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AMERICAN BAR ASSOCIATION

**COMMISSION ON LAW AND AGING
SECTION OF INTERNATIONAL LAW**

SENIOR LAWYERS DIVISION

**SECTION ON REAL PROPERTY, TRUST AND ESTATE LAW
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges the United States Department of State
- 2 and the United Nations and its member states to support the ongoing processes at the United
- 3 Nations and the Organization of American States to strengthen protection of the rights of older
- 4 persons, including the efforts and consultations towards an international and regional human
- 5 rights instrument on the rights of older persons.

REPORT

This resolution calls on the relevant authorities within the federal government to support efforts to strengthen protection of the rights of older person, including consideration of an international and regional human rights instrument. As background and justification for this resolution, this report traces the movement toward an international convention on the rights of the older persons, and the national, international, and U.N. activities appraising and promoting the need for such a convention. The resolution is timely in that there is an increasing interest in a convention among governments and international non-governmental organization (NGOs) and the American Bar Association brings a valuable set of skills and values that can help guide upcoming developments.

A. Background: International Human Rights Standards and the United Nations

The international community has played an increasingly important role in strengthening the normative and institutional framework for dealing with human rights problems for the last 60 years. Today, several international systems recognize and protect basic human rights: the United Nations system, the European system, the Inter-American system, and the African system. Each system has its own unique set of human rights treaties and supervisory mechanisms. However, the United Nations system has the greatest geographic reach and global prominence of any of the systems. Of course, all these systems possess only limited power to ensure the protection of human rights throughout the world; nevertheless, the international human rights system is maturing and gaining greater acceptance and influence, even within the United States which historically has been reluctant to embrace human rights treaties.

The starting point of the United Nations human rights system is the UN Charter, signed by 51 original members in 1945, and which includes two key articles addressing human rights. The first comprehensive human rights instrument was The Universal Declaration of Human Rights, adopted by the U.N. General Assembly in December 1948. The Declaration does not have the legally binding force of a treaty, but because of its moral status and enhanced legal and political importance it has acquired over the years, it ranks with the Magna Carta and the Declaration of Independence as a milestone in human rights attainment.

The core human rights treaties negotiated under U.N. auspices are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both were adopted in 1966 and entered into force in 1976. They take the Universal Declaration a step further by making rights provisions legally binding. A majority of the world's countries have ratified the two Conventions and thereby subject themselves to international monitoring of their human rights practices by the supervisory mechanisms attached to the treaties that further apply the standards by either evaluating the state reports or issuing applicable concluding observations, or considering individual communications and petitions. The petition system has traditionally been established in the form of protocols to the treaties which not all state parties usually sign up to. Although the U.S. ratified the former, it still has not ratified the Covenant on Economic, Social and Cultural Rights. Along with the Universal Declaration, these documents are considered the core of an International Bill of Rights.

Another important intergovernmental treaty organization is the Hague Conference on Private International Law, which has adopted some conventions that touch on older persons, such as the Convention on the International Protection of Adults. However, the purpose of Hague conventions are “to work for the progressive unification of the rules of private international law”¹ rather than to formulate international human rights standards.

B. Global Aging Standards and Non-binding Effect

The phenomena of global aging has called the attention of the international community on two occasions in the past two decades. In 1982, the First World Assembly on Ageing adopted the International Plan of Action on Ageing. The “Vienna Plan” was the first international instrument on aging that aimed to strengthen the capacities of governments and civil society to deal effectively with the aging of populations, address the developmental potential and dependency needs of older persons, and to promote regional and international cooperation.

In 1991, in the context of the review of the International Plan of Action on Ageing and related activities, the General Assembly adopted the U.N. Principles on Older Persons to encourage governments to incorporate the principles of independence, participation, care, self-fulfillment, and dignity of older persons in national programs. These principles constitute an elaborate list of general principles specifically promoting the rights of older persons.²

Finally, in 2002 the United Nations revisited the rights of the elderly at the Second World Conference on Ageing in Madrid, and reviewed the recommendations adopted in the Vienna Plan. The conference resulted in the Madrid International Plan of Action on Aging (MIPAA), which was adopted by 159 countries and called for the promotion and protection of all human rights and fundamental freedoms, including the right to development, the need to include aging in global agendas, and the need to combat discrimination based on age.³ The MIPAA shifted the existing policy framework considerably as it promoted the view of aging from the perspective of both developing and developed countries. It also adopted an intergenerational policy approach that pays attention to all age groups, with major outcomes being the objective of creating a society for all ages, and a shift from developing policies for older persons towards the inclusion of older persons in the policymaking process.⁴

C. The U.N. Human Rights Mechanisms and the Rights of Older Persons

International human rights standards for identified vulnerable populations have gained increasing recognition in contemporary society. However, older persons as a group have not been a high priority beneficiary of this attention. Many treaties and declarations do refer to rights that are of importance to older persons, but there is no comprehensive international instrument that adequately addresses the specific protections required for an aging society. As amplified below, there is a growing advocacy effort among both non-governmental and

¹ Available at http://www.hcch.net/index_en.php?act=faq.details&fid=5.

