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**STRATEGY PROPOSAL, FROM THE PERSPECTIVE OF LATIN AMERICA AND THE  
CARIBBEAN, FOR ADVANCING TOWARDS AN INTERNATIONAL CONVENTION  
ON THE HUMAN RIGHTS OF OLDER PERSONS**



UNITED NATIONS



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## PRESENTATION

The Brasilia Declaration, adopted in 2007 at the second Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean: towards a society for all ages and rights-based social protection,<sup>1</sup> and ratified in ECLAC resolution 644(XXXII) of 2008, called on participating governments to work towards adopting a international convention regarding the rights of older persons (Article 24). It also established a mandate for a Human Rights Council Special Rapporteur who would be responsible for promoting and protecting the rights of older persons (Article 25).

Three meetings were held during the past biennium pursuant to that commitment. The first and second meetings took place, respectively, in Rio de Janeiro, Brazil (2008)<sup>2</sup> and in Buenos Aires, Argentina (2009).<sup>3</sup> At the third meeting, held in Santiago (Chile), on 5-6 October 2009, participating countries requested the Secretariat of the United Nations Economic Commission for Latin America (ECLAC) to prepare “a proposal for a strategy on how to follow up article 24 and 25 of the Brasilia Declaration.”<sup>4</sup> This proposal should include the “minimum content necessary in an international convention on the rights of older persons from the Latin American and Caribbean perspective.”<sup>5</sup>

In response to this request, this document first presents a general overview of existing human rights standards, both at the international and at the regional levels, that are relevant to the promotion and the protection of the rights of older persons. It then provides the arguments that, from a Latin American and Caribbean perspective, justify the adoption of an international convention regarding the rights of older persons, as well as the minimum contents that this convention should include. The document finally presents a proposed strategy to move towards the adoption of an international convention in this realm from a Latin American and Caribbean perspective.

### I. THE EMERGING CONSENSUS ON THE MINIMUM CONTENTS OF THE RIGHTS OF OLDER PERSONS UNDER INTERNATIONAL LAW

To date, the rights of older persons have not been covered specifically by the United Nations human rights system in the form of a specific convention or treaty, as has been the case for other specific groups such as women, children or (more recently) persons with disabilities. Despite the absence, and, as discussed below, the desirability of such instrument, the state of affairs as regards the human rights of older persons has attracted increasing attention and concern from the international community.

A review of the standards enshrined in existing human rights instruments (irrespective of their legal status), adopted either under the auspices of the United Nations or within the region, as well as of the way those standards have been interpreted by the competent human rights bodies and mechanisms,

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<sup>1</sup> Brasilia Declaration (LC/G.2359).

<sup>2</sup> See “Informe de relatoría” [online] [http://www.cepal.org/celade/noticias/noticias/7/34107/Reunión\\_Rio\\_Set\\_Idoso\\_2008.pdf](http://www.cepal.org/celade/noticias/noticias/7/34107/Reunión_Rio_Set_Idoso_2008.pdf).

<sup>3</sup> See “Informe de relatoría” [online] [http://www.cepal.org/celade/noticias/noticias/5/35715/Relatoria\\_Buenos\\_Aires.pdf](http://www.cepal.org/celade/noticias/noticias/5/35715/Relatoria_Buenos_Aires.pdf).

<sup>4</sup> See “Executive Report” (para. 6) [online] [http://www.cepal.org/celade/noticias/documentosdetrabajo/0/37450/Report\\_ThirdMeeting\\_Followup\\_Brasilia\\_Declaration.pdf](http://www.cepal.org/celade/noticias/documentosdetrabajo/0/37450/Report_ThirdMeeting_Followup_Brasilia_Declaration.pdf).

<sup>5</sup> Ibid.

suggests that a clear international normative consensus has emerged concerning the minimum content of older persons' rights under international law. In turn, this consensus reflects and interacts with recent trends of constitutional and legal reform at the national level, as is evident, particularly, in Latin America and the Caribbean.

The emerging international consensus about the rights of older persons provides a firm argument in favor of an international convention on these rights. As discussed in further detail in Section II of this report, the need for such a convention lies more in the need to strengthen the international protection on the rights of older persons than on the "legal vacuum" regarding these rights. Owing to the important proliferation in recent decades of standards affirming the rights of older persons, the current legal context may be best depicted in terms of normative dispersion fragmentation. This context generates a number of practical difficulties that in turn limit the capacity of State Members (and the international community as a whole) to provide the special protection these persons need to enjoy basic human rights on an equal basis with other sectors of society.

Existing international standards already list issues of particular concern for older persons and identify the kinds of measures required to safeguard their rights. Moreover, these standards represent an important frame of reference for the definition of a future international convention.

This section provides a brief overview of the evolution of international human rights law on the rights of older persons. Because a complete description goes beyond the objectives of the present report,<sup>6</sup> the section underlines only some of the most important standards affirmed in United Nations human rights treaties and General Assembly resolutions, and other international instruments and policies, as well as those developed by United Nations human rights bodies. It also pays particular attention to the normative developments that have taken place within the Inter-American Human Rights system (of particular relevance for Latin American and Caribbean countries) as well as to recent processes of constitutional and legal recognition of the rights of older persons in those countries.

## A. UNITED NATIONS HUMAN RIGHTS INSTRUMENTS

The first references to older persons in international human rights instruments are only indirect, and generally limited to social protection and the right to an adequate standard of living. For example, the Universal Declaration of Human Rights affirms the right to social benefits in old age.<sup>7</sup> Similarly, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) affirms the "right of everyone to social security, including social insurance."<sup>8</sup>

The first United Nations human rights convention to explicitly affirm age as a prohibited basis for discrimination was the Convention on the Elimination of All Forms of Discrimination against Women,

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<sup>6</sup> For a more detailed overview of existing international and regional standards affirming the rights of older persons, see generally Luis Rodríguez-Piñero, "Los desafíos de la protección internacional de los derechos de las personas de edad", *Project documents*, No. 305 (LC/W.305), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC), pp. 9-21.

<sup>7</sup> See article 25 of the Universal Declaration on Human Rights, adopted by General Assembly resolution 217(III) of 10 December 1948.

<sup>8</sup> See article 9 of the International Covenant on Economic, Social, and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 .

proscribing the discrimination against women's access to old-age subsidies.<sup>9</sup> The scope of prohibited discrimination on the basis of age was subsequently widened by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>10</sup> and, subsequently, by the Convention on the Rights of Persons with Disabilities, in relation to such issues as the elimination of prejudices, stereotypes, and harmful practices; access to justice; and protection against exploitation, violence, and abuse.<sup>11</sup>

Together with these specific references in United Nations human rights treaties, the rights of older persons have been repeatedly affirmed in numerous resolutions by the General Assembly. These policies, often grouped under the label of "soft law," obviously have a legal status different from treaties. However, this does not mean that they lack judicial relevance. Since they have been adopted by the highest representative body of the United Nations, with the intent of expressing the common concerns, commitments, and aspirations of the international community regarding the rights of older persons, these instruments should be seen as authoritative reflections of an emerging normative consensus on the minimum contents of those rights under international law.

While the specific situation of older persons has been the object of a continuous stream of resolutions adopted by the General Assembly since the 1969 Declaration on Social Progress and Development,<sup>12</sup> the adoption in 1991 of the United Nations Principles for Older Persons<sup>13</sup> clearly signals the emergence of a rights perspective to ageing issues on the United Nations agenda. The Principles, which were adopted pursuant to the 1982 Vienna International Plan of Action on Ageing,<sup>14</sup> affirm a number of rights and State measures under the headings of "independence," "participation," "care," and "self-fulfilment" and "dignity." They constitute the most important expression at the United Nations level so far on the minimum contents of the rights of older persons.

The 2002 Madrid Political Declaration and Madrid International Plan of Action on Ageing, adopted at the Second World Conference on Ageing, held in Madrid, from 8 to 12 April 2002, further contributed to the development of understanding regarding the rights of older persons in the context of international and domestic policies. The follow-up to the Madrid Plan of Action, in which United Nations regional commissions have played a fundamental role, has further contributed to the development of standards regarding these rights, as affirmed in the ECLAC Brasilia Declaration and in the United Nations Economic Commission for Europe (UNECE) ministerial declarations of Berlin<sup>15</sup> and Leon.<sup>16</sup>

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<sup>9</sup> See article 11(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women, adopted and opened for signature, ratification, and accession by General Assembly resolution 34/180 of 18 December 1979.

<sup>10</sup> International Convention on the Protection of the Rights of Migrant Workers and their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, Article 1.

<sup>11</sup> See articles 1(2), 8, 13, and 16 of the Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006 by General Assembly resolution 61/106.

<sup>12</sup> United Nations Declaration on Social Progress and Development, proclaimed by the General Assembly resolution 2524(XXIV) of 11 December 1969.

