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CONGRESSIONAL TESTIMONY

Hearing before the
United States Senate
Committee on Foreign Relations
on
**Convention on the Rights of Persons with Disabilities
(Treaty Doc. 112-7)**

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Mr. Chairman and members of the Committee:

Thank you for inviting me to testify before you today regarding the Convention on the Rights of Persons with Disabilities (CRPD or Convention).

I had the opportunity to testify before this Committee a month ago regarding U.S. accession to the United Nations Convention on the Law of the Sea. While there are no similarities between the two conventions in terms of scope or subject matter, the central question regarding the propriety of U.S. ratification remains the same—whether membership in the convention protects, preserves, or advances U.S. national interests.

The United States should not ratify the CRPD if membership would not advance U.S. national interests at home or abroad. The Administration concedes that U.S. membership in the Convention would not advance the cause of persons with disabilities living in the United States since the United States already has in place comprehensive statutory, regulatory, and enforcement mechanisms regarding disability rights.

The question remains whether membership in the Convention would advance national interests in the international sphere. Joining the Convention is unlikely to advance U.S. national interests abroad, but instead would obligate the United States to answer to a committee of “disability experts” in violation of principles of U.S. sovereignty. The United States need not become party to the Convention to demonstrate its strong commitment to disability rights to the international community. Nor is there any evidence that U.S. ratification would enhance the ability of the U.S. government or non-governmental organizations to promote disability rights in foreign countries.

The Convention

On December 13, 2006, the United Nations General Assembly adopted the CRPD “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.”¹

The terms of the Convention are meant to protect the rights of persons with disabilities in the civil, political, economic, social and cultural spheres. It recognizes traditional civil and political rights that are guaranteed under the U.S. Constitution—such as the right to life and liberty, equality before the law, and the freedom of expression and opinion²—alongside certain economic, social, and cultural “positive rights,” such as the right to education, health, and “an adequate standard of living for [persons with disabilities] and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”³

The Convention entered into force on May 3, 2008, after 20 nations had deposited their instruments of ratification. The Convention currently has 117 parties, and an additional 36

¹Convention on the Rights of Persons with Disabilities, art. 1.

²*Ibid.*, arts. 10, 12, 14, and 21

³*Ibid.*, arts. 24, 25, and 28.

nations, including the United States, have signed but not ratified the treaty.⁴ U.S. Ambassador to the United Nations Susan Rice signed the Convention on July 30, 2009.⁵ President Obama transmitted the Convention, an article-by-article analysis, and a set of recommended reservations, declarations, and understandings to the Senate for its advice and consent on or about May 17, 2012 (Transmittal Package).⁶

If the Senate gives its advice and consent and the Convention is ratified, it would become the “supreme Law of the Land” on par with federal statutes, including statutes relating to disability rights.⁷ When the United States becomes party to a human rights treaty it obligates itself to the other treaty parties that it will comply with the terms of the treaty within U.S. territory. Therefore, the United States needs to take great care when deciding whether to ratify such a treaty when its terms—or the interpretation of those terms by a treaty committee—may not conform to existing state and federal law or to prevalent American social, cultural, and economic norms.

America’s Leadership on Disability Rights

The United States should become party to a treaty only if it advances U.S. national interests. The U.S. should be especially wary of international conventions that require domestic enforcement by the federal government. U.S. national interests in the context of the Convention may be characterized in both foreign and domestic terms: Would becoming a party to the Convention serve U.S. interests within the international community or would joining advance the cause of Americans with disabilities?

From a purely public diplomacy calculus, one can argue that the United States will enhance its reputation within the international community by holding itself to a high standard of human rights. However, in the case of the CRPD, the United States already has effective legislative measures in place to protect the rights of the disabled. Those who say that ratification would allow the United States to claim the moral high ground within the international community—at least in regard to disability rights—imply that the United States is deficient in protecting the rights of the disabled. In truth, the United States has been a leader in protecting the rights of the disabled. It already holds the moral high ground. Signing a treaty merely to “score points” overseas is not a sound basis for making policy.

Ratification of the CRPD is unnecessary to end discrimination against persons with disabilities in the United States. As is made clear throughout the Transmittal Package, the United States already has in place a wide range of federal laws to protect and advance the cause of Americans with disabilities.⁸ Major pieces of legislation include the Rehabilitation Act of 1973,⁹ the

⁴U.N. Office of Legal Affairs, Treaty Section, “Status: Convention on the Rights of Persons with Disabilities,” United Nations Treaty Collection,” at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15&chapter=4&lang=en (July 10, 2012).

