



## WRITTEN COMMENTS

submitted by

**MENTAL DISABILITY ADVOCACY CENTER**

**Z.H. v. Hungary**

European Court of Human Rights  
Application no. 28973/11

27 June 2012

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## INTRODUCTION

These written comments are submitted by the Mental Disability Advocacy Center (MDAC) pursuant to leave granted by the President of the Second Section under Rule 44(3) of the Rules of Court. MDAC is an international human rights organisation which advances the rights of children and adults with intellectual disabilities and psycho-social disabilities. MDAC uses law to promote equality and social inclusion through strategic litigation, advocacy, research and monitoring and capacity-building. It operates at the global level as well as regional and domestic levels in Europe and Africa. It is headquartered in Budapest, Hungary and was founded in 2002. MDAC has participatory status with the Council of Europe and a special consultative status with the United Nations Economic and Social Council. MDAC has previously served as a third party intervener in the cases of *Kędzior v. Poland* (no. 45026/07), *Gauer and Others v. France* (no. 61521/08) and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (no. 47848/08).

### I. BACKGROUND INFORMATION ON PERSONS WITH INTELLECTUAL DISABILITIES AND CRIMINAL PROCEEDINGS

According to the 2011 World Report on Disability one billion people worldwide have a form of disability: that is, 15% of the global population<sup>1</sup>, including 80 to 120 million Europeans<sup>2</sup>.

The Court recognised in *Kiss v Hungary* that people with mental disabilities are a “particularly vulnerable group in society” having suffered discrimination and prejudice resulting in social exclusion<sup>3</sup>, and Judge Sajó commented in an additional opinion in *M.S.S. v Belgium and Greece* that all members of such a group deserve “special social protection”<sup>4</sup>. This is particularly relevant in light of the evidence that, for example, people with disabilities are at a greater risk of ill-treatment – including sexual abuse – than those without disabilities<sup>5</sup>.

Within the criminal justice system, where international research indicates that persons with intellectual disabilities are over-represented<sup>6</sup>, issues of vulnerability and stigma remain apparent. The needs of persons with intellectual disabilities are frequently unmet<sup>7</sup>.

Communication problems between people with disabilities and service providers in general translates in the justice system into inaccessible legal information, lack of awareness of legal rights, and an inaccessible legal system<sup>8</sup>. Australian research by the New South Wales Law Reform Commission found that people with learning disabilities tended to be unaware of their legal rights: more than three-quarters of those interviewed said they would sign anything the police requested<sup>9</sup>.

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<sup>1</sup> World Health Organisation and World Bank, *World Report on Disability*, 2011, p. xi; p. 44; p. 261

<sup>2</sup> Commissioner for Human Rights, *Issue Paper: Human Rights and Disability: Equal rights for all*, 2008; European Commission, *People with disabilities have equal rights: The European Disability Strategy 2010-2020*, 2010

<sup>3</sup> *Kiss v Hungary*, no. 38832/06, para.42, 20 May 2010

<sup>4</sup> *MSS v Belgium and Greece*, no. 30696/09, 21 January 2011

<sup>5</sup> World Health Organisation and World Bank, *World Report on Disability*, 2011, p. 59; House of Lords and House of Commons Joint Committee on Human Rights, *Seventh Report of Session 2008-08: A Life Like Any Other? Human Rights of Adults with Learning Disabilities – Volume 1*, 2008, p. 68

<sup>6</sup> Hayes, S., ‘Missing out: offenders with learning disabilities and the criminal justice system’ (2007) *British Journal of Learning Disabilities*, 35, 146–153, p. 142; Hayes, S., Shackell, P., Mottram, P., Lancaster, R., ‘The prevalence of intellectual disability in a major UK prison’ (2007) *British Journal of Learning Disabilities*, 35, 162–167, p. 162; Cant, R., & Standen, P., ‘What professionals think about offenders with learning disabilities in the criminal justice system’ (2007) *British Journal of Learning Disabilities*, 35, 174–180, p.175; New South Wales Law Reform Commission, *Consultation Paper 5: People with Cognitive and Mental Health Impairments in the Criminal Justice System: An Overview*, 2010, p. 14

