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Jorge Araya
Secretary of the Committee on the Rights of Persons with Disabilities
Groups in Focus Section
Human Rights Council and Treaties Division
Office of the United Nations High Commissioner for Human Rights

52 Rue de Paquis

1201 Geneva, Switzerland

Re: Submission Luxembourg

Dear Secretary Araya**:**

My name is Stephen L. Mikochik. I am an emeritus professor of Constitutional Law at Temple Law School in Philadelphia and presently a visiting professor at Ave Maria Law School in Florida. Before joining the Temple faculty, I was an expert on disability law with the Civil Rights Division, U.S. Department of Justice. I later chaired the National Catholic Partnership on Disability, established four decades ago to implement the 1978 Pastoral Statement on People with Disabilities of the U.S. Catholic bishops. I have published extensively on the civil rights of disabled persons and am myself blind.

I write on behalf of the International solidarity and Human Rights Institute (ISHRI), a non-governmental organization in consultative status with the United Nations Economic and Social Council, committed to establishing solidarity among people worldwide by promoting authentic human rights based on Natural Law principles as understood by the universal Teaching Office of the Catholic Church. On behalf of ISHRI, I ask the Committee to challenge Luxembourg’s initial report under the Convention on the Rights of Persons with Disabilities (CRPD). To put it simply, Luxembourg’s claim that its act of March 16, 2009, legalizing euthanasia and assisted suicide, does not discriminate against disabled people is false. For the Committee to accept that claim would set a dangerous precedent for States Parties considering end-of-life legislation in the future.

Luxembourg signed the CRPD and optional protocol on March 30, 2007 and ratified both without reservations on September 26, 2011. They came into force in Luxembourg a month later. Luxembourg filed its initial report under the Convention on March 4, 2014. Though the report recognized that Luxembourg had enacted legislation regulating euthanasia and assisted suicide, it claimed that the Act did “not differentiate between persons with disabilities and persons without disabilities.”[[1]](#footnote-1)

I first note that Luxembourg does not have a uniform legal definition of “disability.”[[2]](#footnote-2) The CRPD also forgoes such definition, though Article 1 explains that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”[[3]](#footnote-3) As the Preamble observes, however, such barriers can be “attitudinal,” as well as “environmental.”[[4]](#footnote-4) Thus, if attitudes regarding impairment hinder someone’s equal participation in society, that person is “disabled” for purposes of the CRPD.[[5]](#footnote-5)

Such attitudes were well described by Pope Francis, in words worth quoting at length:

We are familiar with the objections raised, especially nowadays, to a life characterized by serious physical limitations.  It is thought that sick or disabled persons cannot be happy, since they cannot live the lifestyle held up by the culture of pleasure and entertainment.  In an age when care for one’s body has become an obsession and a big business, anything imperfect has to be hidden away, since it threatens the happiness and serenity of the privileged few and endangers the dominant model. Such persons should best be kept apart, in some “enclosure” – even a gilded one – or in “islands” of pietism or social welfare, so that they do not hold back the pace of a false well-being. In some cases, we are even told that it is better to eliminate them as soon as possible, because they become an unacceptable economic burden in time of crisis.[[6]](#footnote-6)

The short of it is, when society affords the lives of people with impairments less protection because they are considered imperfect, such people are regarded as “disabled.” Further, when such people are afforded less protection because they are regarded as disabled, they are subjected to discrimination on account of such disability.[[7]](#footnote-7) This is precisely what Luxembourg’s Act of March 16, 2009 has done.

The Act defines “euthanasia” as the action of a physician that “intentionally ends the life of a person at the express and voluntary request of the latter.”[[8]](#footnote-8) It further defines “assisted suicide” as the action of a physician that “intentionally assists another person to commit suicide or provides another person with the means for this purpose at the express and voluntary request of the latter.”[[9]](#footnote-9) Physicians are exempt from civil and criminal liability for performing euthanasia or assisting a suicide if they conform to the Act’s requirements.[[10]](#footnote-10)

To trigger the exemptions, the patient making the request must be “in a hopeless medical situation… as a result of an accident or serious illness [.]”[[11]](#footnote-11)”Hopeless” here means merely “incurable,” as the Act assiduously refrains from using the phrase “terminal condition.”[[12]](#footnote-12) Further, “medical situation” is sufficiently broad to include both psychiatric, as well as physical impairments.