⁵Edith M. Lederer, “US Signs Disabled Rights Treaty,” ABC News, July 30, 2009, at <http://abcnews.go.com/US/wireStory?id=8215921> (April 15, 2010).

⁶Message from the President of the United States transmitting the Convention on the Rights of Persons with Disabilities, 112th Cong., 2nd Sess., Treaty Doc. 112-7, May 17, 2012, at <http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc7/pdf/CDOC-112tdoc7.pdf> (July 10, 2012).

⁷U.S. Constitution, art. VI, cl. 2.

⁸Transmittal Package, Tab 1-2, pp. 83-93.

⁹29 U.S.C. § 791 *et seq.*

Americans with Disabilities Act (ADA),¹⁰ the Individuals with Disabilities Education Act, Part B,¹¹ and the Fair Housing Act.¹² Other federal laws that protect persons with disabilities include the Telecommunications Act of 1996, the Air Carrier Access Act of 1986, the Voting Accessibility for the Elderly and Handicapped Act of 1984, the Civil Rights of Institutionalized Persons Act, and the Architectural Barriers Act of 1968.¹³

These federal laws, unlike the broad provisions of the CRPD, were crafted to address the situation of disabled persons living in the United States, not to address the general opinions of the international community. As a whole, the legislation is a firm foundation that can be modified or expanded as necessary through the legislative or regulatory process.

In addition, U.S. disabilities laws are enforced by a panoply of federal agencies, most notably the Civil Rights Division of the Department of Justice.¹⁴ Other elements of the federal government have responsibilities under the ADA and other federal disability legislation. In addition to federal law, all 50 states and the District of Columbia have enacted a wide range of laws to prevent discrimination against the disabled and provide an array of resources to persons with disabilities.¹⁵

In short, the U.S. government treats disability discrimination in a comprehensive and exhaustive manner that makes membership in an international covenant purporting to set standards for the treatment of the disabled superfluous at best. To allow an international committee of disability experts to scrutinize the U.S. record every four years would yield little or no benefit in realizing disability rights for Americans. Any public diplomacy or other possible marginal benefits, if any, that could arise from ratifying the Convention should be weighed against the negative consequences of ratification.

Ceding Authority to an International Committee

To monitor implementation, human rights treaties usually establish a “committee of experts” to review reports from states parties on their compliance. States parties are required to submit periodic reports (usually every four years) to the committee detailing their compliance with the particular treaty. The CRPD established the Committee on the Rights of Persons with Disabilities (CRPD Committee), which is charged with reviewing periodic reports and making “such

¹⁰42 U.S.C. § 12101 *et seq.*, later amended by the ADA Amendments Act of 2008, Public Law 110–325 (enacted on September 25, 2008).

¹¹20 U.S.C. § 1400 *et seq.* The Education for All Handicapped Children Act, the predecessor legislation to IDEA, was enacted in 1975.

¹²42 U.S.C. § 3601 *et seq.*

¹³42 U.S.C. §§ 255, 251(a)(2); 49 U.S.C. § 41.705; 42 U.S.C. §§ 1973ee *et seq.*; 42 U.S.C. §§ 1997 *et seq.*; 42 U.S.C. §§ 4151 *et seq.* See also U.S. Department of Justice, Civil Rights Division, Disability Rights Section, “A Guide to Disability Rights Laws,” September 2005, at <http://www.ada.gov/cguide.htm#anchor64984> (April 15, 2010).

¹⁴U.S. Department of Justice, Civil Rights Division, “Disability Rights Section Home Page,” at <http://www.justice.gov/crt/drs/drshome.php> (April 15, 2010). See also Americans with Disabilities Act, “ADA Home Page,” at <http://www.ada.gov> (April 15, 2010).

¹⁵For example, see Cancer Legal Line, “State Disability Discrimination Laws,” http://www.marlow.org/PATIENT/Support_Resources/Patient_Teleconferen/PDFs/Aug.6.08.Handout-State_Disability_Laws.pdf (April 15, 2010); Disability.gov, “Information by State,” at <http://www.disability.gov/state/index> (April 15, 2010).

suggestions and general recommendations on the report as it may consider appropriate.”¹⁶

Since the Convention entered into force in May 2008, the CRPD Committee has conducted reviews of a small number of states parties and has issued final conclusions and recommendations regarding Tunisia, Spain and Peru.¹⁷

Abuses by Treaty Committees. Human rights treaty committees have been known to make demands of states parties that fall well outside the scope of the subject matter of the treaty that conflict with the legal, social, economic, and cultural traditions and norms of states parties. This has especially been the case with the United States.

