

Background

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Ratification of the Disabilities Convention Would Erode American Sovereignty

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Abstract: *On July 30, 2009, the Obama Administration signed the Convention on the Rights of Persons with Disabilities, an international treaty purporting to guarantee the civil, political, economic, social, and cultural rights of the disabled. However, U.S. membership in the Disabilities Convention would not appreciably advance U.S. national interests either at home or abroad. The rights of Americans with disabilities are well protected under existing law and are enforced by a wide range of state and federal agencies. Joining the convention merely opens the door for foreign “experts” to interfere in U.S. policymaking in violation of the principles of U.S. sovereignty.*

Ratification of the Convention on the Rights of Persons with Disabilities (CRPD) would not advance U.S. national interests either at home or abroad. Moreover, joining the Disabilities Convention would obligate the federal government to defer to an unaccountable committee of academics and “disability experts” in Switzerland in violation of the principles of U.S. sovereignty and federalism. The United States need not become party to the convention to demonstrate its strong commitment to disability rights, because existing U.S. law and a multitude of federal agencies already protect Americans with disabilities against discrimination.

The CRPD

On December 13, 2006, the U.N. General Assembly adopted the Convention on the Rights of Persons with Disabilities “to promote, protect and ensure the

Talking Points

- Ratification of the Disabilities Convention would neither advance U.S. national interests within the international community nor improve the rights of Americans who suffer with disabilities.
- The United States does not need to become party to the convention to demonstrate to the rest of the world its commitment to the rights of persons with disabilities. Becoming a member of the treaty would produce, at best, an intangible public diplomacy benefit.
- Domestically, ratification of the convention would do little or nothing to supplement the existing comprehensive statutory framework and enforcement system for the protection of the rights of persons with disabilities in the United States.
- Moreover, the Geneva-based treaty committee would inevitably interfere with U.S. policymaking, thereby infringing on American sovereignty and intruding into matters wholly unrelated to disabilities, such as the controversial issue of abortion.

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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 Disabilities 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 Disabilities Convention entered into force on May 3, 2008, after 20 nations had deposited their instruments of ratification. The convention has 80 parties, although many more nations have signed the treaty.⁴ The United States is one of the nations that has signed but not ratified the convention. U.S. Ambassador to the United Nations Susan Rice signed the convention on July 30, 2009,⁵ but President Barack Obama has not yet submitted the convention to the Senate for its advice and consent, a prerequisite to depositing the U.S. instrument of ratification.

If the United States ratifies the Disabilities Convention, it will become the “supreme Law of the Land” on par with federal statutes and the Constitution itself.⁶ When the United States becomes party to a treaty—particularly 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 a treaty, because its terms—or the interpretation of those terms by the treaty committee—may not conform either 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 complex domestic regulation and enforcement by the federal government. U.S. national interests in the context of the Disabilities Convention may be characterized in both foreign and domestic terms: Would becoming a party to the treaty serve U.S. interests within the international community, and 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 Disabilities Convention, 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.

1. Convention on the Rights of Persons with Disabilities, art. 1, at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Convention.aspx> (April 15, 2010).
2. *Ibid.*, arts. 10, 12, 14, and 21.
3. *Ibid.*, arts. 24, 25, and 28.
4. U.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&mtdsg_no=IV-15&chapter=4&lang=en (April 15, 2010).
5. Edith M. Lederer, “US Signs Disabled Rights Treaty,” ABC News, July 30, 2009, at <http://abcnews.go.com/US/wireStory?id=8215921> (April 15, 2010).
6. U.S. Constitution, art. VI, cl. 2.

U.S. Laws Protecting the Rights of Americans with Disabilities

- **Section 504 of the Rehabilitation Act of 1973** prohibits discrimination on the basis of disability in federal employment, programs conducted by federal agencies, programs receiving federal funding, and the employment practices of federal contractors.
- **The Americans with Disabilities Act of 1990** provides a private cause of action for the disabled, including for instances of discrimination in employment, public accommodations, transportation, telecommunications, and other areas.
- **The Individuals with Disabilities Education Act of 1990** provides federal funds for the educational needs of children with disabilities and requires states that accept such funds to identify and individually evaluate children who are eligible for special education and craft an individualized education program for each child.
- **The Fair Housing Act** as amended in 1988 protects the disabled against discrimination in the sale, rental, or financing of housing.
- **Other federal laws** protecting persons with disabilities include the Telecommunications Act, the Air Carrier Access Act, the Voting Accessibility for the Elderly and Handicapped Act, the Civil Rights of Institutionalized Persons Act, and the Architectural Barriers Act.