² Available at http://www.un.org/esa/socdev/ageing/un_principles.html.

³ Report of the 2nd World Assembly on Ageing, 1-43, U.N. Doc. A/CONF.197/9, U.N. Sales No. E.02.IV.4. 2002.

⁴ Report of the Secretary-General: Follow-up to the Second World Assembly on Ageing, A/64/127, 2009, Par. 10.

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governmental organizations to commence a convention drafting and approval process.

The group Global Action on Aging, based at the United Nations and having consultative status with the U.N. Economic and Social Council has been a key coordinating entity in mobilizing efforts toward a convention and tracking U.N. developments on its website at: <http://www.globalaging.org/agingwatch/index.htm>. Other groups involved in the effort include, among others, the International Federation on Ageing, the International Longevity Center, HelpAge International, and AARP. These groups have encouraged our Commission on Law and Aging to become involved in helping mobilize the legal profession in the United States to support and implement this goal.

The current international standards and recommendations on the rights of the elderly are based upon the fundamental premises established in human rights instruments starting with the Universal Declaration of Human Rights (“UDHR”), in particular Article 25:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁵

The U.N. or its instrumentalities have issued some 17 documents on aging since 1948, including declarations, principles, resolutions, plans of action, and proclamations. However, none of these rise to the level of a binding treaty. In a 2003 analysis, Professors Diego Rodriguez-Pinzon and Claudia Martin of the Academy on Human Rights and Humanitarian Law at the American University provided a detailed overview of the different types of international human rights and the various international regional systems of protection that relate to varying extents to older persons.⁶ These authors concluded that the older persons are the only group in need of the special protection [unlike women, children, persons with disabilities, etc.] that does not have an international instrument to protect their rights and the current international instruments are not providing adequate answer to their needs. Thus, they recommended that any future action or plan for the elderly should consider creation of legal instrument and supervising body for the rights on older persons.

This approach is based on a broad interpretation of the principle of equality, as enshrined in human rights instruments and reflected in affirmative action programs, or measures that are often labeled as positive discrimination. When older persons are considered a vulnerable group, in other words, facing additional obstacles to realize their rights, it enhances the protection that states are obliged to provide to them in order to comply with the obligation to guarantee the human rights standards that are meant to be achievable for every person by international human rights instruments.

For the most part, the rights of the elderly are recognized in isolated provisions in

⁵ Handbook – International and Regional Human Rights of Older Persons (Draft, April 2011), Academy on Human Rights and Humanitarian Law, AU WCL, , Chapter D., at 1.

⁶ Diego Rodriguez-Pinzon and Claudia Martin, “The International Human Rights Status of Elderly Persons,” 18 American Univ. International Law Rev., 915 (2003).

international human rights instruments, with most of the rights expressly recognized in treaties protecting economic, social and cultural rights with the scope and standards to be protected and realized by duty-bearers as the rights. These types of treaties identify standards for progressive implementation. Such categorization tends to imply that these rights are programmatic aspirations, but not subjective rights - in contrast with civil and political rights, which are of immediate application.

There are a number of international treaties that include norms applicable to the rights of older persons, including the instruments that recognize the specific nature of their rights and are applicable to elderly people as citizens of signatory states. The scope of the protection and interpretation of the rights frequently depends upon the composition of the supervisory body, its commitment and combined expertise, as well as the operational creativity within the larger political climate it exercises its functions. The concerns of older persons have been addressed by such treaty bodies in their concluding observations in a number of reports, yet in a very inconsistent manner. A number of them adopted general comments and recommendations, which principally aim to specify the content of the rights, entrenched in the instruments and respective obligations of the state parties, which at times focused on the specific situation of an older person as a right-holder.

Additionally, their evaluation depends on the content of country reports submitted to the U.N. A recent report by Chin-sung Chung, a member of the Advisory Committee of the Human Rights Council, published in 2010, indicated the neglect of this theme. Of 124 country reports reviewed by the Human Rights Committee, only three mentioned discrimination based on age, and one addressed long-term care. Of 122 country reports reviewed by the Committee on Economic Social and Cultural Rights, only 24 included references to elderly. Of 190 country reports reviewed by the Committee on Elimination of Discrimination against Women, only 32 included references to elderly.