For instance, in February 2008, the Committee on the Elimination of Racial Discrimination reviewed the U.S. record on racial discrimination and issued a report directing the United States to change its policies on a series of political causes completely divorced from the issues of race and racial discrimination. Specifically, the committee urged the United States to guarantee effective judicial review to the foreign unlawful enemy combatants held at the Guantanamo Bay detention facility, prevent U.S. corporations from abusing the rights of indigenous populations in other countries, place a moratorium on the death penalty, restore voting rights to convicted felons, and other matters completely unrelated or only tangentially related to racial discrimination.¹⁸

The committees overseeing the enforcement of other human rights treaties to which the United States is not a party often recommend changes in policies that are outside of traditional American norms. For example, the committee that oversees the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) regularly advocates that states decriminalize prostitution, expand access to abortion, devalue the role of women as mothers, reduce parental authority, and implement strict numerical gender quotas in the government and private sectors.¹⁹

The U.S. has reason to expect that the experts on the CRPD Committee will give short shrift to U.S. sovereignty, laws, regulations and norms, and embark on similar forays in pursuit of a

¹⁶Convention on the Rights of Persons with Disabilities, art. 36(1).

¹⁷Committee on the Rights of Persons with Disabilities, “Concluding observations,” *Tunisia*, CRPD/C/TUN/CO/1, May 13, 2011, at http://www2.ohchr.org//SPdocs/CRPD/5thsession/CRPD-C-TUN-CO-1_en.doc (July 10, 2012); *Spain*, CRPD/C/ESP/CO/1, October 19, 2011, at http://www.ohchr.org/Documents/HRBodies/CRPD/6thsession/CRPD.C.ESP.CO.1_en.doc (July 10, 2012); *Peru*, CRPD/C/PER/CO/1, May 9, 2012, at <http://www.ohchr.org/Documents/HRBodies/CRPD/7thsession/CRPD.C.PER.CO.1-ENG.doc> (July 10, 2012). The Committee may have completed reports on Argentina, China, and Hungary, but if so the reports are not yet available online.

¹⁸Steven Groves, “The Inequities of the U.N. Committee on the Elimination of Racial Discrimination,” Heritage Foundation *Backgrounder* No. 2168, August 7, 2008, at <http://www.heritage.org/Research/InternationalOrganizations/bg2168.cfm>. See also Committee on the Elimination of Racial Discrimination, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America,” CERD/C/USA/CO/6, February 2008, at <http://www.universalhumanrightsindex.org/documents/824/1310/document/en/text.html> (April 15, 2010).

¹⁹Patrick F. Fagan, “How U.N. Conventions on Women’s and Children’s Rights Undermine Family, Religion, and Sovereignty,” Heritage Foundation *Backgrounder* No. 1407, February 5, 2001, at <http://www.heritage.org/Research/Reports/2001/02/How-UN-Conventions-On-Womens>; Grace Melton, “CEDAW: How U.N. Interference Threatens the Rights of American Women,” Heritage Foundation *Backgrounder* No. 2227, January 9, 2009, at <http://www.heritage.org/Research/Reports/2009/01/CEDAW-How-UN-Interference-Threatens-the-Rights-of-American-Women>; and Wendy Wright, “CEDAW Committee Rulings,” Concerned Women for America, August 27, 2002, at <http://www.cwfa.org/articledisplay.asp?id=1870> (April 15, 2010).

broader agenda of social engineering unrelated to disability rights.

Defining the CRPD Committee’s Role. Any debate over U.S. ratification of the Convention should make it clear through reservations, understandings, and declarations that the CRPD Committee has no power—either through its recommendations or by the issuance of general comments—to provide authoritative or legally enforceable interpretations of the Convention.

