

31 de marzo de
2010

ORIGINAL:
ENGLISH

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

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Presentation

The Brasilia Declaration, adopted in 2007 by the Second Regional Intergovernmental Conference on Aging in Latin American and the Caribbean,¹ and ratified in ECLAC resolution 644(XXXII) of 2008, called upon participating Governments to work towards the adoption of a international convention regarding the rights of the older persons (Article 24), as well as to the establishment of the mandate of a Human Rights Council Special Rapporteur responsible for the promotion and the protection of the rights of older persons (Article 25).

Following up on commitment during the last biennium three meetings were held. The First and Second Follow-Up Meetings to the Brasilia Declaration, which took place, respectively, in Rio de Janeiro, Brazil (2008)² and in Buenos Aires, Argentina (2009).³ At the Third Follow-Up Meeting to the Brasilia Declaration, held in Santiago (Chile), from 5-6 October 2009, participating countries requested the Secretariat of the United Nations Economic Commission for Latin America (ECLAC) to prepare “a proposal of a strategy on how to advance in the follow up of article 24 and 25 of the Brasilia Declaration.”⁴ 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.”⁵

In response to this request, this documents presents, first, a general overview of existing human rights standards, both at the international and at the regional levels, which 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 the older persons, as well as the minimum contents that this convention should include. The document finally presents a proposed strategy to advance, from a Latin American and Caribbean perspective, towards the adoption of an international convention in this realm.

I. The emerging normative consensus regarding the minimum contents of the rights of older persons under international law

To date, the rights of the older persons have not been object of a specific coverage by the United Nations human rights system in the form of a specific convention or treaty, as it is the case in relation to other specific groups, such as women, children or, more recently, persons with disabilities. The absence, and, as discussed below, the desirability of such instrument, does not however preclude the fact that the situation of the human rights of older persons have been subject of increased attention and concern by the international community.

The review of the standards enshrined in existing human rights instruments of different legal status, both at the United Nations and at the regional level, as well as the authoritative construction of those standards by human rights bodies and mechanisms, allows to conclude that a clear

¹ *Brasilia Declaration. Second Regional Inter-governmental Conference on ageing in Latin America and the Caribbean: “Towards a society for all ages and rights-based social protection” (Brasilia, 4-6 December 2007)*, LCG.2359 (January 2008).

² *Informe de relatoría: Primera reunión de seguimiento de la Declaración de Brasilia (Río de Janeiro, Brasil, 16 y 17 de septiembre de 2008)*, available at: http://www.cepal.org/celade/noticias/noticias/7/34107/Reunião_Rio_Set_Idoso_2008.pdf

³ *II Reunión de seguimiento de la Declaración de Brasilia: Hacia una Convención sobre los Derechos de las Personas Mayores*, available at: http://www.cepal.org/celade/noticias/noticias/5/35715/Relatoria_BuenosAires.pdf

⁴ *Reporte ejecutivo: III Reunión de Seguimiento a la Declaración de Brasilia: Por los Derechos de las Personas Mayores*, párr. 6. Available at: http://www.cepal.org/celade/noticias/documentosdetrabajo/4/37434/InformeEjecutivo_IIIReuniondeseguimiento.pdf

⁵ *Ibidem*.

international normative consensus has emerged concerning the minimum content of the rights of older persons under international law. In turn, this normative consensus reflects and interacts with recent trends of constitutional and legal reform at the domestic level, as shown, particularly, in the context of Latin America and the Caribbean.

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

Existing international standards provide already a list of issues of particular concern for older persons, while identifying the kind of measures required for safeguarding the rights of these persons. Moreover, these standards represent, unavoidably, an important framework of reference in the definition of a future international convention in this realm.

This section provides a brief overview of the evolution of international human rights law concerning the rights of older persons. While a complete description goes beyond the objectives of the present report,⁶ 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 progressively developed by United Nations human rights bodies and mechanisms in their interpretation of generally applicable standards. It also pays a particular attention on 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 instruments

The first references to the 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. Thus, the Universal Declaration affirms the right to social benefits in case of older age.⁷ Similarly, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) affirms the “right of everyone to social security, including social insurance.”⁸

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, proscribing the discrimination against women in relation to their access to old age subsidies.⁹ The scope of prohibited discrimination on the basis of age was subsequently widened by the Convention on the Protection of the Rights of Migrant Workers and their Families,¹⁰ and, subsequently, by the Convention on the Rights of Persons with Disabilities, in relation to such issues

⁶ 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*. Santiago, ECLAC, 2010 (LC-W305), at 9-21.

