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Convention on the Rights of Persons with Disabilities - Testimony of Timothy L. Meyer before the U.S. Senate Committee on Foreign Relations

Timothy L. Meyer

University of Georgia School of Law, tim.meyer@vanderbilt.edu

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Testimony of Professor Timothy Meyer
Assistant Professor of Law
University of Georgia School of Law

November 5, 2013

Hearing: Convention on the Rights of Persons with Disabilities

Senate Foreign Relations Committee

Chairman Menendez, Ranking Member Corker and Members of the Committee. Thank you for the invitation to testify today. My name is Timothy Meyer, and I am an Assistant Professor of Law at the University of Georgia School of Law in Athens, Georgia. I am pleased to offer my thoughts regarding the Convention on the Rights of Persons with Disabilities (“CRPD” or “the Convention”).

Like most human rights treaties, the CRPD establishes an expert committee, the Committee on the Rights of Persons with Disabilities (“the Committee” or “the Committee on Disabilities”). I would like to focus my testimony today on the Committee on Disabilities’ role in the implementation of the Convention. The Committee’s principal task is to consider reports made by parties to the CRPD about their measures taken to comply with the Convention. The role of expert committees in general and the legal effect of their suggestions, recommendations, and comments is a subject of some debate among the various committees, member states, and academics. On the one hand, a number of commentators have expressed concerns that ratifying the Convention will result in unelected officials from multilateral organizations rewriting American laws. In response, others have pointed out that the Committee on Disabilities does not have the legal authority to compel any action by the United States. In my view, neither of these positions fully captures the way in which the suggestions, recommendations, and comments of human rights committees have effect.

I wish to make two points today regarding the role of these committees in general and the Committee in particular.

First, while reports of these expert committees are not legally binding, they do have legal significance because they influence how parties to the Convention perceive what constitutes compliance with treaty obligations and customary international law.

Second, declining to ratify the treaty does not necessarily mean that interpretations of human rights norms developed by the Committee will not be asserted against the United States. I therefore offer some possible understandings to the CRPD that would allow the United States to protect and advance its interests while ratifying the CRPD. These understandings would

clarify that the Committee's interpretations of the Convention are not due any deference from parties to the Convention.

With that introduction, I will now elaborate on these points.

THE "SOFT" LEGAL NATURE OF EXPERT COMMITTEES

The CRPD requires that each State Party "submit to the Committee . . . a comprehensive report on measures taken to give effect to its obligations" under the Convention. CRPD art. 35(1). The CRPD then empowers the Committee on Disabilities to "make such suggestions and general recommendations on the report as it may consider appropriate." CRPD art. 36(1). The Convention requires States Parties to make its reports "widely available to the public in their own countries and facilitate access to the suggestions and general recommendations" of the Committee. CRPD art. 36(4). The Committee on Disabilities is also authorized to "make suggestions and general recommendations based on the examinations of reports and information received from the States Parties" to the U.N. General Assembly and Economic and Social Council. CRPD art. 39. Moreover, it is common practice for expert committees to issue "general comments" which elaborate a committee's interpretation of the treaty it is charged with implementing. The Committee on Disabilities has continued this practice.¹

As a matter of international law, the Committee's suggestions, recommendations, and comments are not legally binding. Nor does the Committee have the power itself to make customary international law. Provided that ratification of the Convention is accompanied by a declaration that the Convention is not self-executing and a package of reservations, understandings, and declarations (RUDs) clarifying that the Convention does not impose any obligations on the United States beyond those offered under existing state and federal laws, such as the Americans with Disabilities Act, the Committee's work cannot be the basis for legally compelling any changes to federal law. Finally, the United States could ratify the Convention with a reservation to ensure that the United States undertakes no obligations that cannot be satisfied through federal legislation passed under Congress's constitutionally-enumerated powers. Where disabilities are concerned, Congressional power to make federal laws flows primarily from Congress's authority to regulate interstate and foreign commerce. U.S. Constitution, Art. I, Section 8. The United States could ratify the Convention with a reservation to those obligations in the Convention that cannot be satisfied under Congress's authority to regulate interstate or foreign commerce or under another of Congress's enumerated powers.²

¹ See, e.g., Draft General comment on Article 12 of the CRPD – Equal Recognition before the Law; Draft General Comment on Article 9 of the CRPD – Accessibility,

