

Testimony on the Convention on the Rights of Persons with Disabilities  
before the Senate Foreign Relations Committee

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Chairman Menendez, Ranking Member Corker, members of the committee, thank you for inviting me to present my views on the Convention on the Rights of Persons with Disabilities.

I appreciate the hopes some of my fellow veterans have for this treaty. I am one of many veterans who do not share that optimism, and like AMVETS, realize that ratifying this treaty will not help disabled Americans here or abroad.

This treaty is meant to help other nations raise their standards to those of the Americans with Disabilities Act. Secretary of State Kerry addressed leaders at the UN High Level Summit on Disabilities a few weeks ago, reminding them that "in too many countries...we still see the rights and the dignity that we take for granted are not existent in many of those places." Yet experience demonstrates that other governments comply with, or shirk, their treaty obligations independent of whether or not we bind ourselves to them.

I have been asked to address the controversial term "sexual and reproductive health" in the treaty. There is no better example of the dangers of ratification or the way UN bureaucracies disregard the will of nations by routinely misinterpreting international obligations to instead promote their own agenda.

I want to make three points. The way that language got into the treaty, the dangers of the way it is being used, and how the example of sexual and reproductive health illustrates the current crisis within the UN treaty system.

This is the first time the term "sexual and reproductive health" appeared in any UN treaty and yet it was left undefined. While there may be a perception that the term achieved consensus, that was not the case. In fact, 23 nations opposed the term and opposition remained throughout the negotiations. I would point out that this is a very high number of objectors, and that ordinarily the language would have been removed. I included a detailed account of that negotiation in my law review article as an addendum to this testimony. In order to get the term into the text, proponents had to resort to secret meetings in remote venues where not all delegates were allowed.

On the day this landmark treaty was adopted, nearly half of all the statements made by countries struck a note of warning. Fifteen nations rose to reject the term, declare it did not include abortion, or to say the treaty created no new rights. The United States said the treaty "cannot be

interpreted to constitute support, endorsement, or promotion of abortion.”<sup>i</sup> Four countries would go on to make such statements at the time of signature or accession.

During negotiations, nations were assured that a footnote in a draft of the treaty would clarify the issue, but that footnote does not accompany the treaty. It is not a part of the materials provided by President Obama for ratification by the Senate. The bottom line is that many countries were not satisfied with assurances that the presence of this term in the treaty would not be used to promote new rights.

Since the time of adoption, their fears have come true: countries are being pressured to change their laws. For example, UNICEF announced in May the Disabilities Treaty and Convention on the Rights of the Child give children as young as 10 years old a "right" to "confidential" reproductive and sexual health services. This means adults who are not the child's parents can supply sexual information or medical services (including pharmaceuticals) without their parents' knowledge.<sup>ii</sup>

The second point I want to make is how this term is used.

We should be clear. The Disabilities Treaty includes "sexual and reproductive health" as a category of non-discrimination and not as a right. But this should not allay the concerns of lawmakers. In ten year's time, treaty bodies pressured more than 90 countries over 120 times to liberalize abortion, even though no UN treaty mentioned reproductive health or rights, let alone abortion.

The term "sexual and reproductive health" has only been defined once in a negotiated document, the non-binding 1994 International Conference on Population and Development Program of Action (Cairo). Nations rejected any right to abortion at the Cairo conference; they only defined the term as including abortion where it is not against the law. Treaty bodies have ignored the agreement of nations at Cairo that regulation of abortion laws is the prerogative of sovereign states.

In just one example, the Human Rights Committee told Peru that its protection of an unborn disabled child was "cruel and inhuman" and therefore violated the treaty.<sup>iii</sup> The following year when the Disabilities Treaty was adopted, the Holy See announced it would not sign the Disabilities treaty, explaining that "It is surely tragic that . . . the same Convention created to protect persons with disabilities . . . may be used to deny the very basic right to life of disabled unborn persons."

The Committee on the Rights of Persons with Disabilities has already shown the same disregard for the agreement of nations on this issue, and it has pressured nations on their abortion laws. The committee took Spain and Hungary to task, noting that healthy children could be aborted legally through the first trimester and children identified to have abnormalities through the second trimester. Instead of recommending more protection for these children, the committee suggested they simply remove any "distinction" in the periods, in effect calling for liberalizing

the law. Some countries have made reservations to the term sexual and reproductive health, The Disabilities committee has told countries they should remove all reservations. This includes reservations that preserve the supremacy of the national constitution over the treaty if they were to conflict. This raises concern, since this is precisely the type of reservation that the US makes when entering into any treaty.

In theory, according to the treaties and under international law, treaty-monitoring bodies have no authority to interpret these treaties in ways that create new state obligations or that alter the substance of the treaties.

In reality, jurists *are accepting* treaty body interpretations as creating new obligations. In 2006, Colombia's high court cited the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) committee observations in a decision that liberalized abortion laws in that country. Last year Argentina's high court made a similar decision, citing the treaty body as authoritative. There is concern that such cases can reverberate in U.S. law. Some U.S. Supreme Court justices approve of considering international jurisprudence in U.S. decisions.

The committees use a notion of "evolving standards" to create new obligations and then promote their views as binding precedent by calling it "jurisprudence." This raises concerns of the emergence of an international custom on abortion, which other countries would consider binding on the U.S.

