

OLDER PERSONS AND THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK: ARGUMENT FOR A SPECIFIC INTERNATIONAL CONVENTION

Abstract

The human rights of older persons have been largely neglected in the international human rights framework until recent times. Older persons, however, face numerous human rights challenges in the form of discrimination, violence, poverty, and marginalisation. Existing human rights instruments are applicable to older persons as to every human being and a number of “soft law” measures in the form of declarations, principles, and plans of action are available to protect their rights. However, it has been argued that these measures are insufficient to address the specific problems faced by this segment of society. This paper seeks to consider the specific human rights challenges faced by the elderly, available measures in international human rights law for their protection, and the debate on the need for a specific international convention on the rights of older persons.

I Introduction

IN THE international human rights context, older persons¹ are a segment, the issues and challenges affecting whom, have been largely neglected, and it is only in recent times² that the problems and concerns of this group have begun to be recognised and steps taken towards addressing them. Older persons are stereotyped, often negatively, and thought of as confined to certain roles, not active or capable, nor contributing socially or economically to society. They are victims of discrimination,

1 General comment no. 6 of the CESCR takes note of the different terminology used to designate the elderly in international literature pointing out its varied nature. Terms used include “the elderly”, “older persons”, “the aged”, “the third age”, and “the ageing”. In the context of persons aged over 80, the term “fourth age” is used. CESCR, general comment 6 on The Economic, Social and Cultural Rights of Older Persons, para 9 (Aug. 12, 1995), *available at*: <http://www1.umn.edu/humanrts/gencomm/epcomm6e.htm> (last visited on June 4, 2014). Other terms used to describe older persons include “seniors” and “senior citizens”.

2 This is not to say however that the issues facing the elderly went entirely unaddressed earlier. In fact as far back as 1948, at the initiative of Argentina, the question of ageing was first taken up at the United Nations and a resolution was adopted regarding a declaration on the rights of the elderly. The issue was again raised at the UN twenty years later in 1969, and thereafter in 1973, when a resolution on “Questions of the Elderly and the Aged” was adopted. On the same date was also adopted a Resolution on Social Security for the Aged. It was in 1982 that the first meeting was convened in Vienna to address the “silent revolution”, that is increase in longevity by nearly 20 years since the year 1950. See “The United Nations and the Question of Ageing” *available at*: <http://www.unac.org/iyp/unquest.html> (last visited on Mar. 10, 2014). However, such steps can be said to have been piecemeal, and issues facing the elderly were not dealt with consistently.

abuse, and human rights violations in other forms too. These issues are of concern at all levels- international, regional, and domestic, not least because of the changing demographic situation, with older persons comprising a growing proportion of the world's population, estimated to increase from 600 million in the year 2000 to nearly two billion in 2050, and set to outnumber that of children in 2050.³ While older persons face numerous human rights challenges, it is felt that these issues are not adequately dealt with by the existing human rights framework. In fact, while human rights instruments prohibit discrimination on various grounds including race, sex, colour, language, religion, etc, among others, age is not expressly mentioned as a ground in most core instruments.⁴ Even reports filed by various states parties to monitoring bodies under different international instruments have been characterised in most cases by absence of discussion on age discrimination and other issues related to the human rights of older persons.⁵ Humanitarian law also until recently essentially failed to recognise the acute vulnerability of older people in times of conflict.⁶ Another

- 3 INPEA et al., *Strengthening Older People's Rights: Towards a UN Convention*, 3 (2010) *available at*: <http://social.un.org/ageing-working-group/documents/Coalition%20to%20Strengthen%20the%20Rights%20of%20Older%20People.pdf> (last visited Sep. 18, 2013); UNGA, "Report of Secretary General: Follow Up to Second World Assembly on Ageing", A/66/173, para 3 (22 July 2011) *available at*: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/428/83/PDF/N1142883.pdf?OpenElement> (last visited on May 20, 2014). The INEPA report also points out that the increase in the population of the elderly will be most rapid in developing countries with numbers expected to triple in forty years. The population of those in the "fourth age" has been observed to be the fastest growing segment of the population in most countries throughout the world. Arlene S. Kanter, "The United Nations Convention on the Rights of Persons With Disabilities and Its Implications for the Rights of Elderly People under International Law" 25 (3) *Georgia State University Law Review* 527, 529 (2009).
- 4 One Convention that contains an express reference to age as a ground for non-discrimination is the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families, 1990 (See particularly, arts. 1 and 7).
- 5 See Marthe Fredvang and Simon Biggs, "The Rights of Older Persons: Protection and Gaps under Human Rights Law" Social Policy Working Paper 17 (The Centre for Public Policy, August 2012) *available at*: <http://social.un.org/ageing-working-group/documents/fourth/Rightsofolderpersons.pdf> (last visited on May 20, 2014). For information on references to older persons in reports under various treaty bodies, see Lindsay Judge, "The Rights of Older People: International Law, Human Rights Standards, and the Case for New Normative Standards" (Dec. 2008), Background Briefing Paper prepared for the International Symposium on the Rights of Older People, January 2009 *available at*: <http://www.globalaging.org/elderrights/world/2008/internationallaw.pdf> (last visited on Jul. 3, 2014). See also INPEA *et al.*, *supra* note 3 at 7, which notes that older persons remain invisible in the new UN Periodic Review System where every UN member reports to the Human Rights Council on its human rights record.
- 6 Judge, *ibid.* These initiatives include the UN High Commissioner on Refugees' Policy on Older Refugees in 2000, and an agreement in 2004 by NGOs on a Humanitarian Charter setting standards for provision of relief in disaster situations, which considers the plight of older persons in some depth.

indicator of the neglect of the issue is the absence of any reference to it in the Millennium Declaration or the Millennium Development Goals.⁷

Mégret points out, while the elderly arguably raise specific human rights issues and can be said to have “distinct human rights experiences” issues related to them have been debated, through “registers, analytical or normative” such as medical, welfare, political, economic, *etc. i.e.*, other than human rights.⁸ In other words, while steps have been taken toward addressing issues facing older persons, they have been dealt with either from the “welfare” perspective or as individual issues but not often from the rights perspective. Also, despite measures such as the UN Principles on Older Persons, 1991 and the Universal Declaration on Human Rights (UDHR), older persons have been noted to have “fared far worse than other groups in terms of international human rights protections”, having been mostly ignored by the international community as a consequence of which they have encountered physical and social obstacles preventing them from leading a life of dignity and rights.⁹

The present paper attempts to look into human rights issues affecting older persons and examine the manner in which they have been dealt with in the international human rights framework. The second section considers the heterogeneity of older persons as a group noting that while older persons constitute as diverse a group as the population in general, they may also have certain shared characteristics pertaining to their experiences of ageing. The third section examines specific human rights issues and challenges which elderly persons across the world increasingly face today. The next section considers the steps that have been taken at the international level toward addressing human rights of the elderly, and the current legal framework available for safeguarding them, taking into account both “soft law” measures and measures available under the core conventions and instruments. The fifth section looks into the current debates on the need for a specific international convention for protecting the rights of older persons, the arguments in favour of and against having such a convention, and the ways in which having a convention may benefit or hinder the efforts towards ensuring that all older persons can lead their lives with dignity.

7 See UN Department of Economic and Social Affairs, Report of Expert Group Meeting: Rights of Older Persons, Bonn, 15 (5–7 May, 2009) *available at*: <http://www.un.org/esa/socdev/ageing/documents/egm/bonn09/report.pdf> (last visited on May 21, 2014).

8 Frédéric Mégret, “The Human Rights of the Elderly: An Emerging Challenge” 2 *available at*: <http://papers.ssrn.com/abstract=1584303> (last visited on May 20, 2014).

9 Kanter, *supra* note 3 at 538–39 (2009). The experience of neglect under international law and even in domestic regimes was one that the elderly shared with persons with disabilities, until the Convention on the Rights of Persons with Disabilities was adopted in 2006. *Id.* at 539.

