



4. The Convention on the Rights of Persons with Disabilities (CRPD) sets out state obligations necessary to ensure the rights of persons with disabilities on an equal basis with others. As such, it provides authoritative guidance supplementing other core human rights treaties. The CRPD has been applied as an integral component of international human rights standards by UN mechanisms such as the Special Rapporteur on Torture,<sup>1</sup> and by regional human rights mechanisms in Europe and in the Americas. The European Court of Human Rights, referring to the CRPD, found that a worldwide consensus existed to protect persons with disabilities against discriminatory treatment, despite the fact that the country involved had not signed or ratified the Convention.<sup>2</sup> An OAS body charged with monitoring the implementation of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities found that a provision stating that a declaration of legal incompetence did not constitute discrimination was rendered obsolete by the CRPD, which follows an alternative paradigm of supported decision-making. The OAS Committee adopted an interpretive criterion design to annul the offending provision in practice.<sup>3</sup>
5. The CRPD enjoys widespread support, having been signed by 158 countries, including the United States, of which 145 have gone to ratification. The CRPD, as an instrument adopted by the General Assembly, is entitled to at least the same weight given to non-binding declarations of that body, with respect to countries that have not signed or ratified the Convention. In particular, the CRPD supersedes earlier non-binding declarations such as the Declaration of Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care of 1991 (A/RES/46/119), which had accepted the legitimacy of involuntary treatment and involuntary confinement.<sup>4</sup>
6. A prohibition of nonconsensual psychiatric interventions arises under several provisions of the CRPD. Article 12 (equal recognition before the law) provides that all persons have legal capacity on an equal basis with others, and measures related to the exercise of legal capacity must respect the rights, will and preferences of the person. States are obligated to respect the equal legal capacity of persons with disabilities, to provide access to support that may be needed to exercise such capacity, and to establish safeguards to prevent abuse. The Committee on the Rights of Persons with Disabilities consistently interprets article 12 to require the replacement of substituted decision-making regimes by supported decision-making, which respects the autonomy, will and preferences of

---

<sup>1</sup> Report of the Special Rapporteur on Torture, 1 February 2013, A/HRC/22/53 ¶¶ 27-35, 57-67, 89; Interim Report of the Special Rapporteur on Torture, 28 July 2008, A/63/175.

<sup>2</sup> *Glor v Switzerland*, European Ct of Human Rights, Application No. 13444/04, 30 April 2009.

<sup>3</sup> Committee on the Elimination of All Forms of Discrimination Against Persons with Disabilities, General Observation No. 1, CEDDIS/doc.12(I-E/11) rev.1, 28 April 2011.

<sup>4</sup> A/HRC/22/53 ¶ 58; A/63/175 ¶ 44.

the person.<sup>5</sup> Legal capacity includes the right to give or withdraw consent to medical treatment,<sup>6</sup> and mental health laws that permit forced treatment are considered a form of substituted decision-making and must be repealed.<sup>7</sup> The Committee on the Rights of Persons with Disabilities has recently elaborated a General Comment on Article 12 to clarify its normative content and requirements for implementation, which will be explained in greater detail below.

7. Article 14 guarantees the right to liberty and security of the person, and provides that the existence of a disability shall in no case justify a deprivation of liberty. The Committee on the Rights of Persons with Disabilities considers that institutionalization against a person's will constitutes arbitrary detention and violates both article 12 and article 14.<sup>8</sup> The Committee derives from Article 14 an obligation "to ensure that no one is detained in any kind of mental health facility" and to repeal legal provisions authorizing detention and compulsory treatment in mental health services.<sup>9</sup> Legal provisions authorizing detention based on a characterization of the person as dangerous to oneself or others or as being in need of care and treatment are viewed as incompatible with article 14.<sup>10</sup>

