African Disability Forum, Arab Organization of Persons with Disabilities, ASEAN Disability Forum, Down Syndrome International, European Disability Forum, Inclusion International, International Federation of Hard of Hearing People, International Federation for Spina Bifida and Hydrocephalus, Latin American Network of Non-Governmental Organizations of Persons with Disabilities and their Families, Pacific Disability Forum, World Blind Union, World Federation of the Deaf, World Federation of the DeafBlind, World Network of Users and Survivors of Psychiatry

Submission for Draft General Comment on Article 4 of the Optional Protocol to the Convention Against Torture

April 2023

The **International Disability Alliance (IDA)** is a network of global and regional organisations of persons with disabilities (DPOs) comprising eight global and six regional DPOs. Established in 1999, each IDA member represents a large number of national organizations of persons with disabilities (OPDs) from around the globe, covering the whole range of disability constituencies. IDA thus represents the collective global voice of persons with disabilities counting among the more than 1 billion persons with disabilities worldwide, the world's largest – and most frequently overlooked – minority group. IDA's mission is to advance the human rights of persons with disabilities as a united voice of organisations of persons with disabilities utilising the Convention on the Rights of Persons with Disabilities and other human rights instruments.

I. Introduction

1. The International Disability Alliance (IDA) welcomes the Draft General Comment No. 1 on places of deprivation of liberty (article 4) by the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or (hereinafter the SPT). IDA also appreciates the opportunity to provide its insights in this written contribution.

2. IDA notes that the aim of the Draft General Comment is "to clarify and address any questions that States parties, national preventive mechanisms and other relevant actors may have regarding the obligations of States parties to the Optional Protocol as they pertain to the definition of places of deprivation of liberty." Both the Committee against Torture and the Committee on the Rights of Persons with Disabilities have expressed concerns that national preventive mechanisms are given limited mandates to monitor places of deprivation of liberty specific for persons with disabilities and/or where they may be overrepresented. The draft general comment can be pivotal in counteracting such trend by strengthening standards and providing clarifications.

3. IDA welcomes the explicit acknowledgement of the CAT Committee's jurisprudence in relation to deprivation of liberty of persons with disabilities and States obligation to prohibit, prevent and redress torture and ill-treatment.[1] IDA also commends other elements such as the recognition of the fact that "[o]ther places where persons may be *de facto* deprived of their liberty, such as privately owned or rented housing for persons with intellectual disabilities, owing to restrictions imposed by specific service providers, are included within the scope of article 4."[2]

4. This IDA's submission provides insights on the current human rights standards on deprivation of liberty of persons with disabilities, stemming from the Convention on the Rights of Persons with Disabilities (CRPD) and the jurisprudence of the CRPD Committee, mainly related to articles 14 and 19 CRPD. In addition, standards related to Article 12 of the CRPD on equal recognition before the law should be reflected in the general comment to prevent an outdated interpretation suggesting that guardians, as legal representatives, express the will of persons deprived of legal capacity, either *de iure* or *de facto*.

[1] SPT, Draft general comment No. 1 on places of deprivation of liberty (article 4), para 13.
[2] SPT, Draft general comment No. 1 on places of deprivation of liberty (article 4), para 37.

II. Absolute ban on deprivation of liberty based on impairment: pending implementation, need for continuous monitoring of diverse existing institutions by an explicitly expanded mandate for NPMs and the SPT

A- Article 14 CRPD: an absolute ban on deprivation of liberty based on impairments

5. Article 14 of the CRPD provides for the right to liberty and security of persons with disabilities. The CRPD Committee has elaborated on the content of article 14 CRPD throughout its concluding observations, general comments and other developments (e.g. Guidelines on article 14, guidelines on deinstitutionalization including during emergencies).

