AMERICAN BAR ASSOCIATION
COMMISSION ON LAW AND AGING
SECTION OF INTERNATIONAL LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

As adopted by the House of Delegates August 2018

RESOLVED, That the American Bar Association supports in principle the Inter-American
Convention on Protecting the Human Rights of Older Persons and encourages the United
Nations, operating through its Open-Ended Working Group on Ageing or similar process, to
draft a convention on the rights of older persons, considering the Organization of American
States Convention as an instructive precedent.
On June 15, 2015, the General Assembly of the Organization of American States (OAS) approved the Inter-American Convention on Protecting the Human Rights of Older Persons during its General Assembly. It is the first international human rights convention focused on the rights of older persons. The purpose of the Convention is stated in Article 1: “to promote, protect and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration, and participation in society.” As of March 2018, the convention has been signed and ratified by the governments of Argentina, Bolivia, Chile, Costa Rica and Uruguay. Brazil has signed the convention but not yet ratified it.


This resolution recognizes the historic nature of the convention, supports its purpose in principle, and calls on the United Nations to use it as a springboard to the creation of a U.N. Convention on the Rights of Older Persons, an option that has been under consideration by the U.N. Open-ended Working Group on Ageing since 2010. The ABA has participated in the meetings of the Working Group through an appointed liaison since the House of Delegates adopted the following resolution in August 2011:

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

The debate in the U.N. Working Group among member states has been characterized by stark differences in views over the need for a convention, although the participating non-governmental organizations have been uniformly in support of a convention. This resolution goes one step further than the 2011 resolution above by expressly calling on the U.N. to begin the process of drafting a convention on the rights of older persons, considering the OAS convention as a useful precedent on which to build and revise as needed.

We know from experience that a rights treaty is not a magic bullet, but it will serve as a very important tool to bring about a better future for older people. The rationale for the convention rests on a recognition that, while all existing conventions addressing human rights and fundamental freedoms apply to older persons, they lack specificity and coherence in addressing the special circumstances of older persons as a group; and in their enforcement, they have consistently been inadequate in protecting the human rights deficiencies experienced by older persons.
A U.S. State Department official expressed the United State’s position on the OAS convention, or on any other convention on the rights of older persons, in the following response to a query on August 11, 2016:

[T]he U.S. has consistently opposed the negotiation of new legally binding instruments on the rights of older persons. The U.S. recognizes the importance of using the OAS and the UN to address the challenges older persons face in this hemisphere and throughout the world, including the enjoyment of their human rights. However, the U.S. does not believe that a regional convention is necessary to ensure that the human rights of older persons are protected. Rather than promoting a new instrument, the U.S. believes resources of the OAS and its member states should be used to identify practical steps that governments in the Americas might adopt to combat discrimination against older persons, including best practices in the form of national legislation and enhanced implementation of existing international human rights treaties. In doing so, such efforts should be aimed at addressing immediately and in practical ways the challenges faced by older persons.¹

While the U.S. has not been a supporter of a convention up to this point, international thinking and activities concerning the aging of the planet’s population suggest considerable momentum toward a need to recognize the special circumstances of older persons in a rights-based instrument.

**Current Landscape of Human Rights and Aging**

The demographics are daunting. Worldwide, persons age 60 years and older numbered 607 million in the year 2000, or 9 percent of the world population. By 2015 the number rose to 901 million people, or over 12% of the population. By 2050, the global population of older persons is projected to reach nearly 2.1 billion, or 21.5% of the global population. Moreover, the number of people aged 80 years or over, the “oldest-old” persons, is growing even faster. In 2000, there were 71 million people aged 80 or over worldwide. By 2050, that number is projected to increase to 434 million, a more than six-fold increase in its size in 2000.² The growth rate is not uniform everywhere. Two thirds of the world’s older persons live in the developing regions and their numbers are growing faster there than in the developed regions. Gender differences are also important. In 2015, women accounted for 54 per cent of the global population aged 60 years or over and 61 per cent of those aged 80 years or over in 2015. Older women are especially vulnerable to multiple discrimination, based on age, gender, race, and other characteristics.

