



**Written submission of the
Validity Foundation – Mental Disability Advocacy Centre
to the UN Subcommittee on Prevention of Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment**

**concerning a draft general comment on article 4 of the
Optional Protocol to the Convention against Torture**

Submission:
11 April 2023

Validity Foundation – Mental Disability Advocacy Centre
Milestone Institute, Impact Hub, Wesselényi utca 17., 1077 Budapest, Hungary
Email: validity@validity.ngo; Website: www.validity.ngo

Introduction

1. The Validity Foundation – Mental Disability Advocacy Centre (*hereinafter*: “Validity”) is an international non-governmental human rights organisation which uses the law to secure equality, inclusion and justice for persons with mental disabilities worldwide. Validity’s vision is a world of equality where emotional, mental and learning differences are valued equally; where the inherent autonomy and dignity of each person are fully respected; and where human rights are realised for all persons without discrimination of any form. Validity has participatory status at the Council of Europe, and observer status at ECOSOC.
2. The aim of this written submission is to provide the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment with comments on the draft general comment on article 4 of the Optional Protocol to the Convention against Torture from a disability rights point of view.

General remarks

3. Validity is of the opinion that the draft general comment will provide important guidance concerning definitions of “places of detention” and “deprivation of liberty”. We welcome that the draft general comment engages substantively with legal and practical difficulties and challenges national preventive mechanisms and the Subcommittee have to deal with when exercising their mandate to prevent torture and other cruel, inhuman or degrading treatment or punishment.
4. As a disability rights organisation, Validity notes that the current draft General Comment does not refer to the UN Convention on the Rights of Persons with Disabilities (*hereinafter*: “CRPD”) and related authoritative interpretations of the UN Committee on the Rights of Persons with Disabilities (*hereinafter*: “CRPD Committee”). In particular, we believe that the draft general comment would be strengthened through explicitly referencing these binding international standards, including the CRPD Committee’s Guidelines on deinstitutionalization, including in emergencies ([CRPD/C/5](#)) adopted in September 2022. This link is crucially important in ensuring that the general comment adequately covers the full range of disability-specific forms of deprivation of liberty, and that it concretely covers all disability-specific places of detention.
5. Persons with disabilities are disproportionately affected by detention in a wide variety of places. While detention on the basis of disability or impairment is widespread in institutional settings,¹ there are many other places where persons with disabilities are otherwise deprived of their liberty through denial of reasonable accommodations, support and community-based services. This may also concern other populations, including older persons. Unfortunately, national preventive mechanisms do not often recognise these settings, which may include schools, daycare centres, and sheltered workshops, as places of detention. The consequence of this is that places of detention of persons with disabilities are not regularly monitored by independent authorities. Further, it is crucially important that the general comment enhances the knowledge of States, national preventive mechanisms and others about disability-specific forms of deprivation of liberty and the necessity to ensure effective independent monitoring until institutions are abolished in accordance with the CRPD.

¹ See Para. 8 of this submission.

6. We urge the Subcommittee to explicitly rely on the CRPD and the relevant instruments of the CRPD Committee, including general comment No. 5 (2017) on living independently and being included in the community (art. 19 of the Convention), the CRPD Committee’s guidelines on the right to liberty and security of persons with disabilities (art. 14) and the Guidelines on deinstitutionalization, including in emergencies.

Specific remarks

Paragraphs 13-18

7. Paragraphs 13-18 address the definition of places of deprivation of liberty in international law and present useful interpretations of the Committee against Torture, the Human Rights Committee, the Working Group on Arbitrary Detention and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment from the United Nations. Furthermore, the draft general comment focuses on the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment adopted by the Council of Europe, the relevant jurisprudence of the European Court of Human Rights, and finally, the American Convention on Human Rights, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.
8. **However limited the space available in the document, Validity encourages the Subcommittee to rely on CRPD and CRPD Committee interpretations here. We suggest adding a new paragraph after the current para. 14 with the following wording:**

The Committee on the Rights of Persons with Disabilities has emphasised that institutionalization of persons with disabilities refers to any detention based on disability alone or in conjunction with other grounds such as “care” or “treatment”. Disability-specific detention typically occurs in institutions that include, but are 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. Mental 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.²

9. We further wish to point out that the African Court of Human and Peoples’ Rights is not mentioned in section II. C. of the draft general comment, although it is one of the three regional human rights tribunals, together with the European Court of Human Rights and the Inter-American Court of Human Rights. **We respectfully recommend that the Subcommittee extend the scope of this section by addressing the African Charter on Human and Peoples’ Rights and the relevant interpretation of places of deprivation of liberty by the African Court of Human and Peoples’ Rights. Furthermore, we suggest mentioning the Robben Island Guidelines, which give concrete guidance for African States on how to implement the African Charter’s provisions on the prohibition and prevention of torture and providing redress for victims.**

² CRPD Committee (2022). Guidelines on deinstitutionalization, including in emergencies. CRPD/C/5, para 15.

Section C

10. Section C focuses on the part of the definition that says that a place of deprivation of liberty can be any place where persons are or may be deprived of their liberty. Here, especially in the case of persons with disabilities, it is important to consider whether reasonable accommodations³ and support⁴ are available for the person concerned. If these are not available in a particular place, facility or setting, these places should be considered places of deprivation of liberty.
11. **We suggest adding a new paragraph after the current para 29 with the following content:**

When considering whether a particular place, facility or setting is a place of deprivation of liberty, attention should be paid to whether reasonable accommodations and support are available for persons with disabilities. If reasonable accommodations and support are unavailable, these places should be considered places of deprivation of liberty.

