

WRITTEN COMMENTS

submitted by

VALIDITY

(Mental Disability Advocacy Centre)



Tymoshenko v. Ukraine

Application no. 13459/1

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1. Introduction

1. These written comments are submitted by Validity Foundation (previously Mental Disability Advocacy Centre) pursuant to leave granted by the President of the Court under Rule 44(3), Rules of the Court. Validity is an international human rights NGO independent of all governments and working to advance the human rights of persons with actual or perceived intellectual or psychosocial (mental health) disabilities, including people diagnosed with paranoid schizophrenia, like the applicant.
2. This intervention seeks to assist the Court by drawing on Validity's theoretical and practical expertise concerning the rights of persons with psychosocial disabilities in the context of criminal proceedings and ensuing detention. We aim to offer the Court analysis of international human rights norms in this area, particularly those of the United Nations Convention on the Rights of Persons with Disabilities ("UN CRPD").
3. Based on the communication published by the Court, the case raises two principal issues from the perspective of the UN CRPD: the involuntary detention and treatment used as a result of a so-called insanity defence and the exclusion and denial of the agency during the criminal proceedings. This submission will cover both areas, explaining how the UN CRPD and other international human rights norms may assist the Court in applying its existing standards to ensure effective and practical protection of persons with disabilities in the context of criminal justice.

2. The lawfulness and review of psychiatric detention and treatment

4. The first part of the submission concerns the psychiatric detention and involuntary treatment the applicant was subject to after the criminal court established that she had been incapable of understanding and controlling her actions due to her diagnosis of paranoid schizophrenia. The use of the so-called insanity defence is highly controversial from the perspective of the UN CRPD, and there is a broad consensus that under this convention, the ensuing detention and involuntary treatment violate the human rights of persons with disabilities. The following paragraphs discuss why the Court should incorporate these standards into assessing the lawfulness of detention under Article 5 of the Convention. They also emphasize the need to ensure effective access to safeguards against arbitrary detention, including active assistance in initiating its review.

a. The controversy of the insanity defence

5. Persons with disabilities are often seen as unfit to stand trial in criminal proceedings or held criminally non-liable for reasons of "insanity". Their criminal incapacity is typically derived from an expert report establishing or confirming a diagnosis of the person with a disability and linking the diagnosis with the requisite inability: inability to understand the court proceeding in the case of incapacity to stand trial, or inability to control their actions and/or understand their impact in the case of the so-called insanity defence.
6. The presumption of incapacity linked with a person's disability openly contradicts one of the basic principles of the UN CRPD, the right to equal legal recognition and full legal capacity on an equal basis with others, as enshrined in Article 12 of the UN CRPD. This provision is the cornerstone of the convention expressing the fundamental equality of persons with disabilities vis-à-vis others. It recognizes no exemptions which are linked,

directly or indirectly, to disability. Even persons with reduced functional or cognitive abilities have the right to enjoy legal capacity on an equal basis with others.¹

7. Implementing the UN CRPD, states have been urged to remove all systems denying legal capacity of persons with disabilities, including all substitute-decision making regimes (guardianships), and replace them with UN CRPD-compliant tools. The United Nations Committee on the Rights of Persons with Disabilities (“UN CRPD Committee”), the body responsible for guiding states in effective implementation of the convention, clearly indicated that unfitness to stand trial and insanity defence belong among these systems.² Although they were, like guardianship systems, introduced to protect persons with disabilities, they fail to treat them as equals and deny their full legal capacity. In its *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities* from 2015, the UN CRPD Committee also explained that “*declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to Article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.*”
8. This position has also been highlighted in the reports of the United Nations High Commissioner for Human Rights. In 2009, the commissioner stated that “*(i)n the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.*” The institution recommended that states introduce disability-neutral doctrines of the subjective element of the crime, which can fulfil the same desired role without being discriminatory on the basis of disability.³ In 2017, the commissioner’s report again reiterated that the so-called insanity defence is a manifestation of the denial of legal capacity and should be substituted with other measures.⁴ This position is also reflected in disability rights academic literature, advanced, for instance, by Tina Minkowitz, an attorney and the President of Center for the Human Rights

¹ UN CRPD General Comment no. 1 on Equal recognition before the law, CRPD/C/GC/1, § 40.

