

# International Rights of Older Persons: What Difference Would a New Convention Make to Lives of Older People?

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# INTERNATIONAL RIGHTS OF OLDER PERSONS: WHAT DIFFERENCE WOULD A NEW CONVENTION MAKE TO THE LIVES OF OLDER PEOPLE?

Israel Doron\* & Itai Apter\*\*

## INTRODUCTION

In recent years there has been a growing interest in the creation of an international convention on the rights of older persons.<sup>1</sup> This growing interest was transformed into an argument in favor of establishing an International Charter for Older Persons. As argued by Doron:

It may be that the most important challenge in international elder law is the framing of an international charter that defines the fundamental rights of old people the world over. Such a document, in addition to its obligatory legal status, would have great educational, symbolic, and political value and would serve to advance the rights and improve the status of the elderly the world over. Moreover, international and regional organizations should publish papers, covenants, and detailed international agreements as a basis for the specific rights of the

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1. See Edward Gordon & Luke T. Lee, *Aging: A New Human Rights Concern*, in 81 AM. SOC'Y INT'L L. PROC., 164, 164 (1987); Israel Doron, *From National to International Elder Law*, 1 J. INT'L AGING L. & POL'Y 43, 45 (2005); Diego Rodriguez-Pinzon & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT'L L. REV. 915, 1008 (2003).

elderly. The creation of such legal instruments would bring about change throughout the field of elder law at both the national and the international levels.<sup>2</sup>

This article will examine more deeply this general argument, and more specifically try to answer the following question: What difference, if any, would a new convention on the rights of older persons make to the lives of older people in light of the previous experiences with the Convention on the Eliminations of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC)?

In order to answer the research question, we will focus on the existing legal literature on international human rights law, with a particular focus on international human rights treaties. To understand the potential benefits, lack thereof, or harms from such a treaty, we will discuss the CRC and the CEDAW. As it turns out, most existing legal literature is not empirically based, but rather adopts a conceptual value-based analysis. Nevertheless, it is still valuable, as legal progress cannot be empirically "measured" without considering values and politics.<sup>3</sup>

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2. Doron, *From National to International Elder Law*, *supra* note 1, at 67.

3. Naturally, throughout the analysis we refer to the process of implementing international treaties in different domestic jurisdictions. This process of implementation is largely dependent on the "kind" of country concerned, mainly whether the legal system is of a civil law or common law nature. In civil law countries, international treaties are applied directly and so are international treaties, while in the common law systems, domestic legislation is required. See Jacob Dolinger, *Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 22 CAP. U. L. REV. 1041, 1043-44 (1993). This distinction can reflect upon the effectiveness of the treaty for the rights of the older persons, as some scholars argue that non self-executing treaties are much harder to implement. Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 184 (1998). Looking at the CRC and CEDAW, we see that this is not the case (for countries which ratified both treaties), and it would be much more relevant to look at legislation and case law, as courts in both legal systems can use the treaties as interpretive sources. For the purposes of this paper, we will assume that even if a specific country is a common law country, and local legislation is still needed, de-facto the country will eventually indeed conform to its duty to have local legislation that complies and enforces the legal commitments made according to the international convention that the country ratified.

**DETAILED ANALYSIS****DESCRIBING THE SPECTRUM**

In theory, the possible answer for the question “what difference would a new international convention for elderly rights make to the lives of older persons,” is found within a spectrum of potential arguments, as follows:

1. It will actually cause harm and reduce existing rights (the “negative” approach);
2. It will not make any difference (the “neutral” approach);
3. It will improve the rights and status of older persons (the “positive” approach).

Within the existing scientific literature, one can find support for each of the different options within this spectrum, which will be described hereby:

**THE NEGATIVE APPROACH: THE CONVENTION WILL CAUSE HARM**

This approach argues that human rights treaties are a compromise,<sup>4</sup> and while the goals are ambitious, the results are often disappointing and counterproductive. Some argue that this is the case with CEDAW, as it failed in eradicating global discrimination against women.<sup>5</sup> More specifically, this approach argues that:

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4. William E. Myers, *The Right Rights?: Child Labor in a Globalizing World*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 38, 44 (2001).