⁷ Universal Declaration on Human Rights, adopted by General Assembly resolution 217(III) of 10 December 1948, Article 25.

⁸ 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, Article 9.

⁹ 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, Article 11(1)(e).

¹⁰ 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.

as the elimination of prejudices, stereotypes, and harmful practices; access to justice, or the protection against exploitation, violence and abuse.¹¹

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 instruments, often group under the label of “soft law,” have obviously a legal status that differs from treaties. However, this does not entail that they lack juridical relevance. Inasmuch as they have been adopted by the highest representative body of the United Nations, and with a view to expressing the common concerns, commitments and aspirations of the international community regarding the rights of the older persons, these instruments should be seen as authoritative reflections of an emerging normative consensus regarding the minimum contents of those rights under international law.

While the specific situation of older persons has been object of a continuous stream of resolutions adopted by the General Assembly since the 1969 Declaration on Social Progress and Development,¹² the adoption in 1991 of the United Nations Principles for Older Persons,¹³ clearly signals the entry of a rights perspective to ageing issues on the United Nations agenda. The Principles, which were adopted as a follow-up of the 1982 Vienna International Plan of Action,¹⁴ affirm a number of rights and State measures under the headings of “independence,” “participation,” “care,” “self-realisation and dignity.” They constitute, up to date, the most important expression at the United Nations level regarding the minimum normative contents of the rights of older persons.

The 2002 Madrid Political Declaration and International Plan of Action on Ageing, adopted at the Second World Conference on Ageing,¹⁵ further contributed to the development of normative understanding regarding the rights of the 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, have 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) Inter-ministerial Declarations of Berlin¹⁶ and Leon.¹⁷

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,¹⁸ as well as a number of specific resolutions related to older women.¹⁹ Other General Assembly resolutions incorporate specific standards regarding the older persons, including the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;²⁰ the Standard Minimum Rules for non-custodial measures (the Tokyo Rules);²¹ the Declaration on

¹¹ Convention on the rights of persons with disabilities, adopted by General Assembly resolution 61/106 of 3 May 2008, Articles 1(2), 8, 13, and 16.

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

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

¹⁴ Vienna International Plan of Action on Ageing, adopted by the World Conference on Ageing (Vienna, 26 July-6 August 2006).

¹⁵ Madrid Political Declaration and International Plan of Action, adopted by the Second World Conference on Ageing (Madrid, 8-12 April 2002).

¹⁶ UNECE, *Berlin Inter-ministerial Declaration: “A society for all ages in the UNEC region,”* ECE/AC.23/2002/3/Rev.2 (11 September 2002).

¹⁷ UNECE, *Leon Inter-ministerial Declaration: “A society for all ages: challenges and opportunities,”* ECE/AC.30/2007/2 (28 January 2007).

¹⁸ United Nations Proclamation on Ageing, adopted by General Assembly resolution 47/5 of 16 October 1992.

¹⁹ 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.”

²⁰ United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 5(2) (special measures for older persons).

²¹ United Nations Standard Minimum Rules for non-custodial measures, adopted by General Assembly resolution 45/110 of 14 December 1990, Principle 2(2) (non discrimination by reason of age).

fundamental principles of justice for victims of crimes and abuse of power;²² the Declaration on the elimination of violence against women, and the Declaration of the rights of indigenous peoples.²³