² See the UN CRPD Committee’s following concluding observations: CRPD/C/CAN/CO/1, §§ 31 (b) and 32 (b); CRPD/C/ETH/CO/1, §§ 31 and 32; CRPD/C/ARE/CO/1, § 27 (b); CRPD/C/THA/CO/1, §§ 29 and 30; CRPD/C/QAT/CO/1, § 27; CRPD/C/DNK/CO/1, § 34; CRPD/C/KOR/CO/1, §§ 27 and 28; and CRPD/C/ECU/CO/1, §§ 28 and 29 (b); CRPD/C/BEL/CO/1, § 28-29; CRPD/C/AUS/CO/1, § 30; CRPD/C/MNG/CO/1, § 25; CRPD/C/DOM/CO/1, § 29 (a); CRPD/C/CZE/CO/I, § 28; CRPD/C/HRV/CO/1, § 22; CRPD/C/DEU/CO/1, § 32; CRPD/C/DNK/CO/1, § 34-35; CRPD/C/ECU/CO/I, 29 (b); CRPD/C/KOR/CO/1, § 28; CRPD/C/MEX/CO/I, 27; CRPD/C/NZL/CO/1, § 34. Available at: <https://uhri.ohchr.org/en/search-human-rights-recommendations>

³ Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, A/HRC/10/48, 26 January 2009, § 47.

⁴ Report of the Office of the United Nations High Commissioner for Human Rights. Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, A/HRC/37/25, 27 December 2017, § 36

of Users and Survivors of Psychiatry,⁵ or by Christopher Slobogin, the Director of the Criminal Justice Program and the Affiliate Professor of Psychiatry at the Vanderbilt University Law School.⁶ In consonance with the UN bodies cited above, professor Slobogin proposes that *‘the effects of mental disorder should still carry significant moral weight. More specifically, mental illness should be relevant in assessing culpability only as warranted by general criminal law doctrines concerning mens rea, self-defence and duress.’*⁷ Such an approach would safeguard the same interests advanced by the so-called insanity defence, but it would not stigmatize persons with psychosocial disabilities. It would cease to perpetuate the myth that people with psychosocial or intellectual disabilities are inherently dangerous or uncontrollable.⁸

9. The position is not held unequivocally throughout the legal scholarship and the disability rights community. Some, on the contrary, fear that complete abolition of the insanity defence would harm people with disabilities⁹ who are already disproportionately represented in the criminal justice system.¹⁰ Until criminal justice systems are reformed, insanity defence may serve as a mechanism partially compensating for the existing unfair disadvantage criminal justice systems pose for persons with psychosocial disabilities.¹¹ Nevertheless, the controversy of directing certain people into separate criminal proceedings because of their disability must make us all the more beware of its consequences, especially those interfering with basic human rights.¹²

⁵ Minkowitz argues that: *‘(a) negation of responsibility based on the attribution of mental incapacity is fundamentally flawed. Unfitness to plead, incompetence to stand trial, insanity acquittals, and incarceration in forensic psychiatry as a security or treatment measure, all constitute discrimination based on disability, and violate obligations of formal and substantive equality towards persons with psychosocial disabilities.’* Tina Minkowitz, ‘Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/ Incapacity Acquittals and Unfitness to Plead, and Beyond’ (2014) 23 Griffith L Rev 434, p. 462.

⁶ Christopher Slobogin, An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases. 6 Virginia Law Review 86 (2000) 1199-1247; Christopher Slobogin, Eliminating mental disability as a legal criterion in deprivation of liberty cases: The impact of the Convention on the Rights of Persons with Disabilities on the insanity defense, civil commitment, and competency law. International Journal of Law and Psychiatry 40 (2015) 36–42.

⁷ Christopher Slobogin, An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases. 6 Virginia Law Review 86 (2000) 1199-1247.

⁸ Ibid.

⁹ Michael L. Perlin, ‘God Said to Abraham/Kill Me a Son’: Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence’ (2017) 54 American Criminal Law Review 477. Perlin argues that the abolition of this defence would result in increased findings of guilt for persons who are morally and factually innocent.