² For example, in 2005 the United States ratified the United Nations Convention on Transnational Organized Crime with a reservation providing that:

Although the Committee's suggestions, recommendations, and comments are not legally binding, they nevertheless can have indirect legal effect, what might be termed a "soft" legal effect.³ As with many laws, both international and domestic, the substantive commitments contained in the Convention are vague and imprecise. Legal scholars often make a distinction between "rules" and "standards" in terms of how precise a law is.⁴ As an ideal type, a "rule" is a law that that can be applied without any interpretation. An example is the speed limit. If the speed limit is 65 miles per hour, one only needs to answer the factual question of how fast the driver was going to know whether he was speeding. By contrast, if the rule is that drivers must drive at a "reasonable" speed, one must both interpret what "reasonableness" means and then determine factually whether the driver's conduct conforms to the law. The commitments made by parties to the Convention are more like standards than rules. By this I mean that no one – other parties, the Committee, outside observers, etc. – can determine

The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, serves as the principal legal regime within the United States for combating organized crime, and is broadly effective for this purpose. Federal criminal law does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or another federal interest. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Convention. The United States of America therefore reserves to the obligations set forth in the Convention to the extent they address conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other Parties as contemplated in the Convention.

³ See, e.g., Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171 (2010); Mark A. Pollack & Gregory C. Shaffer, *Hard v. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 Minn. L. Rev. 706 (2010); Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 Chi. J. Int'l L. 515 (2009); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. (2000).

⁴ See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).

whether a state is complying with its obligations under the Convention without first forming some more specific notion of what the commitments undertaken in the Convention require.

The implementation of the Convention thus necessarily requires some interpretation of the Convention's terms. As the United States has consistently maintained, the authority to issue legally binding interpretations of a treaty remains with the parties to the treaty unless the treaty specifically says otherwise.⁵ But in considering the reports made by parties to the Convention, the Committee unavoidably has to give some meaning to the Convention's vague obligations. It cannot otherwise assess the relationship between specific practices described in parties' reports and the vague language of the Convention. Moreover, states parties to the Convention may look to the Committee for guidance as to how *they* might interpret the obligations created by the Convention. Thus, even though the Committee's suggestions, recommendations, and comments are not legally binding, they can in some circumstances influence how other actors – parties to the Convention, including domestic courts and administrative agencies, as well as non-governmental organizations – interpret and apply the Convention. In effect, an expert committee's recommendations can sometimes become a focal point around which the expectations of a treaty's parties coalesce when determining what constitutes compliance with vague treaty terms.⁶

This phenomenon is perhaps easiest to observe among international tribunals. Like the Committee on Disabilities' suggestions, recommendations and comments, the decisions of most international tribunals are non-binding with respect to states not party to the dispute.⁷ There is thus little formal role for precedent in international law. In general neither international courts nor expert committees can lay down interpretations of treaties that bind the parties to the treaty prospectively. Nevertheless, tribunals frequently cite to and follow their own precedents, as well as the precedents of other tribunals.⁸ The World Trade Organization's Appellate Body has justified this practice as follows:

⁵ See, e.g., Human Rights Committee, Summary of the 2380th Meeting, U.N. Doc. CCPR/C/SR.2380 ¶ 8 (July 27, 2006) (in which the United States delegation noted in a colloquy with the Human Rights Committee that "in general, only the parties to a treaty were empowered to give a binding interpretation of its provisions unless the treaty provided otherwise.").

⁶ See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171, 203 (2010).

⁷ See, e.g., Statute of the International Court of Justice art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.")

⁸ See Harlan Grant Cohen, *The Strategy of International Precedent*, in INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi, et al eds forthcoming 2014).