The limited protection afforded to the rights of the older persons by existing human rights conventions has been partially covered by the progressive interpretation of those conventions by their supervisory bodies. This is the case, for instance, of the Human Rights Committee, which has developed the principle of non-discrimination by reason of age in a number of cases examined under its complaint procedure.²⁴ Of particular relevance is also the practice of the CESCR, which in 1995, the committee adopted its General Comment No. 6 on the economic, social and cultural rights of older persons, developing the obligations that correspond to State Parties to ICESCR in relation to these persons.²⁵ The committee has further elaborated upon the content of those rights under different provisions of or issues covered by the convention, including forced displacement,²⁶ education,²⁷ health,²⁸ and social security.²⁹ On its part, the Committee on the Elimination of Discrimination against Women (CEDAW) has devoted a particular attention to the situation of older women in its concluding observations on individual State Parties, including in relation to key human rights issues such as violence against women; education and illiteracy, and access to social benefits. In 2000, as a contribution to the upcoming Madrid World Assembly on Ageing, CEDAW adopted Decision 26/III, where it systematized and elaborated upon its own jurisprudence regarding older women.³⁰

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 relation to the specific situation of the older persons. Even though no thematic mandate currently exists within the Council’s special procedures machinery, other thematic procedures have identified the older persons as a group requiring of a special protection, such as in relation to the right to an adequate housing or the right to physical and mental health. A number of standards developed by thematic special procedures have also taken an old aged-specific approach, including the General Recommendation of the Special Rapporteur on torture;³¹ the Guiding Principles on international displacement;³² the

²² United Nations Declaration on fundamental principles of justice for victims of crimes and abuse of power, adopted by General Assembly resolution 40/34 of 29 November 1985, Principle 3 (non discrimination by reason of age).

²³ United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly resolution 61/19 of 13 September 2007, Article 22 (special protection of indigenous elders).

²⁴ See inter alia 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 Hinojosa Solís v. Peru*, Communication No. 1016/2001, CCPR/C/86/D/1016/2001 (2006).

²⁵ CESCR, *General Comment No. 6: The economic, social and cultural rights of older persons*, E/1996/22 (1995).

²⁶ CESCR, *General Comment No. 7: The right to adequate housing (Article 11 paragraph 1 of the Covenant): Forced displacement*, E/1999/22, Annex IV (1997).

²⁷ CESCR, *General Comment No. 13: The right to education (Article 13 of the Covenant)*, E/C.12/1999/10 (1999);

²⁸ CESCR, *General Comment No. 14: The right to enjoy the highest possible level of health (Article 12 of the International Covenant on Economic, Social, and Cultural Rights)*, E/C.12/2000/4 (2000).

²⁹ CESCR, *General Comment No. 19: The right to social security (Article 9)*, E/C.12/GC/19 (2008).

³⁰ CEDAW, *Decision 26/III: Elimination of discrimination against older women under the Convention*, A/57/38, Part I (7 May 2002).

³¹ General Recommendation of the Special Rapporteur on the question of torture, reproduced in *Report submitted by the Special Rapporteur on the question of torture, Theo van Boven, pursuant to Commission resolution 2002/38*, E/CN.4/2003/68 (27 February 2003), Annex 1.

³² Guiding Principles on international displacement, reproduced in *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 2*. E/CN.4/1998/53/Add.2 (11 February 2008)

Human Rights Guidelines for pharmaceutical companies in relation to access to medicine,³³ and the Basic Principles and Guidelines on development-based evictions and displacement.³⁴

B. Other international standards of universal scope

The minimum contents of the rights of the older persons have also been promoted by a number of legal instruments and policies adopted by international organizations and agencies, which are typically restricted to their respective mandates and expertise. This is the case of the various conventions and recommendations adopted within the framework of the International Labour Organisation (ILO). These include, by way of example, the Social Security (Minimum Standards) Convention;³⁵ the Invalidity, Old-Age and Survivors' Benefits Convention,³⁶ Recommendation on older workers.³⁷ Old age considerations also taken into account in two of the ILO core conventions regulating fundamental rights at work, the Convention on Discrimination regarding Employment or Occupation, and the Freedom of Association Convention.³⁸

In addition, specific provisions regarding the 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.³⁹ Worth mentioning is also the 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 in situation of legal guardianship or otherwise requiring it.⁴⁰

C. Inter-American human rights standards

The foundational instruments of the inter-American human rights, the American Declaration on the Rights and Duties of Man,⁴¹ and the American Convention on Human Rights,⁴² failed to include any reference to the rights of the 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 the older persons were explicitly affirmed in the context of the inter-American system, although restricted only to the area of welfare and social policies. According to Article 17 of the Protocol,

³³ Human Rights Guidelines for pharmaceutical companies in relation to access to medicine, reproduced in *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/63/263 (11 August 2008).