Moreover, the Human Rights Council functions as an administrator and guarantor of the Universal Periodic Review process which is a State-driven process that provides the opportunity for each state to report and address the actions they have taken to fulfill their human rights obligations. The UPR's ultimate goal is to improve the human rights situation in all countries, and address human rights violations of the standards entrenched in the international human rights instruments. In this peer-review process, a number of states used the opportunity to highlight the unmet concerns of older persons.⁷

D. Recent Institutional Developments and Resolutions at the United Nations

Over the past two years, U.N. activities and resolutions have increasingly recognized the need for an international instrument addressing the rights of older persons. Some examples are:

- The Open-Ended Working Group on strengthening the protection of the human rights of older persons, established by the General Assembly by resolution 65/182 on 21 December 2010, and has mandate to consider the existing international framework of the human rights

⁷ Available at <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.

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of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures. The organization session of the Working Group took place on February 15, 2011; the first Working Session is scheduled to take place in NYC, 18-21 April, 2011, and will focus on “understanding the current situation of the human rights of older persons around the world ... including existing international and regional human rights frameworks.”

- Recent joint Draft Report produced by the UN Department of Economic and Social Affairs and the Office of the High Commissioner for Human Rights identified several human rights concerns that the UN human rights mechanisms have attempted to address in the general comments, concluding observations, jurisprudence of the treaty bodies, as well as various thematic and country specific reports of the Special Procedures. These included non-discrimination, special protection measures, right to social security, social protection, right to health, and right to adequate housing.⁸ The Report also noted that Committee on Economic, Social and Cultural Rights has made numerous references to the global aging documents, including the Vienna Plan and the U.N. Principles of Older Persons.
- Commission for Social Development 48th Session (February 2010) - The Commission for Social Development (CSocD) is a working commission of the Economic and Social Council of the United Nations (ECOSOC). It consists of 46 government members elected by ECOSOC. It meets once a year in New York. In its last meeting held on February 3-12, 2010, a resolution to encourage member states to consider an international framework to ensure the full enjoyment of the rights of older persons, including instruments or measures to further improve the situation of older persons.
- Working Paper presented by Ms. Chinsung Chung (member of the HRC Advisory Committee) Advisory Committee of the Human Rights Council, 4th session, 25-29 January 2010, Implementation of sections III and IV of the annex to Human Rights Council resolution 5/1 of 18 June 2007: Agenda and annual program of work, including new priorities.⁹ The Report concluded that the elderly persons “...are not protected under international law... [despite] their special needs.” Further, the Report found normative and implementation gaps not sufficiently addressed in the international policy documents, including the U.N. principles on Older Persons, and suggested that the international convention on the human rights of the elderly would “... change negative attitudes, increase visibility of older persons, clarify responsibilities, improve accountability and provide an international [protection] framework.”
- Economic and Social Council, Commission for Social Development Report of the Secretary General on the implementation of MIPAA (Madrid International Plan of Action on Ageing, 2002), held on November 25, 2009. The report is in response to resolution 47/3 of the Commission for Social Development. The report suggests that the current international and constitutional human rights instruments are not enough. There is a need for “sufficient and appropriate mechanism for exercising rights such as: (a) appointing a *special rapporteur* on the rights of older persons; (b) establishing a *working group* on older persons and aging at the regular sessions of the Commission for Social Development; (c) developing a new legal mechanism, such as a *convention* on the rights of older persons.

⁸ Draft Report: “Current Status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide”, UN DESA and OHCHR, August 2010.

⁹ P. 24-25, A/HRC/AC/4/CRP.1, available at

<http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/session4/documentation.htm>.

- The General Assembly Third Committee, 64th session, adopted resolution A/C.3/64/L.6 on Aging Follow-up to the Second World Assembly on Ageing on October 22, 2009. This resolution encourages member states to consider how best the international framework of norms and standards can ensure the full enjoyment of the rights of older persons, including instruments or measures to better improve the situation of older persons.
- United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Program on Ageing, Report of the Expert Group Meeting “Rights of Older Persons”. This meeting was convened in preparation for the report of the Secretary-General to the 64th session of the General Assembly, 5-7 May 2009, Bonn Germany. The purpose of this Expert Group Meeting was to provide the General Assembly with independent expert opinion on questions related to the rights of older persons, as well as inputs into and recommendations for the report of the Secretary-General. The experts agreed to encourage governments to consider their support of appointing of a special rapporteur on the rights of older persons; and to consider their support of establishment of a comprehensive convention on the rights of older persons.

E. Recent Institutional Developments and Resolutions in the Latin America and the Caribbean Region

Additionally, in the last few years, a number of states in the Latin America and the Caribbean have also advocated for the strengthened protection of the rights of older persons. This growing regional interest is linked to the ongoing processes at the United Nations, as many of the countries leading the regional efforts have been firmly behind the movement that brought about the Open-ended Working Group mentioned in the previous section.