<sup>13</sup> United Nations Principles for Older Persons, adopted by General Assembly resolution 46/91 of 16 December 1991.

<sup>14</sup> Adopted by the World Assembly on Ageing, held in Vienna, 26 July-6 August 1982.

<sup>15</sup> United Nations Economic Commission for Europe (UNECE), Berlin Ministerial Declaration: "A society for all ages in the UNECE region" (ECE/AC.23/2002/3/Rev.2), 11 September 2002.

<sup>16</sup> United Nations Economic Commission for Europe (UNECE), Leon Ministerial Declaration: "A society for all ages: challenges and opportunities" (ECE/AC.30/2007/2), 28 January 2007.

The content of rights of older persons has been further developed by several other General Assembly resolutions. These include, notably, the United Nations Proclamation on Ageing,<sup>17</sup> as well as a number of specific resolutions related to older women.<sup>18</sup> Other General Assembly resolutions incorporate specific standards regarding older persons, including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;<sup>19</sup> the Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules);<sup>20</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;<sup>21</sup> the Declaration on the Elimination of Violence against Women; and the Declaration on the Rights of Indigenous Peoples.<sup>22</sup>

The limited protection afforded to the rights of older persons by existing human rights conventions has been partially augmented by the progressive interpretation of those conventions by their supervisory bodies. This is the case, for instance, for the Human Rights Committee, which has developed the principle of nondiscrimination by reason of age in a number of cases examined under its complaint procedure.<sup>23</sup> The practice of the Committee on Economic, Social and Cultural Rights (CESCR) is also relevant here. In 1995, CESCR adopted General comment No. 6 on the economic, social, and cultural rights of older persons, in which it specified the obligations that correspond to States that are parties to ICESCR in this connection.<sup>24</sup> The committee has further elaborated the content of those rights under different provisions of or issues covered by the convention, including forced displacement,<sup>25</sup> education,<sup>26</sup> health,<sup>27</sup> and social security.<sup>28</sup> On its part, the Committee on the Elimination of Discrimination against Women (CEDAW) has devoted particular attention to the situation of older women in its concluding observations on individual State parties, including issues such as violence against women; education and illiteracy; and access to social benefits. In 2000, as a contribution to the upcoming Madrid World

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<sup>17</sup> Adopted by General Assembly resolution 47/5 of 16 October 1992.

<sup>18</sup> General Assembly resolution 44/76 of 8 December 1989: "Older Women;" General Assembly resolution 49/162 of 9 February 1995: "Integration of older women in development;" General Assembly resolution 56/126 of 25 January 2002: "Situation of older women in society;" and General Assembly resolution 57/177 of 30 January 2003: "Situation of older women in society."

<sup>19</sup> Adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 5(2) (special measures for older persons).

<sup>20</sup> Adopted by General Assembly resolution 45/110 of 14 December 1990, Principle 2(2) (nondiscrimination by reason of age).

<sup>21</sup> Adopted by General Assembly resolution 40/34 of 29 November 1985, Principle 3 (nondiscrimination by reason of age).

<sup>22</sup> Adopted by General Assembly resolution 61/295 of 13 September 2007, Article 22 (special protection of indigenous elders).

<sup>23</sup> See Human Rights Committee, "John K. Love et al. v. Australia. Communication, No. 983/2001, (CCPR/C/77/D/983/2001), 2003. "Rupert Althammer et al. v. Austria. Communication, No. 998/2001, (CCPR/C/78/D/998/2001), 2003; "Rubén Santiago Hinostroza Solís v. Peru. Communication, No. 1016/2001" (CCPR/C/86/D/1016/2001), 2006.

<sup>24</sup> United Nations, The economic, social and cultural rights of older persons, General Comment, No. 6 (E/C.12/1995/16/Rev.1), Geneva, Committee on Economic, Social and Cultural Rights, 1995.

<sup>25</sup> United Nations, The right to adequate housing (article 11 para 1 of the International Covenant on Economic, Social, and Cultural Rights): Forced displacement, General Comment, No. 7 (E/1999/22), annex IV, 1997.

<sup>26</sup> United Nations, The right to education (article 13 of the International Covenant on Economic, Social, and Cultural Rights), General Comment, No. 13 (E/C.12/1999/10), 1999.

<sup>27</sup> United Nations, The right to enjoy the highest possible level of health (article 12 of the International Covenant on Economic, Social, and Cultural Rights), General Comment, No. 14 (E/C.12/2000/4), 2000.

<sup>28</sup> United Nations, The right to social security (article 9), General Comment, No. 19 (E/C.12/GC/19), 2008.

Assembly on Ageing, the Committee adopted Decision 26/III, in which it systematized and elaborated on its own jurisprudence regarding older women.<sup>29</sup>

Together with the standards progressively developed by United Nations Treaty Bodies, the Special Procedures of the former Commission on Human Rights, subsequently assumed by the Human Rights Council, has also played a role —albeit still limited— in the specific situation of older persons. Even though no thematic mandate currently exists within the Council’s special procedures machinery, other thematic procedures have identified older persons as a group requiring special protection, such as the right to adequate housing or the right to physical and mental health. A number of standards developed by thematic special procedures have also taken an old-age-specific approach, including the general recommendation of the Special Rapporteur on torture;<sup>30</sup> the Guiding Principles on International Displacement;<sup>31</sup> the Human Rights Guidelines for pharmaceutical companies in relation to Access to Medicine;<sup>32</sup> and the Basic Principles and guidelines on development-based evictions and displacement.<sup>33</sup>

## **B. OTHER INTERNATIONAL STANDARDS OF UNIVERSAL SCOPE**

The minimum rights of older persons have also been promoted by a number of legal instruments and policies adopted by international organizations and agencies; these typically are restricted to their respective mandates and expertise. This is the case for the various conventions and recommendations adopted within the framework of the International Labour Organization (ILO). These include, for example, the C 102 Social Security (Minimum Standards) Convention;<sup>34</sup> the C 128 Invalidity, Old-Age, and Survivors’ Benefits Convention;<sup>35</sup> and R162 Older Workers Recommendation.<sup>36</sup> Old-age considerations are also taken into account in two of the ILO core conventions regulating fundamental rights at work, the C 111 Convention concerning Discrimination in Respect of Employment and Occupation, and the Freedom of Association Convention.<sup>37</sup>

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<sup>29</sup> Committee on the Elimination of Discrimination against Women, “Decision 26/III Elimination of discrimination against older women under the Convention” (A/57/38), Part I, 7 May 2002.

<sup>30</sup> United Nations, Civil and political rights, including the questions of torture and detention. Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted pursuant to Commission resolution 2002/38 (E/CN.4/2003/68/Add.1), 27 February 2003.

<sup>31</sup> United Nations, Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the Commission on Human Rights, mass exoduses and displaced persons. Report of the Representative of the Secretary General, Francis Deng, submitted pursuant to Commission resolution 1997/39. Addendum (E/CN.4/1998/53/Add.2), 11 February 2008.

<sup>32</sup> United Nations, “Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines”, The Right to Health (A/63/263), 11 August 2008.

<sup>33</sup> United Nations, “Basic principles and guidelines on development-based evictions and displacement”, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari (A/HRC/4/18), 11 June 2007.

<sup>34</sup> Adopted by the thirty-fifth session of the International Labour Conference, 28 June 1952, entered into force on 27 April 1955.

<sup>35</sup> Adopted by the 51<sup>st</sup> session of the International Labour Conference on 7 June 1967, entered into force on 1 November 1969.

<sup>36</sup> Adopted by the 66<sup>th</sup> session of the International Labour Conference on 23 June 1980.

<sup>37</sup> Adopted by the 42<sup>nd</sup> session of the International Labour Conference on 25 June 1958, entered into force on 15 June 1960; Adopted by the 31<sup>st</sup> session of the International Labour Conference on 17 June 1948, entered into force on 4 July 1950.

In addition, specific provisions regarding older persons are included in the third and fourth Geneva Conventions on international humanitarian law (1949) regarding, respectively, the treatment of prisoners of war and the protection of civilians in time of war.<sup>38</sup> Worth mentioning also is the C35 Convention on the International Protection of Adults, adopted by The Hague Conference in 2000, regulating issues of cross-national co-operation in relation to the protection of adult persons (for example, in situations of legal guardianship).<sup>39</sup>

### C. INTER-AMERICAN HUMAN RIGHTS STANDARDS

The foundational instruments of inter-American human rights, the American Declaration of the Rights and Duties of Man<sup>40</sup> and the American Convention on Human Rights,<sup>41</sup> failed to include any reference to the rights of older persons. It was only in 1988, with the adoption of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) that the rights of older persons were explicitly affirmed in the context of the inter-American system, although restricted to the area of welfare and social policies. According to Article 17 of the Protocol,

Everyone has the right to special protection in old age. With this in view, the State Parties agree to take the necessary steps to make this right a reality and, particularly, to:

- Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;
- Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;
- Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

Older persons have further been identified as a social group requiring special protection in other human rights instruments adopted by the General Assembly of the Organization of American States (OAS), including the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belem do Para);<sup>42</sup> the Declaration of San Pedro de Sula:

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<sup>38</sup> Geneva Convention relative to the Treatment of Prisoners of War, and Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949, and entered into force on 21 October 1950.