II Understanding the heterogeneity of older persons

While age in very basic terms is simply the number of years a person has attained, the concept of old age cannot as such be understood in these terms alone. As Fredvang and Biggs argue, the notion of old age is a “socially constructed phenomenon” which affects people’s perception of older adults and their own ageing, influencing decisions about resources, priorities, and the value attributed to different parts of the life course, and it cannot merely be understood as a biological process.¹⁰ Understandings of old-age, they further note, are shaped not by fact alone but also by non-rational processes, fears, beliefs, and perceptions; to which even “social and economic policies have contributed”, thus shaping “the production of knowledge about old age, which in turn reshapes human behaviour”.¹¹ Mégret similarly observes, that the “quality” of being “elderly” may be culturally and geographically relative depending on life expectancy, life style, etc. which is also true for other groups that have been the object of special human rights attention, but this notion brings difficulties as far as concerns decisions on whether or not a person belongs to that category.¹² Factors such as gender, race, and class affect experience of old age and even of elder abuse.¹³ Yet as has been argued, as is the case with women and members of racial and ethnic minorities, the ageing are part of a “unique minority”, cutting across various social divisions as all eventually join it.¹⁴

The manner in which old age is understood, may thus vary with society and social perceptions but as Lloyd-Sherlock *et al.* note, “ageing is most often framed in negative terms questioning whether health services, welfare provisions, and economic growth are sustainable”.¹⁵ Depictions of older persons remain stereotyped and generalised distorting public opinion and skewing policy debates, for instance viewing older persons as non-productive thereby reinforcing their marginality, though many older people continue to make social, economic, and cultural contributions which can be further enhanced by measures to improve their health and functional status.¹⁶ At times, the elderly are seen as forming a different category of persons from those who aren’t old and are even seen as different from “ordinary” society.

10 Fredvang and Biggs, *supra* note 5 at 6.

11 *Id.*

12 Mégret, *supra* note 8 at 3. See also, Editorial, “Global Healthcare in Crisis” 383 *The Lancet* 927 (15 Mar. 2014).

13 *Id.* at 3–4.

14 Russell E. Morgan Jr., Dr. P.H. and Sam David, “Human Rights: A New Language for Aging Advocacy” 42 (4) *The Gerontologist* 436, 436 (2002).

15 Peter Lloyd-Sherlock *et al.*, “Population Ageing and Health” 379 *The Lancet* 1295 (2012).

16 *Id.* See also Fredvang and Biggs, *supra* note 5 at 6.

In construing older persons, understanding may be impacted by such stereotypical notions, which though may be true for some older persons, can certainly not be generalised. In fact, as pointed out in general comment 6 of the CESCR, older persons are as heterogeneous and varied as the rest of the population and their situation depends on various factors including the socioeconomic situation of the country, demographics, environmental factors, cultural factors, and employment; the situation of the family, education levels, urban or rural environment and the occupation of workers or retirees.¹⁷ While there may be older persons who have complex comorbidity or severe cognitive impairments, and thus may not be able to achieve ideals of active ageing, with there being undeniable and increasing social and economic costs involved in their care, these experiences cannot be extrapolated to older persons in general.¹⁸ There are both older persons who are in good health and are economically well placed, as well as others who lack adequate means of support and are amongst the most vulnerable, marginalised, and unprotected sections.¹⁹

In the context of the elderly, there is thus also what Mégret terms the “power/vulnerability paradox”.²⁰ While in some ways older persons may appear to be a particularly powerful segment of society — being wealthier than other segments, well integrated in society, benefitting from a culture that looks upon their accomplishments and emphasises respect, as well as may concentrate a larger section of political power; in other ways they also form a vulnerable segment of the population — in terms of disease, senescence, and death as well as abuse and exploitation besides being particularly vulnerable in times of disaster or conflict or even to certain crimes, besides being a “prime target” for poverty, marginalisation, exclusion, and negative stereotyping.²¹ Even recession and restructuring of the economy has been observed to put older persons at particular risk.²² However, despite this heterogeneity, it has been observed that there seems to be a shared experience of vulnerability by a disproportionate number of older persons; an experience of living in societies in which stereotyping, attribution of lesser value, political disempowerment, and economic and social disadvantage accompany ageing.²³ Due, in part, to these perceptions and

17 *Supra* note 1 at para 16.

18 Lloyd-Sherlock *et al.*, *supra* note 15 at 1295.

19 *Supra* note 1 at para 17.

20 Mégret, *supra* note 8 at 4.

21 *Id.* In fact as he points out the Holocaust was preceded by a “euthanasia” campaign targeted especially at the elderly in which 70,000 elderly persons were killed by gas between 1939 and 1941, on account among others of the lack of contribution by them to the national economy, and the need to allocate homes, etc, to injured soldiers. He points out that in all over 200,000 elderly persons lost their lives. The Khmer Rouge also implemented policies targeting the elderly. *Id.* at 7.

22 *Supra* note 1 at para 17.

23 Fredvang and Biggs, *supra* note 5 at 15; “Report of Secretary General” *supra* note 3 at para 41.

stereotyping, older persons increasingly face numerous human rights challenges which prevent them from their living lives with dignity.

III Human rights challenges of older persons

The human rights challenges faced by many older persons are not as such confined to any one particular area —perceptions of their age combined with other identity factors such as gender, race, etc, interfere with the enjoyment of their human rights, be they classified as “civil and political rights”(CPRs), or “economic, social, and cultural rights”(ESCRs). As some commentators have noted, it is not age which prevents older persons from enjoying their rights but ideas or conceptions of age.²⁴ Some of these issues include discrimination (in services, jobs, etc. as well as in the form of ageism); subjection to violence, abuse, or neglect (verbal, psychological, financial, or even crimes such as street crimes, *etc.*); poverty (due either to the lack of adequate social security, mandatory retirement laws, discriminatory inheritance laws which may lead to violation of women’s human rights, susceptibility to illness, etc.); inappropriate health and social care access; besides having special requirements in the context of healthcare (physical and mental).²⁵ It has also been observed that although older persons share many problems and needs with other persons, certain issues reflect the specific characteristics and requirements of this group, namely health and nutrition, housing and environment, the family, social welfare, income security and employment, and education.²⁶

Many of the issues that arise in the context of the human rights of older persons (as is the case in other contexts) do not as such fall strictly within the categories of CPRs or ESCRs but may contain elements of both. Rodriguez-Pinzon and Martin in fact point out that usually, the human rights of older persons are viewed as ESCRs creating the perception that their rights are programmatic aspirations and not subjective rights; and this perception while justified in some contexts does not apply to all rights such as CPRs including the right to fair trial and the right to non-discrimination.²⁷

24 Fredvang and Biggs, *id.* at 7; *supra* note 8 at 19.

25 INPEA *et al.*, *supra* note 3 at 5; Fredvang and Biggs, *supra* note 5 at 17–8.

26 Vienna International Plan of Action on Aging, para 17 (United Nations, New York, 1983).

27 Diego Rodriguez-Pinzon and Claudia Martin, “The International Human Rights Status of Elderly Persons” 18 (4) *Am Univ Int’l L.R.* 913, 921–22 (2003). An OHCHR Background Paper noted however, that “overall international human rights mechanisms have placed more emphasis on state obligations vis-à-vis economic, social, and cultural rights, notably the rights relating to social security, to health, and to adequate housing, than on issues relating to civil and political rights”. OHCHR, “Human Rights of Older Persons: International Human Rights Principles and Standards” Background Paper, Open-Ended Working Group, GA Resolution 65/182, 5 (April, 2011).

Older persons face numerous challenges in the context of one of the very basic rights — the right to life, which with regard to older persons may be particularly vulnerable. Some of the issues Mégret identifies are the elderly being victims of abuse and neglect that may lead to death; proposals to explicitly ration health care withholding it for persons above a certain age; as well as euthanasia which though not specific to the elderly may be particularly relevant to them because of their age.²⁸

Older persons are also especially vulnerable to torture or violence which they may experience in the form of abuse (including forms of neglect like malnutrition) or predominantly psychological (such as humiliation) or the use of restraints in institutional settings.²⁹ As Judge notes, two of the best documented examples of violence are abuse in residential care homes, and moves by families to transfer title to property and other assets without regard to the older person's concerns or preferences.³⁰ In assessing the “inhumanity of behaviour” towards the elderly, the concept of dignity becomes key.³¹ Elder abuse has been defined by the WHO as “a single or repeated act or lack of appropriate action, occurring within any relationship where there is expectation of

28 Mégret, *supra* note 8 at 7–8. The problem of euthanasia, Mégret points out is framed in terms of medical ethics or criminal law and not human rights. *Id.* at 8. While death penalty for the elderly is specifically prohibited under the American Convention on Human Rights, there are no similar provisions in the ICCPR, European Convention on Human Rights, or the African Charter. Rodriguez-Pinzon and Martin, *supra* note 27 at 922–23.