[It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ration decidendi contained in previous Appellate Body reports that have been adopted by the DSB . . . *Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports* [emphasis added].⁹

The mechanism through which international tribunals and expert committees have legal effect is thus not through any binding force of the decisions themselves, but rather because – and only to the extent that – parties to the Convention follow the interpretations and reasoning adopted by tribunals. Similarly, the Committee’s interpretations of the Convention could be given effect when other legal actors attach significance to the reasoning or opinions provided by the Committee. This indirect effect is observable in the practice of U.S. government agencies. To give but one illustrative example, a 2005 memo from the Justice Department’s Office of Legal Counsel considered a report of the Committee Against Torture (a committee created by the Convention Against Torture and other Cruel, Inhumane, or Degrading Treatment (CAT) with a mandate similar to the Committee on Disabilities) alongside opinions of the Ninth Circuit of Appeals and the European Court of Human Rights in interpreting federal legislation implementing the CAT by prohibiting torture.¹⁰

An analogy to domestic lawmaking may help clarify the nature of the soft legal effect that these committees have. Domestic legal institutions frequently act in ways that do not have binding legal effect on other institutions, but nevertheless have indirect legal effects. I will highlight two particular kinds of domestic acts that are regularly given indirect legal effect but are not themselves law. First, congressional resolutions are not binding law. Yet scholars have argued that, despite the non-binding nature of resolutions, they are given soft legal effect when courts, administrative agencies, or the President incorporate congressional views expressed in resolutions into binding policies or rulings.¹¹ Similarly, the legislative history of statutes is not itself binding law. Nevertheless, courts routinely give legislative history legal effect when they use it to interpret

⁹ *Stainless Steel (Mexico-United States)* p. 158-160, WT/DS344/AB/R, 30 April 2008.

¹⁰ Memo for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice (May 10, 2005), available at: http://www2.gwu.edu/~nsarchiv/torture_archive/docs/Bradbury%20memo.pdf.

¹¹ Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons From Congressional Practice*, 61 *Stan. L. Rev.* 573 (2008).

statutes.¹² Second, domestic courts routinely cite the decisions of other courts as persuasive authority even when they are not bound to follow those courts' rulings. Federal circuit courts, for example, regularly look to each other's reasoning and analysis in interpreting federal law. They are free to, and frequently do, disagree with each other. But later courts also frequently adopt the reasoning and follow the decisions of earlier courts, even in the absence of a legal rule compelling that result. In the same way, non-binding actions by international institutions such as the Committee on Disabilities can be given indirect legal effect.

Just as the Committee's non-binding interpretations of the Convention may in some circumstances influence how parties view their obligations under the Convention, so too can parties' reactions to the Committee's interpretation shape the development of customary international law. It bears repeating that this does not mean that the Committee has the authority to make customary international law. It does not. But customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."¹³ States' interactions with human rights committees have at least the theoretical possibility of creating customary international law should states begin to act in accordance with a committee's interpretations of international law. Notably, customary international law does not require that all states participate in the practice in order for an obligation to arise.¹⁴ Thus, a country not party to a treaty or interacting with the committee could nevertheless end up bound by the resulting customary obligation. A government can protect itself from being so bound – under a doctrine known as the "persistent objector" doctrine – by monitoring the practices of other governments and objecting to being bound by a customary rule during the time the rule is forming.¹⁵

Thus, to simply state that the Committee has no authority to make binding determinations or to create customary international law does not do justice to the role of the Committee. The Committee unequivocally does not have the authority on its own to create legal obligations for states or to compel any action by parties to the Convention. The Committee cannot direct the United States to take any particular action and cannot rewrite American laws. But the Committee will play a role in influencing how the vague obligations in the Convention are interpreted and understood by States Parties and other actors. International law is, in a sense, a sort of common law. It develops through an accretion of precedents

¹² Andrew T. Guzman & Timothy Meyer, *International Soft Law*, 2 J. Leg. Analysis 171 (2010).

¹³ Restatement (Third) of Foreign Relations Law §102(2) (1987).

¹⁴ Restatement (Third) of Foreign Relations Law §102, comment b (1987) ("A practice can be general even if it is not universally followed").

¹⁵ Restatement (Third) of Foreign Relations Law §102, comment d (1987) ("[I]n principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.").

and through negotiations, both implicit and explicit, about the legal significance that should be accorded to the non-binding acts of institutions like the Committee. The question is thus how to best promote U.S. interests in light of the Convention and the role it affords the Committee.