The Administrations of Presidents Bill Clinton and George W. Bush held that position regarding human rights treaty committees. For example, in 1994 the Human Rights Committee adopted a general comment which claimed that its “role under the [International] Covenant [on Civil and Political Rights]...necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence.”²⁰ The Clinton Administration reacted strongly to this claim of authority by issuing a lengthy critique, which stated:

[The Committee’s] rather surprising assertion...would be a rather significant departure from the Covenant scheme, which does not impose on States Parties an obligation to give effect to the Committee’s interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant. The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so.²¹

The Bush Administration similarly responded to a fact sheet titled “The Right to Health” produced by the Office of the U.N. High Commissioner for Human Rights and the World Health Organization. The fact sheet asserted that the general comments and recommendations adopted by human rights treaty committees “provide an authoritative and detailed interpretation of the provisions found in the treaties.”²² The U.S. response was unequivocal:

General comments and other documents issued by treaty monitoring bodies express the opinions of individuals acting in their expert capacities; such documents are not the result of deliberations among States. While the views of treaty monitoring bodies are entitled to respect and should be considered carefully by States Parties, they do not create legal obligations or “requirements.”²³

This Committee should be equally clear in reaffirming that the CRPD Committee has no authority to create new international norms or customary international law that the states themselves have not deliberated and approved, particularly any that would arguably bind the U.S. domestically. Such a clarification would reinforce the traditional understanding of customary international law as the “law of nations” that “results from a general and consistent

²⁰U.N. Office of the High Commissioner for Human Rights, “General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant,” CCPR/C/21/Rev.1/Add.6, November 4, 1994, at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/69c55b086f72957ec12563ed004ecf7a](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a) (April 15, 2010).

²¹Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations, U.N. document A/50/40, p. 1, March 28, 1995, at <http://www.ijl.org/courses/documents/USandUKResponses.pdf> (April 15, 2010).

²²Office of the U.N. High Commissioner for Human Rights and World Health Organization, “The Right to Health,” *Fact Sheet* No. 31, June 2008, p. 10, at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> (April 16, 2010).

²³U.S. Department of State, “Observations by the United States of America on ‘The Right to Health, Fact Sheet No. 31,’” October 15, 2008, at http://www.globalgovernancewatch.org/docLib/20081222_Health_USG_Paper.pdf (April 16, 2010).

practice of states followed by them from a sense of legal obligation,” not from the recommendations of a treaty committee.²⁴ It would also reaffirm U.S. sovereignty by demonstrating that the federal government will actively work to prevent the improper imposition of norms to which it has not given its democratic consent.²⁵

The Committee should also make clear that the CRPD Committee does not possess the authority to dictate the meaning of the Convention to states parties. Its interpretation of the terms of the Convention, the obligations it imposes, and any recommendations and general comments are entitled only to respect and consideration by the member states. The committee should serve a technical, administrative role as opposed to a substantive, adjudicatory, or quasi-lawmaking role. The United States, not a committee of international disability experts, retains the final authority to interpret the terms of the Convention and determine its international obligations.

This Committee has in the past proposed an understanding regarding the authority of a human rights expert committee. Specifically, a Committee report in 2002 proposed the following understanding as a condition to ratification of CEDAW: “Accordingly, the United States understands that the Committee on the Elimination of Discrimination Against Women has no authority to compel actions by States Parties.”²⁶

Non-Self-Execution

U.S. ratification of the Convention would make it “the supreme Law of the Land” under the supremacy clause of the Constitution.²⁷ Although ratification would constitute a commitment under international law, the text of the Convention gives no indication that its drafters intended its provisions to be automatically enforceable under the domestic law of the states parties.²⁸

Nevertheless, to protect against any assertion to the contrary and as recommended in the Transmittal Package, this Committee should submit a declaration that the Convention is not self-executing, meaning that its provisions would not be enforceable in U.S. courts. Private causes of action or other new avenues of litigation would thus require passage of federal legislation specifically implementing the Convention’s terms.²⁹

²⁴Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987), and Curtis A. Bradley and Jack L. Goldsmith, *Foreign Relations Law*, 2nd ed. (New York: Aspen Publishers, 2006).

²⁵For a critique of the “modern position” that customary international law is applicable or enforceable within the United States, see Curtis A. Bradley and Jack L. Goldsmith, “Customary International Law as Federal Common Law: A Critique of the Modern Position,” *Harvard Law Review*, Vol. 110, No. 4 (February 1997), p. 815.

²⁶*Convention on the Elimination of All Forms of Discrimination Against Women*, Senate Exec. Rept. 107–9, 107th Cong., 2nd Sess., September 6, 2002, p. 13. Citing a July 8, 2002, letter from Secretary of State Colin Powell, the report stated, “State Parties have always retained the discretion on whether to implement any recommendations made by the Committee.”