<sup>7</sup> Hayes, S., ‘Missing out: offenders with learning disabilities and the criminal justice system’ (2007) *British Journal of Learning Disabilities*, 35, 146–153, p. 151

<sup>8</sup> World Health Organisation and World Bank, *World Report on Disability*, 2011, p. 72; Inclusion Europe, *Justice, Rights and Inclusion for People with Intellectual Disability*, p. 23-30

<sup>9</sup> New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, 1996; Hayes, S.,

In many Western nations, people with intellectual disabilities face different treatment within the system in comparison to those without intellectual disabilities<sup>10</sup>. The Prison Reform Trust in the United Kingdom found that people with intellectual disabilities are less likely than those without to receive a fair hearing, and also found examples of mistreatment by the police of persons with learning difficulties and disabilities<sup>11</sup>.

Failure to identify offenders with intellectual disabilities early on in proceedings can lead to consequences such as placement in inappropriate units<sup>12</sup>. Criminal justice professionals need adequate training to ensure more effective investigation practices from the outset<sup>13</sup>. Nevertheless, Inclusion Europe found that such training is not undertaken systematically, thereby hindering the improvement of access to justice for persons with intellectual disabilities<sup>14</sup>.

Research in this area emphasises that as yet there is not universal adequate accommodation of persons with intellectual disabilities in criminal proceedings, with evidence instead pointing to a lack of respect for members of society who have already been described by the Court as vulnerable. Consequently, persons with intellectual disabilities are at risk of having their human rights under international and European law violated. Discriminatory treatment of people with intellectual disabilities in criminal proceedings flies in the face of domestic and international obligations to respect and protect the human rights of adults with intellectual disabilities.

## II. INTERNATIONAL STANDARDS

### A. The United Nations Convention on the Rights of Persons with Disabilities (CRPD)

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the United Nations General Assembly on 13 December 2006 and entered into force on 3 May 2008. As of 27 June 2012 it was signed by 153 and ratified by 115 Parties including the European Union. Its provisions are legally binding for most of the Council of Europe Member States - 45 Member States signed and 33 have already ratified the CRPD. Hungary signed the CRPD on 30 March 2007 and ratified it on 20 July 2007.<sup>15</sup>

The CRPD has been characterised as a major leap forward in international human rights law which represents the first serious effort to discontinue the marginalisation of disability within human rights.<sup>16</sup> It does not create new rights, but it is the first legally binding instrument to comprehensively reaffirm and reinforce existing rights in a framework specific to persons with disabilities.<sup>17</sup> The fundamental purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.<sup>18</sup> The principles of equality and non-

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'Missing out: offenders with learning disabilities and the criminal justice system' (2007) *British Journal of Learning Disabilities*, 35, 146–153, p. 150

<sup>10</sup> Cant, R., & Standen, P., 'What professionals think about offenders with learning disabilities in the criminal justice system' (2007) *British Journal of Learning Disabilities*, 35, 174–180

<sup>11</sup> Prison Reform Trust evidence to the House of Lords and House of Commons Joint Committee on Human Rights, *Seventh Report of Session 2008-08: A Life Like Any Other? Human Rights of Adults with Learning Disabilities – Volume 1*, 2008, p. 75-76

<sup>12</sup> Hayes, S., 'Missing out: offenders with learning disabilities and the criminal justice system' (2007) *British Journal of Learning Disabilities*, 35, 146–153, p. 147-149

<sup>13</sup> Hayes, S., 'Missing out: offenders with learning disabilities and the criminal justice system' (2007) *British Journal of Learning Disabilities*, 35, 146–153, p. 149-150

<sup>14</sup> Inclusion Europe, *Justice, Rights and Inclusion for People with Intellectual Disability*, p. 30

<sup>15</sup> Status of ratifications can be consulted at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (last accessed 27 June 2012).

<sup>16</sup> Andreas Dimopoulos, *The UN Convention on the Rights of Persons with Disabilities* (Ashgate Publishing Limited, 2010) at 79

<sup>17</sup> United Nations, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities*, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007), at 5

<sup>18</sup> Article 1 of the CRPD

discrimination are among the main features of the CRPD. The general provision on equality and non-discrimination can be found in its Article 5(2). The latter expressly obliges States to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”. This general wording is further emphasised and reiterated throughout the other provisions of the CRPD.