---

<sup>5</sup> Committee on the Rights of Persons with Disabilities (CRPD) Concluding Observations on Azerbaijan, 11 April 2014, CRPD/C/AZE/CO/1 ¶ 27; CRPD Concluding Observations on Costa Rica, 11 April 2014, CRPD/C/CRI/CO/1 ¶ 22; CRPD Concluding Observations on Sweden, 11 April 2014, CRPD/C/SWE/CO/1 ¶ 34; CRPD Concluding Observations on Australia, 4 October 2013, CRPD/C/AUS/CO/1 ¶ 25; CRPD Concluding Observations on Austria, 13 September 2013, CRPD/C/AUT/CO/1 ¶ 28; CRPD Concluding Observations on El Salvador, 13 September 2013, CRPD/C/SLV/CO/1 ¶ 28; CRPD Concluding Observations on Paraguay, 15 May 2013, CRPD/C/PRY/CO/1 ¶ 30; CRPD Concluding Observations on Argentina, 27 September 2012, CRPD/C/ARG/CO/1 ¶ 20; CRPD Concluding Observations on China, 27 September 2012, CRPD/C/CHN/CO/1 ¶ 22; CRPD Concluding Observations on Hungary, 27 September 2012, CRPD/C/HUN/CO/1 ¶ 26; CRPD Concluding Observations on Peru, 9 May 2012, CRPD/C/PER/CO/1 ¶ 25; CRPD Concluding Observations on Spain, 2011, CRPD/C/ESP/CO/1 ¶ 34; CRPD Concluding Observations on Tunisia, 29 April 2011, CRPD/C/TUN/CO/1 ¶ 23.

<sup>6</sup> CRPD/C/CRI/CO/1 ¶ 22; CRPD/C/SWE/CO/1 ¶ 34; CRPD/C/AUS/CO/1 ¶ 25; CRPD/C/AUT/CO/1 ¶ 28; CRPD/C/PRY/CO/1 ¶ 30; CRPD/C/HUN/CO/1 ¶ 26.

<sup>7</sup> CRPD General Comment No. 1, CRPD/C/GC/1 (advanced unedited version), 11 April 2014 (GC1) ¶ 7, 38.

<sup>8</sup> GC1 ¶ 36.

<sup>9</sup> CRPD/C/AZE/CO/1 ¶ 29; CRPD/C/SWE/CO/1 ¶¶ 35-36; CRPD/C/AUS/CO/1 ¶¶ 33-34; CRPD/C/AUT/CO/1 ¶¶ 29-31; CRPD/C/SLV/CO/1 ¶ 32; CRPD/C/HUN/CO/1 ¶ 28; CRPD/C/CHN/CO/1 ¶ 26; CRPD/C/PER/CO/1 ¶ 29; CRPD/C/ESP/CO/1 ¶ 36; CRPD/C/TUN/CO/1 ¶ 25.

<sup>10</sup> CRPD/C/SWE/CO/1 ¶¶ 35-36; CRPD/C/AUT/CO/1 ¶¶ 29-31; CRPD/C/SLV/CO/1 ¶ 32.