6. Article 14 of the CRPD establishes an absolute ban on deprivation of liberty based on impairment, whether considered alone or in conjunction with other grounds such as "care", "treatment" or "dangerousness", and this is clear since the negotiations of that Convention.[3] The CRPD Committee has continued to elaborate on the concept of deprivation of liberty and more recently it has expanded its interpretation to the include the concept of "institutionalization" of persons with disabilities. It has recognized that institutionalization constitutes detention and deprivation of liberty based on impairment,[4] defining institutionalization of persons with disabilities as "any detention based on disability alone or in conjunction with other grounds such as 'care' or 'treatment'."[5]

B- Places of deprivation of liberty specific of persons with disabilities and/or where they may be overrepresented: violation of article 14 CRPD and exposure to other human rights violations

7. The CRPD Committee outlined that institutions where disability-specific deprivation of liberty still occur, contradicting article 14 of the CRPD, include -but do not limit to- "social care institutions, psychiatric institutions, long-stay hospitals, nursing homes, secure dementia wards, special boarding schools, rehabilitation centres other than community-based centres, half-way homes, group homes, family-type homes for children, sheltered or

[3] CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, para 7 and 8 (2015).
[4] CRPD/C/5, Para 6.
[5] CRPD/C/5, Para 15.

protected living homes, forensic psychiatric settings, transit homes, albinism hostels, leprosy colonies and other congregated settings".[6] CRPD concluding observations to States parties exemplified on this point. The CRPD Committee expressed concerns to China "about reports of Uyghur and other Muslim minority persons with disabilities who were detained in vocational education and training centres". Similarly, on Lao People's Democratic Republic, the CRPD Committee was concerned about the "Global Study on Children Deprived of Liberty, indicating that in 2018, there were 1,010 children with disabilities living in specialized institutions across the country".

8. Additionally, the CRPD Committee recognizes that "[M]ental health settings where a person can be deprived of their liberty for purposes such as observation, care or treatment and/or preventive detention are a form of institutionalization."[7] The CRPD Committee had already clarified that "involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent for health care (article 25)."[8] In State reviews, the CRPD Committee raised concerns about "the discriminatory provisions of Art. 9 of the Law on the Protection of Persons with Disabilities, which allows for the arbitrary deprivation of liberty of persons with psychosocial disabilities, forced institutionalisation and non-consensual psychiatric treatment, on the grounds of family responsibility and on the grounds of medical assessments and diagnoses such as "severe mental disorder."[9] This point is pervasive among almost all CRPD Committee concluding observations."[10]

9. The CRPD Committee further urges "States to recognize that institutionalization as a form of violence against persons with disabilities as it exposes persons with disabilities to forced medical intervention with psychotropic medications, such as sedatives, mood stabilizers, electro-convulsive treatment, and conversion therapy, infringing articles 15, 16 and 17."[11] The CRPD Committee has also noted that reproductive violence such as forced sterilization, forced contraception and forced abortion disproportionately affects women and girls with disabilities in institutions.[12] It is therefore critical to frequently monitor

[6] CRPD/C/5, Para 15.
[7] CRPD/C/5, Para 15.
[8] CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities The right to liberty and security of persons with disabilities (September 2015)
[9] CRPD/C/CHN/CO/2-3, para 32.
[10] For instance, the CRPD Committee expressed concerns to Hungary about "the discriminatory provisions of Act CLIV of 1997 on health care, which allows for the arbitrary deprivation of liberty of persons with psychosocial disabilities and placement in mental health facilities on the basis of impairment and perceived dangerousness (CRPD/C/HUN/CO/2-3, para 28 (a)). See also CRPD/C/JAM/CO/1, para 28; CRPD/C/CHE/CO/, para 29 (a).
[11] CRPD/C/5, para 6.
[12] CRPD/C/5, para 42; CRPD/C/GC/5, para 83; CRPD/C/GC/3, para 53.

disability specific places of detention and deprivation of liberty to prevent such violence and ensure where violation has occurred redress is provided.