²⁷“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Constitution, art. VI, cl. 2.

²⁸“This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.” *Medellin v. Texas*, 552 U.S. 491, 504 (2008).

²⁹“International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment a, p. 395 (1986).

“Non-self-executing” declarations are common. In fact, the United States has entered such declarations as a condition for ratifying the three major human rights treaties to which it is a party: the International Covenant on Civil and Political Rights (ICCPR),³⁰ the International Covenant on the Elimination of Racial Discrimination (ICERD),³¹ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).³² The non-self-executing declaration has also been proposed as a condition for CEDAW ratification.³³

Of course, the United States would be fully justified in entering such a declaration. Existing state and federal legislation already provide private causes of action for the disabled in the United States, including for instances of discrimination in employment, public accommodations, transportation, telecommunications, housing and other areas.³⁴

The Transmittal Package recommends the inclusion of a non-self-executing declaration, but for some reason includes a proviso that “it is not necessary that such Declaration be included in the instrument of ratification deposited by the President.”³⁵ Excluding the declaration would be a departure from U.S. past practice, as the non-self-execution declaration has been included in the U.S. instrument of ratification in connection with the ICCPR, ICERD, and CAT.

“Reproductive Health”

For many years there has been a heated debate within the U.N. system regarding abortion “rights.”³⁶ Apparently unwilling to use the term “abortion” in the debate, the proponents of establishing abortion as a human right use phrases such as “reproductive rights” and “sexual and reproductive health” as euphemisms for “abortion rights.” The use of one such euphemism in the text of the Convention has extended the abortion debate into the realm of disability rights. Specifically, Article 25 of the Convention requires states parties to “[p]rovide persons with disabilities with the same range, quality and standard of free or affordable health care and

³⁰“That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.” International Covenant on Civil and Political Rights, December 16, 1966, in United Nations, *Treaty Series*, Vol. 999, p. 171 and Vol. 1057, p. 407, “Declarations and Reservations,” United States, Declaration (1), at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en (April 16, 2010).

³¹“That the United States declares that the provisions of the Convention are not self-executing.” International Covenant on the Elimination of Racial Discrimination, Declarations and Reservations, United States, III, at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-2&chapter=4&lang=en#EndDec (April 19, 2010).

³²“That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, p. 85, “Declarations and Reservations,” United States, III, at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&lang=en (April 19, 2010).

³³“The United States declares that, for purposes of its domestic law, the provisions of the Convention are non-self-executing.” *Convention on the Elimination of All Forms of Discrimination Against Women*, Senate Exec. Rept. 107–9, p. 13, September 6, 2002.

³⁴Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. § 794; and ADA Amendments Act of 2008, Public Law 110–325.

³⁵Transmittal Package, p. 82.

³⁶See Douglas Sylva and Susan Yoshihara, “Rights by Stealth: The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion,” International Organizations Research Group *White Paper* No 8, reprinted 2009, at http://www.c-fam.org/docLib/20100126_IORG_W_Paper_Number8FINAL.pdf (April 16, 2010).

programmes as provided to other persons, *including in the area of sexual and reproductive health* and population-based public health programmes.”³⁷

Within the context of the debate over abortion rights, Article 25 of the Convention could be interpreted as ensuring that persons with disabilities are provided access to free or affordable abortions, assuming such access is provided to non-disabled persons by the state party.

When the U.N. General Assembly approved the final text of the Convention on December 13, 2006, more than one dozen nations, including the United States, made official statements regarding their interpretation of the phrase “reproductive health.”³⁸ The pertinent part of the U.S. statement reads:

In that regard, the United States understands that the phrase “reproductive health” in subparagraph (a) of article 25 of the draft Convention does not include abortion, and that its use in that article does not create any abortion rights and cannot be interpreted to constitute support, endorsement or promotion of abortion. We stated that understanding at the time of adoption of the Convention in the Ad Hoc Committee, and note that no other delegation suggested a different understanding of that term.³⁹

However, that statement conflicts with the opinion of Secretary of State Hillary Clinton regarding the meaning of “reproductive health.” On April 22, 2009, Secretary Clinton testified before the House Foreign Affairs Committee, “We happen to think that family planning is an important part of women’s health, and *reproductive health includes access to abortion*, that I believe should be safe, legal and rare.”⁴⁰

Due to this apparent conflict in the interpretation of “reproductive health,” this Committee should clarify the nature of the Convention regarding that phrase and its relationship to abortion.⁴¹