8. Several provisions of the CRPD address the right to physical and mental integrity and the actions that must be taken to ensure these rights to persons with disabilities on an equal basis with others. These include Article 15 on freedom from torture and ill-treatment, Article 16 on freedom from exploitation, violence and abuse, and Article 17 on integrity of the person. Article 25 addresses the right to health and requires that health care services be provided to persons with disabilities on the basis of free and informed consent. The Committee on the Rights of Persons with Disabilities has found an obligation to abolish involuntary institutionalization, compulsory psychiatric treatment and other coercive practices in mental health services under article 15,<sup>11</sup> article 17,<sup>12</sup> and article 25.<sup>13</sup> This is echoed by the UN Special Rapporteur on Torture, who calls for an absolute ban on the use of nonconsensual interventions against persons with disabilities, including psychosurgery, electroshock and mind-altering drugs such as neuroleptics and notes that such practices always amount to ill-treatment and arguably meet the criteria for torture.<sup>14</sup> The Special Rapporteur had stated in an earlier report that such interventions, because they are medical treatments of an intrusive and irreversible nature aimed at correcting or alleviating a disability, may amount to torture when enforced or administered without the free and informed consent of the person concerned.<sup>15</sup>
9. As mentioned above, the Committee on the Rights of Persons with Disabilities has recently issued General Comment No. 1 on Article 12, Equal recognition before the law. A General Comment is considered to have significant normative value within the human rights system, as a clarification of the legal obligations of states parties to a treaty by the body that is authorized to play oversee compliance with those obligations.<sup>16</sup> It also has practical value, given the general language of human rights treaty provisions, to set out detailed content to guide states parties in implementation.<sup>17</sup> General Comment No. 1 was elaborated following broad consultation with experts, state parties, disabled people's organizations, non-governmental organizations, other treaty monitoring committees and UN agencies. It sets out the normative content of the right to equal protection before the law, details the obligations of states parties related to law reform and establishment of a system of support for the exercise of legal capacity, and the relationship between article 12 and other provisions of the CRPD.

---

<sup>11</sup> GC1 ¶ 7, 38; CRPD/C/CRI/CO/1 ¶¶ 33-34; CRPD/C/SWE/CO/1 ¶¶ 37-40; CRPD/C/AUS/CO/1 ¶¶ 35-36; CRPD/C/AUT/CO/1 ¶¶ 32-33; CRPD/C/SLV/CO/1 ¶¶ 33-34; CRPD/C/CHN/CO/1 ¶¶ 27-28; CRPD/C/PER/CO/1 ¶¶ 30-31.

<sup>12</sup> CRPD/C/TUN/CO/1 ¶¶ 28-29.

<sup>13</sup> CRPD/C/ARG/CO/1 ¶ 41-42; CRPD/C/CHN/CO/1 ¶ 38.

<sup>14</sup> A/HRC/22/53 ¶ 81, 89.

<sup>15</sup> A/63/175 ¶¶ 40, 47.

<sup>16</sup> James Crawford, *Brownlie's Principles of Public International Law*, 8<sup>th</sup> ed. (2012) 640; Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 *Vanderbilt J. of Transnational Law* 905, 929-930.

<sup>17</sup> Mechlem, *id.*

10. In General Comment No. 1, the Committee on the Rights of Persons with Disabilities establishes clearly and conclusively that legal capacity is a universal right that cannot be denied based on a person's disability.<sup>18</sup> Under the CRPD the right to legal capacity – both the legal standing to hold rights and duties and the legal agency to exercise those rights and duties – is distinct from a person's actual or perceived decision-making skill, which is sometimes referred to, controversially, as mental capacity or competence.<sup>19</sup> Instead of restricting a person's right to make decisions based on an assessment of mental capacity, the CRPD requires that support be provided for decision-making in accordance with the person's own will and preferences.<sup>20</sup> When the person's will and preferences cannot be known with certainty, the standard to be followed is "best interpretation of will and preferences" rather than "best interests."<sup>21</sup>
11. Following from the premise that the right to decide about medical treatment is a component of legal capacity, states must ensure that health care personnel, including psychiatric professionals, respect the decisions made by persons with disabilities, and do not allow substitute decision-makers to provide consent on their behalf.<sup>22</sup> Forced treatment, which is an infringement of the right to be free from torture, is acknowledged to be a particular problem in the context of mental health services:

Forced treatment is a particular problem for persons with psychosocial, intellectual and other cognitive disabilities. State parties must abolish policies and legislative provisions that allow or perpetrate forced treatment, as it is an ongoing violation found in mental health laws across the globe, despite empirical evidence indicating its lack of effectiveness and the views of people using mental health systems who have experienced deep pain and trauma as a result of forced treatment.