- Special Session of the Permanent Council of the OAS, as mandated by the resolution AG/RES. 2455(XXXIX-O/09), where the high-level speakers from the Pan-American Health Organization, Inter-American Commission on Human Rights, United Nations Population Fund, Economic Commission for Latin America and the Caribbean (ECLAC), and HelpAge International commented from the perspective of their mandates and activities on the positive impact of future Inter-American Convention on the Rights of Older Persons.¹⁰ In the following discussion, majority of states in principle spoke in favor of the future steps towards such regional convention.¹¹
- “Strategy Proposal from the Perspective of Latin America and the Caribbean, for Advancing Towards an International Convention on the Human rights of Older Persons”, ECLAC Ad-hoc Committee on Population and Development, May 2010. The Proposal called for the follow up on ‘the standard-setting’ agendas at both UN Human Rights Council and ECLAC region, also including the Brasilia Declaration. The proposal further suggested the adoption of the United Nations convention on the rights of older persons would enhance the protection by the supervision mechanism, as well as further “...crystallize the commitment of the international community, including the objectives of the Madrid International Plan on Ageing,” and clarify the content of the existing consensus regarding the rights of older

¹⁰ Available at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-409/10.

¹¹ Available at <http://www.helpage.org/newsroom/latest-news/latin-american-states-support-call-for-a-convention-on-the-rights-of-older-people/>.

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persons and obligations by duty-bearers.

- Latin America: Moving Towards a Convention for the Rights of Older Persons (October, 2009)

More than 240 representatives of nine countries from Latin America and the Caribbean met under the auspices of ECLAC (Economic Commission for Latin America and the Caribbean) in Santiago, Chile, to discuss the challenges and strategies for achieving an International Convention to Promote the Human Rights of Older Persons. The participants analyzed the situation facing older persons in their region. One of their many findings was that the demographics aging will likely lead to increased economic, social, political and cultural problems.

- Latin America and Caribbean states: To Attain the Full Exercise of the Rights of Older Persons (May, 2009)

Argentina hosted the “Second Meeting on the Follow-up of the Brasilia Declaration” May 21-22, 2009. Representatives from 22 countries in Latin America and the Caribbean participated in this meeting. They discussed promoting an aging rights document, including full and effective participation and inclusion of older persons in society, equality of opportunities.

- The Brasilia Declaration (December 2007): an Intergovernmental Conference on Aging in Latin America. The Representatives of the governments created a declaration promoting the older person rights. The representative of the countries agreed, among other issues, to make consultation with the governments to promote the drafting of convention on the rights of older persons.

F. Regional Standards of the Rights of Older Persons

A number of regional mechanisms have incorporated the rights of older persons yet in a very inconsistent and limited manner. Only a few rights have been addressed and usually only in connection with other general human rights provisions, as only a handful of instruments include specific reference to the elderly or age. Additionally, some of them are not directly justiciable by the petitioners or with almost non-existent jurisprudence.

G. Why The Rights of Older Persons Need to Protected Special Convention?

There is a number of compelling reasons supporting the need for a special convention on the rights of older persons including:

1. The Demographic Age Wave:

The revolution in longevity occurring in the 20th century is causing an unprecedented growth in the aging population. The rapid growth is expected to accelerate in the future. In the first half of the 21st century, the number of person over 60 will increase from about 600 million (or 10 percent of the world population) in 2000 to almost 2 billion (or 21 percent) in 2050. Population aging is poised to become a major issue in developing countries, as well as developed countries, although the challenges differ in many ways.

Such a global demographic transformation has profound consequence for every aspect of individual, community, national and international life. While health care advances have enabled

greater numbers of older persons to live active healthy lives into old age, a multitude of impairments and limitations still increase in frequency with age. These result in increased vulnerability to dependency on family caregivers; reliance on public benefits; physical, emotional and financial abuse; negative stereotyping and discrimination. All these factors also severely affect the enjoyment of the rights of older persons, in particular health, social protection, long-term care, employment, to name a few.

2. Ageism and Age Discrimination.

Older persons in large numbers around the world too often are kept on the margins of society, deprived of essential supports of life, financially, medically, socially, and culturally. A convention will create greater awareness of discrimination against older persons in the societies and provide a duty for ratifying states to establish non-discrimination acts. The future convention would also significantly contribute to the ambiguities and heterogeneous regulation of the discrimination against older persons in multiple areas and enable for evolving interpretation of the standards in the attached monitoring mechanism.

3. Lack of Protection in Existing Human Rights Mechanisms

As described above, while there are a number of existing human rights conventions and mechanisms that offer some potential to promote and protect the rights of older persons; this potential has been diluted by a lack of focus and depth. The range of protection and scope of the rights differ also region to region, while some lack such protection altogether, in particular Asia and the Pacific and Arab countries.

The international human rights and standards that are relevant to the rights of the elderly are included in a non-systematic manner in various provisions of civil, political, economic, social, and cultural rights and instruments. There is therefore a need to develop additional protection mechanism(s) that would enable both the protection of the rights of older persons not currently established in the human rights instruments, as well build upon the human rights jurisprudence and develop the standards further.