Older persons in large and growing numbers suffer unique human rights shortcomings around the world. They too often struggle on the margins of society because of discriminatory views on aging. We may not see this as frequently in the United States, but we do see it. Conditions vary widely worldwide and abuses are too common. Older men and women are often denied access

¹ Email communication from Judith Heumann, Special Advisor for International Disability Rights. U.S. Department of State, August 11, 2016, to Charles Sabatino, ABA Commission on Law and Aging.
to services, jobs, pensions and other financial supports, and adequate health and long-term care, including person-centered end-of-life care. Older individuals are unduly vulnerable to abuse, neglect, and poverty. While there are a good number of existing human rights instruments and mechanisms that, in theory, offer potential to protect the rights of older persons, this potential is seriously diluted by the lack of specificity, depth, comprehensiveness, and consistency.

The above is not meant to suggest that international law completely ignores rights protection for older persons. The UN's first rights document after WWII, the non-binding Universal Declaration of Human Rights, contains this in Article 25, paragraph 1:

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. (Emphasis added)

Only three of nine legally binding UN rights instruments make even brief reference to the circumstances of older people: the Migrant Workers Convention; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of Persons with Disabilities (CRPD). However, only the Migrant Workers Convention prohibits discrimination on the basis of age, a provision which obviously excludes those who are not migrant workers. CEDAW provides for the equal right of women to social security in old age, and it offers some protection against sexist inheritance practices. The CRPD requires states to provide services to prevent and minimize further disabilities among older people and to provide “age appropriate” or “age sensitive” measures for persons with disabilities.

Nevertheless, human rights law is largely silent on important topics such as:

- Rights within community-based and long-term care settings, both for the caregiver and for the person receiving care.
- Legal planning mechanisms for older age.
- The abolition of mandatory retirement ages.
- Legal capacity and equality before the law for older women and men under guardianship or diagnosed with dementia.
- The right to access to health care, which in existing human rights instruments, fails to address nursing homes and other institutional isolation and rights to home and community-based care.
- End-of-life rights, including access to palliative care.
- Elder abuse and exploitation in its many forms across cultures, including violence as a result of witchcraft accusations in some cultures.

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4 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 7; CRPD Article 25 (b) Article 28 (2) (b) Article 13, Article 16.
5 CEDAW, Article 11.1 (e).
6 CRPD Article 25 (b) Article 28 (2) (b) Article 13, Article 16.
• Property rights in old age, the loss of which especially impact older women.
• Rights to economic security in the face of worldwide population aging.
• Existing human rights law only offers limited protection against the negative impact of the actions of the private sector and individuals within families.

International human rights standards for identified vulnerable populations (women, children, refugees, persons with disabilities) have gained increasing recognition in contemporary society. However, older persons as a group have not been a high priority beneficiary of this attention. In response to this perceived shortcoming, a growing advocacy effort among both non-governmental and governmental organizations has sought to bring about a convention drafting and approval process directly addressing the human rights of older persons. This effort produced the first regional international convention on human rights and aging, approved by the Organization of American States.

Other related efforts demonstrate a growing worldwide awareness of a need to hone in on the human rights of older persons. The United Nations Open-Ended Working Group on Ageing has met at least annually since 2010 and continues its deliberations. See http://social.un.org/ageing-working-group.

In addition, the U.N. Human Rights Council announced, in May, 2014, the appointment of an Independent Expert “on the full enjoyment of the human rights of all older persons.” During her initial 3-year term, the Independent Expert was specifically tasked with assessing how existing international human rights instruments have been implemented in relation to older people’s rights, identifying both good practices and implementation gaps. Along with other specified duties, the Independent Expert produced a comprehensive report on her findings and recommendations in July of 2016.

The African Union has been active, since 2009, considering a draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa. The draft Protocol received the full support of the African Commission on Human and Peoples’ Rights and was adopted during the 26th African Union Summit which took place in January 2016. It is open to ratification by Member States of the African Union. See www.achpr.org/mechanisms/older-disabled.

The European states have also begun to focus on the human rights of older persons in recent years. In February 2014, the Council of Europe adopted the first European instrument dealing specifically with the full spectrum of human rights of older persons. -- Recommendation CM/Rec(2014)2 of the Committee of Ministers recommends a range of measures to be taken by Member States in order to combat discrimination based on old age and covers the major rights challenges facing older persons: non-discrimination; autonomy and participation; protection from violence and abuse; social protection and employment; care; and administration of justice. See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c649f.