¹⁰ Peter Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75(5) Modern Law Review 752, 772.

¹¹ Peter Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75(5) Modern Law Review 752, 772.

¹² See for instance, the position of World Network of Users and Survivors of Psychiatry (WNUSP). Implementation manual for the United Nations convention on the Rights of Persons with Disabilities, 2008, p. 39: *‘Therefore, we seek abolition of the insanity defense as part of a comprehensive penal reform. We do not condone compulsory psychiatric detention or treatment for people acquitted by*

b. The unlawfulness of disability-based detention and involuntary treatment

10. While, as noted above, there are relevant discussions around the use of so-called insanity defence and its impact on the rights of persons with disabilities, there is unequivocal understanding that the involuntary psychiatric detention and treatment used as “protective measures” linked to insanity defence contravenes basic human rights of persons with disabilities. The coercive nature of such treatment gives it a punitive quality, rather than a therapeutic purpose. Persons with disabilities acquitted in criminal proceedings following the so-called insanity defence often find themselves severely punished, for prolonged periods of time, without having been found guilty of a crime in a due process.¹³
11. Acquittals for reasons of “insanity defence” are typically linked to a diagnosis of psychosocial or intellectual impairment, and so is, therefore, the ensuing detention and treatment. Disability-based detention and involuntary treatment are inherently discriminatory and in violation of the UN CRPD.¹⁴ Article 14, paragraph 1(b) of the UN CRPD unequivocally states that “*the existence of a disability shall in no case justify a deprivation of liberty*”. In its Guidelines on Article 14 of the UN CRPD, the committee insists that this prohibition is absolute and that it does not permit any exceptions. This is evidenced by the states’ positions during the discussion prior to adopting the UN CRPD.¹⁵ The link with a disability can be only partial or indirect, such as when detention is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment’.¹⁶ The UN CRPD Committee already criticized Ukraine, the state party to this application, for failing to comply with this provision.¹⁷

reason of insanity.” Available online at:

http://wnusp.rafus.dk/documents/WNUSP_CRPD_Manual.pdf.

¹³ Violating the *nullum crimen sine lege* principle.

¹⁴ UN CRPD Committee, “Statement on Article 14 of the Convention on the Rights of Persons with Disabilities” (September 2014). Available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183>. See also, by way of example, the following concluding observations of the committee: CRPD/C/HUN/1, § 28; CRPD/C/AUT/1, §§ 29-31. Available at: <https://uhri.ohchr.org/en/search-human-rights-recommendations>

¹⁵ UN CRPD, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities “The right to liberty and security of persons with disabilities” adopted during the Committee’s 14th session, held in September 2015, § 6-7 (“UN CRPD Guidelines on article 14”), quoting the Ad Hoc Committee, Third Session, Daily summary of discussions, May 26, 2004; Fifth Session, Daily summary of discussions, January 26, 2005.

¹⁶ UN CRPD *Guidelines on article 14*, § 6; *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*, A/HRC/10/48, 26 January 2009, § 48. See also the following concluding observations of the UN CRPD Committee: CRPD/C/HUN/CO/1, § 28; CRPD/C/ESP/CO/1, § 36; CRPD/C/CHN/CO/1, § 26; CRPD/C/AUS/CO/1 § 31. Available at: <https://uhri.ohchr.org/en/search-human-rights-recommendations>

¹⁷ CRPD/C/UKR/CO/1, 2 October 2015, § 31: “*The Committee urges the State party to repeal laws that allow for deprivation of liberty on the basis of impairment.*” Available at: <https://uhri.ohchr.org/en/search-human-rights-recommendations>