5. Kathryn Christine Arnold, Notes and Comments, *Are the Perpetrators of Honor Killings Getting Away With Murder?: Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1376 (2001).

## INTERNATIONAL CONVENTIONS CREATE "SUPERFICIAL" EQUALITY

The lack of emphasis on women's participation in CEDAW implementation resulted in "superficial" equality, as no "true" equality could be achieved without consulting the targeted group.<sup>6</sup> If drafters were unaware of the true realities of women's lives, all they could have achieved was their own sense of equality, a far cry from the real needs of women. Feminists argue that CEDAW ignores past discrimination and that women face unique realities.<sup>7</sup> The danger is that states would only comply with CEDAW, ensuring "superficial" equality, rather than focusing on remedying past wrongs.

## INTERNATIONAL CONVENTIONS ARE "BLIND" TO MULTI-CULTURALISM

The imposition of western values, via the CEDAW, can erode local traditions better suited to protect women in traditional societies. This was the case in Fiji concerning the response to rape.<sup>8</sup> When CEDAW conflicts with local religious law, unlimited/insensitive adoption can breach cultural sovereignty, and can possibly lead to a backlash reaction against local women.<sup>9</sup>

## INTERNATIONAL CONVENTIONS PAY A "PRICE" IN POLITICAL COMPROMISE

Drafting choices can prove fatal to any human rights treaty. Great criticism has been directed at the decision by CEDAW's

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6. Jo Lynn Southard, *Protection of Women's Human Rights Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 PACE. INT'L L. REV. 1, 87 (1996).

7. *Id.* at 86-97.

8. Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259, 301-02 (2004).

9. Kimberly Younce Schooley, Comment, *Cultural Sovereignty, Islam, and Human Rights – Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 672 (1994).

drafters to ignore honor killings due to political pressure<sup>10</sup> and to instead focus only on domestic violence. This choice could potentially be disastrous, as it legitimizes such acts, allowing member states (which ratified the treaty) to ignore them.<sup>11</sup>

#### FAILURE TO ENFORCE INTERNATIONAL CONVENTIONS IS DANGEROUS

The CRC wished to create standards for children's rights, enhancing their international status.<sup>12</sup> Research on CRC's effectiveness concerning, for example, Ugandan child soldiers, proved that the failure to enforce it against warring parties legitimized child soldier recruitment.<sup>13</sup> If violations of international rules go unpunished—as is the case with the CRC—this sends a message that the illegal actions are permissible.<sup>14</sup>

#### DISPUTING THE MORAL VALUES OF "RIGHTS" BASED CONVENTIONS

U.S. scholars argue that the CRC provides excessive autonomy for children, allowing them to make independent decisions traditionally made by parents.<sup>15</sup> The danger is that the

10. Honor killing is defined as a murder by a male family member of a female relative in order to preserve the family's honor. Christina A. Madek, Note, *Killing Dishonor: Effective Eradication of Honor Killing*, 29 SUFFOLK TRANSNAT'L L. REV. 53, 54-55 (2005).

11. *Id.* at 72.

12. Laura C. Clemens, Note, *International Parental Child Abduction: Time for the United States to Take a Stand*, 30 SYRACUSE J. INT'L L. & COM. 151, 169 (2003); United Nations Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on Involvement in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), available at <http://www2.ohchr.org/english/law/crc-conflict.htm> (last visited Jan. 27, 2010).

13. Nsongurua J. Udombana, *War is Not Child's Play!: International Law and the Prohibition of Children's Involvement in Armed Conflicts*, 20 TEMP. INT'L & COMP. L.J. 57, 101-02 (2006).

14. *Id.*

15. Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L. J. 449, 491 (1996).

child will lose the ability to acquire decision making skills from her/his parents,<sup>16</sup> greatly endangering domestic family values.<sup>17</sup>

#### THE PRICE OF LEGAL "GENERALIZATIONS"

The CRC aimed to be universal, avoiding particularities. This resulted in similar treatment of "normal" and "high risk" children.<sup>18</sup> Even though the Optional Protocol focuses on child soldiers, they are not given tools to protect themselves without reliance on adults to access resources.<sup>19</sup> This is worrisome if the CRC signifies the end of the discussion on children's rights.