Gauging how much signing the convention would actually improve the image of the United States abroad is difficult. More determinable are the domestic effects of joining such a convention.

Ratification of the CRPD is not needed to end discrimination against persons with disabilities in the United States. The United States already has in place a wide range of federal laws to protect and advance the cause of Americans with disabilities. These include:

- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federal employment, programs conducted by federal agencies, programs receiving federal funding, and the employment practices of federal contractors.⁷
- The Americans with Disabilities Act of 1990 (ADA), which provides a private cause of action for the disabled, including for instances of discrimination in employment, public accommodations, transportation, telecommunications, and other areas.⁸
- The Individuals with Disabilities Education Act of 1990 (IDEA), which provides federal funds for the educational needs of children with disabilities and requires states that accept such funds both to identify and individually evaluate children who are eligible for special education and to craft an individualized education program for each child.⁹
- The Fair Housing Act as amended in 1988, which protects the disabled against discrimination in connection with the sale, rental, or financing of housing.¹⁰
- Other federal laws that protect persons with disabilities, including the Telecommunications Act, the Air Carrier Access Act, the Voting Accessibility for the Elderly and Handicapped Act, the

7. 29 U.S. Code § 794.

8. 42 U.S. Code § 12010 *et seq.*, later amended by the ADA Amendments Act of 2008, Public Law 110-325 (enacted on September 25, 2008).

9. 20 U.S. Code § 1400 *et seq.* The Education for All Handicapped Children Act, the predecessor to IDEA, was passed in 1975.

10. 42 U.S. Code § 3601 *et seq.* This law was formally known as the Civil Rights Act of 1968, which banned discrimination in housing based on race, color, religion, or national origin. The act was extended in 1974 to include gender as a protected class.

Federal Agencies Charged with Protecting the Rights of Americans with Disabilities

- Civil Rights Division in the U.S. Department of Justice
- U.S. Equal Employment Opportunity Commission
- Federal Transit Administration in the U.S. Department of Transportation
- Office for Civil Rights in the U.S. Department of Education
- Office for Civil Rights in the U.S. Department of Health and Human Services
- Civil Rights Center in the U.S. Department of Labor
- U.S. Department of Housing and Urban Development
- Office of Civil Rights in the U.S. Department of the Interior
- Office of the Assistant Secretary for Civil Rights in the U.S. Department of Agriculture

Civil Rights of Institutionalized Persons Act, and the Architectural Barriers Act.¹¹

These federal laws, unlike the broad provisions of the CRPD, were crafted to address the situation of the disabled 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 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.¹² Other elements of the federal government have responsibilities under the ADA and other federal

disability legislation. (See text box.) 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.¹³

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.¹⁴ To allow an international panel 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

11. See 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).

12. U.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).

13. For example, see Cancer Legal Line, "State Disability Discrimination Laws," at 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).

14. "For the majority of articles, U.S. law can be viewed as either being of a level with the mandates of the Convention or capable of reaching those levels either through more rigorous implementation and/or additional actions by Congress. However, this paper also identifies several CRPD Articles that illustrate significant gaps between United States disability laws and the Convention." National Council on Disability, *Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities (CRPD)*, May 12, 2008, p. 1, at http://www.ncd.gov/newsroom/publications/2008/pdf/ncd_crp_analysis.pdf (April 15, 2010). The National Council on Disability is an independent federal agency tasked with making recommendations to Congress and the President to enhance the quality of life for Americans with disabilities.

marginal benefits, if any, that could arise from signing 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. The “experts” on such committees are not elected democratically; rather, each is appointed by a state party, regardless of that state’s human rights record.

States parties are required to submit periodic reports (usually every four years) to the committee detailing their compliance with the particular treaty. For example, the Human Rights Committee oversees state compliance with the provisions of the International Covenant on Civil and Political Rights, and the Committee on the Rights of the Child monitors compliance with the Convention on the Rights of the Child.