The Court has held on a number of occasions that the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) is a living instrument which must be interpreted “in the light of present-day conditions”<sup>19</sup> and must be read “in the light of the notions currently prevailing in democratic States”.<sup>20</sup> In its recent case-law the Court also took into account the wide acceptance of the CRPD provisions in the Council of Europe Member States. The case of *Glor v. Switzerland*<sup>21</sup> was the first case in which the Court made an explicit reference to the CRPD as the basis for the “existence of a European and universal consensus on the need to protect persons with disabilities from discriminatory treatment”, despite the fact that the relevant events had taken place before the adoption of the CRPD by the General Assembly in 2006 (Switzerland has not even signed the CRPD yet). Since then the Court has cited the CRPD in a number of other cases such as *Kiss v. Hungary*<sup>22</sup>, *Jasinskis v. Latvia*<sup>23</sup>, *Kiyutin v. Russia*<sup>24</sup>, *Seal v. the United Kingdom*<sup>25</sup>, *Stanev v. Bulgaria*<sup>26</sup> and *D.D. v. Lithuania*<sup>27</sup>.

As the UN Special Rapporteur on Disability noted: “[The CRPD] has risen from the very core of the human rights principles of the United Nations. It is founded on the principles of dignity and justice; and rooted in the concepts of inalienability, universality and indivisibility of human rights. It highlights the right to full participation, and rests upon the notion of equality without distinctions; underlines the right to enjoyment without discrimination; stresses the belief in the dignity and worth of all human being, and their right to equality and protection by the law.”<sup>28</sup>

## B. Reasonable accommodation of people with disabilities in judicial procedures

Article 13(1) of the CRPD guarantees that States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. Reasonable accommodation means necessary and appropriate modification and adjustments which do not impose a disproportionate or undue burden, where needed in a particular case, to ensure that people with disabilities enjoy or exercise of all human rights and fundamental freedoms on an equal basis with others.<sup>29</sup> The Committee on the Rights of Persons with Disabilities (“CRPD Committee”) stated that denial of reasonable accommodation constitutes discrimination and that the duty to provide reasonable accommodation is immediately applicable and not subject to progressive realisation.<sup>30</sup> For example, reasonable accommodation might mean that a person who can communicate with the defendant who has disability assist him or her during the investigation.

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<sup>19</sup> See, among many other authorities, *Selmouni v. France* (GC), no. 25803/94, § 101, ECHR 1999-V

<sup>20</sup> *Van der Musselle v. Belgium*, 23 November 1983, § 32, Series A no. 70

<sup>21</sup> *Glor v. Switzerland*, no.13444/04, § 53, 30 April 2009.

<sup>22</sup> *Kiss v. Hungary*, no. 38832/06, § 14, 20 May 2010.

<sup>23</sup> *Jasinskis v. Latvia*, no. 45744/08, § 40, 21 December 2010.

<sup>24</sup> *Kiyutin v. Russia*, no. 2700/10, § 32, 10 March 2010.

<sup>25</sup> *Seal v. the United Kingdom*, no. 50330/07, §§ 41-43, 7 December 2010.

<sup>26</sup> *Stanev v. Bulgaria*, no. 36760/06, § 72, 17 January 2012.

<sup>27</sup> *D.D. v. Lithuania*, no. 13469/06, § 84, 14 February 2012.

<sup>28</sup> Statement by the Special Rapporteur on Disability, *Convention on the Rights of Persons with Disabilities: A Progressive Human Rights Instrument*, September 2006, [www.un.org/esa/socdev/enable/srstathrc2006.html](http://www.un.org/esa/socdev/enable/srstathrc2006.html)

<sup>29</sup> Article 2 of the CRPD.

<sup>30</sup> Committee on the Rights of Persons with Disabilities, Concluding Observations: Spain, 19 October 2011, CRPD/C/ESP/CO/1, para. 44.