#### PARTIAL SUMMARY: THE NEGATIVE APPROACH

CEDAW/CRC experiences show that despite good intentions, there is support for the argument that both inhibited women's and children's rights rather than advanced them, due to political compromises and defective implementation. While future drafters of a treaty on elder rights can act differently, it is likely that such a treaty could cause more harm than good due to similar reasons.

#### *THE CONVENTION WILL MAKE NO DIFFERENCE*

This approach does not necessarily dispute the potential importance of international conventions. However, it argues that in reality, international human rights treaties are not implemented and enforced. Therefore, while CEDAW can be seen as an important international development in promoting women's rights, in real life, it made little, if any, change.<sup>20</sup> More

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16. *Id.*

17. Alison Dundes Renteln, *Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 *ILSA J. INT'L & COMP. L.* 629, 639 (1997).

18. Maria Grahn-Farley, *A Theory of Child Rights*, 57 *U. MIAMI L. REV.* 867, 910 (2003).

19. *Id.*

20. See Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 *HARV. HUM. RTS. J.* 1, 16 (1995).

specifically, this approach argues that:

WITHOUT LOCAL WILL, NO REAL CHANGE IS MADE

Some scholars argue that without domestic political will, enforcement and change are impossible, especially in countries where women have no voice. Infusing foreign aid to fund programs for women's rights would not help, as such aid could be abused by local government, and so again the effect would be minimal.<sup>21</sup>

RESERVATIONS AS A TOOL TO "EMPTY" THE CONVENTION

Some CEDAW member states entered wide reservations to the treaty, marginalizing any impact of the treaty.<sup>22</sup> The so-called "Islamic reservation" to the CEDAW non-discrimination provisions argues that it violates Islamic law, stating that the latter would override CEDAW.<sup>23</sup> In such states, like Algeria,<sup>24</sup> discriminatory provisions remained, and CEDAW was not implemented.<sup>25</sup>

OPPOSING DOMESTIC CULTURE OVERRIDES TREATIES

Even if CEDAW is ratified without reservation, it would not promote change when conflicting with local customs. In

21. *Id.* at 46.

22. Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 283 (1991).

23. Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. JOUR. INT'L L. 1, 18 (1995).

24. United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women, Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Initial Reports of States Parties, Algeria*, U.N. Doc. CEDAW/C/DZA/1, at 8 (Sept. 1, 1998), available at [http://www.bayefsky.com/docs.php/area/reports/treaty/cedaw/opt/0/state/3/node/4/filename/algeria\\_cedaw\\_c\\_dza\\_1\\_1998](http://www.bayefsky.com/docs.php/area/reports/treaty/cedaw/opt/0/state/3/node/4/filename/algeria_cedaw_c_dza_1_1998) (last visited Jan. 27, 2010) (quoted in Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19, 28 (2005)).

25. Khaliq, *supra* note 23, at 25-26, 29-44.



Nigeria, twenty years after ratification, customs still prevented implementation,<sup>26</sup> while in Nepal, discriminatory laws remained fourteen years afterward.<sup>27</sup> Sometimes, CEDAW has also failed in first world countries, like Japan, where traditional discriminatory practices still prevail.<sup>28</sup>

#### IMPLEMENTING LEGISLATION DOES NOT GUARANTEE CHANGE

Likewise, CRC presents gaps between its goal, to globally protect children's rights,<sup>29</sup> and the results. Even if a state ratifies a treaty and implements it, the targeted group can remain unaffected. In Guatemala, child labor was still prevalent in 1998 (eight years after ratification), despite legislation, due to a weak judicial system and no political will.<sup>30</sup> This proves that without serious domestic elements other than legislation, international treaties have minimal effect.

#### INTERNATIONAL TREATIES CAN ALSO BE INEFFECTIVE IN NON-RESERVING MEMBER STATES

In the UK, from the time of ratification in 1991 until 2004, there was little change in children's rights in education and child poverty.<sup>31</sup> This example is noteworthy since despite the four UK CRC reservations, none regard these issues, showing that even if

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26. Andra Nahal Behrouz, Note, *Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative*, 103 COLUM. L. REV. 1136, 1143-44 (2003).