POSSIBLE UNDERSTANDINGS TO THE CRPD

Significantly, not ratifying the CRPD would not necessarily eliminate the Committee's role in influencing how other states perceive the United States' human rights obligations for two reasons. First, as discussed above, the Committee's interpretations and its dialogues with states are precedential acts that can contribute to the creation of customary international law. In its examinations of parties' reports, expert committees sometimes opine that particular treaty obligations constitute customary international law.¹⁶ There is no denying that expert committees at times issue recommendations that go beyond what the parties contemplated when entering into a treaty.¹⁷ Because the formation of a rule of customary international law does not require affirmative consent from all nations, failing to object to these expansive claims can lead to claims that a country is bound by rules it played no role in forming. The U.S. government officials charged with appearing before human rights bodies and monitoring the activities of those bodies have ever been vigilant in protecting American interests against overreaching interpretations of what international law requires.¹⁸ Having the opportunity to nominate an American to serve on the

¹⁶ See, e.g., Human Rights Committee, General Comment 24(52) ¶ 8, General comment on 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, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (asserting that "a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language" because provisions in the ICCPR protecting such rights "represent customary international law.").

¹⁷ See, e.g., Report of the Committee on the Elimination of Discrimination Against Women, U.N. Doc. A/55/38 ¶ 361 (2000) (expressing concern about "the reintroduction of such symbols as Mothers' Day . . .").

¹⁸ See, e.g., Response of the United States to Recommendations of the U.N. Human Rights Council, November 9, 2010, available at: <http://www.state.gov/s/l/releases/remarks/150677.htm>. In his remarks, State Department Legal Adviser Harold Hongju Koh described some of the Human Rights Council's recommendations as "plainly intended as political provocations [that]

Committee and to appear before the Committee is an effective way to ensure that the Committee does not become a vehicle for creating customary international legal obligations that are contrary to U.S. interests.

Second, expert committees frequently cite to each other and to other human rights treaties in interpreting obligations in human rights agreements that overlap.¹⁹ The CRPD itself expressly authorizes this conduct when it provides that:

“The Committee shall, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.” CRPD art. 38(2).

Not ratifying the Convention thus does not ensure that the United States would not face arguments that its conduct is inconsistent with human rights obligations as interpreted by the Committee on Disabilities. The CRPD includes a number of obligations that overlap with rights contained in the International Covenant on Civil and Political Rights (“ICCPR”), to which the United States is party. Conceivably, the United States could find arguments developed by the Committee on Disabilities in its interactions with parties to the CRPD also advanced under the ICCPR. Of course, interpretations developed by the Committee on Disabilities and advanced as consistent with obligations under the ICCPR would not be binding on the United States, just as interpretations developed by the Human Rights Committee under the ICCPR and the Committee on Disabilities under the CRPD are non-binding. But by not participating in the development of these interpretations before the CRPD, the United States may lose some influence over how other nations’ understand the United States’ commitments under those treaties it has ratified.

In light of these considerations, I have two recommendations on how the United States might protect and advance its interests while ratifying the CRPD.

cannot be taken seriously.” *See also* Observations of the United States of America on General Comment 24, in *HUMAN RIGHTS AS GENERAL NORMS AND A STATE’S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS* (J.P. Gardner, ed. 1997) (noting that paragraph 8 of the Human Rights Committee’s General Comment 24 “asserts in a wholly conclusory fashion that a number of propositions are customary international law which, to speak plainly, are not.”).

¹⁹ *See, e.g.*, Draft General Comment on Article 9 of the CRPD ¶ 5 (citing General Comments of the Committees on Economic, Social, and Cultural Rights and the Rights of the Child).

First, American interests at home can be protected through a declaration that the CRPD is not self-executing, as well as a package of reservations, understandings, and declarations (RUDs) that clarify that the United States is not undertaking any commitments that exceed the extensive rights available under existing federal and state laws. These RUDs signal to the Committee and other States Parties to the Convention the limits on the commitments the United States is making by ratifying the Convention. They also ensure that the power to change federal law remains with Congress. These RUDs are important. As the Administration has made clear, the United States tends to follow a practice of “compliance before ratification.”²⁰ RUDs thus give the United States the ability to ratify the Convention knowing we are already in compliance with the commitments that we are making, while increasing our ability to influence how the Convention’s obligations are interpreted by parties that ratify before complying.

Second, the ability of expert committees to influence the views of parties as to how to interpret their binding legal obligations (or about the existence of a rule of customary international law) has led expert committees to claim that they have the ability to make “authoritative” interpretations of the treaties they are charged with implementing, even while conceding that their interpretations are not legally binding.²¹ To the extent that this claim refers to the fact that the parties to a treaty may attach significance to the views of a committee, it does little more than make a factual claim about how a committee is viewed by the governments that created it.