<sup>39</sup> Adopted on 13 January 2000 by the Hague Conference on Private International Law, entered into force on 1 January 2009.

<sup>40</sup> Adopted by the ninth International Conference of American States, Bogota, Colombia, 30 March-2 April 1948.

<sup>41</sup> Signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, entered into force on 18 July 1978.

<sup>42</sup> Adopted on 6 September 1994 by the twenty-fourth regular session of the General Assembly to the Organization of American States, entered into force on 3 May 1995, Article 9 (special measures of protection for older women).



“Toward a culture of nonviolence”;<sup>43</sup> and the Inter-American Declaration on the Family. A particular focus on human rights is also found on the OAS General Assembly resolution on the situation of refugees, returnees, and internally displaced persons in the Americas,<sup>44</sup> as well as in the Draft American Declaration on the Rights of Indigenous Peoples, currently under negotiation.<sup>45</sup>

The inter-American human rights bodies, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights, have so far played a relatively limited role in the rights of older persons, possibly explained by the absence of specific references to those rights in the two main inter-American human rights instruments, the American Declaration and the American Convention. Exceptions to this general pattern are the Inter-American Court’s decisions in “Five pensioners” v. Peru (2003) and Acevedo Buendía et al. v. Peru (2009).<sup>46</sup> In these, the court interpreted property rights to encompass a prohibition against affecting retirement benefits by after-the-fact amendments to State regulations.<sup>47</sup> At the moment of writing this report, similar cases are still pending at the Inter-American Court of Human Rights.<sup>48</sup>

In May 2009, the OAS General Assembly adopted a resolution on human rights and older persons, calling for moving forward “in the creation of international instruments” and “in the adoption of measures” to protect those rights.<sup>49</sup> The resolution further called for strengthening regional cooperation in this realm, and instructed the OAS Permanent Committee to convene an expert meeting with a view to “examining the feasibility of preparing an inter-American convention on the rights of older persons.”<sup>50</sup>

Even though they are not formally part of the inter-American human rights system, a number of subregional intergovernmental organizations of the Americas have also developed a number of standards regarding older persons. These include the Andean Charter for the Promotion and Protection of Human Rights, adopted by the Andean Community<sup>51</sup> and the Charter of Buenos Aires on Social Commitment in MERCOSUR, Bolivia, and Chile.<sup>52</sup>

<sup>43</sup> Adopted by the General Assembly to the Organization of American States resolution OEA/AG/DEC.60(XXXIX-O/09) of 4 June 2009, during its thirty-ninth regular session, in San Pedro Sula, Honduras, Article 4 (prevention of violence, segregation, exploitation and discrimination against older persons).

<sup>44</sup> Adopted by General Assembly AG/RES. 1602(XXVIII-O/98), on 3 June 1998 during its 28<sup>th</sup> ordinary session, at para 4 (special measures of protection for older persons).

<sup>45</sup> Record of the current status of the Draft American Declaration on the Rights of Indigenous Peoples (OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 3), 30 December 2008, Article XVI.1 (recognition and protection of indigenous forms of family, without discrimination concerning gender or age).

<sup>46</sup> Inter-American Court of Human Rights, “Case of ‘Five pensioners’ v. Peru (Merits, Reparations and Costs), Judgment of February 28, 2003”, *Series C*, No. 98.

<sup>47</sup> Inter-American Court of Human Rights, “Case of Acevedo Buendía et al (“Discharged and Retired Employees of the Office of the Comptroller”) v. Peru (Preliminary Objections, Merits, Costs and Reparations). Judgment of July 1, 2009”, *Series C*, No. 198.

<sup>48</sup> See Inter-American Court of Human Rights, “Amilcar Menéndez, Juan Manuel Caride and other (Pension System), v. Argentina”, *Report*, No. 03/01, Case 11.670, enero de 2001; Inter-American Court of Human Rights, “Tomás Eduardo Cirio v. Uruguay”, *Report*, No. 119/01, Case 11.500, 2001.

<sup>49</sup> Human rights and older persons Resolution AG/RES. 2455(XXXIX-O/09) adopted by the OAS General Assembly in 4 June 2009, during its 39th regular session, OP 1.

<sup>50</sup> *Ibid.*, para. 3.

<sup>51</sup> Adopted by the Presidential Council of the Andean Community on 26 July 2002, arts. 46-47 (Rights of older adults).

<sup>52</sup> Adopted on 30 June 2000 by the presidents of Argentina, Brazil, Paraguay, and Uruguay, Member States of MERCOSUR, and the presidents of the Plurinational State of Bolivia and Chile, paras, 4, 7 (special measures of protection for the elderly, including social services, housing policies, and social integration and training programmes).

## **D. INTERNATIONAL AND REGIONAL POLICIES**

The international community's concern with the situation of older persons is further reflected in the gradual adoption, over the last decade, of a number of international policies that specifically address this situation using a rights-based approach. These policies have been promoted by both international and regional agencies to guide their own activities, as well as those of States and other stakeholders, within their respective realms of action.

Of particular relevance in this regard is the path-breaking policy on active ageing launched in 2002 by the World Health Organization, which makes the basic human rights concepts enshrined in the United Nations 1991 Principles for Older Persons operational in public and private health policies.<sup>53</sup> This leading example was followed the same year by its sister organization at the inter-American level, the Pan American Health Organization (PAHO).<sup>54</sup>

Both organizations have been further involved in developing standards on issues of special concern for the health of older persons from a rights perspective, and have also supported similar initiatives. In 1999, WHO and PAHO supported the adoption by the Heads of Governments of the Caribbean Community (CARICOM) of the Caribbean Charter for Health Promotion.<sup>55</sup> In 2002, WHO promoted the adoption of the Toronto Declaration on the Global Prevention of Elder Abuse.<sup>56</sup> In 2009, the theme was also included in the PAHO Plan of Action on the Health of Older Persons, including Active and Healthy Aging.<sup>57</sup>

Irrespective of their respective legal status, these policies help build an emerging international consensus on the rights of older persons and help clarify the content of those rights and State duties in specific areas. This also makes them particularly useful instruments for creating the contents of a future international convention.

## **E. NATIONAL STANDARDS IN THE LATIN AMERICAN AND CARIBBEAN REGION**

Many of the modern constitutions in the Latin American and Caribbean region have incorporated specific provisions that prioritize respect for the rights of older persons, protect them against violence, or condemn discrimination based on age.

The constitutional texts of the Bolivarian Republic of Venezuela, Brazil, Colombia, Costa Rica, Dominican Republic, Honduras, Nicaragua, Panama, and Paraguay state expressly that older persons have the right to special protection from the State. Some charters guarantee the integral protection of older persons, recognizing some economic and social rights, ranging from health care, food, decent living

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<sup>53</sup> World Health Organization (WHO), *Active Aging: A Policy Framework* (HO/NMH/NPH/02.8), Geneva, 2002.

<sup>54</sup> Pan American Health Organization (PAHO), "Health and ageing" (CSP26/13), Washington, D.C., 10 July 2002.

<sup>55</sup> Adopted at the First Caribbean Conference of Health Promotion held in Port Spain, from 1 to 4 June 1993

<sup>56</sup> Adopted at the expert meeting on elder abuse organized by WHO, the International Network on the Prevention of Elder Abuse (INPEA), and the Ontario Network for the Prevention of Elder Abuse (ONPEA) in Ontario, Canada, on 17 November 2002.

<sup>57</sup> Pan American Health Organization (PAHO) (2009), *Plan of Action on the Health of Older Persons, Including Active and Healthy Aging* (CE144.R13), May 2009.

conditions, and housing to the more general concept of the welfare state (the Bolivarian Republic of Venezuela, Brazil, Guatemala, Ecuador, and Panama). In all of these cases, the State has the constitutional duty to promote and implement policies or programs for the effective exercise of rights. Moreover, in other countries, such as in Argentina, the constitution explicitly incorporates the State's duty to enact legislation and promote affirmative action to guarantee true equality of opportunities and treatment for older persons, as well as the full enjoyment and exercise of rights recognized in international treaties.