³⁴ Basic Principles and Guidelines on development-based evictions and displacement, reproduced in *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, A/HRC/4/18 (11 June 2007), Annex 1.

³⁵ ILO Convention concerning Social Security (Minimum Standards), 1952 (No. 102), adopted by the 35th session of the International Labour Conference on 28 June 1952, entered into force on 27 April 1955.

³⁶ ILO Convention concerning Invalidity, Old-Age and Survivors' Benefits, 1967 (No. 128), adopted by the 51st session of the International Labour Conference on 7 June 1967, entered into force on 1 November 1969.

³⁷ Recommendation on Older Workers, 1980 (No. 162), adopted by the 66th session of the International Labour Conference on 23 June 1980.

³⁸ ILO Convention concerning Discrimination in Employment or Occupation, 1958 (No. 111), adopted by the 42nd session of the International Labour Conference on 25 June 1958, entered into force on 15 June 1960; ILO Convention on Freedom of Association and the Protection of the Rights to Organize, 1948 (No. 87), adopted by the 31st session of the International Labour Conference on 17 June 1948, entered into force on 4 July 1950.

³⁹ Third Geneva Convention relative to the Treatment of War Prisoners, and Fourth Geneva Convention relative to the Treatment of Civilians in Times 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.

⁴⁰ Convention on the International Protection of Adults (No. 35), adopted on 13 January 2000 by The Hague Conference on International Private Law, entered into force on 1 January 2009.

⁴¹ American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogota, Colombia, 30 March-2 April 1948.

⁴² American Convention on Human Rights, signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, entered into force on 18 July 1978.

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

- a. 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;
- b. 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;
- c. 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 OAS General Assembly, including the Inter-American Convention on the Elimination of Violence against Women (“Convention of Belem do Para”);⁴³ the Declaration of San Pedro de Sula: “Toward a culture of nonviolence,”⁴⁴ and the Inter-American Declaration on the Family.⁴⁵ A particular focus on the human rights situation is also found on the OAS General Assembly resolution on the legal situation of refugees, returnees, and displaced persons in the Americas,⁴⁶ as well as in the draft American Declaration on the Rights of Indigenous Peoples, currently under negotiation.⁴⁷

The inter-American human rights bodies, the Commission (IACHR) and the Court, have played, up to date, a relatively limited role with regards to 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),⁴⁸ where the Court has interpreted the right to property to encompass the prohibition to affect retirement benefits by subsequent amendments to State regulations.⁴⁹ At the moment of writing this report, similar cases are still pending at the IACHR.⁵⁰

In May 2009, the OAS General Assembly adopted a resolution on “human rights and older persons”, calling for moving forwards “in the creation of international instruments” and “in the

⁴³ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belem do Para”), 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).

⁴⁴ Declaration of San Pedro Sula: “Toward a culture of nonviolence,” adopted by OAS General Assembly resolution OEA/AG/DEC. 60(XXXIX-O/09) of 4 June 2009, during its 39th ordinary session, in San Pedro Sula, Honduras, Article 4 (prevention of violence, segregation, exploitation and discrimination against older persons).

⁴⁵ Inter-American Declaration on the Family, adopted by OAS General Assembly resolution AG/RES. 678(XIII-O/83) on 18 November 1983 during its 13th ordinary session, Article 15 (affirming the rights of “elderly or senior citizens” to an environment enabling them to live decent and active lives and participate in the country’s social life).

⁴⁶ OAS General Assembly resolution on the legal situation of refugees, returnees, and displaced persons in the Americas, adopted by General Assembly AG/RES. 1602(XXVIII-O/98), on 3 June 1998 during its 28th ordinary session, at O.P. 3 (special measures of protection for older persons).