12. Psychiatric detention is often coupled with psychiatric treatment without the free and informed consent of the person with a disability.¹⁸ From the perspective of the United Nations human rights framework, namely the UN CRPD and the UN CAT, involuntary treatment without free and informed consent, unless in situations of emergency,¹⁹ constitutes a violation of personal integrity²⁰ and ill-treatment.²¹ This is the case even if it is justified by the perceived “best interests” of the person and presented as good intentions of health professionals.²² Moreover, when applied against a person with a disability during detention following the application of insanity defence, such involuntary treatment is motivated by the person’s disability, and, therefore, discriminatory in nature. In the view of the UN Special Rapporteur on Torture, such coercive interventions may be qualified as torture.²³ The UN CRPD Committee seconds this conclusion²⁴ and emphasizes that coercive psychiatric treatment is often coupled with specific abuses, such as seclusion and physical and chemical restraints.²⁵
13. The Court has been increasingly reflecting these human rights standards in its jurisprudence under Articles 3, 8, and 5 of the Convention. In *Kuttner v. Austria* (no. 7997/08, 16 July 2015), concerning forensic detention of an applicant with an intellectual disability, the Court gave a comprehensive overview of the UN CRPD standards relating to disability-

¹⁸ The UN CRPD Guidelines on article 14, 2015, § 11. See also the concluding observations: CRPD/C/ECU/CO/1, § 29 c). Available at: <https://uhri.ohchr.org/en/search-human-rights-recommendations>

¹⁹ For explanation of the distinction between permissible involuntary emergency care and impermissible coercive care from the perspective of the United Nations human rights regime, see Wayne Martin and Sándor Gurbai, *Surveying the Geneva impasse: Coercive care and human rights*. *Int J Law Psychiatry* 64 (2019) 117-128.

²⁰ Article 17 of the UN CRPD. See Bantekas, Ashley Stein, Anastasiou (eds.) *The United Nations Convention on the Rights of Persons with Disabilities. A commentary*. Francesco Seatzu, Article 17: Right to integrity of a person, p. 504 etseq.

²¹ Article 19 of the UN CRPD. See Bantekas, Ashley Stein, Anastasiou (eds.) *The United Nations Convention on the Rights of Persons with Disabilities. A commentary*. Phil Fennell, Article 15: Protection against Torture and Cruel or Inhuman or Degrading Treatment or Punishment Right to integrity of a person, p. 440 etseq.

²² UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in a report A/HRC/22/53, 1 February 2013, § 61.

²³ Special Rapporteur on Torture, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council, A/HRC/22/53, 1 February 2013, § 32: “*discriminatory character of forced psychiatric interventions, when committed against persons with psychosocial disabilities, satisfies both intent and purpose required under the Article 1 of the Convention against Torture.*” The Special Rapporteur previously highlighted that coercive and intrusive psychiatric treatments against persons with psychosocial disabilities constitute a form of ill-treatment: see, for instance, A/63/175 of 28 July 2008, § 40 and 47. See also the Bantekas, Ashley Stein, Anastasiou (eds.) *The United Nations Convention on the Rights of Persons with Disabilities. A commentary*. Phil Fennell, Article 15: Protection against Torture and Cruel or Inhuman or Degrading Treatment or Punishment Right to integrity of a person, p. 440 etseq.

²⁴ See the UN CRPD Committee’s following concluding observations: CRPD/C/PER/CO/1, §§ 30 and 31; CRPD/C/HRV/CO/1, § 24; CRPD/C/TKM/CO/, § 32; CRPD/C/DOM/CO/1, § 31; CRPD/C/SLV/CO/1, §§ 33-34; CRPD/C/SWE/CO/1, §§ 37-38. Available at: <https://uhri.ohchr.org/en/search-human-rights-recommendations>

²⁵ UN CRPD Committee’s concluding observations: CRPD/C/NZL/1, § 32; CRPD/C/AUS/CO/1, § 36.

based detention and coercive treatment (§ 2-4). It also affirmed that it had adopted the approach taken by the UN CRPD Committee (§ 4). Similarly, medical treatment, including psychiatric treatment, without free and informed consent is consistently judged as a violation of personal integrity under Article 8.²⁶ Invasive or irreversible involuntary interventions have also been judged as ill-treatment violating Article 3 of the Convention.²⁷