27. Press Release, United Nations, Women's Anti-Discrimination Comm., Process of Women's Empowerment Well Under Way, Anti-Discrimination Committee Told, As It Considers Nepal's Report, U.N. Doc. WOM/1423 (Jan. 13, 2004), available at <http://www.un.org/News/Press/docs/2004/wom1423.doc.htm> (last visited Jan. 27, 2010) (quoted in Neuwirth, *supra* note 24, at 33).

28. M. Christina Luera, Comment, *No More Waiting for Revolution: Japan Should Take Positive Action to Implement the Convention on the Elimination of All Forms of Discrimination Against Women*, 13 PAC. RIM L. & POL'Y J. 611, 614 (2004).

29. Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT'L L. 323, 347 (2007).

30. Jennifer Bol, *Using International Law to Fight Child Labor: A Case Study of Guatemala and the Inter American System*, 13 AM. U. INT'L L. REV. 1135, 1175-76 (1998).

31. Winston Anthony Hall, *The United Nations Convention on the Rights of the Child: The United Kingdom's Efforts to Comply*, 37 UWLA L. REV. 106, 133 (2004).

a “first-world” state ratifies the convention, there is still a chance that nothing would really change.

#### PARTIAL SUMMARY: THE NEUTRAL APPROACH

CEDAW and the CRC have been crafted as “sensitive” treaties relating to “cultural” issues. This could be why reports indicate that there has not been a significant impact on the targeted populations, and it could also be the reason for the minimal effect of a convention for the elderly.

#### *THE CONVENTION WILL IMPROVE THE RIGHTS OF OLDER PERSONS*

This approach argues that despite criticism, international human rights conventions do have an overall positive effect. The positive and declaratory value in international treaties can be determined by looking at the long-term effect of a human rights treaty and the reporting and complaint mechanisms.<sup>32</sup> More specifically:

#### THE POSITIVE OVERALL EFFECT OF TREATIES

The argument is that treaties positively affect targeted groups. Governments’ statements supporting UN declarations or GA resolutions are less effective, as they do not necessarily reflect domestic policy.<sup>33</sup> And so, they are not translated into either legislation or domestic steps which correspond with such “soft” international proclamations.<sup>34</sup> This is unlike treaties and conventions that result in corresponding policy and implementing legislation, which benefit the targeted populations.<sup>35</sup> A study into the “practical” effectiveness of

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32. Allyn L. Taylor, *Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health*, 25 AM. J. L. & MED. 479, 518 (1999).

33. Heather S. Archer, *Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States*, 5 J. INT’L LEGAL STUD. 205, 238 (1999).

34. *Id.*

35. Michele A. Powers, Comment, *The United Nations Framework Convention on*

human rights treaties found that while some member states were less likely to comply with treaty requirements, the added value of human rights treaties makes enacting them worthy.<sup>36</sup> This is the indirect declaratory value.<sup>37</sup>

#### TREATIES POSITIVELY IMPACT HUMAN LIVES

CRC sought to globally transform children's rights.<sup>38</sup> At least normatively, the CRC changed international instruments and discourse about children's rights,<sup>39</sup> as reflected in the resulting world wide domestic legislation.<sup>40</sup> One example is the Colombian legislation to reduce numbers of child soldiers.<sup>41</sup> This legislation failed, but it nevertheless provided a base for further action.<sup>42</sup> Some even argue that the CRC created a global consensus on children's rights,<sup>43</sup> turning it to customary international law.<sup>44</sup>

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*Biological Diversity: Will Biodiversity Preservation be Enhanced Through its Provisions Concerning Biotechnology Intellectual Property Rights?*, 12 WIS. INT'L L. J. 103, 120 (1993).

36. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, 2019-21 (2002).

37. Douglass Cassel, *International Human Rights Law in Practice: Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 135 (2001).

38. Rochelle D. Jackson, *The War Over Children's Rights: And Justice For All? Equalizing the Rights of Children*, 5 BUFF. HUM. RTS. L. REV. 223, 235 (1999).

39. Cynthia Price Cohen, *An Introduction to the Developing Jurisprudence of the Rights of the Child*, 3 ILSA J. INT'L & COMP. L. 659, 663 (1997).