The CRPD Committee urged the State Party to raise awareness on non-discrimination among members of the legal profession, particularly the judiciary, and persons with disabilities themselves, including through training programmes on the concept of reasonable accommodation.<sup>31</sup> The CRPD highlights the importance of appropriate training for those working in the field of administration of justice, including police and prison staff.<sup>32</sup> The CRPD Committee also stressed that guidance, awareness-raising and training should be given to ensure a better comprehension by all stakeholders, including persons with disabilities, of the concept of reasonable accommodation and prevention of discrimination.<sup>33</sup>

The CRPD emphasises the importance of reasonable accommodation both concerning access to justice for people with disabilities and regarding their detention. It is the responsibility of the State Party to ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and treated in compliance with the objectives and principles of the Convention, including by provision of reasonable accommodation.<sup>34</sup>

Good practices of reasonable accommodation of people with intellectual disabilities in the judicial proceedings can ensure the fairness of such proceedings and place persons with disabilities in a more equal position to those without disabilities. One such model is the Investigation and Testimony Procedural Act (Accommodations for Persons with Mental and Cognitive Disabilities) adopted in Israel in 2005. The United Nations Human Rights Committee took favourable note of the law in its Concluding Observations in 2010.<sup>35</sup> The Act provides comprehensive accommodations for people with cognitive or mental disabilities throughout the criminal justice process. The basis of these accommodations is the involvement of professionals from mental health and other therapeutic disciplines (e.g. psychiatrists, psychologists, criminologists, social workers etc). These professionals are vested with authority and they mediate between the person with disability and the law enforcement or justice agents. Furthermore, the Act allows for the alteration of procedural and evidentiary rules in order to accommodate the needs of people with disabilities. The accommodations are, *inter alia*, the following: a friendlier environment in the courtroom, questions framed in an easy-to-understand way and expert testimony that explains the words and conduct of the person with disability involved in the judicial proceeding. The Act covers both defendants and victims with disabilities. In the police investigations it is always a "special investigator" who carries out the interrogation of a person with intellectual disability who is a professional with a background in special education and who has undergone a special training. Under the Act the police are obliged to notify a family member about the investigation and people with intellectual disabilities have the right to be accompanied by a person of their choice during the investigation. In addition, there are strict rules to document the investigation by visual, audio or manual recording.<sup>36</sup> There are other noteworthy initiatives in other States as well. For example, the United States Department of Justice prepared a guidebook for law enforcement officers on how to deal with victims with disabilities<sup>37</sup> while in the U.K. the Judicial Studies Board published a "bench book" of equal treatment for all judicial office-holders on how to accommodate litigants, defendants and witnesses with disabilities.<sup>38</sup>

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<sup>31</sup> Committee on the Rights of Persons with Disabilities, Concluding Observations: Tunisia, 13 May 2011, CRPD/C/TUN/CO/1, para. 13.

<sup>32</sup> Article 13(2) of the CRPD.

<sup>33</sup> CRPD/C/ESP/CO/1, para. 20.

<sup>34</sup> Article 14(2) of the CRPD.

<sup>35</sup> Human Rights Committee, Concluding Observations: Israel, 3 September 2010, CCPR/C/ISR/CO/3, para 4.

<sup>36</sup> Neta Ziv, *Witnesses with Mental Disabilities: Accommodations and the Search for Truth — The Israeli Case*, Disability Studies Quarterly Fall 2007, Volume 27, No.4, available at <http://dsq-sds.org/article/view/51/51> (last accessed 27 June 2012).

<sup>37</sup> U.S. Department of Justice, *First Response to Victims of Crime – A Guidebook for Law Enforcement Officers*, 2008, available at <http://www.ojp.usdoj.gov/ovc/publications/infores/pdf/FirstResponseGuidebook.pdf> (last accessed 27 June 2012).

<sup>38</sup> Judicial Studies Board, *Equal Treatment Bench Book*, 2005, <http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/equal-treatment-bench-book> (last accessed 27 June 2012).