The Act further requires as a condition of eligibility that such patients “report [] constant and unbearable physical or psychological suffering without any prospect of improvement [.]”[[13]](#footnote-13) To establish this, the physician must only come to the conviction that, “in the eyes of the patient, there is no other acceptable solution to his/her situation [;]”[[14]](#footnote-14)and nothing in the Act prevents patients from shopping for physicians willing to be convinced. At bottom, all the Act requires is such patients’ insistence that they cannot bear living the way they are.[[15]](#footnote-15)

It cannot be gainsaid that the distressed eighteen year old, the long-term unemployed, the grieving parent, and others may equally desire assistance in dying. Yet, Luxembourg denies them that wish, granting it only to those with serious and incurable medical impairments. The conclusion is irresistible that Luxembourg affords the lives of such people less protection because it believes their lives are less worth protecting, thus regarding them as “disabled” for purposes of the CRPD. To agree then with Luxembourg that the Act does “not differentiate between persons with disabilities and persons without disabilities”[[16]](#footnote-16)is simply to blink reality. Moreover, to deny the equal protection of laws designed to secure human life simply because people are impaired is the very hallmark of discrimination. It follows that the Act’s continued enforcement violates Luxembourg’s agreement “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities[.]”[[17]](#footnote-17)

I should add that, even if it were correct that the Act was neutral on its face, serious doubts would remain over its compliance with the CRPD. Luxembourg reported[[18]](#footnote-18) that most people euthanized or assisted in suicide under the Act[[19]](#footnote-19) were cancer patients.[[20]](#footnote-20) Cancer is a disabling condition both because it “substantially limits normal cell growth”[[21]](#footnote-21) and because of the continuing stigma that surrounds it.[[22]](#footnote-22) “Discrimination” under the CRPD includes laws that have “the purpose *or* effect” of discriminating on the basis of disability.[[23]](#footnote-23) Thus, like similar legislation in the United States, “The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”[[24]](#footnote-24) In its operation, the Act clearly has a disparate impact on disabled people and thus is presumptively incompatible with the CRPD.[[25]](#footnote-25)

Notwithstanding these concerns, the Committee failed to inquire about the Act in its “List of Issues” regarding Luxembourg’s initial report under the CRPD.[[26]](#footnote-26) In contrast, it had requested Canada to “inform … [it] about measures to ensure that the State Party’s legislation on assisted dying is in compliance with [Article 10, “Right to Life”] of the Convention.”[[27]](#footnote-27) Given the foundational importance of that Article to the CRPD, the Committee should identify the Act as a “topic of concern” in its concluding observations[[28]](#footnote-28) and request Luxembourg to provide information on whether its legalization of euthanasia and assisted suicide is in compliance with the Convention.