40. Cleveland Ferguson III, *Of Politics and Policy: Can the U.S. Maintain its Credibility Abroad While Ignoring the Needs of its Children at Home?*, 14 TULSA J. COMP. & INT'L L. 191, 233 (2007).

41. Veronica Escobar, Comment, *Reclaiming the "Little Bees" and the "Little Bells": Colombia's Failure to Adhere to and Enforce International and Domestic Laws in Preventing Recruitment of Child Soldiers*, 26 FORDHAM INT'L L. J. 785, 850-57 (2002-2003).

42. *Id.* at 867.

43. Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 139-40 (2008).

44. Katie Hatziavramidis, *Parental Involvement Laws for Abortion in the United States and the United Nations Conventions on the Rights of the Child: Can International Law Secure the Right to Choose for Minors*, 16 TEX. J. WOMEN & L. 185, 197 (2007).

## SPECIFIC HUMAN RIGHTS TREATIES CREATE NEW DIMENSIONS

CEDAW also attempted to eradicate “private” discrimination against women.<sup>45</sup> This is significant, as it added a new dimension to states’ obligations. Even if women would continue to be “privately” discriminated against, the recognition that private actors must refrain from discriminatory practices is of great value.<sup>46</sup> General International Convention on Civil and Political Rights (ICCPR) provisions ignored this type of discrimination, and CEDAW complements it in a manner that could have never been solely done with ICCPR interpretation.<sup>47</sup>

## SPECIFIC TREATIES ARE A USEFUL ADVOCACY TOOL

While CEDAW had not revolutionized women’s rights legislation in member states, it provided non-governmental organizations (NGOs) with an important tool for advocacy of women’s rights, also due to NGO participation in the drafting process.<sup>48</sup> Scholars argue that without CEDAW, NGOs’ promotion of recognition of women’s rights would hardly have been as effective.<sup>49</sup>

## RESERVATIONS DO NOT NECESSARILY NEGATE THE POSITIVE IMPACT OF HUMAN RIGHTS TREATIES

Admittedly, CEDAW has drawn a large number of reservations.<sup>50</sup> However, it is still widely recognized that

45. Felipe Gómez Isa, *The Optional Protocol for the Convention on the Elimination of all Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women’s Human Rights*, 20 ARIZ. J. INT’L & COMP. L. 291, 300-01 (2003).

46. Transcript, *Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women’s Rights?*, Apr. 6, 2002, 24 MICH. J. INT’L L. 347, 443 (2002).

47. *Id.*

48. Sasha Courville & Nicola Piper, *Harnessing Hope through NGO Activism*, 592 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 49 (2004).

49. Neuwirth, *supra* note 24, at 38.

50. Michelle Lewis Liebeskind, *Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights*, 63 REV. JUR. U.P.R. 645, 667 (1994).

CEDAW positively influenced customary international law.<sup>51</sup> Much like the CRC, CEDAW created a foundation for a "global legality" of women's rights, essential for the global promotion of such rights.<sup>52</sup>

### *THE POSITIVE EFFECT OF REPORTING AND COMPLAINT MECHANISMS – CRC/CEDAW*

The relatively effective enforcement mechanisms in treaties are country reporting, enhancing monitoring of compliance and internal discussion in member states, and individual complaint mechanisms.<sup>53</sup>

We will now examine these elements in CEDAW and CRC for their potential added value.

#### REPORTING ADVANCES TREATY EFFECTIVENESS

Member states report to the CEDAW Committee on Compliance and Implementation Difficulties.<sup>54</sup> Some argue that reporting is ineffective, as the Committee cannot conduct independent investigations or impose sanctions.<sup>55</sup> However, this can be resolved if NGOs fill in the blanks,<sup>56</sup> the monitoring body engages in independently collecting data,<sup>57</sup> and international organizations act upon the recommendations of the monitoring

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51. *Id.*

52. Elizabeth M. Schneider, *Anna Hirsch Lecture: Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW ENG. L. REV. 689, 714 (2004).

53. See Takele Soboka Bulto, *Beyond the Promises: Resuscitating the State Reporting Procedure Under the African Charter on Human and Peoples' Rights*, 12 BUFF. HUM. RTS. L. REV. 57, 59 (2006).