In addition to the above, a number of Latin American constitutions affirm specific social rights to older persons, such as the right to social security, although the scope of this protection varies from country to country. The Brazilian constitution explicitly guarantees a minimum income for older persons in need, irrespective of their contribution to social security. The Colombian constitution further states that the State shall guarantee a food subsidy for indigent older persons. Similarly, the Cuban constitution provides explicitly for social assistance to the elderly who are without resources and without protection. Under the Brazilian and Ecuadorian constitutions, older persons are identified as a vulnerable group and are granted priority care, which is mandatory in cases of domestic violence.

The constitutional charters of Brazil, Ecuador, and Mexico condemn age-based discrimination in general, while those of the Bolivarian Republic of Venezuela, Panama, and Paraguay forbid age-based discrimination in the field of labour. The rights of older persons to participate and be an integral part of their communities are expressly affirmed in the constitutions of Colombia and Brazil.

In addition, most countries of the region have enacted special legislation specifically designed to promote and guarantee the human rights of older persons (Brazil, Costa Rica, Ecuador, El Salvador, Guatemala, México, Paraguay, Peru, Dominican Republic, Uruguay, and the Bolivarian Republic of Venezuela). Some civil and political rights are particularly protected under existing legislation. With respect to economic, social, and cultural rights, the different laws provide for the rights of older persons in areas such as work, social security, education, health care, housing, and social welfare.<sup>58</sup>

Taken as a whole, the various developments analysed above unquestionably signal the international community's concern about older persons as subject to global patterns of discrimination and marginalization, which places them in a situation of particular vulnerability in their enjoyment of basic human rights; this concern is particularly noticeable, as seen, in the Latin American and Caribbean region.

## **II. JUSTIFICATION FOR AN INTERNATIONAL CONVENTION ON THE RIGHTS OF OLDER PERSONS**

The development of specific standards related to the rights of older persons in international and regional human rights policies, as well as in the practice of human rights bodies, provides plenty of evidence of international consensus on the minimum rights of older persons. Yet, as further analysed, no human rights convention of universal scope currently exists to systematise these rights and make them operational, and to establish a specific mechanism for their protection. This leaves an important gap in the international protection of the rights of older persons.

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<sup>58</sup> For a more detailed overview, see Sandra Huenchuan, (ed.), "Ageing, human rights and public policies", *Libros de la CEPAL*, No. 100 (LC/G.2389-P), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC), 2009, forthcoming. United Nations publication, Sales No. S.08.II.G.94.

It is from this perspective that the representatives of Latin American and Caribbean countries, as well as other ECLAC members and other stakeholders, came together to proclaim, in the Brasilia Declaration, their commitment to work towards the adoption of a United Nations convention on the rights of older persons. This commitment is in line with numerous recommendations from and proposals by experts and civil society organizations, and particularly older persons' organizations, to advance towards the same goal. These include, for instance, the recommendations of the Expert Group Meeting on the Rights of Older Persons, conveyed by the United Nations Programme on Aging in 2009.<sup>59</sup>

This recommendation has been further reinforced, as analysed below in more detail, by the preliminary study on the rights of older persons prepared by the Human Rights Council Advisory Committee, at the Council's request. Among other things, this study recommended, in line with the Brasilia Declaration, joint work towards the "establishment of an international convention on the rights of the elderly."<sup>60</sup> According to the Advisory Committee's study,

This convention should aim to change negative attitudes, increase the visibility of older persons, clarify responsibilities, improve accountability, and provide an international framework by which to protect older persons. It should not only codify the rights of older persons as internationally recognized principles, but it must also specify the obligations of member States to ensure the full protection of the rights of their older citizens. In particular, the convention should include responsibilities for States to strengthen the gender perspective in their legislative and policy actions on ageing.<sup>61</sup>

A similar concern was expressed at the forty-eighth session of the Commission on Social Development, where the need for an international convention was discussed by member States in the context of future action for the implementation of the Madrid Plan of Action. The Commission's discussion illustrated the existence of "considerable interest within the social community in further exploring the human rights dimensions of aging,"<sup>62</sup> including the establishment of "a working group within the regular session for the Commission for Social Development, to further pursue discussions on the most appropriate ways and means of promoting and protecting human rights for older persons."<sup>63</sup>

The commitment to work towards an international convention further complements ongoing initiatives taking place within the inter-American and African regional systems to enhance their respective work of human rights protection with regard to older persons, including the consideration of new regional standards.

Taking these commitments as a point of departure, this section elaborates on the pressing legal and policy arguments for taking concrete steps in this direction.

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<sup>59</sup> United Nations, "Recommendation 3", Report of the Expert Group Meeting Rights of Older Persons [online] <http://www.un.org/esa/socdev/ageing/documents/egm/bonn09/report.pdf>, 2009.

<sup>60</sup> United Nations, The Necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person (A/HRC/AC/4/CRP.1), 4 December 2009, para. 63.

<sup>61</sup> Ibid., para. 64.

<sup>62</sup> United Nations, Further implementation of the Madrid International Plan of Action on Ageing, 2002. Report of the Secretary-General (E/CN.5/2010/4) 25 November 2009, para. 27.

<sup>63</sup> Ibid., para. 28.

## A. PREPARING FOR AN AGEING POPULATION

The world population is ageing at a steady, quite spectacular rate. The total number of persons aged 60 and above was 700 million in 2009 and is projected to reach 2 billion by the year 2050.<sup>64</sup> In Latin America and the Caribbean —as a result of demographic transition— the population is ageing gradually but inexorably. The next few decades will see steady increases in both the proportion and the absolute number of people aged 60 and over. In absolute terms, the number of people aged 60 and over will grow by 57 million between 2000 and 2025 (43 and 100 million, respectively) and by 83 million between 2025 and 2050. This population group is growing at a faster pace than other younger groups (average annual growth rate of 3.4% between 2000 and 2025). The rate of change within this age group will be between three and five times higher than among the total population in the periods 2000-2025 and 2025-2050. As a result, the proportion of people aged 60 and over in the total population will triple between 2000 and 2050 (8.2 and 24%, respectively).<sup>65</sup>

These figures illustrate a quiet revolution that has far-reaching and unpredictable consequences. It is now affecting the social and economic structures of societies both at the world level and at the country level, and will affect them even more in the future.<sup>66</sup> In fact, a demographic transformation of such dimensions has far-reaching repercussions on society and public policy; and, in the next years, the ageing population will increase the demand for the effective exercise of human rights and fundamental freedoms at all ages.

## B. GIVING MORE VISIBILITY TO AGEING-RELATED ISSUES

Beyond the international legal obligations they entail vis-à-vis ratifying States, United Nations human rights conventions are important educational instruments that can raise the awareness of all actors concerned (including member States, United Nations organizations and agencies, and civil society) regarding specific human rights issues. Many of the United Nations human rights conventions have explicitly incorporated provisions to this effect.

An international convention regarding the rights of older persons would provide more visibility for the challenges that older persons face in the enjoyment of their basic human rights. The adoption of such a convention would represent a powerful pedagogic tool, particularly at the national level, combating prevailing stereotypes and generating positive and realistic images about the ageing process. It would also provide greater awareness of the many contributions that older persons make to society as a whole.

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<sup>64</sup> See United Nations, *World Population Ageing* (ESA/P/WP/212), December 2009.

<sup>65</sup> For a more detailed overview of the ageing process in the Latin America and the Caribbean, see generally Latin American and Caribbean Demographic Centre (CELADE) - Population Division of ECLAC, *El envejecimiento y las personas de edad. Indicadores sociodemográficos para América Latina y el Caribe* (LC/L.2987/Rev.1), Santiago, Chile, 2009.

<sup>66</sup> United Nations, *The economic, social and cultural rights of older persons*, General Comment, No. 6 (E/C.12/1995/16/Rev.1), Geneva, Committee on Economic, Social and Cultural Rights, 1995.

### **C. THE NEED TO CLARIFY THE CONTENTS OF THE RIGHTS OF OLDER PERSONS**

Due to the existing plurality of normative sources, their different legal status, and their varied regional or material scope, there is a great variance concerning the minimum rights of older persons in international human rights law. This variance involves important practical difficulties for duty-bearers, and particularly for States, which are ultimately responsible for the adoption of legislative measures and policies to promote older persons' rights. This situation also affects rights-holders and other stakeholders, inasmuch as they play a substantive role in promoting the protection of and respect for those rights.

The adoption of an international convention would therefore help clarify and systematize, in a single, legally binding instrument of universal scope, the contents of the existing and emerging international normative consensus regarding the rights of older persons. The adoption of this convention would also help fill specific areas that are insufficiently covered by existing standards, including those included in United Nations human rights conventions and those developed by the practice of human rights bodies.

### **D. PREVIOUS NON-CONVENTIONAL INTERNATIONAL INSTRUMENTS**

The typical pattern followed in the adoption of United Nations human rights conventions regarding specific rights or the rights of particular groups is the prior adoption by the General Assembly of a declaration. From a purely legal perspective, human rights declarations adopted by the General Assembly have, in principle, the same legal status as other human rights instruments adopted under other designations. Nevertheless, some of these designations, such as those of "declaration" or "proclamation," seem to confer a particular political or normative solemnity to those resolutions.