Respectfully submitted,



Stephen L. Mikochik

1. Initial Report of Luxembourg under the Convention on the Rights of Persons with Disabilities, #100, available at http://tbinternet.ohchr.org/\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29 (last visited June 13, 2017). [↑](#footnote-ref-1)
2. See id., #17. Cf. Committee on the Rights of Persons with Disabilities, List of Issues on the Initial Report of Luxembourg, #1 (Apr. 10, 2017), available at http://tbinternet.ohchr.org/\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=18 (last visited June 13, 2017) (Accordingly, the Committee requested information on “whether the concept of disability in … [Luxembourg’s] national laws is compliant with the human rights model of disability and is in line with the purpose of the Convention.” Id.). [↑](#footnote-ref-2)
3. A/RES/61-106, Art. 1, “purpose,” available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-1-purpose.html (last visited June 13, 2017). [↑](#footnote-ref-3)
4. A/RES/61-106, “Preamble,” #5, available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/preamble.html (last visited June 14, 2017). Cf. Americans with Disabilities Act, 42 U.S.C. § 12102 (1) © (“defining “disability” to include “being regarded as having [a physical or mental impairment that substantially limits one or more major life activities].”). [↑](#footnote-ref-4)
5. For example, someone treated unequally “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity” is “regarded” as disabled for purposes of the Americans with Disabilities Act. Id., § 12101 (3) (A). [↑](#footnote-ref-5)
6. Francis I, Homily for the Jubilee of the sick and disabled (June 12, 2016), available at http://en.radiovaticana.va/news/2016/06/12/pope\_francis\_homily\_for\_jubilee\_of\_the\_sick\_and\_disabled\_/1236700 (last visited June 18, 2017). [↑](#footnote-ref-6)
7. “Discrimination” under the CRPD includes “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms[.]”A/RES/61-106, Article 2, “Definitions,” available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-2-definitions.html (last visited June 15, 2017). As I will explain, the Act treats people with serious and incurable medical conditions unequally under Luxembourg’s criminal and civil laws simply because they are impaired. [↑](#footnote-ref-7)
8. Appendix I: Act of March 16, 2009, Art. 1 (unofficial English translation). [↑](#footnote-ref-8)
9. *Id.*  [↑](#footnote-ref-9)
10. *See* *id.*, Art. 2 (1). [↑](#footnote-ref-10)
11. *Id.*, Art. 2 (1) (3). [↑](#footnote-ref-11)
12. The Act seemingly refers to a “terminal condition” when it requires any physician “treating a patient at *the end of his/her* life or a patient in a hopeless medical situation” to inquire whether the patient has a registered advanced directive requesting euthanasia. *Id.*, Art. 4 (2) (emphasis added). This language, however, supports the view that the Act is not using “hopeless” and “terminal” synonymously. [↑](#footnote-ref-12)
13. *Id.* Though physicians are required to inform such patients of “the possibilities offered by palliative care, and their consequences [,]” *id.*, Art. 2 (2) (1), patients are not required to undergo treatment such physicians believe would alleviate their suffering before their request for euthanasia or assistance in suicide is satisfied. [↑](#footnote-ref-13)
14. *Id.*, Art. 2 (2) (1). Though the physician must conduct several meetings with the patient to confirm such conviction, *see* *id.*, Art. 2 (2) (2), and a consulting physician must likewise be convinced, *see* *id.*, Art. 2 (2) (3), still, if, “in the eyes of the patient, there is no other acceptable solution [,]” *id.*, Art. 2 (2) (1), the condition is met. [↑](#footnote-ref-14)
15. A physician can honor an advanced directive for euthanasia under the Act, without any showing of pain, if the declarant is unconscious and has a serious and incurable condition irreversible according to the current state of science. See *id.*, Art. 4 (3) (1-3); see also id*.*, Art. 4 (1). [↑](#footnote-ref-15)
16. Initial Report of Luxembourg under the Convention on the Rights of Persons with Disabilities, #100, *supra* note 1. [↑](#footnote-ref-16)
17. A/RES/61-106, Art. 4 (1) (b), “General Obligations,” available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-4-general-obligations.html (last visited June 24, 2017). Further, by signing the CRPD in 2007, Luxembourg was under an obligation when it adopted the Act of March 16, 2009 “to refrain in good faith from acts that would defeat the object and purpose of the treaty.” Timeline of Events, available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/timeline-of-events.html (last visited Apr. 4, 2017). [↑](#footnote-ref-17)
18. See Appendix II: Relevant Portions of Luxembourg Reports on Euthanasia and Assisted Suicide. The reports were prepared by the National Commission on Control and Evaluation of the Law of March 16, 2009 on Euthanasia and Assisted Suicide and were available through 2014. [↑](#footnote-ref-18)
19. In contrast to those euthanized, only one patient was assisted in committing suicide. See id. [↑](#footnote-ref-19)
20. Of the 34 total cases, 27 were cancer patients; six had neurodegenerative conditions; and one had a neurovascular disease. See id. See also English Version of First Luxembourg’s Review Commissions Report (Apr. 25, 2011), available at http://www.worldrtd.net/news/english-version-first-luxemburgs-review-commissions-report-published#main-content (last visited June 15, 2017). Since the terms “neurodegenerative” and “neurovascular” are vague, I did not include patients listed with such conditions in my count of disabled persons euthanized or assisted in suicide under the Act. [↑](#footnote-ref-20)
21. 28 C.F.R. § 35.108 (d) (2) (iii) (F) (U.S. Dept. of Justice Regulations implementing Title II of the Americans with Disabilities Act) (“[T]he individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under … (the ‘actual disability’ prong) or … (the ‘record of’ prong) [of the ADA’s definition of ‘disability.’]”. Id., § 35.108 (d) (2) (ii)). [↑](#footnote-ref-21)
22. See, e.g., Daher, M., Cultural Beliefs and Values in Cancer Patients, 23 Ann. Oncol. (sup\_3) 66-69 (Apr. 1, 2012), available at https://academic.oup.com/annonc/article/23/suppl\_3/66/207372/Cultural-beliefs-and-values-in-cancer-patients (last visited June 16, 2017). [↑](#footnote-ref-22)
23. A/RES/61-106, Art. 2, “Definitions,” *supra* note 7 (emphasis added). [↑](#footnote-ref-23)
24. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (applying an “effects test” under Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment on grounds of race or sex). *See* *also* 42 U.S.C. § 12112 (b) (3) (A) & (6) (providing an “effects test” under Title I of the Americans with Disabilities Act, prohibiting discrimination in employment on grounds of disability). [↑](#footnote-ref-24)
25. Any claim that such discrimination was justified to preserve disabled patients’ autonomy would need first to demonstrate that the Act’s procedures were sufficient to protect true choice. [↑](#footnote-ref-25)
26. See Committee on the Rights of Persons with Disabilities, List of Issues in relation to the Initial Report of Luxembourg (Apr. 10, 2017), available at http://tbinternet.ohchr.org/\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=18 (last visited June 14, 2017). [↑](#footnote-ref-26)
27. Committee on the Rights of Persons with Disabilities, List of Issues in Relation to the Initial Report of Canada, #16 (Sept. 22, 2016), Available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshFUYvCoX405cFaiGbrIbL8lFYC2ZuxbHMUqA9bI0hv8%2fZvSQdfJ%2fKKPz6TFFVUKqvgjiEEgvNP9NVOQxvaygPwKzLXKkOvQWC423HWcCJDC (last visited Apr. 12, 2017). Article 10 provides in full: “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.” A/RES/61/106, Art. 10, “Right to Life,” available at https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-10-right-to-life.html (last visited Apr. 11, 2017). [↑](#footnote-ref-27)
28. See Committee on the Rights of Persons with Disabilities, Working Methods, #19 (Sept. 2, 2011), available at http://tbinternet.ohchr.org/\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/5/4&Lang=en (last visited Apr. 11, 2017). [↑](#footnote-ref-28)