The European Union has no special instrument addressing older persons, although the EU Charter of Fundamental Rights does contain one sentence on the rights of the elderly: “The
Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”

The United Nations and its instrumentalities have issued some 17 documents on aging since 1948, including declarations, principles, resolutions, plans of action, and proclamations. However, none of these rises to the level of a binding treaty. Most provisions affecting older persons that are recognized in treaties and other instruments protect economic, social and cultural rights. These types of treaties identify standards for progressive implementation. Such categorization tends to imply that these rights are programmatic aspirations - in contrast with civil and political rights, which are of immediate application. In other words, they are “soft law” -- they lack sanctions for non-compliance or infringements. Though it applies only to the Americas, the Inter-American Convention on Protecting the Human Rights of Older Persons is the first international convention providing mandatory rights recognition and protection for older persons.

It is noteworthy that the comprehensive report of the U.N. Independent Expert to the Human Rights Council, favorably highlights the OAS convention as a model practice, stating:

> The Convention is an example of good practice that could inspire other regions, as it allows States to strengthen cohesion and normative action and to clarify States’ obligations with regard to the rights of older persons.\(^8\)

The need for an international convention on the rights of older persons has been recognized for some time. 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.\(^9\) These authors concluded that older persons are the only group in need of the special protection (unlike women, children, persons with disabilities, etc.) that do not have an international instrument to protect their rights; 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 a legal instrument and supervising body for the rights of older persons. The Inter-American Convention fulfills that recommendation.

### The Inter-American Convention

The Inter-American Convention on Protecting the Human Rights of Older Persons provides a comprehensive statement of broadly defined human rights as specifically applied to older persons, especially in connection with respect to circumstances unique to or disproportionately affecting older persons. For example, the convention defines key terms not addressed in other

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7 EU Charter of Fundamental Rights, Article 25.
treaties, such as age discrimination in old age, multiple discrimination, palliative care, active and healthy aging, and long-term care services. Starting with a set of general principles, the convention then sets forth 27 specific protected rights. Quite different views have been expressed within the ABA about the appropriateness or breadth of certain rights and their practical implications, as well as certain of the enforcement provisions, but there is unanimity in support for the explicit recognition of the rights of older persons in a binding international instrument. Moreover, the ABA did not play any role in influencing the OAS drafting process. In the United Nations process, the input of the ABA and other non-governmental organizations has been welcomed.

The driving principal of the Inter-American Convention is embraced by this resolution. That principle calls for a fundamental change in the social paradigm of aging. Older persons must be seen as legitimate, productive, and important rights holders in an aging world, rather than perceived as merely a vulnerable and no-longer-productive group that makes unwarranted claims on public resources. The Preamble of the Inter-American Convention espouses:

the need to address matters of old age and ageing from a human-rights perspective that recognizes the valuable current and potential contributions of older persons to the common good, to cultural identity, to the diversity of their communities, to human, social, and economic development, and to the eradication of poverty.

A rights-based perspective is the missing element in several decades of U.N. activities on aging. 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 provide a roadmap to strengthen the capacities of governments and civil society to deal effectively with the aging of populations. Building on gaps in that plan, the General Assembly adopted the U.N. Principles on Older Persons in 1991. These principles specifically promoted the rights of older persons but without any authority to enforce them. In 2002, the Second World Conference on Ageing in Madrid adopted the “Madrid International Plan of Action on Aging” or MIPAA to strengthen efforts toward goals not met by the prior two instruments. MIPAA 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.

The U.N. Commission for Social Development evaluated MIPAA after ten years and then 20 years. Its 20-year review found that the goals of the Plan overall have not been met. Among the Commission’s findings:

- Implementation continued to be weak. Gaps between policy and practice and the mobilization and/or building of sufficient human and financial capacities remained a major constraint. Ten years after its adoption, the Madrid Plan of Action had made only limited headway in national development plans. The mainstreaming of ageing issues saw little progress by any yardstick....

- Recommendations for action proposed in the strategic implementation framework through 2012 had only limited impact on the situation of older persons. Awareness of the
Madrid Plan of Action and the current living conditions of older persons remained low in many developing countries….

- The second review and appraisal highlighted several major challenges faced by older persons that were common to all or most regions and that undermined the social, economic and cultural participation of the aged, namely, income security, access to age-appropriate health-care services, access to labour markets and social protection, protection from abuse and violence and age discrimination.  