⁴⁷ Draft American Declaration on the Rights of Indigenous Peoples, reproduced in Record of the current status of the Draft American Declaration on the Rights of Indigenous Peoples (Outcomes of the Eleventh Meeting of Negotiations in the Quest for Points of Consensus, held by the Working Group) [Updated upon the conclusion of the Eleventh Meeting of Negotiations], 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).

⁴⁸ I/A Court H.R., *Case of “Five Pensioners” v. Peru* (Merits, Reparations and Costs). Judgment of February 28, 2003. Series C, No. 98.

⁴⁹ I/A Court H.R., *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.

⁵⁰ See *Amilcar Menéndez, Juan Manuel Caride and other (Pension System)*, v. Argentina, IACHR, Report No. 03/01 (admissibility), Case 11.670 (2001); *Tomás Eduardo Cirio v. Uruguay*, IACHR, Report No. 119/01 (admissibility), Case 11.500 (2001).

adoption of measures” to protect those rights.⁵¹ The resolution further called for strengthening regional cooperation in this realm, and instructed the OAS Permanent Committee to convey an expert meeting with a view to “examining the feasibility of preparing an inter-American convention on the rights of older persons.”⁵²

Even though they are not formally part of the inter-American human rights system, a number of sub-regional inter-governmental organizations of the Americas have also developed a number of standards regarding the older persons. These include the Andean Charter on the Promotion and Protection of Human Rights, adopted by the Andean Community of Nations;⁵³ and the Charter of Buenos Aires on Social Commitment in the Southern Common Market (MERCOSUR), Bolivia, and Chile.⁵⁴

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 address specifically this situation from a rights-based approach. These policies have been promoted by both international and regional agencies in order 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 aging launched in 2002 by the World Health Organization, which operationalizes the basic human rights concepts enshrined in the United Nations 1991 Principles for Older Persons in relation to public and private health policies in the context of old age.⁵⁵ This leading example was followed, the same year by its sister organization at the inter-American level, the Pan-American Health Organization.⁵⁶

Both organizations have been further involved in developing standards regarding issues of special concern for the health of older persons from a rights perspective, and have also supported other similar initiatives. In 1999, WHO and PAHO supported the adoption by the Heads of Governments of the Caribbean Community (CARICOM) Charter on Health and Aging.⁵⁷ In 2002, WHO promoted the adoption of the Toronto Declaration on Global Prevention of Elder Abuse⁵⁸, in 2009 the theme also has been included in the PAHO Plan of action on the health of older persons, including active and healthy aging.⁵⁹

Irrespective of their respective legal status, these policies and instruments further reflect and contribute to building the emerging international consensus regarding the rights of older persons, while helping clarify the content of those rights and State correlatives duties in specific areas. This make them also particularly useful instruments in devising the contents of a future international convention.

⁵¹ Resolution AG/RES. 2455 (XXXIX-O/09): “Human rights and older persons,” adopted by the OAS General Assembly in 4 June 2009, during its 39th regular session, OP 1.

⁵² *Ibid.*, OP 3.

⁵³ Andean Charter for the Promotion and Protection of Human Rights, adopted by the Presidential Council of the Andean Community of Nations on 26 July 2002, Arts. 46-47 (“rights of older adults”).

⁵⁴ Charter of Buenos Aires on Social Commitment in MERCOSUR, Bolivia and Chile, adopted on 30 June 2000 by the presidents of Argentina, Brazil, Paraguay, and Uruguay, Member States of MERCOSUR, and the presidents of Bolivia and Chile, Ops 3, 7 (special measures of protection for the elderly, including though social services, housing policies, and social integration and training programmes).

⁵⁵ WHO, *Active Aging: A Policy Framework*. Geneva, WHO, 2002.

⁵⁶ PAHO, *Health and ageing* (CSP26/13), 26th Pan-American Health Conference, Washington, D.C., 24-29 September 2002.

⁵⁷ Caribbean Charter on Health and Ageing, *Carta del Caribe para la Promoción de la Salud*, adopted at the Forum on Health and Ageing in Nasau (Bahamas), from 27 to 30 May 1993.

⁵⁸ Toronto Declaration on Global Prevention of Elder Abuse, adopted at the Expert Meeting on Elder Abuse, organized by WHO, the International Network on Prevention of Elder Abuse (INPEA), and the Ontario Network on Prevention of Elder Abuse (ONPEA) in Ontario, Canada, on 17 November 2002.