C- Need for continuous monitoring through explicitly expanded mandates for national preventive mechanisms (NPM)

10. With regards to the mandate of national preventive mechanism, the CAT Committee and the CRPD Committee have expressed concerns that in certain contexts national preventive mechanisms have narrow mandate that limits monitoring of disability-specific places of detention. For instance, the CAT Committee noted to Kazakhstan that "the NPM's mandate does not provide for visits to all places of deprivation of liberty, such as medical social institutions for children with certain disabilities, special boarding schools, nursing homes".[13]

11. To Bolivia, the CRPD Committee raised concerns "[t]hat the Torture Prevention Service does not have a mandate to monitor the situation of persons with disabilities who are institutionalized against their will or, in particular, information on acts that could be deemed torture, or cruel, inhuman or degrading treatment committed against persons with disabilities".[14] The CRPD Committee urged Bolivia to "broaden the powers of the Torture Prevention Service to include the monitoring of facilities where persons with disabilities are held and to put in place an effective mechanism for preventive action and protection and defence of the rights of persons with disabilities who are institutionalized".[15]

D- Recap and recommendations

12. To sum up:

a. Deprivation of liberty based on impairments is contrary to the CRPD (article 14 CRPD and others) and should not happen: the only persons with disabilities whose deprivation of liberty would be justified under the CRPD are those found guilty of a crime and convicted.

b. Nevertheless, it remains a pervasive practice through a great variety of places of detention, including prominently psychiatric institutions and residential social care institutions, among many others. Such deprivation of liberty exposes persons with disabilities to an array of human rights violations, including among others forced

[13] CAT/C/KAZ/CO/3, para 13.
[14] CRPD/C/BOL/CO/1, para 39.
[15] CRPD/C/BOL/CO/1, Para 40.

medical intervention with psychotropic medications, such as sedatives, mood stabilizers, electro-convulsive treatment, and conversion therapy.

c. Consequently, while deprivation of liberty based on disability still occurs, the monitoring role of the SPT and of NPMs created under the OPCAT is essential to prevent harms and human rights violations, additional to the deprivation of liberty itself.

13. **IDA would like to request the SPT to:**

a. Explicitly refer to the absolute ban of deprivation of liberty of persons with disabilities established by Article 14 of the CRPD, to provide human rights legal context to its clarifications pertaining monitoring of places of deprivation of liberty, in connection to persons with disabilities.

b. Reinforce the references in the draft general comment to monitoring of places of deprivation of liberty specific for persons with disabilities and/or where they may be overrepresented, explicitly referring to the fact that those still existing specific for persons with disabilities and disability-based deprivation of liberty should be phased out in line with human rights standards.

III. Article 12 CRPD and right to legal capacity: need for explicit clarifications pertaining the "will of the person" when it comes to persons with disabilities.

14. Article 12 of the CRPD provides for the equal recognition before the law of persons with disabilities, including both the capacity to be holder of rights and the capacity to act and exercise their rights. To do so, they might want to request support in decision making, which should be provided together with safeguards to prevent undue influence or abuse. Despite the CRPD, persons with disabilities continue to be deprived of their legal capacity to act and substituted by third parties (relatives, guardians, etc.). According to the CRPD, their decisions, will and preferences should be recognised and respected and, if they request so, support in decision making must be provided.

15. This distinction is of utmost importance when it comes to discuss deprivation of liberty as those "situations in which persons cannot leave a particular place, facility or setting

of **their own free will**."[16] Indeed, lack of awareness around the CRPD and its article 12 could lead readers, even those committed to monitor deprivation of liberty, to interpret the draft in an outdated manner and perpetuate substituted decision making models and the legal fiction that the will of the person with disability deprived of legal capacity -and of liberty- would be the one expressed by their guardian on their behalf.

16. The CRPD Committee, in its General Comment No.1 on equal recognition before the law, has recognized that "detention of persons with disabilities in institutions against their will, **either without their consent or with the consent of a substitute decision-maker**, is an ongoing problem".[17] Such level of detail is necessary and contributes to ensure the respect of the will and preferences of persons with disabilities, in line with the CRPD.