29 Mégret, *Id.* at 9. A *Report on Elder Abuse in India* by HelpAge India for 2014 has found almost 50 percent of the respondents reported abuse in some form, with verbal abuse, disrespect, and neglect being the most common types of abuse experienced by the elderly. Respondents identified emotional and financial dependence on the abuser and changing ethos as some of the reasons for such abuse. See Main Findings, *Report on Elder Abuse in India* (HelpAge India, 2014) available at: <http://www.helpageindia.org/pdf/home-slider-national.pdf> (last visited on Jul. 2, 2014). Under European Union Law, one instance of a case where age was taken into account in the context of “assessing a person's suitability for detention” under article 3 of the European Convention on Human Rights, was *Mouisel v. France* (2004) 38 ECHRR 34. The Court observed that factors such as health, age and severe physical disability had to be taken into consideration under article 3, and held conditions under which the detainee was forced to wear handcuffs to be taken to the hospital incompatible with the article. Quoted in Paul De Hert and Eugenio Mantovani, “Specific Human Rights for Older Persons” 4 *European Human Rights Law Review* 398, 407 (2011). However, as the authors point out, case law of the ECtHR indicates that “acts or omissions subject to complaint must be clearly and narrowly detailed and must reach a particular level of severity to engage this article”. *Id.* at 407.

30 Judge, *supra* note 5 at 8. The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment has also highlighted the vulnerability of older persons in detention facilities. See Report of Special Rapporteur on Torture and other Cruel, Inhuman, or Degrading Treatment, A/HRC/13/39/Add.5 (February 2010), quoted in OHCHR, *supra* note 27 at 10.

31 Mégret, *supra* note 8 at 9.

trust which causes harm or distress to an older person”.³² This definition covers most forms of abuse commonly faced by the elderly; however some aspects such as street crime as have been noted to be experienced by older persons may not be covered as the element of a relationship where there is “expectation of trust” may be absent in such a case. Abuse of older persons is often underreported as physicians are unaware of this issue, and also as older persons are reluctant or unable to report incidents.³³ Older persons also continue to experience multiple threats to their property, income or goods including fraud, arbitrary deprivation of property, expropriation of land, property or goods, *etc.*³⁴ In this regard, the biggest drawback of international human rights law, which first and foremost governs state conduct, is the lack of sufficient measures on the actions of both private sector organisations and private individuals.³⁵

In institutional settings, where older persons may have to be housed for health or other reasons, another issue that arises is of arbitrary detention, that is to say, where older persons may be placed under care even when it is not the most suitable option.³⁶ Moreover, though in some cases, there may be legitimate reason for placing older persons under institutional care, such situations have potential for abuse, and there have been many cases wherein older persons have challenged institutionalisation on human rights grounds.³⁷

Placement under institutional care can also have an impact on the family life of older persons, for instance in situations where one spouse must be placed in an institution while the other may not be accepted, leading to separation, having, at times serious emotional and psychological impact, or placement of older persons in institutions located too far from their families to have meaningful interactions with their grandchildren, *etc.*³⁸ These issues are now dealt with as involving the right to family life and have led to reappraisal of policy including proposals for permitting

32 Quoted in De Hert and Mantovani, *supra* note 29 at 406.

33 Todd D. Nelson, “Ageism: Prejudice Against Our Feared Future Self” 61 (2) *Journal of Social Issues* 207, 213 (2005). See also, “Report of Secretary General”, *supra* note 3 at para 52. In the Indian context, as a study conducted by HelpAge India on Elder Abuse for 2014 has noted, “maintaining confidentiality of the family matter” is given as the major reason (in about 59 % of cases) for non reporting of abuse. See *Report on Elder Abuse in India*, *supra* note 29.

34 “Report of Secretary General”, *supra* note 3 at para 56.

35 Judge, *supra* note 5 at 8.

36 Mégret, *supra* note 8 at 9.

37 *Id.* Mégret in this regard cites the case of *JE v. DE*, [2006] EWHC 3459 (Fam), in which a wife obtained a declaration that her husband, aged 76, and who was suffering from dementia, was deprived of his liberty within the meaning of article 5 of the European Convention on Human Rights, by the County Council. *Id.*

38 *Id.* at 10–11

persons caring for elderly members in their family to be able to take leave from work without losing benefits or claim paid leave.³⁹ In this regard, general comment 6 of the CESCR highlights the need for states parties to make all efforts to support, protect and strengthen the family, and help it to respond to the needs of ageing members in accordance with each society's system of cultural values, besides providing social services to assist families in caring for their elderly at home.⁴⁰

Moreover, in considering the issue of institutional care *vis-à-vis* care within the family, it must also be noted that for the elderly, housing does not imply mere physical shelter, but has psychological and social benefits and when formulating policy, it must be ensured as far as possible that older people can continue to live in their own homes for as long as possible if they so wish, through restoration, development and ensuring adaption in terms of accessibility, *etc.*⁴¹

Another challenge that must be addressed is of speedy judicial determination of disputes to which older persons are party. A vast number of cases concerning the elderly involve pension rights denied at times after arbitrary administrative procedures; the requirement of the reasonably speedy trial is to be interpreted in the light of the litigants' age and the fact that the elderly have less of their lives before them may be considered relevant (though not the only factor) in determining whether proceedings were unduly lengthy.⁴² It has been noted that in recent cases, courts have begun to consider the age of the litigant as a factor when determining the diligence required of domestic courts in deciding social security cases.⁴³ Human rights bodies have also been using CPRs to protect the elderly — specifically the rights to fair trial, non-discrimination, property, and equality before the law have been used to provide access to social benefits or ensure that they are not arbitrarily affected, though in practice this protection has been limited.⁴⁴

39 *Id.* at 11

40 *Supra* note 1 at para 31.

41 *Id.*, at para 33. See also De Hert and Mantovani, *supra* note 29 at 412. In the context of housing, the Committee on Social Rights under the European Social Charter has read article 31 of the European Social Charter with article 23 on social protection of older persons, calling on states to provide housing suited to the needs of older persons, and their state of health besides support toward adaptation of their houses. Quoted in De Hert and Mantovani, *Id.*

42 Mégret, *supra* note 8 at 10.

43 Rodriguez-Pinzon and Martin, *supra* note 27 at 926.

44 *Id.* at 923. For instance, in *Brooks v. Netherlands*, the Human Rights Committee stated that the scope of article 26 (ICCPR) extends to prohibit discrimination in law and in practice in any field regulated and protected by public authorities. The complainant had claimed violation of her right of equality as her social security benefits on account of disability were denied, being ensured to married women who were either "breadwinners" or separated from their husbands. *Id.* at 924.