Similar issues arose in this Committee in 1994 and 2002 in the context of CEDAW. In these instances, Senators raised the question of whether abortion rights were to be inferred from certain language in CEDAW that related to “family planning.” This Committee issued two reports (in 1994 and 2002) submitting understandings that the U.S. will “determine which health care services are appropriate in connection with family planning, pregnancy, confinement and the post-natal period...” Moreover, in the 2002 report the Committee required as a condition to the Senate’s advice and consent an understanding explicitly stating that nothing in CEDAW “shall be construed to reflect or create any right to abortion and in no case should abortion be

³⁷Convention on the Rights of Persons with Disabilities, art. 25(a) (emphasis added).

³⁸See Susan Yoshihara, “UN Adopts Disabilities Treaty, Many States Reiterate Rejection of Abortion,” Catholic Family & Human Rights Institute *Friday Fax*, December 14, 2006, at http://www.c-fam.org/publications/id.492/pub_detail.asp (April 16, 2010).

³⁹U.N. General Assembly, 61st Session, 76th plenary meeting, U.N. Doc. A/61/PV.76, December 13, 2006, p. 7 (July 10, 2012).

⁴⁰Hearing, *New Beginnings: Foreign Policy Priorities in the Obama Administration*, Committee on Foreign Affairs, U.S. House of Representatives, 111th Cong., 1st Sess., April 22, 2009, at <http://foreignaffairs.house.gov/schedule.asp?showdate=4/22/2009&adj=4/22/2009> (emphasis added)(April 16, 2010).

⁴¹Article 10 of CRPD, titled “Right to life,” requires that “States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.” This provision is seemingly inconsistent with an interpretation of “reproductive health” that requires access to abortion.

promoted as a method of family planning.”⁴²

Abortion remains one of the most heated social issues being debated in the United States among activist groups, state and federal legislatures, and courts at all levels, including the U.S. Supreme Court. Introducing an “international” opinion on the matter from a group of disability experts ensconced in Geneva is unlikely to resolve or advance the debate in the United States.

Defining the Convention’s Terms

It stands to reason that an international treaty designed to end discrimination on the basis of “disability” should provide a working definition of that term, yet the Convention provides none.⁴³ In fact, the treaty clouds any legally workable definition of disability by stating in its opening paragraphs that “disability is an evolving concept.”⁴⁴ Such ambiguity invites abuse by persons or groups who do not suffer from a recognized medical disability, yet seek resources and protection under the authority of the Convention. This would also complicate implementation of the Convention in the United States, in which the definition of “disability” is still regularly contested by activists, litigants, and judges.

Under the Americans with Disabilities Act, a person is considered disabled if he has “a physical or mental impairment that substantially limits one or more...major life activities,” has “a record of such an impairment,” or has been “regarded as having such an impairment.”⁴⁵ Recent amendments to the ADA further clarified that definition by defining “major life activities” to include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working” and “[m]ajor bodily functions.”⁴⁶

Absent a definition or an “evolving” definition, ratification may result in conflict between U.S. law and the Convention. The Administration has recognized the potential for conflict between the definitions (or lack thereof) of “disability” and “persons with disabilities” and has recommended an understanding to address the issue.⁴⁷

But that understanding falls short. To ensure that the United States is not seen to consent to other key definitions the understanding should be broadened to include the terms “discrimination based on disability,” “reasonable accommodation,” and “major life activity.” The CRPD Committee may interpret these terms differently than Congress or U.S. courts would interpret them. For instance, a committee of experts recently questioned the United States on whether the

⁴²*Convention on the Elimination of All Forms of Discrimination Against Women*, Senate Exec. Rept. 103-38, 103rd Cong., 2nd Sess., October 3, 1994, and *Convention on the Elimination of All Forms of Discrimination Against Women*, Senate Exec. Rept. 107-9.

⁴³There is no definition of “disability” in the operative definition section of the convention (Article 2 “Definitions”). The failure to reach consensus on the definition of “disability” was the result of a dispute concerning whether the term “disability” should be a medical concept or a social concept. Language describing disability as an “evolving concept” certainly leans towards a more social definition. See Susan Yoshihara, “The Quest for Happiness,” in Brett D. Schaefer, ed., *ConUNdrum: The Limits of the United Nations and the Search for Alternatives* (Lanham, Md.: Rowman & Littlefield Publishers, 2009), p. 182.