17. Section D of the draft general comment is very brief and does not elaborate on the idea of "free will". To rightly assess whether a given situation constitutes a deprivation of liberty of persons with disabilities, the standard emanating from Article 12 of the CRPD should be explicitly reflected in the draft general comment. This would prevent the outdated interpretation suggesting that guardians and others, as legal representatives, express the will of persons deprived of legal capacity, either *de iure* or *de facto*.

18. **Hence, IDA requests the SPT to explicitly state that: "For the case of persons with disabilities in places of detention, the will and preferences to consider are the ones of the person with disability herself, which must not be replaced by the will or consent of a substitute decision-maker (e.g. guardian) as it would be a violation of current human rights standards."**

IV. Participation of organizations of persons with disabilities and civil society organizations in monitoring of places of deprivation of liberty

19. The CRPD, adopted in 2006, brought about a great contribution to human rights law. It explicitly incorporated right holders and their representative organizations in the design, implementation, and monitoring of practices to implement and protect the rights enshrined in the Convention. Such element is essential for complementing and

[16] SPT, Draft general comment No. 1 on places of deprivation of liberty (article 4), section D, para. 30.
[17] CRPD/C/GC/1, para 40 (emphasis added).

supporting the work of the SPT and of National Preventive Mechanisms at the national level.

20. More specifically, as general obligation, Article 4(3) of the CRPD obligates States parties to closely consult and actively engage persons with disabilities in matters concerning them. Specifically concerning institutions and monitoring:

a. Article 16 (3) of the CRPD requires that "in order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities."
b. Article 33 (2) obligates States parties to designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention.
c. Article 33 (3) provides that "[c]ivil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process."

21. Regarding the involvement of representative organizations of persons with disabilities in the monitoring process, the CRPD Committee explained that States Parties must "ensure that independent monitoring frameworks **allow for**, **facilitate** and **ensure the active involvement** of organizations of persons with disabilities in such frameworks and processes, through formal mechanisms, ensuring that their voices are heard and recognized in its reports and the analysis undertaken".[18]

22. More specifically on monitoring places of deprivation of liberty, the CRPD Committee stressed "the necessity to implement monitoring and review mechanisms in relation to persons with disabilities deprived of their liberty."[19] The CRPD Committee referred to articles 16(3) and 33 CRPD, cited above (para. 16), making explicit the correlation between those and article 14 of the CRPD.

23. The Committee further elaborates this correlation in numerous concluding observations under article 14 and 15 of the Convention.[20] For instance, the CRPD Committee recommended Niger, "guided by the Committee's guidelines on article 14

[18] CRPD/C/GC/7, para 38.
[19] CRPD Committee, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities.
[20] CRPD/C/VEN/CO/1, para 27 (c); CRPD/C/JPN/CO/1, para 34 (d); CRPD/C/GRC/CO/1, para 20; CRPD/C/IRQ/CO/1, para 30 (a); CRPD/C/FRA/CO/1, para 33 (d); CRPD/C/ZAF/CO/1, para (d), CRPD/C/ECU/CO/2-3, para 26 (c), CRPD/C/ESP/CO/2-3, para 30 (d).

(2015) to **involve persons with disabilities, through their representative organisations, in monitoring of all places where persons with disabilities may be detained** and provide training to mental health professionals and law enforcement and prison officials on the rights of persons with disabilities in mental health facilities, prisons and detention centres."[21] Likewise, the CRPD Committee recommended Switzerland to ensure "that the National Commission for the Prevention of Torture has sufficient human, technical and financial resources and monitoring mechanisms based on Convention standards and principles, and that it **actively involves persons with disabilities, including children with disabilities, through their representative organizations**."[22]

24. This issue of participation of OPDs connects of course with the mandate of the National Preventive Mechanism required by the OPCAT. On this, the CRPD Committee has noted not only that in certain countries the national preventive mechanisms do not have mandate to monitor disability-specific places of deprivation of liberty (see section II.C) **but also that organizations of persons with disabilities are restricted to monitor these places**. Regarding Turkey, the CRPD Committee expressed concern on the "lack of information about monitoring of residential facilities to prevent ill treatment and the **restrictions to the monitoring by civil society organizations** of persons with disabilities deprived of liberty."[23]