⁵⁹ PAHO (2009) Plan of action on the health of older persons, including active and healthy aging, CE144/9, 11 May 2009

E. Domestic standards at the Latin American and Caribbean region

Many of the modern Constitutions in the Latin American and Caribbean region have incorporated specific provisions that prioritize to 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 conditions and housing to the more general concept of the welfare State (the Bolivarian Republic of Venezuela, Brazil, Guatemala, Ecuador and Panama). In all 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 have 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.⁶⁰

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Taken as a whole, the various normative developments analyzed above, unquestionably signal the international community's concern regarding the older persons as groups subject to global patterns of discrimination and marginalization, which place them in situation of particular

⁶⁰ For a more detailed overview Huenchuan, Sandra (ed.) (2009), *Envejecimiento, derechos humanos y políticas públicas*, Libros de la CEPAL N° 100 (LC/G.2389-P), Santiago, CEPAL. Publicación de las Naciones Unidas, N° de venta: S.08.II.G.94.

vulnerability regarding their enjoyment of basic human rights; this concern is particularly noticeable, as seen, in the Latin American and Caribbean region. The development of specific standards related to the rights of the older persons in international and regional human rights instruments, as well as in the practice of human rights bodies and mechanisms, provides plenty of evidence of the existing international normative consensus regarding the minimum contents of the rights of the older persons. Yet, as further analysed, no human rights convention of universal scope currently exist to systematise and operationalize these rights, and to establish and specific mechanism regarding their protection. This leaves an important gap in the international protection of the rights of the older persons.

II. Justification for an international convention on the rights of the older persons

The development of specific standards related to the rights of the older persons in international and regional human rights instruments, as well as in the practice of human rights bodies and mechanisms, provides plenty of evidence of the existing international normative consensus regarding the minimum contents of the rights of the older persons. Yet, as further analysed, no human rights convention of universal scope currently exist to systematise and operationalize these rights, and to establish and specific mechanism regarding their protection. This leaves an important gap in the international protection of the rights of the older persons.

It is from this perspective that the representatives of Latin American and Caribbean countries, as well as other ECLAC members and other stakeholders, come together to proclaim, in the Brasilia Declaration, their commitment to work towards the adoption of a United Nations convention on the rights of the older persons. This commitment is in line with the numerous recommendations from and proposals by experts and civil society organisations, and particularly older persons people organisations, 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 Ageing in 2009.⁶¹

This recommendation has been further reinforced, as analysed below in more detailed, by the preliminary study on the rights of the older persons prepared by the Human Rights Council Advisory Committee, at the Council's request. Inter alia, this study recommended, in line with the Brasilia Declaration, to jointly work towards the "establishment of an international convention on the rights of the older persons."⁶² 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 populations. 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 persons citizens. In particular, the convention should include responsibilities for States to strengthen the gender perspective in their legislative and policy actions on ageing.⁶³

A similar concern was expressed at the forty-eight session of the Commission on Social Development, where the necessity of 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

⁶¹ Programme on Ageing (Division for Social Policy and Development-United Nations Department of Economic and Social Affairs), *Report of the Expert Group Meeting "Rights of Older Persons," convened in preparation for the report of the Secretary-General to the 64th session of the General Assembly (Bonn, Germany, 5-7 May 2009)*, recommendation 3. Available at <http://www.un.org/esa/socdev/ageing/documents/egm/bonn09/report.pdf>

⁶² The necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person. Working paper prepared by Ms. Chinsung Chung, member of the Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1 (4 December 2009), at para. 63.

⁶³ *Ibid.*, at para. 64.

exploring the human rights dimensions of aging,”⁶⁴ including by 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.”⁶⁵

The commitment to work towards an international convention is further complementary with, and not contradictory to, ongoing initiatives taking place within the Inter-American and African regional systems to enhance their respective work of human rights protection with regard to the older persons, including the consideration of developing new regional standards.