⁴⁴Convention on the Rights of Persons with Disabilities, Preamble, ¶(e).

⁴⁵Americans with Disabilities Act, 42 U.S.C. § 12102(2).

⁴⁶Public Law 110-325, § 4(a)(2)(A) (September 25, 2008).

⁴⁷Transmittal Package, p. 8.

definition of “racial discrimination” under U.S. law comported with the terms of the ICERD.⁴⁸

The United States has similarly qualified terminology in previous treaties. For example, when the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it entered an understanding that substituted its own definition of “torture,” which differed from the convention’s definition.⁴⁹ The United States also entered a reservation that limited the treaty’s definition of “cruel, inhuman or degrading treatment or punishment” to prohibit only those acts considered cruel, inhuman, or degrading treatment or punishment under the U.S. Constitution.⁵⁰

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U.S. membership in the Convention would produce, at best, an intangible, incalculable, and marginal public diplomacy benefit in the international community. The United States need not become party to the Convention to demonstrate its commitment to the rights of persons with disabilities or to advance the cause of the disabled in other nations. Any nation that questions U.S. dedication to protecting Americans with disabilities need only review the architecture of state and federal laws and the network of state and federal agencies that enforce those laws.

On the domestic front, persons with disabilities in the United States would be better served by a continual review of the implementation of existing state and federal laws. The U.S. Congress, American civil society, and special interest groups are far better positioned to conduct such reviews than a committee of disability experts from Bangladesh, China, Qatar, and Tunisia, which are current members of the CRPD Committee.

In addition to the reservations, understandings, and declarations (RUDs) included in the President’s Transmittal Package, this Committee should include additional RUDs in its resolution of advice and consent to ratification. At a minimum, the following RUDs should be made:

- **Definitions.** The Transmittal Package recommends an understanding in regard to the definition of “disability” and “persons with disabilities,” but there are several other crucial definitions, including some that are defined by the Convention, that should be addressed. An understanding along the following general lines would make clear that the United States is not obligated to accept the CRPD Committee’s interpretation of these terms:

The United States would consider itself bound by the obligations of the Convention only insofar as the terms “disability,” “persons with disabilities,” “discrimination based on disability,” “reasonable accommodation,” and “major life activity” are defined coextensively with the definitions of such terms pursuant to the relevant laws in the United

⁴⁸The CERD Committee rapporteur questioned the U.S. definition of racial discrimination in regard to the necessity to prove intentional discrimination versus practices that are facially neutral but have an unlawful disparate impact upon members of a protected class. Committee on the Elimination of Racial Discrimination, “Questions Put by the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America (CERD/C/USA/6),” March 7, 2008, pp. 13–15, at <http://www.state.gov/documents/organization/107362.pdf> (April 19, 2010).

⁴⁹Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, in United Nations, *Treaty Series*, Vol. 1465, p. 85, “Declarations and Reservations,” United States, II(1), at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (April 19, 2010).

⁵⁰*Ibid.*, I(1).

States.

- **The Authority of the CRPD Committee.** An understanding along the following general lines would make clear that the United States considers the role of the Committee on the Rights of Persons with Disabilities to be technical and advisory, as opposed to authoritative or adjudicatory:

The United States understands that the Committee on the Rights of Persons with Disabilities has no authority to compel actions by states parties, and the United States does not consider conclusions, recommendations, or general comments issued by the committee as constituting customary international law or legally binding on it in any manner.

- **“Reproductive Health”.** To remain consistent with the U.S. understanding of the term “reproductive health” at the time that the Convention was adopted in 2006, an understanding along the following lines should be included in the resolution of advice and consent:

The United States understands that the phrase “sexual and reproductive health” in Article 25(a) of the Convention does not include abortion, and its use in that Article does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion, and in no case should abortion be promoted as a method of family planning.

These RUDs, in addition to those recommended in the Transmittal Package, could limit, although not eliminate, the danger that the Convention would pose to U.S. law and American sovereignty. Regardless, even with the inclusion of the aforementioned RUDs, U.S. ratification will not advance its national interests. Nor will it advance the cause of Americans with disabilities.

Current U.S. law meets or exceeds the provisions of the Convention, and mere membership in the Convention will not convince the international community that America protects the rights of its disabled citizens. Moreover, ratification of the Convention may harm U.S. national interests because human rights treaty committees increasingly view themselves as the legislators of binding international norms, instead of as experts fulfilling the technical roles they were intended to perform.

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