14. It is apparent that the Court's jurisprudence strives for a reading of the Convention, which is in line with the evolving standards of international human rights law.²⁸ This is particularly important in the context of the rights of persons with disabilities, who had been, for a long time, invisible in these human rights provisions.²⁹ The Court has already incorporated the specific UN CRPD standards in several areas, such as education,³⁰ equality and non-discrimination,³¹ or family and private life.³² In other areas, such as legal capacity³³ or the right to vote,³⁴ it regularly refers to the UN CRPD as the relevant international framework.
15. However, when it comes to forensic detention associated with a person's disability, the jurisprudence still relies on the test set out in *Winterwerp v. the Netherlands* (no. 6301/73, 15 December 1977),³⁵ a judgment pronounced over 40 years ago, in times of entirely different global understanding of the issue and inexistent standards of human rights protection of persons with disabilities. This is strikingly at odds with the Court's evolutive

²⁶ See, for instance, *X. v. Finland*, no. 34806/04, 03/07/2012, concerning involuntary administration of psychiatric medication to the applicant, § 222. Or *Glass v the United Kingdom* (2004) ECHR 103.

²⁷ *V. C. v. Slovakia*, no. 18968/07, 8. 11. 2011.

²⁸ See, for instance, *Cam v. Turkey*, no. 515800/08, 23 February 2016, § 53, in which the Court explains why it incorporates the UN CRPD standards in its equality and non-discrimination jurisprudence.

²⁹ The need to synthesize the standards of the torture framework and the UN CRPD was emphasized, inter alia, by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in a report A/HRC/22/53, 1 February 2013, § 61-62: „*It is therefore necessary to reaffirm that the Convention on the Rights of Persons with Disabilities offers the most comprehensive set of standards on the rights of persons with disabilities, inter alia, in the context of health care, where choices by people with disabilities are often overridden based on their supposed “best interests”, and where serious violations and discrimination against persons with disabilities may be masked as “good intentions” of health professionals.*“

³⁰ *Enver Şahin v. Turkey*, no. 23065/12, 30/01/2018.

³¹ *Ibid.*, also *Cam v. Turkey*, no. 515800/08, 23 February 2016, or *Guberina v. Croatia*, no. 23682/13, 22/03/2016.

³² *Kacper Nowakowski v. Poland*, no. 32407/13, 10/01/2017, § 93.

³³ *N. v. Romania* (No. 2), no. 38048/18, 16 November 2021.

³⁴ *Toplak and Mrak*, no. 34591/19, 26 October 2021.

³⁵ See, for instance, the reference to *Winterwerp* in *X. v. Finland*, no. 34806/04, 03/07/2012, §§ 144 and 148.

approach when it comes to protecting other groups in vulnerable positions in the society, such as trans people³⁶ or the Roma people.³⁷

16. The UN CRPD, adopted in 2006, manifests a clear paradigm shift in the understanding of disability which has already been endorsed by 182 states, including all Council of Europe members states.³⁸ Clearly, this paradigm shift has been increasingly reflected also in the Court's case-law. The present case is an opportunity for the Court to reflect this paradigm shift also in its jurisprudence concerning disability-based detention and involuntary treatment. It would be a welcome reiteration of the Court's to see and treat people with disabilities as equals, protecting their individual liberty and autonomy with such diligence as is afforded to others.

c. The right to initiate a review of detention on the patient's own motion

17. Considering the contentious nature of detention and treatment based on a person's disability, the Court should likewise be particularly careful in assessing the effectiveness of safeguards against arbitrary and/or unlawful detention. Independent access to review of the detention is a safeguard of utmost importance³⁹, which is even more paramount for people confined in psychiatric hospitals, such as the applicant in the present case. Detention in a psychiatric institution causes a particular situation of powerlessness, dependency, and subordination.⁴⁰ Detention and involuntary treatment in a psychiatric institution gravely affect numerous fundamental rights.⁴¹

18. The Court has already made it clear in several judgments that detained patients “*must have the right to seek judicial review on his or her own motion*” and that whatever other guarantees were available, they could “*not eliminate the need for an independent right of individual application by the patient*” (*Gorshkov v. Ukraine*, no. 67531/01, 8 November 2005, §§ 44-45; see also *Rakevich v. Russia*, no. 58973/00, §§ 43-44, 28 October 2003, and *X. v. Finland*, 34806/04, 03 July 2012, §§ 170-171). In *Shtukaturov v. Russia* (no. 44009/05, 27/03/2008), a case concerning the detention of a person with psychosocial disability, the Court made it clear that the right to initiate a judicial review on the patient's own motion necessarily implies that this right must be independent of other persons, including the guardian or