The flaw in relying only on aspirational road maps and identifying best practices is that they have no teeth. They lack a rights-based mandate and enforceability mechanism.

This conclusion is reinforced by the findings of the U.N. High Commissioner for Human Rights whose office did an analysis of the normative standards in international human rights laws in 2012 and concluded:

The analysis supports the view that there is a demonstrable inadequacy of protection arising from normative gaps, as well as fragmentation and a lack of coherence and specificity of standards as they relate to the experience of older persons.  

Rationale for ABA Action and Existing ABA Policy

The ABA has the ability and the stature to play a key role in shaping U.S. policy with respect to human rights and international conventions. The ABA brings to the table the legal expertise and a long history of human rights values that adds recognized credibility in helping to shape positions taken by the Administration. The ABA can serve in a leadership role to advocate for the first ever binding treaty that articulates with specificity human rights principles as they apply to the aging members of our aging society.

The ABA has supported other conventions in recent years such as the Convention on the Rights of Persons with Disabilities (2010), the Convention on the Rights of the Child (1991), and the Convention on the Elimination of All forms of Discrimination against Women (1996), all of which have been signed but not ratified by the United States. On the subject of international aging, the ABA adopted the 2011 resolution quoted at the beginning of this report.

ABA policy has consistently been supportive of the creation of a regional and international human rights instrument on aging. The ABA has also acted on that goal by appointing a liaison to the U.N. Open-Ended Working Group on Aging in 2012. The present resolution builds upon the momentum created by the OAS convention and can be used by the ABA as a springboard and precedent to energize efforts to move the United Nations toward the goal of drafting a U.N. convention on the rights of older persons.

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12 The current ABA Liaison to the U.N. Open-Ended Working Group on Ageing is Prof. William Mock.
Conclusion

The proposed policy acknowledges the human rights milestone represented by the OAS convention and enables the ABA to speak out clearly in support of the rights of older persons and to encourage the U.N. to move forward toward the drafting of U.N. convention, recognizing the OAS convention as a useful precedent. As a prominent advocate for international human rights and the rule of law, the ABA shoulders an especially important leadership role to advocate for and guide the drafting of a binding treaty that articulates with specificity human rights principles as they apply to the aging members of our aging society.

Respectfully submitted,

Hon. Patricia Banks, Chair  Steven M. Richman, Chair
Commission on Law and Aging  Section of International Law
August 2018  August 2018
GENERAL INFORMATION FORM

Submitting Entity: Commission on Law and Aging and the Section of International Law

Submitted By: Hon. Patricia Banks, Chair, Commission on Law and Aging, and Steven M. Richman, Chair, Section on International Law

1. Summary of Resolution(s).

This resolution supports in principle the Inter-American Convention on Protecting the Human Rights of Older Persons adopted by the Organization of American States on June 15, 2015, and encourages the United Nations to move forward toward drafting a United Nations convention on the rights of older persons, using the convention as an instructive precedent.

The purpose of the Convention is to promote, protect, and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons in the Americas in order to contribute to their full inclusion, integration and participation in society. The United Nations has no specialized convention on the rights of older persons, but it does have an Open-Ended Working Group on Ageing that, among other things, is considering the need for such as convention.

2. Approval by Submitting Entity.

Approved by Commission on Law and Aging on April 20, 2018; and by the Section of International Law in April 25, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?

Yes, a somewhat related resolution sponsored by the Commission on Law and Aging that expressly called on the US to sign and ratify the OAS Convention was before the House of Delegates in August, 2017; but the resolution was voluntarily withdrawn to permit further dialogue on the contents of the resolution with the Section of International Law.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

On the subject of international rights of older persons, the ABA adopted a resolution in August, 2011, to support emergent efforts to strengthen the protection of the rights of older persons, including consideration of an international convention. The resolution stated:

That the American Bar Association urges the United States Department of State and the United Nations and its member states to support the ongoing processes at the United Nations and the Organization of American States to strengthen protection of the rights of older persons, including the efforts and consultations towards an international and regional human rights instrument on the rights of older persons.
Thus, ABA policy clearly points toward the creation of a regional and/or international human rights instrument on aging. The ABA has also supported other specialized conventions in recent years, such as the Convention on the Rights of Persons with Disability (2010), the Convention on the Rights of the Child (1991), and the Convention on the Elimination of All forms of Discrimination against Women (1996), all of which have been signed but not ratified by the United States.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?  N/A


As of March 2018, the OAS Convention had been signed and ratified by the governments of Argentina, Bolivia, Chile, Costa Rica and Uruguay. Brazil has signed the convention but not yet ratified it. 