### C. Freedom from torture or inhuman and degrading treatment or punishment of people with disabilities

The absolute prohibition against torture is enshrined in numerous international treaties.<sup>39</sup> The CRPD endorses this legal regime and places it in the framework relevant for persons with disabilities. Article 15 guarantees that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. States Parties are responsible to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. Furthermore, under Article 16 of the CRPD on freedom from exploitation, violence and abuse, States have a fivefold obligation: to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse; to ensure, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse; to ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities; to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse; to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted. Finally, Article 17 of the CRPD guarantees that every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others. The CRPD provides further authoritative guidance on the absolute prohibition of torture in respect of persons with disabilities. Article 3 of the CRPD proclaims the principle of respect of the individual autonomy of persons with disabilities.

The prohibition of ill-treatment has an absolute and non-derogable character, enshrined in Article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which has become accepted as a matter of customary international law.<sup>40</sup> The obligations to prevent torture and ill-treatment are indivisible, interdependent and interrelated.<sup>41</sup> The definition of torture contains the obligation of non-discrimination.<sup>42</sup> The Committee against Torture emphasizes that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.<sup>43</sup> The Committee stated that “the protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of [...] mental or other disability [...]. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.”<sup>44</sup>

It is the State’s responsibility to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.<sup>45</sup> The State’s obligation also applies to all persons who act,

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<sup>39</sup> Such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 2), the International Covenant on Civil and Political Rights (Article 7) and the Convention on the Rights of the Child (Article 37)

<sup>40</sup> Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), para. 1.

<sup>41</sup> Ibid. para 3.

<sup>42</sup> “Torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. (Article 1 of the CAT).

<sup>43</sup> Committee Against Torture, General Comment 2, para 20.

<sup>44</sup> Ibid. para 21.

<sup>45</sup> Article 2(1) of the CAT.

de jure or de facto, in the name of, in conjunction with, or at the behest of the State party.<sup>46</sup> The obligation to conduct effective investigations into alleged ill-treatment has been recognised by international bodies, including the Human Rights Committee.<sup>47</sup>

Manfred Nowak, the former United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in his interim report drew the attention of the General Assembly to the situation of persons with disabilities, “who are frequently subjected to neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence ... such practices, perpetrated in public institutions, as well as in the private sphere, remain invisible and are not recognized as torture or other cruel, inhuman or degrading treatment or punishment.”<sup>48</sup> The Special Rapporteur further stressed that “the lack of reasonable accommodation in detention facilities may increase the risk of exposure to neglect, violence, abuse, torture and ill-treatment.”<sup>49</sup> Manfred Nowak acknowledged that “torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person. Persons with disabilities often find themselves in such situations, for instance when they are deprived of their liberty in prisons or other places [...]. In a given context, the particular disability of an individual may render him or her more likely to be in a dependant situation and make him or her an easier target of abuse.”<sup>50</sup> Finally the Special Rapporteur stresses that “States have the further obligation to ensure that treatment or conditions in detention do not directly or indirectly discriminate against persons with disabilities. If such discriminatory treatment inflicts severe pain or suffering, it may constitute torture or other form of ill-treatment.”<sup>51</sup>

The Law Reform Commission of New South Wales explained that “in order to understand how people with an intellectual disability interact with the criminal justice system, it is important to consider the typical life experiences of these people in our society. While the Commission recognises the individual nature of intellectual disability and the dangers of generalisation, people with an intellectual disability as a group have, in varying degrees, common experiences of vulnerability to abuse, discrimination, and social marginalisation due to their disability”.<sup>52</sup> There is evidence of an under-reporting of targeted violence and hostility in general. This is attributed to “physical, procedural and attitudinal barriers”.<sup>53</sup> The level of pain or suffering is relative in its nature and when assessing the circumstances of the case, including one’s disability has to be taken into account.<sup>54</sup>

The Prison Rape Elimination Act (PREA, 2003), which is being implemented this year in the United States<sup>55</sup>, states that “inmates with mental illness are at increased risk of sexual victimization”.<sup>56</sup> The final rule adopting national standards to prevent, detect, and respond to prison rape, pursuant to the PREA issued by the Department of Justice guarantees equal opportunity for inmates with disabilities stating that “the agency shall take appropriate steps to ensure that inmates with disabilities (including, for example, inmates who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities), have an equal opportunity to participate in or benefit from all aspects of the agency’s efforts to prevent, detect, and respond to sexual abuse and sexual harassment. Such steps shall include, when

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<sup>46</sup> Committee against Torture, General Comment 2, para. 7.