If nations were convinced that there were no danger of new rights being imposed on states parties to this treaty, there would be no need for these same nations to be taking measures to reject the treaty body's broad interpretations of "sexual and reproductive health," and to reject similar terms such as "reproductive rights." Yet that is what is happening. This is most notable in meetings such as the 2011 Rio High Level Summit on Sustainable Development, and this year's negotiations over the Sustainable Development Goals, which will set the agenda for UN development spending for decades to come.

At the same time, UN agencies have promoted broad interpretations of these terms more assertively than ever in policy documents from the Office of the High Commission on Human Rights and the World Health Organization. Just weeks ago, the CEDAW committee issued its views to states parties that nations are obligated to provide "sexual and reproductive health care" in situations of conflict that includes "*abortion services*"<sup>iv</sup>. This contravenes U.S. law.

This brings me to my third point: the UN human rights system is in disarray. The UN General Assembly launched a process to overhaul the monitoring committees last year.<sup>v</sup> Backlogs, inefficiency, the proliferation of reports – many of which examine domestic laws and policies lying far beyond committee mandates – have simply overwhelmed states parties and the committee staff. Treaty body members say this is the result of new accessions to the treaty and a testament to the success of the treaty body system. In reality, the problem is in large part the

treaty body working methods developed by the committees and the secretariat, the Office of the High Commissioner on Human Rights.

What was once a straightforward reporting mechanism has become a laborious monitoring process where committees instruct parties on how to implement treaties. Rather than a forum where countries can seek best practices, it has become a venue for upbraiding countries via elaborate treaty interpretations that sometimes intrude upon the democratic process.

Even the United States has said during treaty body reform negotiations that before Americans invest more money in the treaty bodies we must be sure the committees will not be conducting business as usual, and reforms will actually have an effect.

Simply put, states parties and UN bureaucracies find themselves at loggerheads on the interpretation of sexual and reproductive health and at odds on the purpose of the UN treaty system itself. This has raised the question of whether the United States, or any of the dozens of countries who have not ratified the treaty, should lend the system credibility or put themselves under its review. They should not.

The good news is that the U.S. doesn't need to be a party to this treaty to promote its best practices.

As Secretary of State Kerry told the UN high level summit on disabilities just a few weeks ago, the Americans with Disabilities Act is the "gold standard." He encouraged the "international community to look at, study, and, hopefully, emulate this law," and the many other laws, policies, and programs Americans have already enacted. Notably, other countries rose to recognize American leadership at the summit. Russia said the United States remained the model for its own efforts.

As the High Level Summit demonstrates, not only are Americans at the table, they are at the head. We can expect that, even without ratifying this controversial treaty, U.S. diplomats will continue to wield American credibility when promoting fairness and opportunity for persons with disabilities around the world.

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<sup>i</sup> Lithuania said: "the concept of 'sexual and reproductive health' used in Article 25(a) of the Convention shall not be interpreted to establish new human rights and create relevant international commitments of the Republic of Lithuania. The legal content of this concept does not include support, encouragement or promotion of pregnancy termination, sterilization and medical procedures of persons with disabilities, able to cause discrimination on the grounds of genetic features." Malta said: "the phrase 'sexual and reproductive health' in Art 25 (a) of the Convention does not constitute recognition of any new international law obligation, does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion. Malta further understands that the use of this phrase is intended exclusively to underline the point that where health services are provided, they are provided without discrimination on the basis of disability. Monaco said: "articles 23 and 25 of the Convention must not be interpreted as recognizing an individual right to abortion except where expressly provided for under national law."

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<sup>ii</sup> UNICEF director Tony Lake asserted in the agency's May 2013 report, "Under the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD), all children have the right to the highest attainable standard of health. It follows that children with disabilities are equally entitled to the full spectrum of care – from immunization in infancy to proper nutrition and treatment for the ailments and injuries of childhood, to *confidential sexual and reproductive health information and services during adolescence and into early adulthood*. Equally critical are such basic services as water, sanitation and hygiene." UNICEF, *State of the World's Children 2013*, page 23. Emphasis added.

[http://www.unicef.org/sowc2013/files/SWCR2013\\_ENG\\_Lo\\_res\\_24\\_Apr\\_2013.pdf](http://www.unicef.org/sowc2013/files/SWCR2013_ENG_Lo_res_24_Apr_2013.pdf)

<sup>iii</sup> For an example of national courts considering the rights of disabled unborn, *see the case of Costa and Pavan v. Italy*, (No. 54270/10, 28th August 2012), in which the Italian court took a significant step toward the recognition of a right to a genetically healthy child, which the Court calls the "right [of the applicants] to bring a child into the world who is not affected by the illness that they carry" (§ 65).

<sup>iv</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 30 on women in conflict prevention, conflict and post conflict situations, 18 October 2013 Available at

<http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>

See also: United Nations, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Aug. 3, 2011 Available at

[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/66/254](http://www.un.org/ga/search/view_doc.asp?symbol=A/66/254)

World Health Organization. Safe abortion: technical and policy guidance for health systems. World Health Organization, Geneva, Switzerland (2012) 134 pp. ISBN 978 92 4 154843 4 Available at

[http://www.who.int/reproductivehealth/publications/unsafe\\_abortion/9789241548434/en/](http://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241548434/en/)

Office of the High Commissioner on Human Rights, Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality, 2012. Available at [http://www2.ohchr.org/english/issues/women/docs/A.HRC.21.22\\_en.pdf](http://www2.ohchr.org/english/issues/women/docs/A.HRC.21.22_en.pdf).

<sup>v</sup> See UN General Assembly Resolution A/RES/66/254, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/474/06/PDF/N1147406.pdf?OpenElement>