The Disabilities Convention established the Committee on the Rights of Persons with Disabilities (CRPD Committee), which is charged with reviewing periodic reports and making “such suggestions and general recommendations on the report as it may consider appropriate.”¹⁵ Since the convention entered into force in May 2008, the CRPD Committee has not yet reviewed the record of any state party. The first such review session should occur in the near future for those nations that ratified the convention in 2007. Thus, they will be the first nations required to report their compliance.¹⁶

Abuses by Treaty Committees. In general, U.N. human rights treaty committees have frequently made demands of states parties that fall well outside of the legal, social, economic, and cultural tradi-

tions 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,

U.N. human rights treaty committees have frequently made demands of states parties that fall well outside of the legal, social, economic, and cultural traditions and norms of states parties.

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 take action on other matters completely unrelated or only tangentially related to racial discrimination.¹⁷

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, radically 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.¹⁸

15. U.N. Convention on the Rights of Persons with Disabilities, art. 36(1).

16. Early ratifications include Bangladesh (November 30, 2007); Croatia (August 15, 2007); Cuba (September 6, 2007); El Salvador (December 14, 2007); Gabon (October 1, 2007); Hungary (July 20, 2007); India (October 1, 2007); Jamaica (March 30, 2007); Mexico (December 17, 2007); Namibia (December 4, 2007); Nicaragua (December 7, 2007); Panama (August 7, 2007); and South Africa (November 30, 2007).

17. Steven Groves, “The Inequities of the U.N. Committee on the Elimination of Racial Discrimination,” Heritage Foundation *Background* No. 2168, August 7, 2008, at <http://www.heritage.org/Research/InternationalOrganizations/bg2168.cfm>. See also U.N. 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).

The U.S. has ample reason to expect that the experts on the CRPD Committee will disregard U.S. sovereignty and embark on similar forays in pursuit of a broader agenda of social and cultural engineering unrelated to disabilities.

Defining the CRPD Committee's Role. Any debate over U.S. ratification of the Disabilities 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 universally authoritative or legally enforceable interpretations of the treaty.

The Administrations of Presidents Bill Clinton and George W. Bush held that position on treaty committees. In 1994, the Human Rights Committee adopted a general comment claiming 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.”¹⁹ The Clinton Administration reacted strongly to this claim of authority by issuing a lengthy critique, which observed that:

[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 Cove-

nant could have given the Committee this role but deliberately chose not to do so.²⁰

The Bush Administration responded in a similar manner to a fact sheet titled “The Right to Health” that was produced by the Office of the U.N. High Commissioner for Human Rights and the World Health Organization. The fact sheet asserted that the

“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.’”

general comments and recommendations adopted by human rights treaty bodies “provide an authoritative and detailed interpretation of the provisions found in the treaties.”²¹ 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.”²²

The Obama Administration needs to be equally clear in reaffirming that the CRPD Committee would have no power to interpret or create new

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18. Patrick F. Fagan, “How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty,” Heritage Foundation *Background* 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 *Background* 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).
19. U.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.unhcr.ch/tbs/doc.nsf/\(Symbol\)/69c55b086f72957ec12563ed004ecf7a](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a) (April 15, 2010).
20. “Observations 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, March 28, 1995, p. 1, at <http://www.ijl.org/courses/documents/USandUKResponses.pdf> (April 15, 2010).
21. Office 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).

international norms or customary international law that the states themselves have not 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 practice of states followed by them from a sense of legal obligation,” not from the recommendations of a treaty committee.²³ It would also reaffirm U.S. sovereignty by demonstrating that the federal government will work actively to prevent the improper imposition of norms to which it has not given its democratic consent.²⁴

The CRPD Committee does not possess the authority to dictate the meaning of a treaty 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. This understanding of the committee’s role should be made clear if the Senate considers giving its consent to ratification. The United States, not a committee of so-called experts, retains the final authority to interpret the terms of the treaty and determine its obligations under the treaty.

The U.S. has proposed such an understanding of the authority of the expert committee that monitors CEDAW. Specifically, the Senate Foreign Relations Committee proposed such an understanding in 2002 as a condition for 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.”²⁵

Opening the Door to Litigation

U.S. ratification would make the Disabilities Convention “the supreme Law of the Land” under the Supremacy Clause of the Constitution.²⁶ 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.²⁷

Nevertheless, to protect against any assertion to the contrary, the United States needs to enter 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 to implement the treaty’s terms.²⁸

22. U.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).
23. Restatement (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).
24. For 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.
25. *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.”
26. “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.
27. “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).
28. “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 the 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,²⁹ the International Covenant on the Elimination of Racial Discrimination,³⁰ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³¹ The non-self-executing reservation has also been proposed as a condition for CEDAW ratification.³²

Of course, the United States would be fully justified in entering such a declaration. Existing state and federal legislation already provides 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.³³

Pushing “Reproductive Health” and Abortion

For many years, there has been a heated debate within the U.N. system regarding abortion “rights.”³⁴ Apparently unwilling to use the term “abortion” in the debate, the proponents of establishing abortion as a human right use terms such as “reproductive rights” and “sexual and reproductive health” as euphemisms for “abortion rights.”