³⁶ Compare the early judgments in cases concerning right to legal recognition of trans people against the United Kingdom (*Rees v. the United Kingdom* and *Cossey v. the United Kingdom*, X., Y. and Z. v. the United Kingdom, 22 April 1997, *Sheffield and Horsham v. the United Kingdom*, 30 July 1998) and the newer *Christine Goodwin v. the United Kingdom* (no. 28957/95, 11 July 2002) case. In *Christine Goodwin*, § 74, the Court provides a very convincing explanation for why it is necessary to maintain a dynamic and evolutive approach to interpreting the Convention to provide effective and practical protection of human rights in light of current-day circumstances.

³⁷ Compare, for instance, the evolution of standards between *Buckley v. the United Kingdom* (no. 20348/92, 25/09/1996) and *Chapman v. the United Kingdom* (G.C. (no. 27238/95, 18 January 2001), and later judgments *Yordanova and others v Bulgaria* (no. 25446/06, 24 April 2012) and *Winterstein and others v France* (no. 27013/07, 17 October 2013).

³⁸ See the current state of ratifications available at:

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

³⁹ See, amongst others, *Storck v. Germany* (no. 61603/00, § 102.

⁴⁰ *Herczegfalvy v. Austria*, no. 10533/83, 24 September 1992, § 82.

⁴¹ European Union Agency for Fundamental Rights (“EU FRA”), “Involuntary placement and involuntary treatment of persons with mental health problems”, 2012, foreword.

family members, even if under the national law the guardian exercises procedural rights on behalf of the patient (§ 123-125 of the judgment). Moreover, recognizing the vulnerable positions these persons might be in, effective protection of this right implies that the authorities inform them about this right in an accessible manner and help them exercise it (*Hasáliková v. Slovakia*, no. 39654/15, 24 June 2021, § 69).⁴²

3. The right to a fair trial

19. The second part of the submission concerns the procedural rights of persons with disabilities in the context of criminal justice as enshrined in the criminal limb of Article 6 of the Convention, read in line with the UN CRPD. It highlights that UN CEDAW General recommendation No. 19 that by virtue of their equal recognition and equal standing before the law, persons with psychosocial disabilities cannot be excluded from the proceedings concerning them. They have the right to be active agents in the proceedings, whether by directing the actions of their representatives or by their own motions and submissions. Their psychosocial disability is never a reason to deny them this right and must merely prompt the authorities to ensure appropriate accommodations which will enable them to exercise it on an equal basis with others.

a. The right to legal capacity and procedural accommodations

20. The discriminatory nature and fundamental wrongfulness of disability-based detention becomes even more obvious when ordered in the proceedings from which the concerned person was excluded. The right to equal recognition before the law enshrined in Article 12 of the UN CRPD implies that people with disabilities must be seen as equal participants of court proceedings. It is discriminatory to presume their incapacity do so on account of their psychosocial disability.⁴³ Articles 12 (3) and 13 of the UN CRPD, to the contrary, enshrine their right to be supported in the exercise of this capacity and ensured access to justice through the provision of procedural accommodations. Again, these provisions represent a fundamental paradigm shift necessary to ensure that persons with disabilities are seen and treated as equals and has been endorsed by an overwhelming majority of states, including all Council of Europe member states.⁴⁴

21. The right to access to justice is a core element of the rule of law, a fundamental right and an essential prerequisite for the protection and promotion of all other human rights. It is implied in the right to a fair trial, including equal access to and equality before the courts, the right to effective investigation, as well as the right to just and timely remedies for rights violations.⁴⁵ Its elements have recently been specified in the *International Principles and Guidelines on Access to Justice for Persons with Disabilities* adopted by several UN

⁴² CRPD *Guidelines on Article 14*, § 24, points d), e).

⁴³ UN CRPD *Guidelines on Article 14*, § 6, § 24.