Committees might also be understood, however, to be making a claim that their rulings have a formal legal status somewhere between “binding” and “non-binding.” That is, expert committees might be understood to be arguing that their interpretations of a treaty are entitled to greater weight when considered by a treaty’s parties than are the views of, say, a law professor.²²

²⁰ Opening Remarks of Legal Adviser Harold Hongju Koh to the United Nations Committee on the Rights of Child Concerning the Optional Protocols to the Convention on the Rights of the Child (January 16, 2013).

²¹ See, e.g., Human Rights Committee, Summary of the 2380th Meeting, U.N. Doc. CCPR/C/SR.2380 ¶ 57 (July 27, 2006) (in which the Human Rights Committee asserts in a colloquy with the United States’ delegation that “its findings, while not legally binding, had considerable authoritative status.”).

²² See Observations of the United States of America on General Comment 24, in HUMAN RIGHTS AS GENERAL NORMS AND A STATE’S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS (J.P. Gardner, ed. 1997). In its observations, the United States responded to General Comment 24 of the Human Rights Committee (“HRC”), which arguably asserted that it was contrary to the object and purpose of the Covenant on Civil and Political Rights to reject the interpretations of the HRC. The United States clarified that “it is unnecessary for a

The United States could use ratification of the CRPD to clarify once again that the parties to the Convention are under no obligation to accord any weight to expert committee's interpretations. Last year when this Committee reported the CRPD to the full Senate, it included a proposed understanding stating:

The United States of America understands that the Committee on the Rights of Persons with Disabilities, established under Article 34 of the Convention, is authorized under Article 36 to "consider" State Party Reports and to "make such suggestions and general recommendations on the report as it may consider appropriate." Under Article 37, the Committee "shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention." The United States of America understands that the Committee on the Rights of Persons with Disabilities has no authority to compel actions by states parties, and the United States of America does not consider conclusions, recommendations, or general comments issued by the Committee as constituting customary international law or to be legally binding on the United States in any manner.²³

This understanding could be supplemented in two ways to make clear that the United States does not recognize the authority of the Committee to interpret the Convention. First, the understanding could include a sentence stating that:

"The United States further understands that the Committee's interpretations of the Convention are not entitled to any weight apart from that given to them by States Parties to the Convention."

Such an understanding goes beyond the 2012 understanding by clarifying that the Committee's interpretations are not due *any* deference by parties to the Convention. Such an understanding is consistent with the text of the Convention, which imposes no obligations on parties to adopt or agree with the Committee's views on what the Convention requires.

Second, the understanding could include a sentence making clear that the United States preserves its right to consent to any interpretations of the Convention, from whatever source, before they have any effect whatsoever in the United

state to reserve as to the Committee's power or interpretative competence since the Committee lacks the authority to render binding interpretations or judgments." *Id.*

²³ Report of the Committee on Foreign Relations on the Convention on the Rights of Persons with Disabilities § 7 (July 31, 2012).

States. For example, a sentence might be added to the understanding stating that:

“Moreover, the United States understands that no interpretation of the obligations of the Convention issued by the Committee or any other international institution can have binding legal effect with regard to the United States unless the United States consents to such an interpretation in accordance with its constitutionally-required procedures.”

This understanding makes clear that by joining the Convention the United States has not delegated any authority to any international institution to create legal obligations for the United States. It therefore preserves the primacy of the United States’ domestic lawmaking process in determining what international obligations bind the United States.

CONCLUSION

In sum, Mr. Chairman, thank you for the opportunity to present these views on the CRPD. International institutions such as the Committee on Disabilities have proliferated in recent decades and an accurate understanding of what they do and do not do is critical to engaging with these institutions in a way that protects and advances the interests of the United States. A simple binary conception of the legal effect – either binding or non-binding – of the Committee’s suggestions, reports, and recommendations, does not do justice to the ways in which the Committee can have indirect, “soft” legal effects. A more nuanced understanding of how these institutions works offers the possibility of a more effective strategy for ensuring that U.S. involvement with these institutions promotes U.S. interests.