The U.N. Open-Ended Working Group on Ageing is scheduled to convene its 9th meeting in July, 2018, during which the drafting of a similar U.N. convention will continue to be urged by several States and most non-governmental organizations participating. However, the Working Group has made no formal decision or recommendation on the drafting of such a convention.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy will allow further consultations with the State Department to urge its consideration of the convention and will enable collaboration with other non-governmental organizations in advocacy for the convention, as well as in the drafting of a convention if and when the U.N. decides to proceed with that course.

8. Cost to the Association. (Both direct and indirect costs)

None

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

- Center for Human Rights
- Civil Rights and Social Justice
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Homelessness and Poverty
- Government and Public Sector Lawyers Division
- National Legal Aid & Defender Association
- Rule of Law Initiative
- Section of Administrative Law and Regulatory Practice
• Section of Dispute Resolution
• Section of Family Law
• Section of Litigation
• Section of Real Property, Probate and Trust Law
• Section of Science and Technology Law
• Section of State and Local Government Law
• Section of Tort, Trial and Insurance Practice
• Senior Lawyers Division
• Special Committee on Bioethics and the Law
• Standing Committee on Governmental Affairs
• Standing Committee on Legal Aid and Indigent Defendants
• Standing Committee on Pro Bono and Public Service
• Standing Committee on the Delivery of Legal Services
• The Judicial Division
• Young Lawyers Division

• Solo, Small Firm and General Practice Division

National Conference of Bar Presidents

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
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12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)
Hon. Patricia Banks, Chair
Commission on Law and Aging
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution, submitted jointly by the Commission on Law and Aging and the Section on International Law, supports in principle the Inter-American Convention on Protecting the Human Rights of Older Persons adopted by the Organization of American States on June 15, 2105, and encourages the United Nations to move forward toward drafting a United Nations convention on the rights of older persons, using the convention as an instructive precedent.

2. Summary of the Issue that the Resolution Addresses

Older persons in large and growing numbers suffer unique human rights shortcomings around the world. They too often struggle on the margins of society because of discriminatory views on aging. We may not see this as frequently in the United States, but we do see it. Conditions vary widely worldwide and abuses are too common. Older men and women are often denied access to services, jobs, pensions and other financial supports, and adequate health and long-term care, including person-centered end-of-life care. Older individuals are unduly vulnerable to abuse, neglect, and poverty. While there are a good number of more general human rights instruments and mechanisms that, in theory, offer potential to protect the rights of older persons, this potential is seriously diluted by the lack of specificity, depth, comprehensiveness, and consistency.

The purpose of the OAS Convention is to promote, protect, and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons in the Americas in order to contribute to their full inclusion, integration and participation in society. The United Nations has no specialized convention on the rights of older persons, but it does have an Open-Ended Working Group on Ageing that, among other things, is considering the need for such a convention.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution recognizes the historic nature of the Inter-American Convention on Protecting the Human Rights of Older Persons as an important precedent. It supports the convention in principle and not in all its specifics, because there are a variety of views within the ABA about the appropriateness or breadth of certain rights in the convention and their practical implications, as well as certain of the enforcement provisions. But, there is unanimity in support for the explicit recognition of the rights of older persons in a binding international instrument. The resolution can be used by the ABA as a springboard and precedent to energize efforts to move the United Nations toward the goal of drafting a U.N. convention on the rights of older persons. A U.N. convention, if undertaken, can provide a comprehensive statement on how existing broadly defined human rights specifically apply to older persons, especially in connection with respect to
circumstances unique to or disproportionately affecting older persons, such as discrimination based on age; multiple discrimination; palliative care; long-term care services and supports; a right to life and dignity in old age; a right to independence and autonomy; a right to participation and community integration; and a right to safety and a life free of violence of any kind.

4. **Summary of Minority Views**

None as of this writing.