As concerns the right to work, older persons face both discrimination on account of age as well as issues such as mandatory retirement ages which hinder their ability to support themselves as well as impact their confidence, but at the same time raise issues of intergenerational justice. In fact, as has been noted, claims against discrimination on the ground of age emerged in human rights law as a reaction to the formalisation of age barriers, and accordingly concerns against discriminatory practices based on age were first voiced in the area of employment by the ILO.⁴⁵

As some commentators point out, the ability of seniors to realize equality in the workplace has been hurt by their limited access to training and employers' negative view of older workers.⁴⁶ Negative stereotypes that are often far from the truth, continue to influence employers that older workers are inflexible, not easily adaptable to new technologies, lack initiative, are reluctant to take part in training, and tend to take more sick leave.⁴⁷ These inequalities are seen to particularly impact older women and minorities, who have already been discriminated on other accounts, having training and income that is historically disproportionate to the rest of the senior population, worsening their situation.⁴⁸

The area of mandatory retirement ages which is the subject of challenge by older persons is one where considerations of intergenerational justice are strong as mandatory retirement is seen as one way of making employment available to the young.⁴⁹ The institutionalising of age-related retirement leads to a consensus on when individuals became old regardless of their actual abilities, and such policies, despite

45 De Hert and Mantovani, *supra* note 29 at 405.

46 Morgan and David, *supra* note 14 at 438. The problem of older persons, even when they have not reached retirement age, finding employment has also been taken note of in GC 6 which stresses the need for measures to prevent discrimination in employment and occupation, and the importance of article 7 ICESCR in this regard, highlighting the desirability of employing older persons in situations making best use of their experience and know-how. The implementation of "retirement preparation programs" is also encouraged so as to inform future retirees of their rights regarding pensions, opportunities for continuing occupation, and means of curbing the detrimental effects of ageing among others. *Supra* note 1 at paras 23 and 24.

47 Morgan and David, *id.* at 438; "Report of Expert Group Meeting", *supra* note 7 at 4.

48 Morgan and David, *id.*

49 Mégret, *supra* note 8 at 15. In fact in 1995, General Comment 6 of the ICESCR observed that mandatory retirement ages was one of the few areas on which age discrimination continued to be tolerated but that even in this area as also the case of tertiary education, there is a clear trend towards the elimination of these barriers. *Supra* note 1 at para 12. The comment also calls for states to establish retirement ages that are flexible, with regard to nature of the occupation, working ability of the persons concerned, as well as demographic, economic, and social factors. *Id.* at para 28.

good intentions may become a source of discrimination, at times leading to increased economic dependence of older persons.⁵⁰ While some elderly may be willing to opt for mandatory retirements accompanied by pensions seeing it as a way of avoiding endless work, work is also seen as a defining element of human life which should not be denied except on strong arguments.⁵¹ It has been argued that mandatory retirements may be well for an elite section but its most adverse effects are felt by those that lack access to adequate pensions.⁵² For some, retirement may lead to feelings of uselessness and loss of control and in fact, work-based approaches may foster a sense of higher self esteem and empowerment.⁵³ While mandatory retirement laws have been gradually moderated by some states due both to economic reasons and civil rights, the issue remains a contentious one.⁵⁴

Social security is another issue of importance for older persons, particularly in view of limited opportunities for employment beyond a certain age, and the fact that some sections of the elderly may not due to reasons of health be in a position to take up employment, even if available. Concern has been expressed by the Committee on Economic, Social and Cultural Rights (CESCR) on both the low coverage of old age pensions as well as the lack of social protection systems for older persons.⁵⁵

The area of health and healthcare for older persons also raises a number of concerns ranging from those of availability and access, to focus in policies only on certain aspects of healthcare, which may be guided by stereotypical understandings of the health situation of older persons, as well as neglect or lack of sufficient attention to matters of concern for older persons. International documents on ageing highlight three areas of health and health care especially relevant for older persons; namely the right to access and receive health care services; to respect for autonomy (involvement in decision-making on health issues); and to have networks of care and assistance in place.⁵⁶ Among the challenges identified in the report of the UN Secretary General on the follow up to the Madrid International Plan of Action on Ageing (MIPAA), one issue taken note of is social and medical services in remote and sparsely populated

50 Fredvang and Biggs, *supra* note 5 at 6.

51 Mégret, *supra* note 8 at 15.

52 *Id.* at 16.

53 *Id.*

54 *Id.* He notes that generally even courts have refused to strike down mandatory retirement policies that seem to be justified by the need to manage worker mass, preserve labour market flexibility, or renew staff, especially in the case of universities where younger members may bring in new perspectives (For instance, the decision in *McKinney v. University of Guelph* [1990] 3 SCR 229). *Id.* at 17.

55 OHCHR, *supra* note 27 at 13.

56 De Hert and Mantovani, *supra* note 29 at 413.

areas which pose challenges despite existence of mobile services teams in some countries.⁵⁷ Further as Nelson points out, as a result of the perpetuation of the “myth” that ageing causes physical and cognitive decline, there is focus on continuous disease management rather than prevention.⁵⁸ It is not often realised that the association between chronological age and health status is often variable.⁵⁹ In lower and middle income countries, discourse on healthcare remains focussed on maternal and child health as a result of which health issues throughout the course of life remain absent from the debate; also little attention is given to non-communicable diseases, which most often affect older persons.⁶⁰ Lack of comprehensive health policies with measures for prevention, rehabilitation, and care of the terminally ill; absence of strategies on healthy and active ageing; absence of guarantees of shelter, food, sanitation, potable water, and essential medicines; and inadequate public health education, leading at times to delay in seeking health care when issues are attributed to age; inadequate staffing and lack of skilled staff, are some challenges in the context of healthcare for older persons.⁶¹

Discrimination on account of age and ageism is another important human rights challenge faced by older persons affecting enjoyment of various human rights. Age, is one of the three dimensions (the others being race and gender) on which people automatically categorise those they encounter.⁶² Ageism is described as “systematic stereotyping and discrimination against people, because they have reached a certain chronological point, and are considered ‘old’.”⁶³ Other forms of discrimination such

57 “Report of Secretary General”, *supra* note 3 at para 11.

58 Nelson, *supra* note 33 at 211.

59 Lloyd-Sherlock *et al.*, *supra* note 15. They in fact point out that the role of some relatively cheap and simple interventions such as management of hypertension, diabetes, and hypercholesterolaemia, as well as promotion of healthy lifestyles including physical activity. But such interventions are not available to large sections of adult populations in many countries.

60 “Report of Secretary General”, *supra* note 3 at para 60.

61 *Id.*, para 61.

62 Nelson, *supra* note 33 at 207.

63 See “Report of Expert Group Meeting”, *supra* note 7 at 5. It is also defined as “the view whereby “people cease to be people, cease to be the same people or become people of a distinct and inferior kind, by virtue of having lived a specified number of years”. Mégret, *supra* note 8, at 14. Another definition of ageism, is “stereotyping and prejudice against older people that leads to age discrimination”. Chinsung Chung, “Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1 (4 December 2009) quoted in OHCHR, *supra* note 27 at 7. Nelson identifies two major developments in civilisation that may have given rise to ageism. One, the printing press, which caused a change in the status and power of elders as village historians; and second, the industrial revolution, which increased family mobility, and less adaptive family structure as well as jobs that tended to be more suited to younger, stronger workers, but with longevity at the same time increasing due to advances in medicine. Nelson, *supra* note 33 at 208–9.

as that based on health conditions, sex, disabilities, or ethnic origin may further compound age discrimination.⁶⁴ Some distinguish between ageism and age discrimination noting that, ageism is stereotyping of, prejudice against, or discrimination against a person because of their age while age discrimination is when someone is treated differently because of their age.⁶⁵ It may however, be said that that merely treating a person “differently” may not necessarily imply (negative) discrimination, since at times different treatment in the form of “positive” discrimination may be called for or even measures toward ensuring equal enjoyment of rights may involve treating certain sections “differently”.

Ageism reinforces a negative image of older persons as being dependent, having declined in intellect, cognitive and physical performance and other areas of autonomous functioning, leading to a perception of the elderly as a burden, drain on resources, and persons in need of care.⁶⁶ It makes the elderly more vulnerable to abuse and discrimination in the form of denial of access to voting, education, work, etc.⁶⁷ It bars older people from getting good health care as illness is wrongly seen as an inherent part of ageing, treatments are seen as ineffective due to multimorbidity, and economic and health gains as minimal as many older persons would die soon; older persons are even excluded from clinical trials.⁶⁸ Portrayal of older persons in a negative light by ageist trends in society is one reason behind discrimination and as observed, ageism “is evident in popular culture and a certain glorification of youth”, and is a phenomenon accentuated by industrialisation, modernisation, and globalisation which corrode traditional respect for the elderly, and lead to family dislocation; as well as by prevalent individualism and consumerism.⁶⁹ The extremely rapid development of technology and difficulty faced by some older persons in keeping up has worsened attitudes in this regard.⁷⁰ Ageism manifests itself in the form of patronising language (used even by those with a positive attitude toward older persons); ageist attitudes in helping professionals (including counsellors, educators, physicians, etc. who tend to hold stereotypical views); acceptance of stereotypical roles and loss of self-esteem in older persons themselves; and elder abuse to which ageism may be a contributing factor.⁷¹

64 “Report of Secretary General”, *supra* note 3 at para 77.