4. Normative Gap and Clarification of Obligations

A new convention would help articulate the rights of older persons in our aging societies to close the normative gap in international instruments. A convention would further establish minimum standards and strengthen respect for these rights by the states. The new instrument would also benefit from firmly established context and principles of an international human rights framework.

Therefore, the standards of older persons as *rights-holders* would be developed within the human rights framework as universal and inalienable, indivisible, interdependent, and interrelated, as well as within the concepts of equality and non-discrimination, participation and inclusion, as well as accountability and the rule of law. Further, the new convention would help clarify the human rights obligations of states and other duty-bearers, and thus help the former in the implementation of the related policies and programs to protect, promote, and fulfill the human rights of older persons.

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5. Action Plans on Aging and U.N. Principles on Older Persons are not Legally Binding Instruments

None of the international or regional action plans on aging are legally binding human rights instruments, nor are the U.N Principles on Older Persons. While a limited number of human rights mechanisms have referred to them in their jurisprudence and reports, they only played an interpretative role in applying broader human rights and principles. As such, these documents represent “soft law”, where there may be a comprehensive treatment of issues and strategies but the commitment and implementation functions lack sanctions for non-compliance or infringements.

Therefore, the new convention would become “hard law” as a part of the international human rights framework formed by the instruments in which the states have expressed the intent to be legally bound by their provisions and fulfill the expectations of implementation and accountability. There is therefore primary responsibility that rests with the state to respect and protect specified human rights and to make positive actions via implementation and administration of a national legal framework.

6. Providing a Platform for Civil Society Organizations and Associations of Older Persons

A new instrument and protection mechanism is likely to involve monitoring framework that will require states to submit periodic reports on the implementation of the convention. This process has proved to be vital and benefitting civil society organizations that can submit parallel reports and launch advocacy campaigns based on the reporting process and content and scope of the rights as well as future jurisprudence. Further, this platform would provide for national dialogue on human rights amongst the various stakeholders for it encourages and facilitates public scrutiny at a national level of government implementation and stimulates constructive discussion with civil society of ways to advance enjoyment by all of the rights laid down in the various conventions.

7. International Development Programs to Support Well-being of Older Persons

The new convention would provide additional standards and indicators for development agencies of the United Nations to implement *human rights-based approaches* in their strategies and programs designed for older persons. The methodology of a human rights-based approach to development, in accordance with the U.N. Statement of Common Understanding, uses the human rights instruments and developed standards pertaining to duty-bearers and rights-holders to contribute to the realization of at least one of the rights established in international human rights instruments. This is based on the correlative obligations of *rights-holders*, with their claims based on human rights, and *duty-bearers*, who have corresponding obligations.

Additionally, the international development agencies that do not have a mandate to fulfill and promote human rights *per se* have used the human rights principles as mechanisms for compliance and enforcement. The principles and indicators in the programs and project phase are derived from the human rights discourse and include accountability and transparency, empowerment, participation and partnership, non-discrimination and equality, and attention to vulnerable groups.

The legitimacy of this approach comes from the inherent dynamics of the human rights

construct—they are in fact internationally agreed and legally enshrined *obligations* of duty-holders.¹² Further, the indicators used in the human rights based approach to development are applied in accordance with the scope and definitions of the recognized human rights and further structured in three categories for each right: structural (legal framework), process (state policy), and outcome indicators (realization of the human right).¹³

H. Impact of the International Human Rights Mechanisms on the Protection of Other Vulnerable Groups

The existing human rights frameworks set up to protect other vulnerable groups, including persons with disabilities, children, women, etc, have had in most cases positive impact on the protection, promotion and fulfillment of the rights of the protected group at a national level. There have been also controversies in terms of the scope and definition of some rights during the negotiation phase or the slow and vague monitoring processes. Other barriers have resulted from less than adequate funding for implementation of these treaties. Appropriate funding for monitoring and implementation is crucial to the success of human rights treaties. Even with these barriers, the existing international and regional human right mechanisms have provided an opportunity for both duty-bearers and rights-holders to clarify their content and establish a process to improve the human rights situations in the country in the area protected by the convention.

1. Monitoring Mechanisms

Generally, there are three strategies for the implementation of the UN treaty system—a state reporting system, an individual complaint, and a state-to-state complaint system. Some critics have cast doubt on the self-reporting system concerning whether such a system will work optimally, as it may involve misrepresentation or speculation that States will “overshadow their problems with exaggerated successes.”¹⁴ Overall, the international human rights regimes are most effective when reporting is combined with some kind of quasi-judicial processes allowing for inter-State cases and individual petitions from persons within jurisdiction of State parties.