While the General Assembly has not adopted a declaration on the rights of older persons under such a designation, it has adopted a number of important resolutions in this regard. These clearly identify older persons as a specific and particularly vulnerable group within society, and they define a minimum consensus regarding their rights. Consequently, these instruments already fulfill the function of a single declarative text regarding the rights of older persons.

### **E. THE NEED TO CLARIFY STATE OBLIGATIONS**

Even though the rights of older persons have been progressively affirmed by a number of international and regional instruments with different status, as well as by the evolving practice of human rights bodies, the adoption of an international convention would significantly help reinforce the legal obligations to respect, promote, and fulfill those rights.

The ratification of a human rights convention entails obligations by States parties to perform it in good faith, adopting such legislative and other measures as may be required in order to give effect to those rights. The adoption of legislative measures is particularly important in the effort to eliminate all regulations in national law that may result in formal or substantive discrimination against specific groups. Human rights conventions further include programmatic provisions, by virtue of which States undertake to take all required measures to achieve the full realization of human rights, both individually—to the maximum of its available resources—and through international economic and technical cooperation.

Moreover, by ratifying a human rights convention, States commit to guarantee the respect of those rights by private agents acting within their respective jurisdictions.

Furthermore, beyond the specific legal obligations that they create vis-à-vis States parties, United Nations human rights conventions are also highly authoritative instruments that reflect the ethical commitment of these States. The ratification of these instruments thus represents a significant statement by States members of their pledge to fulfil the basic human rights principles enshrined in the Charter of the United Nations and in the Universal Declaration of Human Rights.

## **F. THE NEED TO STRENGTHEN INTERNATIONAL PROTECTION**

The adoption of an international convention on the rights of older persons would intensify the international protection of those rights. Human rights treaties adopted by United Nations typically establish their own supervisory bodies and processes. United Nations treaty bodies, made up of experts acting in their individual capacities, are mandated to oversee the effective implementation by States of their obligations under the conventions and to make recommendations in this regard.

Furthermore, the adoption of an international convention would have a cross-fertilization effect on other human rights bodies and mechanisms. United Nations treaty bodies, for instance, typically resort to other international and regional human rights standards as they create an authoritative interpretation of their conventions. The same holds true with Human Rights Council special procedures, including areas of particular concern such as health, food, housing, and violence against women. A similar cross-cutting effect could occur with regional human rights bodies and mechanisms, for which United Nations conventions also constitute important frameworks of reference.

Last but not least, the adoption and subsequent ratification of an international convention on this subject would have an impact on the Human Rights Council's universal periodic review (UPR), whose terms of reference are constituted by the "human rights obligations and commitments" of States parties.<sup>67</sup> Therefore, the adoption of a legally binding instrument would open the UPR process to a specific focus on the rights of older persons, further strengthening the international protection of those rights.

## **G. THE NEED TO PROMOTE A HUMAN-RIGHTS-BASED APPROACH TO AGEING POLICIES**

The adoption of a United Nations convention on the rights of older persons would also further promote the incorporation of a rights-based approach to ageing policies, both at the international and the national level. Such a convention would significantly help foster the "paradigm shift" reflected in, for example, the United Nations Principles for Older Persons, the Madrid Plan of Action, and the WHO policy on active ageing, which seek to replace the historically predominant view of older persons as "objects" of assistance with one in which these persons are genuinely seen as "subjects" of rights. By the same token, a convention would significantly enhance the effectiveness of other human rights instruments that have promoted this change of perspective.

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<sup>67</sup> Human Rights Council, resolution 5/1 "Institution Building of the Human Rights Council", 18 June 2007, Annex: (para. 1(d)).

The adoption of a convention would significantly help duty-bearers, including both States and civil society agents, in designing and implementing legal measures and policies from an older-persons'-rights perspective. This would particularly benefit States that are parties to the future convention, but also, potentially, other States.

In addition, it is important to bear in mind that the United Nations human rights conventions are closely associated to the work of economic and technical co-operation undertaken by United Nations agencies, funds, and regional commissions, particularly in the field. Under the paradigm of the human-rights-based approach to development, all these agents are engaged in supporting both duty-bearers and rights-holders in the effective implementation of human rights within their respective mandates. The adoption of a United Nations convention on the rights of older persons would consequently enhance and guide the work that international organizations and bodies carry out on behalf of older persons.

### **III. POSSIBLE CONTENTS OF A FUTURE CONVENTION**

The review of existing standards affirming the rights of older persons helps identify a number of general areas that may be covered by a future United Nations convention, as well as the specific issues on which the international community has expressed a particular concern and common normative approach. This section presents a synthesis, which does not pretend to be exhaustive, of the main content of the rights of older persons according to those standards, which should be subject to further elaboration during the drafting of an international convention regarding those rights.

#### **A. THE RIGHT TO EQUALITY AND NON-DISCRIMINATION**

A new convention on the rights of older persons should reaffirm the basic principle of equality and nondiscrimination on the basis of age, as explicitly recognized by international standards and human rights bodies. This further involves the adoption of "affirmative action" or "special measures," involving the differential treatment of older persons, and "reasonable accommodation," the adjustment of general State regulations to the specific needs of older persons.

#### **B. AWARENESS-RAISING**

States, in cooperation with older persons' associations, educational institutions, media, and other civil society agents, should adopt measures in order to raise awareness concerning the rights of older persons. These measures may include

- Recognition of older persons' authority, wisdom, productivity, and other important contributions to society;
- Promotion of a dignified and respectful treatment of older persons
- Promotion of a positive and realist image of ageing and the elimination of stereotypes



### **C. RIGHT TO LIFE AND TO A DIGNIFIED DEATH**

A convention on the rights of older persons may reaffirm the inherent right to life of all human beings, and the need for State measures to guarantee the effective enjoyment of this right by older persons. Existing or developing standards regarding the right to a dignified death include:

- The limitation of the imposition of the death penalty or life prison terms for older persons
- The right of access to palliative treatment to ensure terminal or dying patients a dignified and painless death
- The prohibition of the abandonment of treatment, or active euthanasia for financial reasons

### **D. RIGHT TO PHYSICAL, MENTAL AND EMOTIONAL INTEGRITY, AND TO A DIGNIFIED TREATMENT**

A clear international consensus exists with regards to the right of older persons to receive dignified treatment and to not to be subject to abuse, an issue that was specifically addressed by the WHO Toronto Declaration on the Global Prevention of Elder Abuse and by the PAHO Plan of Action on the Health of Older Persons, including Active And Healthy Ageing. A new convention on the rights of older persons may cover, among other issues:

- The right of older persons to be free from any kind of physical, mental, emotional, or financial abuse, or exploitation and abandonment
- State measures to prevent, stop, and punish those responsible for those actions
- The right of older persons not to be subject to torture or other cruel, inhuman, or degrading treatment or punishment, or to medical or scientific experiments without their free, prior, and informed consent
- The protection of the rights and dignity of older persons living in assistance institutions, both public and private, including thorough periodic visits to medical and psychiatric institutions
- The establishment of prevention and supervisory mechanisms, as well as the reinforcement of judicial mechanisms, in order to prevent interfamily violence against older persons

### **E. OLDER PERSONS IN SITUATION OF DETENTION OR IMPRISONMENT**

Existing human rights standards of universal or regional scope, including the United Nations principles for Older Persons, the United Nations Standard Minimum Rules for Non-Custodial Measures, and the IACHR principles and good practices regarding the protection of persons deprived from liberty in the americas, affirm the right of older persons deprived from liberty to a preferential treatment in penitentiary establishments, subject to the supervision by an independent and impartial judge or other competent authority. this preferential treatment includes measures allowing for:

- The separation of older men and women in different sections within penitentiary establishments

- The provision of adequate provisions and services as required in order to meet the special needs of older persons, particularly regarding their physical and mental health
- Access by older persons, without discrimination, to punishment measures other than the deprivation of liberty and other penitentiary benefits

The Third Geneva Convention on international humanitarian law further includes a set of minimum standards regarding older prisoners of war.