54. Elizabeth Evatt, *Finding a Voice for Women's Rights: The Early Days of CEDAW*, 34 GEO. WASH. INT'L L. REV. 515, 518 (2002).

55. Jennifer Riddle, Note, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 618 (2002).

56. Afra Afsharipour, Note, *Empowering Ourselves: The Role of Women's NGOs in the Enforcement of the Women's Convention*, 99 COLUM. L. REV. 129, 150-51 (1999).

57. The ILO has developed such an "auditing body" which includes representatives from domestic labor organizations that are not affiliated with the government in their home states. See Taylor, *supra* note 32, at 520.

bodies.<sup>58</sup> In Bangladesh, NGOs took an active role in the reporting process, and this resulted in a much more comprehensive report and an improvement in women's rights.<sup>59</sup>

#### REPORTING FACILITATES TREATIES AS "MAINSTREAMING" TOOLS OF DOMESTIC INTERNATIONAL DISCOURSE

Like CEDAW, CRC requires states to report on implementation.<sup>60</sup> As with CEDAW, the reporting system has drawbacks, but the benefits outweigh them.<sup>61</sup> In reporting, government representatives engage in a beneficial dialogue with the CRC monitoring body and internal domestic discussions, highlighting implementation failures.<sup>62</sup> This creates discourse on global human rights, facilitating a global exchange of ideas.

#### INSTITUTING AN INDIVIDUAL COMPLAINT MECHANISM TO ENHANCE ENFORCEMENT OF HUMAN RIGHTS TREATIES

The CEDAW Optional Protocol (OP) allows women and NGOs to file individual complaints to the CEDAW Committee while enhancing the independent inquiry powers of the committee.<sup>63</sup> Many scholars view it as a means of enhancing

58. In recent years, the Human Rights Committee (an ICCPR treaty body) has undertaken the practice of forwarding its comments about non compliance to the United Nations General Assembly, and in more extreme cases to the United Nations Secretary General. See Linda A. Malone & Scott Pasternack, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 365, 382-83 (2002).

59. Afsharipour, *supra* note 56, at 156-67.

60. United Nations Conventions on the Rights of the Child Art. 44(1)(a), G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Dec. 12, 1989), available at <http://www2.ohchr.org/english/law/crc.htm> (last visited Jan. 27, 2010).

61. Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential*, 10 HARV. HUM. RTS. J. 213, 237 (1997).

62. *Id.*

63. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 38 I.L.M. 763, 43d Sess., Agenda Item 6, U.N. Doc. E/CN.6/1999/WG/L.2 (Mar. 12, 1999), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm> (last visited Jan. 27, 2010).

compliance and establishing enforcement mechanisms.<sup>64</sup>

*THE POSITIVE USE OF THE CEDAW AND THE CRC IN DOMESTIC LITIGATION*

International treaties are helpful tools in litigation in domestic and international tribunals. While the use of human rights treaties in international tribunals is natural, the use of such instruments in the domestic realm is much more recent<sup>65</sup> and can be utilized for criminal prosecutions, administrative proceedings, and civil suits for reparations.<sup>66</sup> The more relevant and interesting question to us is whether this could also be the case for a future convention on the rights of older persons, and we would look at CEDAW and the CRC for possible answers.

HUMAN RIGHTS TREATIES CAN BE A POWERFUL LITIGATION TOOL

A UK CEDAW legal impact study revealed few cases citing the treaty.<sup>67</sup> This could be due to the lack of domestic CEDAW incorporation, but it is probable that the courts are unaware of the treaty's relevance. When the treaty is presented to the court, decisions usually refer to it,<sup>68</sup> sometimes impacting the outcome. In other countries, like Canada, it is referred to as a means of support to a decision, but not as a determinative factor.<sup>69</sup> If parties and NGOs engaged in strategic litigation rely on the

64. Laboni Amena Hoq, Note, *The Women's Convention and Its Optional Protocol: Empowering Women to Claim Their Internationally Protected Rights*, 32 COLUM. HUM. RTS. L. REV. 677, 678 (2001).

65. Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L. J. 141, 143-44 (2001).

66. *Id.*

67. Carole J. Petersen & Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong*, 26 HASTINGS INT'L & COMP. L. REV. 1, 17 (2002).

68. *Islam v. Secretary for State for the Home Department Immigration Appeal Tribunal and Another*, 2 A.C. 629, 655 (1999) (quoted in Petersen & Samuels, *supra* note 72, at 18).

69. Neuwirth, *supra* note 24, at 36.

treaty, it would eventually reach legal prominence, truly impacting women's lives.

#### TREATIES AFFECT MEMBER, AND NON-MEMBER, STATES

The U.S. is not a CEDAW or CRC member, but both are relevant in the U.S. Courts use the treaties for interpretation, resulting in actual real (de-facto) effectiveness.<sup>70</sup> Gaps in enforcement can be resolved by using the treaty as a platform for making domestic legal claims,<sup>71</sup> or by states wishing to protect administrative decisions arising from international obligations.<sup>72</sup>

#### OTHER POSITIVE CONSIDERATIONS

##### INTERNATIONAL CONVENTIONS AS "EDUCATIONAL" TOOLS

The Conventions are tools to educate people and to raise awareness of the plight of the targeted groups. This would be true even if at the pre-ratification stage international players use the proposed treaty when discussing the rights of the targeted groups.<sup>73</sup>

##### THE TREATY AS AN "ANTI-AGEIST" GLOBAL POLICY

Ageism, labeling of the elderly as incompetent merely for

70. See Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 151, 159, 169 (2006).

71. Naomi Cahn, *Representing Children and International Norms*, 6 NEV. L. J. 1232, 1233 (2006).

72. For cases where the court upheld administrative actions due to international commitments in the field of international environmental law, see Carl Bruch, *Is International Environmental Law Really "Law"?: An Analysis of Application in Domestic Courts*, 23 PACE ENVTL. L. REV. 423, 433-37 (2006).

73. Continued reference could also of course encourage the ratification of the treaty. See Shruti Rana, *Restricting the Rights of Poor Mothers: An International Human Rights Critique of "Workfare,"* 33 COLUM. J. L. & SOC. PROBS. 393, 400 (2000).



their age,<sup>74</sup> is a prominent social phenomena, like sexism or anti-semitism.<sup>75</sup> Deciding not to support an elderly rights treaty can be interpreted as yet another discriminatory behavior ignoring the unique situation of older persons. Establishing such a treaty would be a strong anti-ageism, anti-discriminatory, and mainstreaming tool.

## DISCUSSION & RECOMMENDATIONS

An attempt to provide a clear and obvious answer to this project's question is impossible: existing literature does not provide such an answer. Nevertheless, a few general "themes" can be identified:

### LACK OF CLEAR EVIDENCE

A proper policy should be "evidence-based." Unfortunately, our literature review did not find sufficient empirical evidence to answer the question of the positive or negative "net worth" of CEDAW and CRC. Even when impact studies are conducted, they do not point to definite results, and usually, as was the case with the Turkey CEDAW impact study, show negative, neutral, and positive results all together. Women's rights in Turkey improved overall since CEDAW ratification, but at the same time honor killings remain (and as indicated, no enforcement leads to legitimacy of wrongful acts).<sup>76</sup> Yet, the lack of evidence should not deter us from drafting a treaty for elderly rights or adopting a positive or

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74. A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century – A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 74 (1997).

75. All are considered as forms of labeling and categorization based on prejudice and bias against those who are "different" from what the world perceives as the norm. See Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1106, 1163 (2004).