Article 25 of the Disabilities Convention could be interpreted as ensuring that persons with disabilities are provided access to free or affordable abortions.

The use of one such euphemism in the text of the Disabilities 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 programmes as provided to other persons, *including in the area of sexual and reproductive health* and population-based public health programmes.”³⁵

Within the context of the debate over abortion rights, Article 25 of the Disabilities 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.

However, when the U.N. General Assembly approved the final text of the Disabilities Convention on December 13, 2006, more than one dozen nations, including the United States, made official statements regarding their understanding of the

29. “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&mtdsg_no=IV-4&chapter=4&lang=en (April 16, 2010).

30. “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&mtdsg_no=IV-2&chapter=4&lang=en#EndDec (April 19, 2010).

31. “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, December 10, 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&mtdsg_no=IV-9&chapter=4&lang=en (April 19, 2010).

32. “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.

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

34. See 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).

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

phrase “reproductive health.”³⁶ Specifically, the pertinent part of the U.S. statement reads:

In this regard, the United States understands that the phrase “reproductive health” in Article 25(a) of the draft 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. We stated this 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 this term.³⁷

However, that statement appears to conflict with the opinion of a key Obama Administration official on the meaning of “reproductive health.” On April 22, 2009, testifying before the House Foreign Affairs Committee, U.S. Secretary of State Hillary Clinton stated: “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.”³⁸

Due to this apparent conflict in the interpretation of “reproductive health,” any Senate debate on ratification of the Disabilities Convention needs to clarify the nature of the treaty with respect to abortion.³⁹

Similar debates arose in the Senate 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.” The Senate Committee on Foreign Relations issued two reports (in 1994 and 2002) concluding that CEDAW did not require the provision of abortions. Moreover, the committee required as a condition for 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 promoted as a method of family planning.”⁴⁰

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.

Definitional Problems

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 Disabilities Convention provides none.⁴¹ In fact, the treaty clouds any legally

36. See 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).

37. Jeanne E. Head, “UN General Assembly Approves Disability Convention,” National Right to Life, December 13, 2006, at <http://www.nrlc.org/UN/DisabilityConventionApproved.html> (April 16, 2010).

38. Hearing, *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> (April 16, 2010).

39. Article 10 of the 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.

40. *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.

41. There 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 toward 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.

workable definition of disability by stating in its opening paragraphs that “disability is an evolving concept.”⁴²

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

An international treaty designed to end discrimination on the basis of “disability” should provide a working definition of that term, yet the Disabilities Convention provides none.

such an impairment.”⁴³ 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.”⁴⁴

Without a definition or an “evolving” definition, ratification would cause undue conflict between

U.S. law and the convention. Of course, the U.S. could enter an understanding to remedy the ambiguity, at least by defining “disability” in the United States. The understanding would need to state that the United States is bound to comply with the convention within the bounds of “disability” as defined by the ADA and U.S. federal court decisions.

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.⁴⁵ 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.⁴⁶

If the United States considers ratification of the Disabilities Convention, it should enter a reservation regarding the treaty’s overly broad definition of “discrimination” because the CRPD Committee inevitably will interpret this term differently than Congress or U.S. courts would interpret it.⁴⁷ For instance, a committee of experts recently questioned the United States about whether the definition of “racial discrimination” under U.S. law comported with the terms of the International Convention on the Elimination of Racial Discrimination.⁴⁸ The United States would at least need to enter a reservation to the Disabilities Convention

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

43. Americans with Disabilities Act, 42 U.S. Code § 12102(2).

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

45. Convention 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).

46. *Ibid.*, I(1).

47. Convention on the Rights of Persons with Disabilities, art. 2.

48. The 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).

stating that the controlling definitions of “discrimination” and “disability” are set forth in the ADA and other federal legislation and in U.S. court decisions.

The CRPD Committee of experts will likely find the U.S. definitions of “disability” and “discrimination” too narrow and will press the United States to accept the committee’s broader, more flexible descriptions. Thus, the United States needs to enter a reservation to the convention to send a strong signal that it intends to interpret the treaty according to its own laws and will not submit to the interpretations of the CRPD Committee.