65 INPEA *et al.*, *supra* note 3 at 5.

66 See “Report of Expert Group Meeting”, *supra* note 7 at 5.

67 Mégret, *supra* note 8 at 14.

68 Editorial, “How to Cope with an Ageing Population”, 382 *The Lancet* 1225 (Oct. 12, 2013).

69 Mégret, *supra* note 8 at 14.

70 *Ibid.*

71 Nelson, *supra* note 33 at 209–13.

Ageism is a more subtle form of discrimination, combating which and promoting the dignity of older persons becomes key to ensuring older persons the respect they deserve.⁷²

In view of the numerous human rights challenges encountered by older persons on a daily basis, it becomes important to examine what mechanisms in the international human rights framework are available to older persons to ensure enjoyment of their basic human rights.

IV Human rights of older persons: International efforts and legal framework

Older persons and the issues related to them have largely been absent from explicit mention in the international legal framework on human rights. As has been observed, no international treaty offers older persons a tailored, comprehensive, and binding protection of their rights.⁷³ Regional laws also do not offer any such protection to older persons' rights. However, there are provisions of various existing international instruments that are applicable towards the protection of older persons' human rights.

In addition, the international soft law protection of the human rights of older persons, which in fact addresses issues facing them in a more direct and express manner, is wide-ranging and includes sets of principles, declarations, plans of action, and comments on interpreting the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) standards applicable to older persons, all of which provide useful guides for setting standards and influencing domestic policy though they are not legally binding.⁷⁴

One of the earliest major efforts⁷⁵ wherein human rights issues of older persons were discussed and a plan of action prepared was the World Assembly on Aging in 1982 which adopted the Vienna International Plan of Action on Aging. The plan reaffirmed that the fundamental and inalienable rights enshrined in the UDHR apply "fully and undiminishedly" to older persons.⁷⁶ The plan sought "to strengthen the

72 Mégrez, *supra* note 8 at 14; "Report of Expert Group Meeting", *supra* note 7 at 2.

73 Fredvang and Biggs, *supra* note 5 at 12. In fact, as Rodriguez-Pinzon and Martin point out, older persons are the only vulnerable population lacking a comprehensive of binding international instrument specifically addressing their rights. Rodriguez-Pinzon and Martin, *supra* note 27 at 1008.

74 Fredvang and Biggs, *supra* note 5 at 12–3.

75 See *supra* note 2 for steps for protection of the rights of the elderly prior to the 1982 Vienna Conference and Plan of Action.

76 See Preamble, Vienna International Plan of Action on Aging, *supra* note 26.

capacities of countries to effectively deal with the aging of their populations and with the special concerns and needs of their elderly”, besides promoting appropriate international response to the issues of ageing.⁷⁷ It set out steps such as avoiding segregation of the elderly; encouraging care at home, wherever feasible and avoiding extreme measures such as hospitalisation as far as possible; rejection by governments of stereotypical conceptions of the capabilities and needs of the elderly; among others, and also took note of aging being a “cross-cultural” experience where “similarities outweigh differences”.⁷⁸ The plan, however, does not require states to revise their domestic laws toward ensuring better protection of the rights of older persons.⁷⁹

In 1991, the United Nations General Assembly adopted the UN Principles for Older Persons. These are a set of 18 principles classified into five categories, namely independence, participation, care, self-fulfilment, and dignity.⁸⁰ The principles include the recognition of the need for older persons to have access basic necessities, opportunity to work and education; social integration and participation in society; benefit from family and community care, access to healthcare, enjoyment of human rights and fundamental freedoms; besides being able to lead a life with dignity and receiving fair treatment. Mégret argues that the overarching focus in the 1991 UN Principles on concepts such as “independence”, “participation”, “care”, “self-fulfilment”, and “dignity”, fall short of what one might expect from a human rights instrument proper.⁸¹

Another important development in the “soft law” on older persons was the adoption by the CESCR of general comment 6 under the ICESCR on “The Economic, Social and Cultural Rights of Older Persons” in its thirteenth session in 1995. As De Hert and Mantovani point out, general comments have contributed to both defining standards not fully expressed in the covenant, and helped setting a standard, and their quasi judicial character derives from the authority acquired by the CESCR, whose interpretations are often used by human rights courts in their judgments.⁸² The comment discusses the rights of older persons in relation to the ICESCR including the obligations of state parties in this regard as well as specific rights including equal rights of men and women (emphasising the need to pay specific attention to women

77 Foreward, *id.*, para 2.

78 Kanter, *supra* note 3 at 534–35.

79 *Id.* at 535.

80 United Nations Principles on Older Persons, Adopted by General Assembly Resolution 46/91, 16 December 1991.

81 Mégret, *supra* note 8 at 6.

82 De Hert and Mantovani, *supra* note 29 at 401.

who have spent their lives caring for their families); work; social security; family; standard of living; health; education, and culture. The comment has been described as “probably one of the most high profile signs that the condition of the elderly is an issue for mainstream human rights treaty bodies”⁸³, and “as the most comprehensive legal analysis of the rights of the elderly currently existing at international level”.⁸⁴ The comment has however, also been criticised on account of the CESCR’s having stopped short of stating that the term “other status” can be interpreted as including age and not giving reasons for not doing so, and also because while it gave substantial weight to numerous documents towards supporting the trend in eliminating age discrimination, it fell “disappointingly short in interpreting these documents” to conclude that the ICESCR prohibits discrimination based on age.⁸⁵

In 2002, in view of the vast changes that had taken place in the world since the adoption of the Vienna International Plan of Action on Aging in 1982, particularly the fact that ageing which was initially thought a concern for developed countries, had gained real momentum in developing countries also, the UN General Assembly adopted the MIPAA in the Second World Assembly on Ageing held in Madrid that year.⁸⁶ The MIPAA focuses on older persons and development; advancing health and well-being into old age; and ensuring enabling and supportive environments. It aims to ensure that “persons everywhere are able to age with security and dignity and continue to participate in their societies as citizens with full rights”.⁸⁷ Among its central themes are the full realisation of the human rights and fundamental freedoms of all older persons; achievement of secure ageing; empowerment of older persons to fully

83 Mégret, *supra* note 8 at 6. Mégret also points out that the Human Rights Committee under the ICCPR has not produced a similar comment. The Human Rights Committee has however, not neglected the issue of age discrimination. In the case of *Love et al. v. Australia*, Communication No 983/2001 (views of Mar. 23, 2003), it was observed in the context of art. 26 of the ICCPR on equality before law, that while age is not mentioned as one of the grounds of prohibited discrimination, “the Committee may take the view that a distinction relating to age not based on reasonable and objective criteria, may amount to discrimination on the grounds of “other status” or denial of equal protection of law within the meaning of the first sentence of art. 26. See also *Schmitz de Jong v. The Netherlands*, Communication No.85/1999; *Solis v. Peru*, Communication No. 1016/2001; and *Althammer et al. v. Austria*, Communication no. 998/2001. OHCHR, *supra* note 27 at 7. See also, “Report of Secretary General”, *supra* note 3 at para 27.

84 Rodriguez-Pinzon and Martin, *supra* note 27 at 952.

85 *Id.* at 953–4.

86 See United Nations, Political Declaration and Madrid International Plan of Action on Ageing (United Nations: New York, 2002).

