last resort" or "safeguarding different forms of compulsion".

Human rights in this area is not about limited rights within a paternalistic medical model. It is not about forced interventions with due process guarantees and procedural safeguards. It is about full and equal rights within a human rights framework, were **all** mental health treatments and services must be based on the free and informed consent of the person concerned.

The way forward is about fundamental changes and real and meaningful solutions. It is about combatting discrimination and repealing discriminatory legislative provisions. It is about stopping present violations and repairing past wrongdoings.

The European Convention is a living instrument and should align with developing international human rights standards. It will require a fundamental change of approach in these cases, but the Court can achieve this and has done so before. The Court has consistently underscored that the Convention is to be interpreted in light of societal development, which means that the Court throughout time has changed and adjusted its practice in various areas of law.

LGBT+ rights is one such area that has gone through significant developments in the Court's jurisprudence. From 1986, when the States were granted a large margin of appreciation in Rees v. UK, to consider deviating from earlier principles in 1990 and 1992 in Cossey v. UK and B v. France, to opening for future change in 1998 by pointing at "increased social acceptance" and "increased recognition of the problem" in Sheffield and Horsham v. UK, and then finally deviating from its earlier case-law in 2002 in Goodwin v. UK. In a judgment where the Court attaches less importance to the lack of evidence of a common European approach, than to the clear and uncontested evidence of a continuing international trend in favor of increased social acceptance and legal recognition.

We have seen in earlier groundbreaking judgements that the European Court can shift from its earlier legal doctrines and case-law when that is required to guarantee that rights become effective and not illusory, to reflect developments in society and to secure the rights of marginalized and vulnerable groups. We await a Grand Chamber decision that will fundamentally depart from the previous case-law on forced psychiatry, in order to secure the full and equal rights of persons with psychosocial disabilities in Europe.

The CRPD challenges centuries-old legal traditions. The Council of Europe Human Rights Commissioner has given important guidance on how to move forward and underscores that a reading of the relevant articles of the European Convention that reflects the fundamental shift in attitudes globally appears necessary and that such an evolution would be fully in accordance with the Court's established case-law.

This year, marking the 75th anniversary of the Council of Europe, is an occasion to make significant progress in protecting the human rights of people with psychosocial disabilities. Moving forward with the synergy of the Court, other Council of Europe stakeholders, NHRIs and especially the involvement of persons with psychosocial disabilities, survivors of forced psychiatry, and their organizations. In the implementation process the States and the Council of Europe should draw on the expertise of DPOs, relevant UN bodies, and the Council of Europe Human Rights Commissioner, for technical assistance and guidance. Training of legal professionals and the judiciary is crucial. The paradigm-shift will require initiation of fundamental changes of domestic legislation and case-law, and the establishment of mechanisms for reparations. Huge transformations that might seem overwhelming and impossible, but that are urgently needed, achievable and worth fighting for.

Thank you.

"It always seems impossible until it's done" – Nelson Mandela

"Another world is not only possible, she is on her way. On a quiet day, I can hear her breathing" – Arundhati Roy