25. **IDA recommends that the Draft General Comment explicitly recognizes in the draft general comment:**

a. The role of organizations of persons with disabilities, and civil society at large, in monitoring places of deprivation of liberty. In this vein, the Draft General Comment should recognize and reinforce that national preventive mechanism should fully and effectively involve representative organizations of persons with disabilities in monitoring of places of detention and deprivation of liberty.

b. The importance to ensure that mandates of National Preventive Mechanisms and other monitoring bodies include explicitly a mandate to monitor places of deprivation of liberty specific for persons with disabilities and/or where they may be overrepresented and recommend that State Parties expands mandate of national preventive mechanisms accordingly.

[21] CRPD/C/NER/CO/1, para 24 (c) (emphasis added).
[22] CRPD/C/CHE/CO/1, para 32 (b) (emphasis added).
[23] CRPD/C/TUR/CO/1, para 32(c) (emphasis added).

V. Scope of "places of deprivation of liberty": diverse places impacting diverse groups of persons with disabilities. Need for explicit visibility and indication of main features.

26. Section IV of the Draft General Comment elaborates on the scope of "places of deprivation of liberty". While the Draft General acknowledges the list of places of deprivation of liberty may not be exhaustive, it is important, as earlier discussed in this submission, that the Draft General Comment explicitly considers the full range of places of deprivation of liberty specific for persons with disabilities and/or where they may be overrepresented.

27. In paragraph 37, the Draft General Comment states that "[o]ther places where persons may be de facto deprived of their liberty, such as privately owned or rented housing for persons with intellectual disabilities, owing to restrictions imposed by specific service providers, are included within the scope of article 4". This specific reference to persons with intellectual disabilities is very much welcome.

28. It would be important that **other groups of persons with disabilities**, especially those with psychosocial disabilities and those with multiple disabilities, are also explicitly referred in relation with typical places of deprivation of liberty. Such groups are disproportionately deprived of their liberty in both public and private institutions, e.g. psychiatric institutions, residential homes or care institutions or alike, as well as confined in their homes. For instance, prayer camps which are privately owned by churches deprive persons with psychosocial disabilities from their liberty.[24]

29. Additionally, paragraph 38 of the Draft General Comment recognizes "centers for persons with disabilities" as places of deprivation of liberty. Centers of persons with disabilities is a broad term that may lead to misinterpretation, so it might be better to review and include **diverse and more specific denominations of typical places of**

[24] "Like a Death Sentence" Abuses against Persons with Mental Disabilities in Ghana < https://www.hrw.org/report/2012/10/02/death-sentence/abuses-against-persons-mental-disabilities-ghana>; Kenya National Commission on Human Rights speaks on detainment of civilians in Kisumu church https://www.the-star.co.ke/news/realtime/2023-01-26-knhrc-speaks-on-detainment-of-civilians-in-kisumu-church/; https://www.citizen.digital/news/kisumu-govt-sues-father-john-pesa-for-allegedly-holding-mentally-challenged-people-in-church-n313176

deprivation of liberty as well as their main features (to prevent "labelling fraud" in which institutionalisation practices implying deprivation of liberty hide under less typical and more positive names). On this regard, the CRPD Committee's general comment no. 5 on Article 19 of the CRPD (Living independently and being included in the community) is a very important reference to cite explicitly:

> "Although institutionalized settings can differ in size, name and set-up, there are certain defining elements, such as obligatory sharing of assistants with others and no or limited influence over whom one has to accept assistance from; isolation and segregation from independent life within the community; lack of control over day-to-day decisions; lack of choice over whom to live with; rigidity of routine irrespective of personal will and preferences; identical activities in the same place for a group of persons under a certain authority; a paternalistic approach in service provision; supervision of living arrangements; and usually also a disproportion in the number of persons with disabilities living in the same environment. Institutional settings may offer persons with disabilities a certain degree of choice and control; however, these choices are limited to specific areas of life and do not change the segregating character of institutions. Policies of deinstitutionalization therefore require implementation of structural reforms which go beyond the closure of institutional settings. Large or small group homes are especially dangerous for children, for whom there is no substitute for the need to grow up with a family. "Family-like" institutions are still institutions and are no substitute for care by a family".