87 *Id.*, para 10. Mégret thus observes that the MIPAA is more human rights focussed as against the UN Principles of 1991. *Supra* note 8 at 6.

participate in the social, economic, and political lives of their societies including through income-generating, and voluntary work; and elimination of all forms of violence and discrimination against older persons; among others. Since its adoption, the MIPAA has guided the drafting of policies and regional plans and provided an international framework for dialogue.⁸⁸

In 2007, a high level meeting of the regional review of the MIPA was held at Macao. At this meeting 46 recommendations for action were made on the three priority areas of the MIPAA, including mainstreaming ageing concerns, strengthening health systems for the prevention and management of chronic diseases; strengthening old persons associations and NGOs to address the needs of and empower older persons; and promotion of regional cooperation on trans-boundary issues.⁸⁹

In 2010, the CEDAW adopted general recommendation 27 on older women and protection of human rights under CEDAW. The recommendation emphasises the multiple discrimination faced by older women, particularly in areas such as finance and micro-credit or limitations to health services, in which the situation of women erodes with age.⁹⁰ The committee has also scrutinised in recent times, states parties on the situation of older women in the context of different human rights.⁹¹

In 2010, the UN General Assembly set up an open-ended working group on ageing towards strengthening the protection of human rights of older persons. One of the most recent developments in this regard is the appointment in May 2014 of an Independent Expert on the Full Enjoyment of Human Rights of Older Persons, Rosa Komfield-Matte, who will, *inter alia*, assess the implementation of international human rights instruments in relation to older persons, identifying both gaps and good practices; assess the human rights implications of the implementation of the MIPAA; raise awareness of challenges faced by older persons in the realisation of their rights; and make fact finding visits, making annual reports to the Human Rights Council.⁹²

88 “Report of Secretary General”, *supra* note 3 at para 18.

89 See The Macao Outcome Document of the High Level Meeting of the Regional Review of the Madrid International Plan of Action on Ageing, ESID/HLM-MIPAA/Rep. (Nov. 1, 2007).

90 OHCHR, *supra* note 27 at 8.

91 *Ibid.* Some instances of steps taken by the committee include calling for appropriate measures to eliminate discrimination with respect to ownership and inheritance of land; asking states parties to conduct gender assessments of social legislations; urging states parties to pay special attention to rural women, particularly older women towards ensuring their participation in decision-making processes, etc.

92 Bridget Sleap, “UN Human Rights Council Appoints Independent Expert on Older People’s Rights” available at: <http://www.helpage.org/newsroom/latest-news/un-human-rights-council-appoints-independent-expert-on-older-peoples-rights/> (last visited on Jul. 2, 2014).

Thus, the “soft law” measures at the international level recognise that there is need for governments to take steps to provide for the special needs of senior citizens, and at the same time, also take note of the importance of senior citizens leading an independent life as far as possible and being active participants in policies to protect their rights. While soft law has an extremely important role to play as a guide for policy matters, due to their non-binding nature, implementation is often weak.⁹³

While most core international human rights instruments do not expressly mention “age” as a ground for prohibiting discrimination, it has been pointed out that “the lists are merely illustrative”, usually including the open-ended category (“other status”) under which age discrimination may be considered.⁹⁴ However, the inclusion of “age” only within the category of “other” is seen as lacking strength and having the effect of making older persons invisible as a group within the law.⁹⁵

As concerns international conventions, only one, the International Convention on the Rights of Migrant Workers and Members of their Families, mandates against age discrimination.⁹⁶ Article 1 of this convention expressly mentions “age” as one of the grounds on which there should be no discrimination in the application of the convention, in addition to others such as sex, race, colour, political opinion, etc. Further, article 7, which forms part II of the convention titled “Non-discrimination with Respect to Rights”, requires states parties to undertake to respect and ensure to all migrant workers and their families in their territory the rights in this convention without discrimination on various grounds, in which again “age” expressly finds mention.

Another international instrument that mentions “age” as a potential source of multiple or aggravated discrimination is the Convention on the Rights of Persons with Disabilities (CRPD).⁹⁷ Article 8 (1) (b) speaks of combating stereotypes, including those based on age, in all areas of life. It has been observed that among the core human rights treaties, the CRPD offers the most useful protection for older persons.⁹⁸ The CRPD does not specifically define disability and adopts a rights based approach. By not specifically defining “disability”, it recognises that a person may be considered

93 See “Report of Expert Group Meeting”, *supra* note 7 at 15.

94 “Report of Secretary General”, *supra* note 3 at para 24.

95 See “Report of Expert Group Meeting”, *supra* note 7 at 15.

96 INPEA *et al.*, *supra* note 3 at 6

97 OHCHR, *supra* note 27 at 6. For a detailed discussion on the relevance of the CRPD to older persons, see Kanter, *supra* note 3.

98 Fredvang and Biggs, *supra* note 5 at 11.

as having a disability in one society or setting and not in another depending on the role the person is assumed to take in the community and barriers disabling them from participating in a given society.⁹⁹ Moreover, the inclusion of a definition would undermine the CRPD's commitment to a social model placing the responsibility for eradicating unequal treatment on society.¹⁰⁰ The principles in the CRPD including respect for dignity, non-discrimination, full participation and inclusion in society, equality of opportunity and accessibility are relevant to older persons.¹⁰¹ Article 8 and article 12 on the right to recognition before law of persons with disabilities are of importance, for instance in protecting older persons from paternalistic policies.¹⁰² Article 9, addressing issues of accessibility (not only physical but also of information and communication), and requiring both removal of existing barriers and prevention of new ones, is important for older persons with mobility and other challenges who would not be considered "disabled" under most domestic laws.¹⁰³ Further, article 25 (b) on the right of access to health services refers to older persons as does article 28 (2) (b) on right of access to social protection and poverty reduction programs; article 16 ("age-sensitive assistance" by states to ensure freedom from exploitation, violence and abuse); article 19 (independent living); article 20 (mobility); and articles 25 and 26 (health, habitation, and rehabilitation).¹⁰⁴

The CEDAW contains a reference to "old age" in article 11 in relation to the elimination of discrimination against women in the enjoyment of social security. The CEDAW also becomes relevant for the elderly as it offers older women, who are more likely to be poor, suffer loss of status, and double stigmatisation, more tailored and explicit protection by condemning discrimination, considering the vulnerability of rural women, and offering some protection from sexist inheritance laws.¹⁰⁵

Moreover, the CEDAW and CPRD's sweeping definition of discrimination, clarifying that policies and practices that have an unjustifiably disparate gender or race based impact may constitute discrimination, even if unintended, is relevant for older persons as gender and race are often important in examining causes of pre-existing

99 Kanter, *supra* note 3 at 551.

100 *Ibid.*

101 Fredvang and Biggs, *supra* note 5 at 11.

102 *Ibid.*

103 Kanter, *supra* note 3 at 558.

104 Fredvang and Biggs, *supra* note 5 at 11.

105 Judge, *supra* note 5.

inequalities in areas such as income and healthcare.¹⁰⁶ The prohibition against torture, cruel, or inhuman treatment under the ICCPR and the Convention Against Torture can be used to argue for more protective treatment of older persons in residential care and nursing homes.¹⁰⁷

Besides the aforesaid provisions, the ILO in its Older Workers Recommendation No. 162 called for measures to prevent discrimination in employment and occupation within the framework of a national policy to promote equality of opportunity and treatment of workers and in its recommendation 166 stated that age should not constitute a valid reason for termination subject to national law and practice on retirement.¹⁰⁸ Other relevant recommendations of the ILO include convention 142 on provision of career guidance and vocational training without age discrimination, and convention 156 dealing with elderly workers as well as discrimination of workers who take care of the elderly.¹⁰⁹

In addition there are also a number of private international law instruments such as the Hague Convention on the International Protection of Adults, 2000 which may be particularly relevant to the elderly, for instance by calling for improvement in the situation of adults who are unable to safeguard their own interests in the light of such ailments as Alzheimer's disease.¹¹⁰ Various regional human rights instruments also contain references to the rights of older persons, perhaps more specifically than international instruments.¹¹¹

106 Morgan and David, *supra* note 14 at 437.

107 *Id.* at 438.

108 "Report of Secretary General", *supra* note 3 at para 25.