⁴⁴ See above, the UN CRPD was, to this date, ratified by 182 countries. The current state of ratifications is available at: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

⁴⁵ Report of the Office of the United Nations High Commissioner for Human Rights. *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities*, A/HRC/37/25, 27 December 2017, § 3.

authorities.⁴⁶ The Guidelines unequivocally state that it is impermissible to exclude persons with disabilities from legal proceedings due to constructs such as „cognitive incapacity” and “mental incapacity”, as determined, for instance, by functional or mental status assessments.⁴⁷

22. To facilitate participation in proceedings on an equal basis with others, authorities must facilitate procedural accommodations which help overcome the barriers people with disabilities might face during the proceedings. This means, for instance, making the language in the courtroom accessible, providing extra accessible information and guidance to a person with a disability, ensuring frequent breaks, modifying the layout of the courtroom, and many others, depending on the context and the needs of the person.⁴⁸ Diversions from the criminal process to coercive mental health treatment are not procedural accommodations but rather violations of the right to access to justice on an equal basis with others.⁴⁹ In the context of criminal justice proceedings, the UN CRPD Committee insists that all persons with disabilities “*who have been accused of crimes and... detained in jails and institutions, without trial, are allowed to defend themselves against criminal charges, and are provided with required support and accommodation to facilitate their effective participation.*”⁵⁰
23. Nevertheless, as a minimum requirement, if such diversion is in place and some “special care measures” are applied, they must guarantee the same level of respect for due process as would be available in a normal criminal trial.⁵¹ In other words, persons with disabilities considered to lack “cognitive or mental capacity” must be ensured the same substantive and procedural guarantees as others in the context of criminal proceedings.⁵² This fundamental principle also applies to the right to be present and be heard during the proceedings and the right to file an appeal.

⁴⁶ The Guidelines were prepared UN Special Rapporteur on the rights of persons with disabilities, the UN Committee on the Rights of Persons with Disabilities and the Special Envoy of the Secretary-General on Disability and Accessibility and endorsed by the United Nations High Commissioner for Human Rights as “an indispensable contribution to achieving justice for all.” Available at: <https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/GoodPracticesEffectiveAccessJusticePersonsDisabilities.aspx>.

⁴⁷ *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, § 1.2. (b) and (c).

⁴⁸ See, for instance, the *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, § 3.2.

⁴⁹ Bantekas, Ashley Stein, Anastasiou (eds.) *The United Nations Convention on the Rights of Persons with Disabilities. A commentary.* Eilionóir Flynn, Article 13: Access to justice, p. 399.

⁵⁰ See the UN CRPD Committee’s following concluding observations: CRPD/C/AUS/CO/1, § 30; CRPD/C/MNG/CO/1, § 25; CRPD/C/DOM/CO/1, § 29 a); CRPD/C/CZE/CO/1, § 28, CRPD/C/HRV/CO/1, § 22; CRPD/C/DEU/CO/1, § 32; CRPD/C/DNK/CO/1, §§ 34 and 35; CRPD/C/ECU/CO/1, § 29 b); CRPD/C/KOR/CO/1, § 28; CRPD/C/MEX/CO/1, § 27; CRPD/C/NZL/CO/1, § 34. Available at: <https://uhri.ohchr.org/en/search-human-rights-recommendations>

⁵¹ UN CRPD Committee’s concluding observations CRPD/ C/PRY/CO/1, § 32.

⁵² UN CRPD Committee’s concluding observations CRPD/C/AUS/CO/1, § 29.

b. Right to be present and be heard

24. The right to effective participation in a criminal trial, including the right to be present and heard during own criminal process, is one of the fundamental guarantees of a fair trial.⁵³ It is closely connected to the principle of equality of arms and ensures the adversarial nature of the proceedings.⁵⁴ At the same time, it is the only way to ensure the specific criminal justice guarantees enshrined in Article 6(3) sub-paragraphs c), d) and e): especially, the right to defend oneself in person. The Court has established that domestic courts must act diligently to secure the presence of the accused at the hearings⁵⁵ and discourage unjustified absences.⁵⁶ A hearing may only be held in absence if the accused waived the right to be present or when they had been missing.⁵⁷
25. A person's psychosocial disability cannot be a reason for failing to ensure their presence during a hearing in criminal proceedings against them. The Court has emphasized in the context of preventive psychiatric detention that when it comes to proceedings where a person with a disability is being deprived of their liberty, being able to appear before the Court in person is essential.⁵⁸
26. Legal representation may be essential assistance, or procedural accommodation, in this regard. However, representation does not and cannot substitute the right to be present and heard of the person concerned. The legal representation must amplify the voice of the person with a disability and follow their wishes and preferences, not substitute it.⁵⁹