<sup>47</sup> Human Rights Committee, *General Comment no. 20*, 1992, para 14

<sup>48</sup> M. Nowak, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N.Doc. A/63/175 (28 July 2008), summary.

<sup>49</sup> *Ibid*, para 38.

<sup>50</sup> *Ibid*, para 50.

<sup>51</sup> *Ibid*, para 53.

<sup>52</sup> Law Reform Commission of New South Wales, ‘Report 80: People with an Intellectual Disability and the Criminal Justice System’, 1996, p. 2.2

<sup>53</sup> Equality and Human Rights Commission, ‘Research Report 21: Disabled people’s experiences of targeted violence and hostility’ (2009), page. vii

<sup>54</sup> See the report of the European Commission of Human Rights of 10 March 1994 in the case of M. N. v. France, application No. 19465/92, paras. 30, 47 and 48 reference made by M. Nowak, para 47.

<sup>55</sup> See <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html> (last accessed 27 June 2012).

<sup>56</sup> Section 2(3) of the Prison Rape Elimination Act.



necessary to ensure effective communication with inmates who are deaf or hard of hearing, providing access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. In addition, the agency shall ensure that written materials are provided in formats or through methods that ensure effective communication with inmates with disabilities, including inmates who have intellectual disabilities, limited reading skills, or who are blind or have low vision.”<sup>57</sup>

People with intellectual disability often do not know how to complain in case they suffer some form of torture or ill-treatment. In the case of *Keenan v United Kingdom* (application no. 27229/95, Judgement 3 April 2001) the Court stated that “in particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment”.<sup>58</sup> Further the Court emphasised that “treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be able, or capable of, pointing to any specific ill-effects”.<sup>59</sup> These principles were applied in the case of *Renolde v France* (application no. 5608/05, Judgement 16 October 2008).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) found that impunity of those who committed torture or ill-treatment undermines the credibility of the prohibition of torture and other forms of ill-treatment. “If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. [...] In failing to take effective action, the persons concerned – colleagues, senior managers, investigating authorities – will ultimately contribute to the corrosion of the values which constitute the very foundations of a democratic society.”<sup>60</sup>

The European Court of Human Rights has found that where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to the person’s individual needs resulting from his or her disability (see *Price v. the United Kingdom*, no. 33394/96, § 30, ECHR 2001-VII, *Farbtuhs v. Latvia*, no. 4672/02, § 56, 2 December 2004). More broadly, the Court has held that States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought to have had knowledge (*Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V).<sup>61</sup>

## CONCLUSION

Under international law, the obligation of non-discrimination requires that reasonable accommodation be provided for persons with disabilities in any type of judicial proceeding. The provision of such accommodations ensures the effective participation of persons with disabilities in legal proceedings. When rights as fundamental as the right to liberty are at stake, the State’s obligation to ensure that persons with disabilities are provided with appropriate legal, communications, and other assistance at every phase of the investigative and judicial proceedings is heightened accordingly.

People with disabilities have been recognised as being particularly vulnerable to torture and ill-treatment, including sexual abuse, in prison and other detention settings. While the State’s obligation to prevent torture

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<sup>57</sup> *Ibid*, § 115.16.

<sup>58</sup> *Keenan v United Kingdom* (application no. 27229/95, Judgement 3 April 2001), para 111.

<sup>59</sup> *Ibid*, para 113.

<sup>60</sup> CPT/Inf (2004) 28] of CPT Standards (CPT/Inf/E (2002) 1- Rev 2010, p. 83.

<sup>61</sup> See *Jasinskis v. Latvia*, application No. 45744/08, 21 December 2010, para 59

and ill-treatment of all persons is absolute, Article 15 of the CRPD includes an equality provision in stating that “States Parties are responsible to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, *on an equal basis with others*, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. ” Preventing torture and ill-treatment against persons with disabilities in detention must include providing reasonable accommodations on an individualised basis. Ensuring adequate protections for persons with disabilities may also be advanced by measures such as the implementation of independent monitoring mechanisms, staff training and therapeutic interventions, increased judicial procedural control and alternatives to detention.

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