To Ratify or Not to Ratify

On balance, the flaws of the Disabilities Convention indicate that ratifying it would not advance U.S. national interests either at home or abroad.

U.S. membership in the Disabilities Convention would produce, at best, an intangible 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.

RUDs could greatly diminish, although not eliminate, the danger that the convention would pose to U.S. law and American sovereignty.

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 bet-

ter positioned to conduct such reviews than a committee of supposed disability experts from CRPD members Bangladesh, China, Qatar, and Tunisia would be.

Nevertheless, the current Senate leadership may try to move forward with the ratification process once the Obama Administration transmits the convention to the Senate for its advice and consent. If this occurs, concerned Senators should insist on including a series of reservations, understandings, and declarations (RUDs) in the resolution of ratification. RUDs could greatly diminish, although not eliminate, the danger that the convention would pose to U.S. law and American sovereignty.

At a minimum, these RUDs would need to state clearly that:

- The CRPD Committee has no authority to compel actions by states parties, and the United States does not recognize any conclusion, recommendation, or general comment issued by the committee as customary international law or legally binding on it in any manner.
- For purposes of U.S. domestic law, the provisions of the convention are non-self-executing.
- Ratification of the convention would have no effect on existing law in the United States regarding either the restriction or the expansion of abortion “rights.”
- The United States would consider itself bound by the obligations of the convention only insofar as the terms “disability” and “discrimination based on disability” are understood in the Americans with Disabilities Act and related federal legislation.

However, the inclusion of such RUDs will not remedy all of the potential problems that membership in the convention will cause.⁴⁹ Indeed, some legal scholars—including Harold Koh, current Legal

49. There are additional reservations, understandings, and declarations not treated here that would also be necessary, including (1) a reservation regarding governmental interference in private conduct; (2) an understanding regarding the U.S. system of federalism and the jurisdictions of state and local governments; and (3) an understanding clarifying that particular articles of the CRPD do not constitute a “back door” recognition of certain economic, social, and cultural “rights” or *de facto* ratification of other treaties (or provisions thereof) to which the United States is not a party, including the International Covenant on Economic, Social and Cultural Rights. For example, see Convention on the Rights of Persons with Disabilities, arts. 24, 25, 27, 28, and 30; Convention on the Elimination of All Forms of Discrimination Against Women, art. 6; and Convention on the Rights of the Child, art. 7.

Adviser at the Department of State—have questioned the legality of RUDs.⁵⁰ For example, in a 2002 law review article, Koh criticized as “legally questionable” the use of RUDs in connection with ratification of CEDAW:

Indeed, past Administrations... have unwisely proposed that ratification [of CEDAW] be accompanied by a detailed package of conditions designed to insulate existing U.S. practices with regard to protection of individual privacy, the role of women in combat service, comparable worth in pay, maternity leave, freedom of speech, family planning, and the like....

To proceed with such a qualified, “swiss cheese” ratification in which the legal exceptions would overshadow the core act of ratification would be politically unwise, legally questionable, and practically unnecessary to protect American national interests.⁵¹

The Senate seems to find itself in a dilemma: Unconditional ratification of the Disabilities Convention would harm U.S. interests because it would obligate the federal government to defer to an unaccountable committee of disability experts in Geneva. At the same time, any effort by the Senate to condi-

tion its consent to ratification by including certain RUDs may be deemed illegitimate by international legal scholars, including perhaps the top legal scholar in the U.S. government.

Conclusion

The United States need not become a party to the Convention on the Rights of Persons with Disabilities because current U.S. law meets and 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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50. For example, see Louis Henkin, “U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker,” *American Journal of International Law*, Vol. 89 (1995), p. 341. For arguments in support of the use of RUDs as valid and legal conditions of ratification, see Curtis A. Bradley and Jack L. Goldsmith, “Treaties, Human Rights, and Conditional Consent,” *University of Pennsylvania Law Review*, Vol. 149, No. 2 (December 2000), p. 399.

51. Harold Hongju Koh, “Why America Should Ratify the Women’s Rights Treaty (CEDAW),” *Case Western Reserve Journal of International Law*, Vol. 34 (2002), pp. 270–271. Koh has also questioned the legitimacy of entering non-self-executing declarations to human rights treaties. Harold Hongju Koh, “Is International Law Really State Law?” *Harvard Law Review*, Vol. 111 (1998), pp. 1828–1829, note 24.