30. Finally, IDA welcomes **paragraph 39** of the draft general comment, which could be slightly improved to protect persons with disabilities. The Subcommittee's draft explains that "if the ability to leave such a place or facility would be limited or would entail exposing a person to serious human rights violations, that place should also be perceived as a place of deprivation of liberty, in accordance with article 4 of the Optional Protocol".

31. This paragraph 39 is quite important for the case of persons with disabilities who have been institutionalised for years and have no support or resources whatsoever in the community, in contexts in which States do not fulfil their obligations to develop and provide support systems in line with Article 19(b) of the CRPD for independent living. Formally speaking, the institution can say to persons with disabilities that they are free to leave; in practice, leaving the institution might mean simply becoming homeless and/or exposed to many harms and risks, including death, if the transition into the community is not well planned and resourced. This was the 2016 Life Healthcare Esidimeni hospitals in South Africa case, a poorly planned deinstitutionalisation process leading to the death of at least 37 persons with psychosocial and intellectual disabilities.[25] Consequently, it can be said that **the fact of staying in an institution because of the absence of support measures in the community, even if the institution**

[25] https://www.ohchr.org/en/press-releases/2016/12/south-africa-un-experts-shocked-death-least-37-people-flawed-relocation

is ready to let people leave, continues to constitute a deprivation of liberty for the purpose of its conditions to be monitored by the SPT and national prevention mechanisms created under OPCAT.

IDA recommends that the Draft General Comment explicitly:

a. **Recognizes the disproportionate impact of deprivation of liberty to persons with psychosocial disabilities in private sphere specifically in prayer camps, as well as to include explicit references to other groups of persons with disabilities, e.g. persons with multiple disabilities.**

b. **Based on CRPD Committee's interpretation of institutionalization (see in this submission, section II, paragraphs 6, 7 and 8, connected to article 14 CRPD, and section V, paragraph 29, connected to article 19 of the CRPD), ensure the general comment provides with:**

   i. **A reference to the main features characterizing institutionalization of persons with disabilities, as well established by the CRPD Committee's general comment no. 5 on Article 19 of the CRPD (Living independently and being included in the community), in its paragraph 16(c) (see para. 29 above).**

   ii. **A detailed non-exhaustive list of places of deprivation of liberty specific for persons with disabilities and/or where they may be overrepresented, to fall under the mandate of the SPT and NPMs, including but not limited to: social care institutions, psychiatric institutions, long-stay hospitals, nursing homes, secure dementia wards, special boarding schools, rehabilitation centres other than community-based centres, half-way homes, group homes, family-type homes for children, sheltered or protected living homes, forensic psychiatric settings, transit homes, albinism hostels, leprosy colonies and other congregated settings.**

c. **Explicitly refer in paragraph 39 to the case of persons with disabilities who, formally able to leave the institution where they live, decide to remain in the institution as they do not receive the proper support to move to the life in the community safely and without any risk, as a case of deprivation of liberty for the purpose of deserving of the monitoring by the SPT and National Preventive Mechanisms.**

VI. Final considerations

Once again, "monitoring existing institutions does not entail the acceptance of the practice of forced institutionalization"[26] of persons with disabilities. Yet, while IDA and many OPDs and NGOs at the national level continue to advocate for the respect to the CRPD, States' practices continue to rely on deprivation of liberty based on impairments in many forms and in very diverse institutions.

As this unfortunately continues to happen, the role of monitoring mechanisms is essential to prevent exposure of persons with disabilities to additional human rights violations. Strengthening and expanding their mandates and capacities, in the current context, is only a step forward in human rights protection, while States keep delaying proactive measures to fully respect the right to liberty of persons with disabilities and allow them to leave independently and be included in their communities with the appropriate support systems and services.

[26] Guidelines on art 14 of the CRPD, para 19.