Besides these periodic reports, however, given the political environment and experience with the Convention on the Rights of Persons with Disabilities (CRPD), the new convention on older persons is unlikely to establish concrete enforcement mechanisms in the form of an individual complaint. Hence, just like in the case of the Convention on the Rights of the Child (CRC) that lacks inter-State or individual complaints, the smooth running of the reporting system plays a crucial role in ensuring the effective implementation of the convention.

¹² Klaus Decker, Siobhan McNerney-Lankford and Caroline Sage, Working Paper – Human Rights and Equitable Development: Ideals, Issues, and Implications, at 44-45, available at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Human_Rights_and_Equitable_Development_Ideals_Issues_and_Implications.pdf.

¹³ Siobhan McNerney-Lankford, Hans-Otto Sano, World Bank Study – Nordic Trust Fund, Human Rights Indicators in Development, 2010, at 19, available at http://siteresources.worldbank.org/EXTLAWJUSTICE/Resources/HumanRightsWP10_Final.pdf?resourceurlname=HumanRightsWP10_Final.pdf.

¹⁴ Marc D. Seitles, Effect of the Convention on the Rights of the Child Upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala, 16 In Pub. Interest 159, 172 (1997-1998). See also Deirdre Fottrell, One Step Forward or Two Steps Sideways? Assessing the First Decade of the Children’s Convention, in REVISITING CHILDREN’S RIGHTS: 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD, 6 (Deirdre Fottrell, ed., 2000).

Similarly, the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) uses a reporting system as a means to monitor States' compliance with the convention. After the reports are considered, the Committee can only offer suggestions and recommendations. To improve the effectiveness of the CEDAW, an individual complaint procedure was introduced through the adoption of the Optional Protocol to the CEDAW in 1999.¹⁵ The Optional Protocol vests the CEDAW Committee with power to investigate grave and systematic violation in the States which are Parties to the Protocol. However, the Committee's visit can only be conducted with the consent and cooperation of the State in question.

2. Positive impacts of the Conventions

Unlike states' statements supporting "soft" international proclamations, such as UN declarations, or General Assembly's Resolutions, which "do not necessarily reflect domestic policy" of the supporting states, the treaties or conventions, on the other hand, produce a more effective impact, resulting in "corresponding policy and implementing legislation," and thus benefiting the targeted populations.¹⁶ The UN human rights conventions protecting vulnerable groups have a positive impact at the global, regional, and national level.

At the global level, international human rights instruments have set a standard which has a far-reaching impact. The CRC, for instance, is said to have globally transformed children's rights, as the framework has normatively changed international instruments and discourse about children's rights. It radically altered the way the world looks at children. Some scholars even argue that the CRC has created a global consensus on children's rights, turning it into customary international law, which is internationally binding in and by itself.¹⁷

As for the CEDAW, the convention has set a foundation of a "global legality" with respect to human rights of women.¹⁸ Moreover, CEDAW has created a new dimension of human rights not previously recognized in previous UN human rights instruments such as International Covenant on Civil and Political Rights. Not only does the CEDAW prohibit public discrimination conducted by states' agents, it has also attempted to eradicate "private" discrimination inflicted by private actors which has been ignored in the laws of most countries.

Regional human rights protection mechanisms have also adopted legal principles and human rights standard enshrined in the UN human rights instruments as a guidance or reference for the interpretation of the regional human rights instruments to further protect the vulnerable groups. The CRC, for example, has influenced the way in which European Court of Human Rights decided cases relating to children's rights.¹⁹ The use of the provisions of the CRC as a

¹⁵ Deirdre Fottrell, *supra* n. 14, at 38.

¹⁶ Israel Doron & Itai Apte, What Difference Would a New Convention Make in the Lives of Older People, at 3, available at <http://www.globalaging.org/elderrights/world/2008/newconvention.pdf>.

¹⁷ Israel Doron, The Debate Around the Need for an International Convention on the Rights of Older Persons, *The Gerontologist*, 2010, available at <http://www.globalaging.org/elderrights/world/2008/newconvention.pdf>.

¹⁸ Israel Doron & Itai Apte, *supra* n. 17, at 4.

¹⁹ See Ursula Kilkelly, The Impact of the Convention on the Case-law of the European Court of Human Rights, in *REVISITING CHILDREN'S RIGHTS: 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD*, 91-99 (Deirdre Fottrell, ed., 2000).

guide to interpret European Convention on Human Rights has a significant impact on the protection of children's rights in countries that have incorporated ECHR into their domestic laws but have not done so with regard to the CRC.