109 Rodriguez-Pinzon and Martin, *supra* note 27 at 951.

110 Mégret, *supra* note 8 at 7.

111 For instance, the Charter of Fundamental Rights of the European Union, 2000 specifically lists age as a ground for non-discrimination; art. 25 of the said charter recognises the right of the elderly to lead a life of dignity and independence and participate in social and cultural life; art. 23 of the Revised European Social Charter, 1996 deals with the right of the elderly to social protection; art. 17 of the San Salvador Protocol (1988) to the American Convention on Human Rights on the protection of the elderly recognises the right of "everyone" to special protection in old age toward which states parties agree to take steps progressively to provide suitable facilities including food and medical care, for those who are unable to provide for themselves and lack them; undertake work programs designed to give the elderly the opportunity to engage in productive activity suited to their abilities and consistent with their vocation or desire; and fostering the establishment of social organisations aimed at improving the quality of life for the elderly; the African Charter on Human and Peoples' Rights in art. 18 recognises, *inter alia*, that the family shall be "the natural unit and basis of society", also provides that "the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs". Art. 29 further recognises the responsibility of the state to

While the provisions of the core human rights instruments are clearly applicable to older persons and some provisions of the instruments discussed above can play a particular role towards the protection of rights of the elderly, many argue that these along with the non-binding soft law measures are insufficient protection for the human rights of the elderly and a specific convention addressing human rights of older persons is required. Moreover, as Kanter points out, a review of international and regional instruments enacted to enhance the rights of the elderly makes it apparent that the view perpetuated in the majority is of older persons as being “in need of protection”, rather than “rights-holders”.¹¹² The next section discusses the arguments put forth in favour of a convention as well as those opposing it on the ground *inter alia*, of sufficiency of the extant mechanisms.

V An international convention on the rights of older persons: Debates

One approach to protecting the rights of the elderly is treating them as a group deserving special attention, in the same vein as other vulnerable groups, based on a broad interpretation of the principles of equality, reflected in measures of “affirmative action”, or “positive discrimination”.¹¹³ In fact according to Rodriguez-Pinzon and Martin, the “vulnerable group” approach is central to enhancing the protection of the rights of the elderly, as it is applicable in the context of both civil and political, as well as economic, social, and cultural rights.¹¹⁴ Many NGOs such as Help Age International, the International Federation on Ageing and the Council on the Ageing, besides some UN member states argue that the measures available thus far in the context of the ageing fail to provide explicit support and are easily subject to ageist interpretation, and therefore, an international instrument focused on the rights of older persons is required for effective protection of their rights.¹¹⁵

It is argued by proponents of a convention that older persons experience specific forms of rights violation on account of their age and that ageism and age discrimination are unacceptable.¹¹⁶ Further, there are normative gaps that affect the dignity of older people¹¹⁷ as well as gaps in the implementation and monitoring of legal instruments

provide special protection to the elderly as needed, but acknowledging that individual members of the person’s family would also provide care.

112 Kanter, *supra* note 3 at 538.

113 Rodriguez-Pinzon and Martin, *supra* note 27 at 922.

114 *Id.* at 945.

115 Fredvang and Biggs, *supra* note 5 at 13.

116 *Id.* at 15; INPEA *et al.*, *supra* note 3 at 7–8.

117 There are a number of normative gaps where rights of older persons are not adequately addressed by existing human rights law, for instance, international standards on rights within community based and long-term care giving settings for the care giver and person under care;

similarly affecting the enjoyment of rights by the elderly.¹¹⁸ Also, as noted earlier, the existing framework offers insufficient protection and in many instruments age is not listed as a specific ground for prohibition of discrimination. Failure to do so obscures the discriminatory experiences of older persons.¹¹⁹ Judge further observes that standards offering protection to older persons are dispersed through different human rights texts and articulated mainly through interpretative and advisory documents and, as was the case with CEDAW or CRC, bringing the relevant provisions together in one instrument would bring greater clarity as to the nature of rights and corresponding responsibilities.¹²⁰

Advocates of a specific international convention argue that drawing attention to older people in this way will strengthen the struggle against ageism and would enable older persons to live dignified, secure lives, as equal members of society, besides making possible participation in and contribution to their own development and of those around them, thus leading to more equitable, inclusive and sustainable societies, and better development.¹²¹ Recognition of rights would also provide standards for delivery of services.¹²²

A specific convention would highlight the multiple forms of discrimination and abuse faced by older persons; provide specificity on unique human rights challenges encountered by them; provide a basis for advocacy, education, and awareness on the rights of the elderly; and make visible the responsibilities of states and other actors towards older persons.¹²³ Visibility of older persons in human rights law as a consequence of a convention is an aspect also highlighted by the “Chung Report” as lack of express reference to older persons in human rights instruments has rendered them “invisible as a group within the law”, and parties “age-blind” in reporting violations.¹²⁴ It would have educational, symbolic, and political value, serve to advance the rights and improve the status of the elderly the world over; and provide a foundation for bringing positive progress, even if it does not solve all problems.¹²⁵

legal planning for old age; abolition of mandatory retirement ages; and the issue of legal capacity and equality before law for older men and women under guardianship that requires immediate attention. INPEA *et al.*, *Id.* at 6.

118 Fredvang and Biggs, *supra* note 5 at 15.

119 Judge, *supra* note 5 at 11.

120 *Id.*

121 Fredvang and Biggs, *supra* note 5 at 15; INPEA *et al.*, *supra* note 3 at 7–8.

122 INPEA *et al.*, *Id.* at 8.

123 INPEA *et al.*, *Id.*; Fredvang and Biggs, *supra* note 5 at 18–9. See also “Chung Report” quoted in De Hert and Mantovani, *supra* note 29 at 403.

124 De Hert and Mantovani, *Ibid.*

125 Israel Doron, “From National to International Elder Law” 1 *The Journal of International Aging Law and Policy* 43, 67 (2005); Israel Doron and Itai Apter, “International Rights of Older

In the context of international law and human rights bodies also, the adoption of a specific convention can have several advantages. It can contribute towards framing older persons' rights as an essential part of the international human rights agenda; strengthening implementation of existing international law; providing a reporting and accountability mechanism for actions of states; providing a redressal system for violation of rights of the elderly; encouraging dialogue between UN members, civil society, etc; and encouraging better development aid for programmes benefitting the elderly.¹²⁶

Further, in the domestic legal context, it would allow human rights bodies to monitor the situation in their respective countries and lobby governments to incorporate their obligations into law; contribute to generation of political will for change; help towards increasing allocation of government resources to older persons; and establishing legally effective standards to assure older persons' rights and prevent discrimination.¹²⁷ It would, thus, enhance significantly recognition and reparative action, thereby ensuring empowerment and protection.¹²⁸ Also, it would play a part in the transition from the traditional welfare model to the rights model for older persons.¹²⁹

Another advantage of a specific convention is in the context of creating awareness and education about the challenges faced by and rights of older persons and the consequent removal of biases, as well as better training of persons involved in the care of older persons, and others dealing with older persons' rights such as the judiciary.¹³⁰ It could also be a source of guidance to the private sector on protection of rights of the elderly.¹³¹

It is argued that once it is accepted that older people face specific forms of abuse such as social ageism, discrimination in the workplace, health care, etc.; and in view of the fact that other underprivileged groups have internationally recognised charters of rights there is no reason to deny them a specific instrument as has been done for other disadvantaged groups.¹³² Failure to enact policies for older persons and to devote adequate financial and human resources to their needs creates the risk of neglect; though the CRPD may contain relevant provisions, challenges confronted

Persons: What Difference Would a New Convention Make to the Lives of Older People" 11 *Marquette Elder's Advisor* 367, 384–5 (2010).

126 INPEA *et al.*, *supra* note 3 at 8; Fredvang and Biggs, *supra* note 5 at 18–9.

127 Fredvang and Biggs, *ibid.*

128 *Id.* at 18.

129 *Id.* at 18–9.