## **F. LEGAL PERSONALITY AND CAPACITY**

Taking the United Nations Convention on disabilities as a model of reference, a convention on the rights of older persons may:

- Affirm the full rights and legal entitlement of these persons, on an equal footing with any other persons
- Recognize their entitlement to exercise their rights or otherwise bestow other persons with the necessary permissions to act on their behalf
- Prohibit limiting their legal capacity except after a judicial decision

## **G. RIGHT TO PARTICIPATE IN THE SOCIAL, CULTURAL AND POLITICAL LIFE OF THE COMMUNITY**

The active participation by older persons in all political, economic, social, cultural, and spiritual activities in the countries in which they live, according to their own capacities, needs, and preferences, is one of the basic principles affirmed by the United Nations Principles on Older People and further reinforced by other instruments. These rights of older persons are affirmed thus:

- The right to participate actively in the formulation and implementation of legislative and policy measures directly affecting their rights, particularly with regard to ageing policies, social development, and poverty-reduction strategies
- The right to establish their own movements or associations, and to receive State supports through legal or financial measures
- The promotion of participation by older persons in volunteer and in intergenerational activities
- The development of social, cultural, or leisure programs and activities specifically designed for older persons, particularly those living in care institutions

## **H. RIGHT TO AN ADEQUATE STANDARD OF LIVING AND SOCIAL SERVICES**

A convention on the rights of older persons should incorporate minimum standards regarding the rights of these persons (as well as the obligations by States, international organizations, and other agents for the various areas covered under the umbrella of the right to an adequate standard of living) and the basic tenets of welfare and social policies in the context of old age. These basic tenets include:

- The adoption of an age-specific perspective in social services, promoting the preservation, to the maximum extent possible, of active functions
- The facilitation of physical accessibility and transportation to social services
- Special protection to prevent poverty
- The promotion of volunteer activities in favor of these persons, particularly within care institutions

### **I. RIGHT TO PHYSICAL AND MENTAL HEALTH**

Several instruments and policies, particularly the Vienna International Plan of Action on Ageing and Madrid International Plan of Action on Ageing, the WHO policy framework on active ageing, and the PAHO Plan of Action on the Health of Older Persons including active and healthy ageing, have already developed special measures to ensure the enjoyment of the right to health by older persons. These include, among others:

- The recognition of the right to enjoy the highest possible level of physical and mental health, without discrimination, and with full respect for dignity and autonomy.
- The recognition of the right to enjoy preventive and restorative health attention, particularly through primary care, including rehabilitation services.
- The promotion of preferential access to medicines for age-related illnesses.
- The promotion of financial and technical support for home assistance, as well as intra-familial forms of care, including training and periodic visits
- Whenever the internment in care centres is unavoidable, States shall ensure that these persons enjoy an adequate standard of living and full respect for their human rights
- The recognition of the right to provide informed consent before any medical treatment or test, as well as before internment in care centres

### **J. RIGHT TO EDUCATION AND CULTURE**

As affirmed by international standards, older persons should enjoy rights to education in both formal and informal institutions, within a paradigm of lifelong learning. In addition, States should strive to promote:

- Active policies to fight against illiteracy, particularly among older women
- Older persons' access to and active participation in cultural institutions and activities, including volunteer activities
- Educational programs allowing older persons to transmit their knowledge, culture, and spiritual values

## **K. RIGHT TO HOUSING AND TO A HEALTHY ENVIRONMENT**

An important concern has also been raised by the international community regarding the housing conditions of older persons as important factors contributing to their independence and health. Existing international standards affirm these rights to:

- Enjoy adequate housing, particularly in situations of crisis, emergency, displacement, or development-based evictions, and to have high priority in the assignment of houses or land in those situations
- Live in a secure and healthy environment, including having access to clean water and air, and being free from exposure to pollution
- Remain in their own homes for as much time as possible, according to their own wishes and needs

## **L. RIGHTS AT WORK**

A fundamental area to be covered by an international convention on the rights of older persons is labour. The international minimum consensus on this issue, as enshrined in the United Nations Principles for Older Persons and the Vienna Plan of Action, as well as in various ILO convention and recommendations, includes the recognition of:

- The right of older persons to work and have access to other income-generating activities
- The right to equal treatment and opportunity, particularly in access to equal remuneration, labour conditions, professional orientation and vocational training, and employment placement
- The adoption of active employment policies that promote the participation or re-entry into the labour market by older workers
- The right to freedom of association without discrimination based on age
- The promotion of legal reforms and financial incentives that allow for the employment of older persons beyond the compulsory age of retirement, in accordance with their capacities, experience, and preferences, including such measures as the gradual reduction of the working day, part-time jobs, and flexible time
- The diffusion of information about retirement rights and benefits, and the possibilities of other professional or volunteer activities.

## **M. RIGHT TO SOCIAL SECURITY**

International instruments prescribe, as a minimum standard, the right of older persons to benefit from social security and other form of social protection in case of retirement, old age, widowhood, disability, and other cases of involuntary loss of means of subsistence. States should further ensure, within their resource availability, that older persons have access to those benefits when, in reaching the retirement age prescribed by national legislation, they are not entitled to retirement or other social security benefits.

Human rights bodies have further elaborating on some of these standards, including:

- The equality of retirement conditions for men and women
- The proscription of retirement benefit reductions by State regulations
- The State's duty to provide "exceptional diligence" in responding to legal claims related to the provision of old age or widowhood benefits

## **N. THE RIGHTS OF OLDER WOMEN**

The need to pay particular attention to situation and needs of older women is common to international instruments regarding older persons. Particularly worth mentioning in this regard are General Assembly resolutions 31/113, 49/162, and 58/177, as well as Decision 26/III of the Committee on the Elimination of Discrimination against Women (CEDAW), referring specifically to the rights of older women. A new convention on the rights of older persons should also reflect the existing commitment by the international community to:

- Eliminate all kinds of discrimination based on age and ensure the full recognition of and respect for the rights of older women
- Prevent all forms of violence against older women, including sexual violence
- Abolish widow rites and other harmful traditional practices that may affect the integrity of older women
- Recognize the role that older women play in the political, social, economic, and cultural development of their communities, and ensure their equal participation in design and implementation of plans at all levels, particularly in rural areas
- Ensure their access to social security and other measures of social protection, particularly when older women do not enjoy retirement benefits as a result of intra-familial work or other forms of informal occupation
- Guarantee the rights to property and possession for older widows

## **O. THE RIGHTS OF INDIGENOUS ELDERS**

As noted above, both the United Nations Declaration on the Rights of Indigenous Peoples and the draft American Declaration on the Rights of Indigenous People do the following:

- Identify indigenous elders as specific groups within indigenous communities requiring special protection in view of their special needs, particularly against all kind of violence against them
- Protect indigenous family systems, particularly the extended family, based on criteria of gender and generational equality

#### **IV. PROPOSED STRATEGY FOR ADVANCING TOWARDS AN INTERNATIONAL CONVENTION**

The last section of this document analyses the basic elements that should be taken into account in order to advance toward the adoption of an international convention on the rights of older persons. This strategy should consider the new institutional channels of the United Nations human rights machinery, as well as ongoing international and regional initiatives in this realm.

##### **A. INCLUSION OF THE ISSUE ON THE HUMAN RIGHTS COUNCIL STANDARD-SETTING AGENDA**

###### **1. Revision of previous standard-setting initiatives by the United Nations**

The drafting and negotiation of a convention regarding the rights of older persons would not represent the first standard-setting process to be driven by the Human Rights Council. In 2008, the Human Rights Council Advisory Committee started discussion of a draft United Nations declaration on human rights education and training, as well as of a set of principles and guidelines for the elimination of discrimination against persons affected by leprosy and their family members, as mandated, respectively, by Human Rights Council resolutions 6/10 and 8/10.

With its 18 members, the Advisory Committee acts as the “think tank” for the Human Rights Council, taking over the functions of the former Sub-commission on the Protection and Promotion of Human Rights. However, in contrast with the Sub-commission, the Advisory Committee does not have the authority to act on its own initiative or to establish its own supervisory working groups.

In this context, the draft text of the declaration on human rights education is currently being prepared by a “drafting group” integrated by Advisory Committee experts,<sup>68</sup> while the principles and guidelines on discrimination against persons affected by leprosy is being prepared by an individual expert.<sup>69</sup> After the Advisory Committee has completed its work in relation to the those instruments (or at least the United Nations draft declaration), the text would be expected to be negotiated within an ad hoc Working Group of the Human Rights Council and, after the endorsement by the text of the Council’s plenary, forwarded to the General Assembly for adoption.

###### **2. Follow-up on the Advisory Committee study on the rights of older persons**

In 2009, at its third session, the Advisory Committee held a general discussion regarding the rights of older persons as one of its new priority areas for future work. In January 2010, Advisory Committee member Ms. Chunsung Chung presented a preliminary study entitled “The necessity of a human rights approach and effective United Nations mechanism for the human rights of older persons.” As pointed out above, the study noted the absence of a single international instrument regarding the rights of older

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<sup>68</sup> Human Rights Council Advisory Committee recommendation 1/1: “Drafting Group on human rights education and training: Programme of work”, 5 August 2008.