At the national level, UN human rights instruments have a potential impact on national legislation and the judicial system of countries that have ratified them. The principle of the "best interests of the child" enshrined in the CRC, for example, "has gained international status" and has been incorporated in "national constitutions, children's acts, family law codes and a wide range of juvenile justice laws" of many countries that have ratified the convention.²⁰ A study shows that some common law countries have made genuine efforts to established national mechanisms to coordinate policies for children and monitor the implementation of the CRC although they face constraints of "a great need for capacity development and for human and financial resources" to ensure effective function of those mechanisms.²¹ In civil law countries, the CRC has a direct impact on the legislature of countries that have ratified the convention.²²

In most Islamic countries, a number of initiatives have been adopted to bring national legislation in conformity with the CRC. These range from adopting comprehensive children's codes to modifying existing legislation and ushering in child-friendly policies." Egypt, for instance, adopted a Children's Code in 1996 in order to implement the CRC. In Sudan, the Ministry of Justice conducted a review of all relevant laws in 1993 to determine the consistency with the CRC.²³ In judicial systems, domestic courts of many common law countries have invoked the CRC in cases relating to children's rights although the process is still in its infancy.²⁴

With regard to CEDAW, the convention serves as a catalyst for national implementation effort in protecting and promoting women's rights. CEDAW has provided women in various countries that have ratified the convention with a "powerful advocacy tool" in that it has had a significant influence on the drafting of national constitutions, judicial decision making, drafting of national laws, and formulating government policy.²⁵ In Turkey, for instance, legislation and judicial decisions to promote women's rights have been based, in significant part, on CEDAW.²⁶ The process of reporting to the CEDAW Committee has stimulated and empowered women's

²⁰ Rebeca Rios-Kohn, A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries, in PROTECTING THE WORLD'S CHILDREN: IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN DIVERSE LEGAL SYSTEMS, 45-46 (2007).

²¹ Id. at 67.

²² Emilio Garcia, A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Civil Law Countries, in PROTECTING THE WORLD'S CHILDREN: IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN DIVERSE LEGAL SYSTEMS, 109 (2007).

²³ Shaheen Sardar Ali, A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law: Law Reform and Children's Rights in Muslim Jurisdictions, in PROTECTING THE WORLD'S CHILDREN: IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN DIVERSE LEGAL SYSTEMS, 176 (2007).

²⁴ Rebeca Rios-Kohn, A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries, in PROTECTING THE WORLD'S CHILDREN: IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN DIVERSE LEGAL SYSTEMS, 87-89 (2007).

²⁵ Anne F. Bayefsky, CEDAW Convention: Its Contribution Today, 94 Am. Soc'y Int'l L. Proc. 198 (2000).

²⁶ Linda M. Keller, The Convention on the Elimination of Discrimination Against Women: Evolution and (Non) Implementation Worldwide, 27 T. Jefferson L. Rev. 35, 40 (2004-2005).

groups in various countries.²⁷

In some countries CEDAW has been used to change the cultural and religious perception within the country.²⁸ Moreover, the Optional Protocol to the CEDAW has enhanced the effectiveness of CEDAW in providing human rights protection to women at the domestic level. Besides providing a remedy for violation of rights protected by CEDAW at the international level, the Optional Protocol acts as a catalyst pushing states to “take a fresh look at the means of redress that are currently available to women at the domestic level.”²⁹

The case of the Convention on the Rights of Persons with Disabilities (CRPD) represents an argument and ideological precedent why a new instrument is needed. Similar to the current status of the rights of older persons, a number of human rights mechanisms had addressed rights pertinent to this vulnerable group, but most stakeholders ultimately concluded that the absence of legally binding documents with specific minimum content of the rights of persons with disabilities was no longer viable.

I. The Role of the American Bar Association.

The American Bar Association engages in human rights advocacy and system building on many levels. The ABA Commission on Law and Aging is the primary entity through which the ABA has examined and taken action on aging concerns for the last 30 years, and it is in a position to bring together and make use of multiple resources within and outside the ABA. As the largest professional association in the world, the ABA stands in a unique position to speak with authority and credibility on the rights of older persons and the need for such a convention.

NGOs have played an increasingly important role in the developing, drafting, and monitoring of recent conventions. The most recent example of NGO involvement was in the development of the CRPD, signed in 2006 and effective in May 2008, upon ratification by 20 nations. The CRPD is also a relevant model for development of a Convention on the Rights of Older Persons. The U.N. General Assembly established an *ad hoc* committee to consider enacting a disability-based human rights instrument in December 2010. The process that culminated in the signing of a final covenant took nearly five years of negotiations and involved a multitude of entities.

For the first time in the 60-year history of United Nations human rights treaty formation, a targeted group—persons with disabilities—were represented at and actively involved in the drafting of the instrument intended to protect their rights. During its first session, the *ad hoc* Committee had decided that representatives from NGOs could participate in meetings and make statements in accordance with U.N. practice. Thereafter, the General Assembly repeatedly urged that efforts be made to actively involve disability organizations in the work of the *Ad Hoc* Committee. Accordingly, throughout the process, organizations of persons with disabilities and other NGOs were very active in providing comments and information from a disability

²⁷ Anne F. Bayefsky, *supra* n. 27, at 198.