76. Linda M. Keller, Symposium Article, *The Convention on the Elimination of Discrimination Against Women: Evolution and (Non)Implementation Worldwide*, 27 T. JEFFERSON L. REV. 35, 40 (2004).

negative position towards it. While it is important to have supportive data when making policy, sometimes ideological perspectives can prevail and decisions have to be made without full empirical knowledge.<sup>77</sup>

*THE UNKNOWN VARIABLES: THE FUTURE CONVENTION'S SHAPE AND CONTENT*

Success or failure of the convention will ultimately depend on unknown variables: the drafting process, its actual value-content, and the implementation and enforcement tools. Shaping and forming of each element will positively or negatively affect the treaty's actual impact. Emphasis must also be given to active NGO participation in the drafting, as well as allowing representatives of older persons from across the world to be heard. For example, NGO participation in the drafting of the Convention on the Rights of People with Disabilities, as part of the working group, had great impact on the content of the Convention, as it allowed for a "voice" for the disabled in the process, and in one case prevented the break up of negotiations.<sup>78</sup>

The enforcement mechanisms are equally important. A peer review system should be considered alongside a complaint and reporting mechanism. Peer review allows member states to supervise each other's compliance alongside an international monitoring body. Under the Organisation for Economic Cooperation and Development (OECD) Anti-Bribery Convention mechanism, member states file a self-evaluation report, later examined by the other member states, including an

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77. This is similar to the understanding that true comparative law analysis is not a comparison between "numerical" values of legislation, cases, and writings, but rather an understanding of the different ideas at the foundation of the different legal theories. Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L. J. 221, 281 (1999).

78. Janet E. Lord, *NGO Participation in Human Rights Law and Process: Latest Developments in the Effort to Develop an International Treaty on the Rights of People with Disabilities*, 10 ILSA J. INT'L & COMP. L. 311, 314-18 (2004).

on-site visit.<sup>79</sup> It is now clear that the process succeeded in developing elevated governance norms.<sup>80</sup> The involvement of the states in the monitoring process created a sense of shared responsibility, fostering cooperation and global exchange of ideas.<sup>81</sup>

### *THE POTENTIAL ADVANTAGE*

Any future elderly rights treaty will have one significant advantage over existing conventions: it can learn from past mistakes to ensure its success. The drafters must consider the factors that support the negative and neutral approaches and attempt to correct them. By doing so, a future elderly rights convention would not only improve the lives of older persons, but can also constitute a model for future treaties. This would bring older persons rights to the forefront of human rights discourse, even if the treaty would not solve all problems. Moreover, it is symbolic that while most other disadvantaged and excluded groups (children, women, and disabled) are legally "internationally recognized" – the elderly have been left behind. According to Doron, this reflects gerontological ignorance to law, and the need for the development of jurisprudential gerontology as a tool for social change.<sup>82</sup> Thus, an elderly rights treaty can serve as an important turning point in recruiting legal institutions in becoming an effective tool in

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79. Organisation for Economic Co-operation and Development, *OECD Working Group on Bribery in International Business Transaction*, available at [http://www.oecd.org/document/5/0,3343,en\\_2649\\_34859\\_35430021\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/5/0,3343,en_2649_34859_35430021_1_1_1_1,00.html) (last visited Jan. 27, 2010).

80. Organisation for Economic Co-operation and Development, *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, available at [http://www.oecd.org/document/24/0,3343,en\\_2649\\_34859\\_1933144\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/24/0,3343,en_2649_34859_1933144_1_1_1_1,00.html) (last visited Jan. 27, 2010).

81. Roberto de Michele, Symposium, *The Follow-Up Mechanism of the Inter-American Convention Against Corruption: A Preliminary Assessment: Is the Glass Half Empty?*, 10 SW. J. L. & TRADE AM. 295, 318 (2004).

82. See Israel Doron, *Elder Law: Current Issues and Future Frontiers*, 3 EUR. J. AGING 60, 60-66 (2006); see also Israel Doron, *Bringing the Law to the Gerontological Stage: A Different Look at Movies and Old Age*, 62(3) INT'L J. AGING & HUM. DEV. 237, 237-54 (2006).

the struggle of emancipating the older population.

*THE BOTTOM LINE*

It is our view that if the proper process is adopted – weighing all of the considerations – the positive potentials override the negative ones. We do not hold that without a treaty for the rights of older persons they could not be afforded with rights, or that the treaty would be a panacea. However, we do hold that based on past experience, such a treaty could serve as a solid foundation for a process which eventually would bring true positive change to older persons around the world, especially in regions and countries that lack existing legal mechanisms to provide fundamental human rights for their older population. Finally, it could potentially become a powerful tool for the inclusion and integration of “rights discourse” in national and global social policies toward the older population.

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