<sup>69</sup> Human Rights Council Advisory Committee recommendation 1/5: “Elimination of discrimination against persons affected by leprosy and their family members”, 7 August 2008.

persons and recommended that the Human Rights Council instruct the Advisory Committee “to conduct a full study on discrimination in the context of the human rights of older persons with consideration of the establishment of an international convention on the rights of older persons.”<sup>70</sup>

At its fourth session, the Advisory Committee took note of Ms. Chung’s preliminary study and adopted a recommendation expressing the hope that the Human Rights Council would entrust the committee with the preparation of “a study on the application of existing United Nations human rights instruments to older persons, and any possible gaps in the current legal framework.”<sup>71</sup>

In response to the Advisory Committee’s additional study on the issue, Human Rights Council States members, particularly those belonging to the Latin American and Caribbean region, may wish to instruct the committee to continue considering the issue, with a view to prepare a draft text of an international convention regarding the rights of older persons, as previously done on the issues of human rights education and leprosy. As with these cases, the institutional channel expected to be followed by the Human Rights Council in relation to a draft convention on the rights of older persons may involve the establishment of an ad hoc open-ended Working Group as part of its subsidiary bodies, with the intent of negotiating the text of the future convention, to be adopted by the Human Rights Council and subsequently forwarded to the General Assembly for adoption.

## **B. THE ESTABLISHMENT OF A SPECIAL RAPPORTEUR OF THE HUMAN RIGHTS COUNCIL**

The Brasilia Declaration also calls upon States members to promote the establishment, within the Human Rights Council’s special procedures, of a mandate for a Special Rapporteur on the rights of older persons.<sup>72</sup> In addition to many other important benefits that it may imply for the international protection of the rights of these persons, a mandate regarding older persons may also play a relevant role in advancing toward the adoption of an international instrument.

In the absence of specific human rights instruments and mechanisms, United Nations special procedures play a particularly relevant role in defending human rights or the rights of specific groups that are not sufficiently covered by existing instruments, as well as in systematizing existing standards. This is the case, for instance, for the Human Rights Council Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, which is currently mandated to elaborate the content and scope of corporate responsibility to respect human rights and of State duties in this regard.<sup>73</sup> Similarly, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people was also mandated to help draft the 2007 United Nations Declaration on the Rights of Indigenous Peoples.<sup>74</sup> While not formally part of the special procedures machinery, the

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<sup>70</sup> The necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person (A/HRC/AC/4/CRP.1), December 2009, para. 65.

<sup>71</sup> Human Rights Council Advisory Committee recommendation 4/4; “Human rights and older persons”, 29 January 2010, OP 1.

<sup>72</sup> Brasilia Declaration, *op. cit.*, para 25.

<sup>73</sup> Human Rights Council Resolution 8/7: “Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”, 18 June 2008.

<sup>74</sup> Human Rights Council Resolution 6/12: Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, 28 September 2007.

Special Rapporteur on disability of the Commission for Social Development also played a major role in drafting and adopting the United Nations Convention on the Rights of Persons with Disabilities.<sup>75</sup>

The procedure to establish the mandate of a Special Rapporteur on the rights of older persons involves its adoption, generally by consensus, by the Human Rights Council. The Council has set a number of criteria concerning the creation of new thematic mandates. These include, but are not restricted to, the following: (a) increased level of human rights protection and promotion; (b) equal attention to all human rights (civil, political, economic, social and cultural, including the right to development); (c) avoidance of unnecessary duplication; (d) avoidance of ambiguity.<sup>76</sup> These criteria are met in relation to the specific issue of the rights of older persons.<sup>77</sup>

The Human Rights Council's first resolution on a new mandate typically designates the mandate holder for an initial period of three years, subject to renewal for another three-year period. The procedure for appointment of mandate-holders is based on a threefold mechanism. First, nomination by Governments, international and nongovernmental organizations, other human rights bodies, or self-nominations for inclusion in a public list of eligible candidates. Second, selection of a short list by a consultative group composed of representatives of the United Nations regional groups. And third, appointment by the President of the Human Rights Council.<sup>78</sup>

A Special Rapporteur on the rights of older persons could play a very similar role, further contributing to ongoing initiatives at the Advisory Committee and at other international and regional fora, promoting the exchange of experiences and good practices, and making operational the existing international consensus regarding those rights, while also helping to fill the international gap regarding the protection of these persons.<sup>79</sup>

### C. FOLLOW-UP ON REGIONAL STANDARD-SETTING INITIATIVES

The initiative, supported by Latin American and Caribbean States and other member States, to advance toward the adoption of a United Nations convention on the rights of older persons runs parallel to other similar discussions regarding the possibility of adopting regional instruments protecting those rights.

This is the case, as seen above, with the current discussion recently opened by the OAS General Assembly to exchange information and good practices concerning the protection of the rights of older persons, as well as to examine the "viability" of elaborating an inter-American convention in this realm.<sup>80</sup> A similar initiative is currently ongoing within the framework of the African human rights system. The

<sup>75</sup> The Special Rapporteur on disability was established as the monitoring mechanism on the implementation of the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the General Assembly resolution 48/96 of 20 December 1993, Annex, Ch. IV. The Special Rapporteur by subsequently entrusted by the General Assembly to contribute to the work of the Ad Hoc Committee responsible for the negotiation and drafting of the text of the future Convention on Persons with Disabilities. *See* General Assembly resolution 56/168 of 19 December 2001: "Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities," para. 3.

<sup>76</sup> *United Nations Human Rights Council: Institution-building*, op. cit., at para. 58.

<sup>77</sup> Luis Rodríguez-Piñero, *Los retos de la protección internacional...*, supra, at 42-44.

<sup>78</sup> *United Nations Human Rights Council: Institution-building*, op. cit, at paras. 39-53.

<sup>79</sup> Luis Rodríguez-Piñero, *Los retos de la protección internacional...*, op. cit., at 44-46.

<sup>80</sup> Resolution AG/RES. 2455(XXXIX-O/09), supra, OP 3.



Declaration of Kigali, adopted in 2003 by the First African Union Ministerial Conference on Human Rights, called upon African Union Member States to work toward the adoption of a protocol to the African Charter regarding ‘the protection of the rights of people with disabilities and older persons.’<sup>81</sup> This request was followed up by the African Commission on Human and Peoples’ Rights (ACHPR) with the establishment in 2007 of a Focal Point on the Rights of Older Persons in Africa.<sup>82</sup> In 2009, the focal point was transformed into a new Working Group on the Rights of Older Persons and Persons with Disabilities in Africa. Composed of five members of the Commission, the Working Group is responsible, among other things, for helping the ACHPR prepare a new protocol to the African Charter, as mandated by the Declaration of Kigali.<sup>83</sup>

Ongoing discussions within the Inter-American and the African human rights systems are important initiatives that complement and reinforce the work toward a convention of international scope, building on the concern of the international community as a whole to strengthen the mechanism of protection of the rights of older persons.

In relation to the OAS initiative to promote an inter-American convention on the rights of older persons, Latin American and Caribbean States could ensure that, in responding to the report presented by the Permanent Council, the OAS General Assembly (1) takes note of the report’s conclusions and recommendations; (2) requests that the IACHR pay particular attention to the rights of older persons within its mandate of promotion and protection of human rights in the Americas; and (3) further requests that the Human Rights Council Members forward the study to the Advisory Committee for its consideration in the preparation of an international convention on the rights of older persons.

#### **D. FOLLOW-UP ON THE BRASILIA DECLARATION**

ECLAC member States, through the ECLAC Ad Hoc Committee on Population and Development, should continue to follow up the Brasilia Declaration as part of their wider efforts toward the implementation of the Madrid International Plan of Action on Ageing at the regional level. As called for by the forty-eighth session of the Commission for Social Development, action at the regional level should include the development of “regional and subregional networks of experts and practitioners, government and nongovernmental organizations, academia, and the private sector to increase the potential for policy action on ageing.”<sup>84</sup> These networks should further be incorporated into ongoing discussions regarding an international convention of the rights of older persons, as the practice by several ECLAC members already shows.

Working relationships between national focal points and ECLAC should be continued and strengthened in order to continue the exchange of best practices and awareness-raising activities regarding the protection of older persons and the design of common strategies to be followed in the adoption of an

<sup>81</sup> Adopted by the First African Union Ministerial Conference on Human Rights (MIN/CONF/HRA/Decl.1 (I)), 3 March 2003, at para. 20.

<sup>82</sup> Resolution ACHPR/Res.118(XXXXII)07 of the African Commission on Human and Peoples’ Rights: “Establishment of a Focal Point on Older Persons in Africa”, 2009.

<sup>83</sup> Resolution ACHPR/Res143(XXXXV)09: “Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and Persons with Discapacity in Africa”, 2009.