12. Instead of permitting forced treatment,

State Parties must... respect the legal capacity of persons with disabilities to make decisions at all times, including in crisis situations, ensure that accurate and accessible information is provided about service options and that non-medical approaches are made available, and provide access to independent support.... The Committee recommends that State parties ensure that decisions relating to a person's physical or mental integrity can

---

<sup>18</sup> GC1 ¶¶ 8, 9.

<sup>19</sup> GC1 ¶¶ 11, 12, 12bis, 13.

<sup>20</sup> GC1 ¶¶ 13, 14, 25(b).

<sup>21</sup> GC1 ¶ 18bis.

<sup>22</sup> GC1 ¶ 36, 37, 38.

only be taken with the free and informed consent of the person concerned.<sup>23</sup>

13. Support can take many forms but must respect the person's rights, will and preferences and should never amount to substitute decision-making.<sup>24</sup> The Committee sets out some examples of support:

[P]ersons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication.... Support to persons with disabilities in the exercise of their legal capacity might include measures relating to universal design and accessibility... in order to enable persons with disabilities to perform the legal acts required to open a bank account, conclude contracts or conduct other social transactions. Support can also constitute the development and recognition of diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences. For many persons with disabilities, the ability to plan in advance is an important form of support, whereby they can state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others.... The point at which an advance directive enters into force (and ceases to have effect) should be decided by the person in the text of the directive and should not be based on an assessment that the person lacks mental capacity.

14. The right to support itself is subject to the will and preferences of the person and cannot be required as a condition for the person's exercise of legal capacity.<sup>25</sup> The person has the right to refuse support and to terminate or change the support relationship at any time.<sup>26</sup> The approach taken in relation to advance directives is a compromise that may allow people who wish to bind themselves to some future course of action to do so; however, it remains to be seen whether such a doctrine can truly be reconciled with the right to legal capacity and other fundamental rights such as the right to personal integrity.
15. Article 19 on living independently in the community, which requires states to provide access to supports such as personal assistance, and also contemplates the recognition of naturally-occurring support networks in the community,<sup>27</sup> can be

---

<sup>23</sup> GC1 ¶ 38. See also ¶ 16 for the premise that the person retains capacity in crisis situations.

<sup>24</sup> GC1 ¶ 15.

<sup>25</sup> GC1 ¶ 16, 17, 38.

<sup>26</sup> GC1 ¶ 25(g).

<sup>27</sup> GC1 ¶ 41.

invoked as an alternative to the framework of health care in order to move further away from the medical model of mental health. For example, community support networks, including peer support, could help a person to meet basic needs while experiencing severe crisis or distress, and could also support the person to make ongoing decisions as long as may be desired.

16. To summarize, under the standards found in the Convention on the Rights of Persons with Disabilities, interpreting and applying universal human rights without discrimination based on disability, there exists an absolute right to refuse any unwanted psychiatric treatment or hospitalization, subject only to the person's own exercise of decision-making. Involuntary commitment and compulsory treatment violate the right to equal protection before the law and the right to liberty and security of the person, and may amount to ill-treatment or torture. Under the CRPD, and arguably under the jus cogens norm prohibiting torture and ill-treatment, there is an obligation to repeal legal provisions authorizing involuntary commitment and compulsory mental health treatment. Instead of permitting forced treatment, states must ensure that the decision-making of persons with disabilities is respected at all times, including in crisis situations, and must make support available for decision-making both with respect to mental health service options and in any area of life, according to the person's own wishes.



Tina E. Minkowitz, Affiant  
New York Attorney Reg. No. 4030169  
44 Palmer Pond Rd.  
Chestertown, NY 12817

SUBSCRIBED AND SWORN to before me this 20th day of January, 2015.

*Patricia M. Smith*  
*Notary Public State of New York*

**PATRICIA M. SMITH**  
Notary Public, State of New York  
Registration # 01SM6254390  
Qualified in Warren County  
My Commission Expires 1-17-2016