²⁸ Linda M. Keller, *supra* n. 28, at 40.

²⁹ Margaux J. Hall, Using International Law to Promote Millennium Health Targets: A Role for the CEDAW Optional Protocol in Reducing Maternal Mortality, 28 Wis. Int'l L.J., 74, 90 (2010).

perspective. This same kind of participatory model is critical to the development of a covenant on the rights of older persons, and the ABA can be an important contributor.

J. Domestic Impact of Human Rights Covenants within the U.S.

Historically, the United States has been reluctant to ratify most international treaties addressing the human rights of targeted groups. But that pattern began to show some signs of change in 1988 with the ratification of the Genocide Convention. Since then, the stance of the U.S. has varied by president and by make-up of the Senate, which must give its advice and consent to treaties. In addition, virtually every treaty approved by the U.S. Senate since 1988 has been approved subject to various “reservations, understandings, and declarations,” or “RUDs”, stipulated by the Senate. Generally, these are geared to ensure that no treaty is self-executing nor preemptive of state law without specific domestic legislation. But even with RUDs, ratification carries with it an affirmative obligation to move forward with steps to comply with the object and purpose of the treaty.

Even when the United States has not ratified human rights treaties, their existence can have tangible impacts within the U.S., even though even ratified treaties are not self-implementing. One example is the Convention on the Rights of the Child (CRC), adopted by the U.N. General Assembly in 1989, and to date, ratified by 193 countries. This is the largest number of ratifications of any international human rights agreement. Yet, the U.S. is one of only two countries (Somalia is the other) that have not yet ratified it, perhaps in part because of politically driven views over the implications of the convention on issues such as abortion and criminal sentencing of minors, and in part because of entrenched reluctance to embrace international obligations as a peer of other states. Nevertheless, the convention has received judicial notice in cases of vital importance to the rights of children, most notably the U.S. Supreme Court’s decision striking down the death penalty for defendants who committed a capital crime under the age of 18 [*Roper v. Simmons*, 125 S.Ct. 1183, at 1199 (2005)].

Additional important impacts of the convention world-wide include the following:

- Many governments have enacted legislation and taken creative actions to implement change.
- Official reports, required under the CRC, highlight progress or lack of it in adopting nations.
- NGOs play an important role in shadow reporting within countries.
- The CRC has elevated child health care to a right in international law.

Thus, even without ratification, the CRC has set a framework and a high bar that policy leaders have to acknowledge when designing and evaluating state and federal policies and programs. These kinds of positive impacts,—especially with regards to health, well-being, and community engagement—can be expected from a Convention on the Rights of Older Persons.

The issue of ratification by the U.S. of other human rights conventions has become more discussed by both supporters and opponents. Under the Obama administration, the country has become a member of the UN Human Rights Council. Further, regardless of ratification, given the wide acceptance and legitimacy of conventions across the regions, a number of norms

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became a part of international customary law.

The involvement in the UN Human Rights Council is of particular importance due to its duties with regards to the Universal Period Review process. In 2010-2011, a number of NGOs, that advocate for and focus on the civil and human rights issues in the U.S., have been able to engage in the process with the UN Human Rights Council via reports and series of meetings at this international forum. Even more importantly, they engaged in the dialogue with the U.S. administration, especially the State Department which initiated briefings to review the process and key thematic issues.³⁰ As such it would provide an opportunity for stakeholders and advocates to apply a human rights approach in related public policies.

K. ABA Policy.

The ABA has no policy addressing a convention on the right of older persons. The ABA does have a policy supporting ratification of the U.N. Convention on the Rights of Persons with Disability (February 2010), the U.N. Convention on the Rights of Children (February, 1991); and the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (February 1996). ABA policy of February 2000 also urges the ratification of the Hague Convention on the International Protection of Adults which concerns the protection of older adults who, by reason of impairment or insufficiency of their faculties, are not in a position to protect their personal, health care, or property interests in an international context.

L. Conclusion.

The need for an international instrument addressing the rights of older persons is rising with the increasing numbers of older people in the world and the accompanying prevalence of social and economic isolation, age discrimination, and risks to health and long-term care. Existing declarations and conventions make reference to certain rights that are of importance to older persons, but there is no comprehensive international instrument that comprehensively addresses the rights and protections required for an aging world society. For those reasons the international community moved toward the goal of establishing a convention on the rights of older persons. Thus, it is both appropriate and important for the ABA, as the world's largest professional organization of lawyers, to take a part in the supporting and shaping the current process. The ABA Commission on Law and Aging requests that the House of Delegates approve the proposed resolution.

Respectfully Submitted,
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³⁰ Poverty & Race Research Action Council, "International Human Rights and U.S. Civil Rights Policy," available at http://www.prrac.org/full_text.php?text_id=1155&item_id=10756&newsletter_id=0&header=Current%20Projects.

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