<sup>84</sup> Draft resolution submitted to the Economic and Social Council (ECOSOC) entitled “Future implementation of the Madrid International Plan of Action on Ageing,” (E/CN.5/2010/L.6), Commission for Social Development, forty-eighth session (3-12 February 2010), 11 February 2010, at para. 6.

international convention in this realm, in cooperation among other relevant Government sectors, including Ministries of Foreign Affairs.

Member States could also incorporate work towards the adoption on an international convention on the rights of older persons as part of the regional preparatory activities for the second review and appraisal exercise of the Madrid International Plan of Action on Ageing.

## **E. FOLLOW-UP ON THE DISCUSSIONS AT THE COMMISSION FOR SOCIAL DEVELOPMENT**

Ongoing discussions within the Commission for Social Development regarding the need to strengthen the international protection of the rights of older persons within the implementation Madrid International Plan of Action include the possibility of an inter-sessional working group “to further pursue discussions on the most appropriate ways and means of promoting and protecting human rights for older persons.”<sup>85</sup> Member States could also follow up on this important initiative in order to further build consensus within the Commission on the need for an international convention on the rights of older persons, and transmit the Commission’s input to ongoing standard-setting initiatives at the Human Rights Council.

## **F. INVOLVEMENT OF OTHER STAKEHOLDERS**

### **1. Civil society involvement**

Civil society, both at the international and the national level, has played a crucial role in promoting the current work to advance in the adoption of an international convention on the rights of older persons. Organizations representing these persons are to be particularly credited in this regard.

Recent human rights standard-setting initiatives at the United Nations level share a common concern to involve civil society organizations in drafting and negotiating those instruments. This is a clear recognition of the increasing role that these organizations play in the international promotion and protection of human rights, as well as the important expertise they have developed in this regard. By allowing direct civil society involvement, United Nations standard-setting processes have importantly contributed to the international mobilization of civil society, which has come together to contribute to those processes through the organization of specific-issue networks, while gaining valuable knowledge about the functioning of international human rights bodies. Among civil society agents, the United Nations has paid particular attention to the involvement of representative organizations of the groups specifically concerned by the standards under discussion, including families of persons with disabilities, persons who have disappeared, and indigenous peoples.

The pattern described above should also be taken into account in the international discussion of specific standards regarding the rights of older persons. All institutional steps toward the adoption of an international convention in this realm should strive to promote the wide participation of civil society organizations, and particularly international organizations representing older persons, organizations

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<sup>85</sup> Further implementation of the Madrid International Plan of Action on Ageing, 2002. Report of the Secretary-General (E/CN.5/2010/4), 25 November 2009, at para 28.

working in the promotion and protection of the rights of older persons, and scientific and educational institutions active in this area. At the same time, States members should actively seek to incorporate these agents in the definition of their own positions and strategies on international processes.

## **2. Involvement of national human rights institutions**

The Human Rights Council, in partnership with the Office of the United Nations High Commissioner for Human Rights, has promoted the involvement of national human rights institutions (NHRIs) in international human rights institutions in international processes, including standard-setting processes. These institutions should also be naturally incorporated into the discussion concerning a future convention on the rights of older persons, both at the international and national level.

From the perspective of Latin American States, a relevant organizational structure that could be further explored in this regard is the Ibero-American Federation of Ombudsmen (FIO). FIO, whose governing council comprises the Ombudspersons of Latin American countries, Spain, and Portugal, promotes the discussion of human rights issues of particular concern for the region, including the preparation of annual reports and various training and information-sharing initiatives. FIO could thus be particularly useful in promoting the further involvement of Latin American NHRIs in the protection of the rights of older persons, including work to advance toward the adoption of a United Nations convention.

## **3. Involvement of international and other intergovernmental bodies and agencies**

As discussed, several United Nations international organizations, bodies, agencies, and regional commissions, as well as intergovernmental agencies, have taken the lead in international involvement in the promotion of the rights of older persons. In a number of cases, they have further contributed to this promotion by adopting specific sets of standards and policies.

In line with the working methods of the former Commission on Human Rights, General Assembly resolution 60/251, establishing the mandate of the Human Rights Council, also provides for a consultation with specialized agencies and other intergovernmental organizations. State members should ensure that pertinent agencies and organizations are actively involved in further discussions in this realm, contributing to studies and other standard-setting-related initiatives by the Human Rights Council.

## **V. FINAL REMARKS**

The analysis of the current state of development of international law pertaining to older persons shows that an important number of standards, including international and regional instruments of various kinds, as well as the progressive interpretation of those standards by international human rights bodies and mechanisms, are currently in place regarding the rights of older persons. Older persons have been distinctively identified by the international community as a group requiring special protection because of the various challenges they meet in their enjoyment of basic human rights, and they are often discriminated against in many areas as a result of prevailing stereotypes about old age and other structural patterns.

While, in a strict sense, no “legal vacuum” properly exists in relation to the rights of older persons under international law, there are however serious protection gaps within the existing United Nations human rights machinery. Despite the existence of many declaratory texts, particularly in the form of General Assembly resolutions following the increasing role that United Nations Treaty Bodies and other human rights bodies and mechanisms are playing in this regard, the absence of an international convention on the rights of older persons represents a major limitation in the international protection of those rights.

The adoption of a United Nations convention in this area would clearly enhance this protection by establishing a separate mechanism to supervise that convention. Moreover, a convention would further crystallize the commitment of the international community, promoting the objectives marked in the Madrid International Plan on Ageing, and it would significantly help clarify the content of the existing consensus regarding the rights of older persons, as well as the obligations by State and other duty-bearers. A new United Nations convention would also enhance the adoption of national and international ageing policies from a rights-based approach, and would surely promote much-needed international economic and technical cooperation in this area.

This document has highlighted some of the ongoing initiatives that are currently taking place both at the international and regional levels regarding the development of new international standards on older persons. These initiatives should be taken into account when defining a clear strategy for the adoption of a convention, as called for in paragraph 26 of the Brasilia declaration, from the perspective of Latin American and Caribbean States.

To continue making progress toward an international convention on the rights of older persons, it is very important that Latin American and Caribbean countries concentrate their efforts in two strategic areas.

The first area is active participation in actions taken by different international and inter-governmental organizations at the global and regional level. Within the Inter-American field, it is essential that States encourage the celebration of the Special Session on Human Rights and Older Persons at the Permanent Council of the OAS, as mandated by AG/RES. 2455(XXXIX-O/09) and help ensure that the results obtained at this meeting are fully incorporated into future discussions at the Human Rights Council, with a view to strengthening the international support for an international convention. Likewise, in the framework of the Commission for Social Development, countries of the region could continue promoting initiatives aimed to broaden protection of human rights of older persons. They could particularly follow up the establishment of an intersessional working group of the Commission to strengthen the protection of rights of older persons within the implementation of the Madrid Action Plan. Furthermore (as has been previously called for by the Brasilia Declaration), the States of the region should join forces to promote the establishment, within the Human Rights Council, of a Special Rapporteur on the human rights of older persons, who can help draft international standards concerning those rights. Finally, it is important to cooperate with activities that are being carried out by the Human Rights Council Advisory Committee, especially with regard to a study on the rights of older persons.

At the same time, the second strategic area addresses the strengthening of alliances with other countries from outside the region and with civil society. It is crucial to concentrate efforts in order to engage other States members of the United Nations —particularly African, European and Arab states— with the purpose of promoting a wider international consensus on the need to advance quickly toward the adoption of a United Nations convention. This should take into account the standards that have already been developed by United Nations itself, those of the African and European human rights systems, and the relevant provisions of the Arab Charter on Human Rights. At the same time, it is necessary to engage

with civil society at the national and international level, and particularly with older persons' organizations, to seek their continuous support and advice in the process of adopting an international convention. Latin American countries could explore the possibility of seeking the involvement of FIO in this work.

The ECLAC Ad Hoc Committee on Population and Development, an intergovernmental body in charge of following up the Brasilia Declaration, could make a valuable contribution to the development of the abovementioned strategic areas. First, in the framework of the second review and appraisal of the Madrid International Plan of Action on Ageing, the Committee could request the Secretary to organize a regional conference in late 2011, subject to the availability of funds, to assess national progress made on the Plan of Action in general, particularly with respect to the promotion of an international convention on the rights of older persons; to exchange experiences and good practices on strategies used; and to determine priorities for future action. Similarly, the Committee could request the Secretary to present the outcome of that meeting to the Commission on Social Development in 2011. Second, the Committee could recommend that the secretariat should maintain working relations between national focal points on ageing and ECLAC in order to contribute to common strategies toward the adoption of an international convention; establish and reinforce existing regional and subregional expert networks on ageing policy so that they are fully involved in the work done toward the adoption of an international convention; and strengthen the Secretary's activities for technical support to countries in order for them to enforce the Brasilia Declaration.

The progress made in the aforementioned areas could be presented during the next meeting of the ECLAC Ad Hoc Committee on Population and Development, to take place in 2012.