Paragraph 30

12. Paragraph 30 points out that the lack of a possibility to leave places of deprivation of liberty concerns situations in which persons cannot leave a particular place, facility or setting of their own free will. We are concerned that this is unnecessarily narrow interpretation. Persons with disabilities might happen to leave, for example, a group home, which is a type of residential social care institution, but without having a meaningful choice as to where to move, the “choice” or “free will” to leave are essentially meaningless, meaning that persons with disabilities may end up on the streets or in psychiatric hospitals.⁵ In such situations where there is a lack of any realistic alternative for persons with disabilities, we submit that such places (regardless of name or legal categorisation) be considered places of detention.
13. Furthermore, persons with disabilities may require personal assistance, housing, employment and community-based services, support and reasonable accommodations in order to leave places of deprivation of liberty, especially different forms of institutions. If these rights are not fulfilled, persons may not factually be free to leave, although formally the law may regard them as being able to do so. In relation to this, Validity wants to point out that persons with disabilities are not less likely to experience torture and other cruel, inhuman or degrading treatment or punishment in institutions when they are legally permitted to leave but factually are not enabled to do so.

³ Article 2 of the CRPD states, “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Under article 2 of the CRPD, it is also explicitly mentioned that denial of reasonable accommodation is a form of discrimination on the basis of disability.

⁴ Concerning support, Article 12 (2)-(3) of the CRPD states, *States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

⁵ See, for example: Validity and Ors., ‘Communication from NGOs in the case of the execution of Stanev v. Bulgaria (Application No. 36760/06)’, 19 February 2023, available at:

https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680aa7263; and Validity and Ors., ‘Joint NGO Submission pursuant to Rule 9.2 of the Committee of Ministers’ Rules for the Supervision of the Execution of Judgments, on the implementation of Stanev v. Bulgaria’, 23 January 2023, available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680aa0734.

14. Validity wishes to highlight that paragraph 39 of the current draft general comment focuses on similar situations when it mentions that “[a]s noted by the Human Rights Council, whether a particular situation of confinement qualifies as ‘detention’ depends not only on whether persons concerned have a de jure right to leave, but also on whether they are de facto able to exercise that right without exposing themselves to serious human rights violations. In the view of the Subcommittee, 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.”

15. **We suggest modifying paragraph 30 as follows:**

*The lack of a possibility to leave places of deprivation of liberty constitutes a clear factor of article 4. It concerns situations in which persons cannot leave a particular place, facility or setting of their own free will. **ADD: It also concerns situations in which persons may legally or formally leave a particular place or setting, but where they are prevented from doing so in fact due to a lack of meaningful choices as to where to move, or the denial of support, personal assistance, and/or reasonable accommodations that may be required, particularly for persons with disabilities, older persons and others.** Although in some reports, the Subcommittee refers to the “inability to exercise freedom of movement” when describing places in which a person is or may be deprived of liberty, it is the Subcommittee’s view that the correct terminology to refer to being deprived of liberty is that established in article 4 (2); namely, not being permitted to leave at will.*

Paragraphs 36-40

16. In paragraphs 36-40, the draft general comment gives a non-exhaustive list of places of deprivation of liberty. Validity supports this approach.

17. In our view, a new paragraph should be added to this section of the general comment focusing on some examples of places of deprivation of liberty specified by UN treaty bodies. As for Validity, these examples enrich the non-exhaustive list of the draft general comment and give some more concrete places of deprivation of liberty. In the case of persons with disabilities, there is a worrying trend in some countries to name mini-institutions, for example, ‘group homes’ and ‘family-type homes for children’, or to wrongly categorise these institutional service structures as ‘community-based services’. Validity’s experience shows that some national preventive mechanisms are unaware of this, and they therefore fail to acknowledge such locations as places of deprivation of liberty.

18. **We suggest adding a new paragraph after the current para 36 with the following content:**

The Subcommittee highlights the useful approach of the treaty bodies of the United Nations concerning the definition of places of deprivation of liberty, which includes institutions that engage in the care of children, and older persons,⁶ remand detention,

⁶ Committee against Torture, general comment No. 2 (2007), CAT/C/GC/2, para 15.

house arrest, administrative detention, involuntary hospitalization,⁷ group homes, family-type homes for children, and prayer camps.⁸

Final remarks

19. We want to take the opportunity to urge the Subcommittee to enhance the alignment of its monitoring standards with the CRPD and to encourage national preventive mechanisms to follow this approach. It is crucially important to ensure alignment in the jurisprudence of the the treaty bodies to prevent States parties from receiving mixed signals as to the unacceptability of detention of persons with disabilities on the basis of or with reference to disability and/or impairment.
20. We further recommend in accordance with article 33(3) of the CRPD that the Subcommittee calls on States parties to both the OPCAT and the CRPD to allow unfettered access to places of detention of persons with disabilities by civil society, in particular persons with disabilities and their representative organisations. We also suggest that, following the approach set out under article 42 of the Robben Island Guidelines, the Subcommittee calls on States parties to encourage and facilitate visits by non-governmental organisations to all places of detention.
21. We confirm that this submission may be published and express our interest in contributing further to the Day of General Discussion that is scheduled to take place during the Subcommittee's 50th session.

⁷ Human Rights Committee, general comment No. 35 (2014), CCPR/C/GC/35, para. 5.

⁸ Committee on the Rights of Persons with Disabilities (2022). Guidelines on deinstitutionalization, including in emergencies (2022) CRPD/C/5, paras 15, 18.