130 *Ibid.*

131 INPEA *et al.*, *supra* note 3 at 8.

132 Fredvang and Biggs, *supra* note 5 at 15; Doron, *supra* note 125 at 67.

by older persons without disabilities may leave them without access to measures and policies and enjoyment of human rights equally with others.¹³³ Also, a specific convention for older persons should not be inhibited by acknowledged difficulties in the definition of older persons because of the differences in social construction of later life between cultures and contexts.¹³⁴ As is the case with disability, the concept is contingent on chronological age, self-identification, social practice and other external factors.¹³⁵ Doron and Apter argue that one significant advantage that any future treaty on older persons' rights would have over existing conventions would be learning from past mistakes to ensure its success.¹³⁶

However, the formulation of a specific convention has many opponents including countries such as the United States, China, Switzerland, Norway, and Russia. It is argued that universalism ensures the rights of all groups and insisting on the fragmentation of human rights would endanger the rationale and coherence of "universal human rights".¹³⁷ Judge, however, points out in the context of this argument that the generic provisions of human rights law are refracted through discriminatory attitudes and practices and hence do not sufficiently protect older people.¹³⁸

Secondly, "soft law" protections are claimed to be strong enough to ensure effective protection of the rights of older persons. It is argued that the influence of soft law should not be underestimated and could provide sufficient protection if there is focus on better implementation of and respect for present conventions, treaties, principles, and declarations.¹³⁹ In this context, it may be reiterated, that due to the non-binding nature of soft law protections, implementation is usually weak.

Those opposing the adoption of a specific convention also raise the issue of costs, contending that drafting a convention is a costly and lengthy process, with limits to enforceability, a weak accountability system, no effective sanctions, and an already stressed monitoring and complaints mechanism.¹⁴⁰ In this context it is pointed out that the CRC for instance was not effectively implemented as regards the case of Ugandan child soldiers, and if violations of international rules go unpunished, it sends a signal that illegal actions may be permissible.¹⁴¹ The experiences with CEDAW and

133 "Report of Secretary General", *supra* note 3 at para 47.

134 Fredvang and Biggs, *supra* note 5 at 15.

135 *Ibid.*

136 Doron and Apter, *supra* note 125 at 384.

137 Fredvang and Biggs, *supra* note 5 at 14.

138 Judge, *supra* note 5 at 16.

139 Fredvang and Biggs, *supra* note 5 at 14.

140 *Ibid.*

141 Doron and Apter, *supra* note 125 at 371.

CRC show that despite good intentions, there is support for the argument that they inhibited women's and children's rights rather than advancing them.¹⁴²

While as noted above, proponents claim that a convention would draw attention to issues and challenges facing the elderly thereby leading to the issues being more effectively addressed, opponents highlight the issue of "paradoxes within conventions" which may result in working against the interests of the groups sought to be protected.¹⁴³ This is that the creation of human rights specific to the elderly may reinforce some of the very problems it seeks to alleviate as it may artificially reinforce the distinctness of the elderly, a group with which many persons may not like to be identified with merely on account of their age.¹⁴⁴ In other words, singling out older persons through a convention will underline differences between them and "normal" society, thereby increasing their marginalisation.¹⁴⁵

Moreover a convention may result in only superficial legal rights with no actual social change.¹⁴⁶ In this context, the instance of CEDAW is cited, with regard to which it has been argued that it has resulted in only superficial equality and no true equality could be achieved without consulting the targeted group.¹⁴⁷ Thus, it is suggested that instead of a convention, efforts could be made towards working with lobbying agencies to ensure better provision of services to older persons.¹⁴⁸

While many of the arguments opposing a convention are persuasive and demonstrate that a specific convention may offer only superficial protection and may result in hindering rather than protecting the rights of older persons, it is equally important to note that as pointed out the existing measures have been found insufficient in adequately ensuring the rights of older persons. Moreover, as noted, in the process of formulating a convention on older persons' rights, the experiences of previous conventions can be borne in mind and any process that follows would necessarily address those issues such as involvement of the elderly in the drafting process, and using more successful experiences such as the CRPD as a model.

VI Conclusion

Older persons face numerous human rights challenges in their daily lives on account of age and the negative stereotypes wrongly associated therewith, as a

142 *Id.* at 372.

143 Fredvang and Biggs, *supra* note 5 at 14.

144 Mégret, *supra* note 8 at 15.

145 Fredvang and Biggs, *supra* note 5 at 14.

146 *Ibid.*

147 Doron and Apter, *supra* note 125 at 370.

148 Fredvang and Biggs, *supra* note 5 at 14.

consequence of which their ability to exercise their right to life with dignity is hindered. Yet, issues facing them have remained mostly unaddressed or only nominally acknowledged for long with older persons continuing to be “invisible” within human rights mechanisms which have been and continue to be “age-blind”.

One issue that becomes important to understand is that of heterogeneity as stereotypical perceptions of older persons lead them to be viewed narrowly as not active and not contributing to society. In this regard education and awareness becomes relevant. It can help towards moulding opinion in combating such stereotypes, for instance, in the context of work, can give both employers better understanding and potential employee’s confidence and public support¹⁴⁹, as well as in other contexts enable younger persons as well as older persons themselves to view the elderly as any other segment of the population. It must also be borne in mind that some sections of older persons may be marginalised and made vulnerable due to specific circumstances, but again, this cannot be the generalised view of the older population as a whole.

As noted, older persons face human rights challenges across the entire range of human rights- from issues of CPRs - the right to life, to speedy trial, violence and abuse (both physical and psychological) to fraud, to ESCRs such as work, healthcare, social security, etc. Most cases may involve discrimination on account of their age, and more so ageism or stereotypes associated with that age. What is to be ensured in this regard is an environment and a framework in which older persons are viewed as rights-holders and not merely as “persons in need of protection”, or from a “welfare” perspective. The Office of the High Commissioners for Human Rights (OHCHR) in a background paper has pointed out that some human rights mechanisms have addressed the human rights of older persons by acknowledging the need for age specific measures, not necessarily requiring identification of older persons as marginalised or vulnerable but instead considering identifiable age-group requirements in comparison with other age groups.¹⁵⁰ The concept of universal design put forth under the CPRD which is the design of “products, environments, programmes, and services” such that they can be used by all persons, becomes relevant¹⁵¹ here as such notions can ensure that the environment available in the context of enjoying one’s basic rights is such that all persons can equally access and exercise their rights. The CRPD model is also important as it focuses on capability and inclusion, and ways to prevent and remove attitudinal and structural barriers that prevent persons with disabilities from becoming members of communities.¹⁵²

149 Morgan and David, *supra* note 14 at 438.

150 OHCHR, *supra* note 27 at 11.

151 *Id.* at 14.

152 Kanter, *supra* note 3 at 572.

The existing international human rights framework contains both soft law measures towards ensuring the human rights of older persons as well as provisions of existing human rights instruments that are applicable and some which are of particular importance such as the CRPD in the context of older persons. Attempts have been made towards ensuring that older persons' issues are not neglected in the human rights framework, for instance by the CESCRC by requiring states parties to address such issues through their questioning on reports filed. The recent appointment of an Independent Expert on the Full Enjoyment of Human Rights of Older Persons is another positive development and will certainly play an important role in identifying and highlighting the human rights situation of older persons. However, the existing framework is argued to be insufficient for adequately protecting the human rights of older persons. Soft law measures are not binding and implementation is weak, and coverage of older persons only in "other status" in the provisions of core instruments has been noted to be weak and thus the "invisibility" of older persons persists.

There have, thus, been debates on the need for a specific convention addressing the human rights of older persons, so far, the only group that lacks such an instrument. A specific convention would have several advantages including bringing to light human rights issues faced by older persons on a day to day basis and providing a framework bringing clarity on rights and responsibilities, strengthening the struggle against ageism, and enabling them to lead a life of dignity and security.

While as pointed out, other instruments for specific groups may not have brought about the desired changes, this cannot be held against having a specific instrument for the elderly, particularly in view of the fact that the current framework does not offer strong protection. A new instrument would certainly provide a strong starting point for initiating better levels of protection as well as for creating awareness and combating stereotypes which are seen to be the root cause of much of the discrimination and human rights abuses. If steps are taken toward drafting such a convention, the involvement of older persons would be of utmost importance in this process.

Until such steps are taken efforts must be made to ensure that available measures are implemented in the strongest possible manner. This process has certainly commenced with different human rights bodies taking note of the need to address these issues and taking steps in this regard. Creation of awareness and advocacy efforts are of utmost importance in this regard, and it is here that NGOs working in this area can make a vital contribution.

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