c. Right to file an appeal

27. It is a fundamental principle of equal access to justice that legal representation should amplify the voice of a person with a disability and facilitate their effective engagement in the proceedings by respecting their wishes and preferences, not substituting them.⁶⁰ Yet the Fundamental Rights Agency of the European Union found in their research concerning

⁵³ *Murtazaliyeva v. Russia* [GC], no. 36658/05, 18 December 2018, § 91; *Hermi v. Italy* [GC], no. 18114/02, 18 October 2006, §§ 58-59; *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, §§ 81 and 84; and many others.

⁵⁴ *Stanford v. the United Kingdom*, no. 16757/90, 23 February 1994, § 26.

⁵⁵ *Colozza v. Italy*, no. 9024/80, 12 February 1985; § 32; *M.T.B. v. Turkey*, 47081/06, 12 June 2018, §§ 49-53.

⁵⁶ *Medenica v. Switzerland*, no. 20491/92, 14 June 2001, § 54

⁵⁷ See the Court's *Guide to Article 6* (criminal limb), § 284-290, and the case-law cited therein.

⁵⁸ In *Shtukurov v. Russia* (no. 44009/05, 27 March 2008), the Court found a violation of Article 6 of the Convention also because the applicant was not present and heard during the proceedings concerning his deprivation of liberty in a psychiatric institution.

⁵⁹ UN CRPD General Comment no. 1 on Equal recognition before the law, CRPD/C/GC/1, § 17:

„Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making.”

⁶⁰ *Ibid.* See also the United Nations *Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court*, A/HRC/30/36, Guideline 20, § 126: *“Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substituted decision-making”*; see also the UN CRPD *Guidelines on Article 14*, § 6, § 24.

effective access to justice that the restrictive rules on legal standing for persons with disabilities are major obstacles in effective participation in legal proceedings.⁶¹

28. For legal remedies to be effective for persons with disabilities, they must be accessible to them directly and not solely dependent on their legal representatives' action. The Court's jurisprudence also supports this position. In *M.D. and others v. Malta*, for instance, the Court emphasized that “*in the context of machinery for human rights protection, the Court cannot accept [...] the possibility [...] to pursue a remedy should depend entirely on the intervention of uninterested third parties.*” (no. 64791/10, 17 July 2012, § 36). In combination with exclusion from the hearing, the failure to examine an appeal filed personally by the applicant, otherwise represented by a legal guardian, was found to violate Article 6 of the Convention in *Shtukaturov v. Russia* (no. 44009/05, 27/03/2008, § 75-76).
29. While it is generally permissible to limit access to court through procedural rules to ensure effective administration of justice, such limitation cannot render the protection of human rights of a vulnerable segment of a society completely dependent on an activity of a third person. In other words, to ensure fundamental fairness of criminal proceedings, the person concerned, whether or not they are considered to have a full legal capacity, must have the right to challenge the outcome of the proceedings on their own motion.

4. Conclusion

30. The submission presented selected fundamental issues in ensuring fair access to justice to persons with psychosocial disabilities in the context of criminal proceedings. Relying on the UN CRPD standards, we highlighted why disability-based detention and coercive psychiatric treatment, ordered during criminal proceedings, violates the human rights of persons with disabilities. We also underscored that these standards must, in light of the current-day conditions and the consensus among the Council of Europe states, finally find their reflection also in the Court's jurisprudence.
31. The submission also emphasized that the right to effectively participate in own criminal proceedings, be present at a hearing, and file motions and submissions belong among the fundamental guarantees of a fair process that must be ensured to persons with psychosocial disabilities on an equal basis with others. These guarantees are ensured by the UN CRPD and the caselaw of the Court alike.

In Budapest, 23 November 2021

Validity Foundation

⁶¹ EU FRA, “Involuntary placement and involuntary treatment of persons with mental health problems”, 2012, § 40.