Taken as a point of departure the commitment taken by Latin American and Caribbean ECLAC Member States and other ongoing initiatives to work towards the adoption of a United Nations convention regarding the rights of the older persons, this section further elaborates on the pressing legal and policy arguments that substantiate the need for taking concrete steps into this direction.

A. Preparing for an aging population

The world population is ageing at a steady, quite spectacular rate. The total number of persons aged 60 and above rose from 700 million in 2009 and is projected to reach 2 billion by the year 2050.⁶⁶ In Latin America and the Caribbean —as a result of demographic transition— the population is aging 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).⁶⁷

These figures are illustrations of a quiet revolution, but one which has far-reaching and unpredictable consequences and which 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.⁶⁸ 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 in order to 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 the older persons would provide more visibility regarding the challenges that the older persons face in the effective enjoyment of their basic human rights. The adoption of such convention would represent a powerful pedagogic tool, particularly at the domestic level, contributing to combat prevailing stereotypes and generating

⁶⁴ *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. 27.

⁶⁵ *Ibid.*, at para. 28.

⁶⁶ See United Nations (2009) *World Population Ageing*, ESA/P/WP/212, December 2009

⁶⁷ For a more detailed overview the ageing process in the Latin America and The Caribbean, see generally CELADE (2009) *El envejecimiento y las personas de edad. Indicadores sociodemográficos para América Latina y el Caribe* (LC/L.2987/REV1),

⁶⁸ *Op.cit* CESCR (1995)

positive and realistic images about the ageing process, as well as a wider awareness about the many contributions that the older persons make to society as a whole.

C. The need to clarify the contents of the rights of the older persons

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

The adoption of an international convention would therefore contribute to clarifying and systematizing, in a single legally-binding instrument of universal scope, the contents of the existing and emerging international normative consensus regarding the rights of the older persons. The adoption of this instrument would also contribute to 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 and mechanisms.

D. The existence of previous international instruments of non-conventional character

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 the older persons under such designation, it has however adopted a number of important resolutions in this regard, which clearly identify the older persons as specific group within society that face situations of particular vulnerability and define a minimum normative consensus regarding their rights. Consequently, these instruments fulfill already the function of a single declarative text regarding the rights of the older persons.

E. The need to clarify State obligations

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

The ratification of a human rights convention entails the obligations by State Parties to perform it in good faith, adopting such legislative and other measures as may be required in order to give effect to the rights affirmed therein. The adoption of legislative measures is particularly relevant in order to eliminate all regulations in domestic law that may result into 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 co-operation. Moreover, by ratifying a human rights convention, States commit to guarantee the respect of those rights by private actors acting within their respective jurisdictions.

Furthermore, it should be also noted that, beyond the specific legal obligations they create vis-à-vis State 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 restatement by State Members of their pledge to fulfil the basic human rights principles enshrined in the United Nations Charter and in the Universal Declaration on Human Rights.

F. The need for strengthening international protection

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

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

Last but not least, the adoption and subsequent ratification of an international convention on this subject matter which also 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 State Parties.⁶⁹ Therefore, the adoption of a legally-binding instrument regarding would open the UPR process to a specific focus on the rights of the older persons, further contributing to the strengthening of 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 the older persons would also be an instrument of particular relevance in order to further promote the incorporation of a rights-based approach to ageing policies, both at the international and the domestic level. Such convention would significantly contribute to fostering the "paradigm shift" reflected, inter alia, in 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 the older persons as "objects" of assistance to one in which these persons are genuinely seen "subjects" of rights. By the same token, a convention would significantly contribute to enhancing the effectiveness of other human rights instruments that have promoted this change of perspective.

The adoption of a convention would significantly help duty-bearers, including both States and civil society actors, in designing and implementing legal measures and policies from an older persons-rights perspective. This would particularly benefit States 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 convention are closely associated to the work of economic and technical co-operation undertaken by United Nations bodies agencies, funds, and regional commissions, particularly in the field. Under the

⁶⁹ Human Rights Council resolution 5/1: "Institution Building of the Human Rights Council" (18 June 2007), Annex: *United Nations Human Rights Council: Institution-Building*, para. 27(a).

paradigm of the human rights-based approach to development, all these actors 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 the older persons would consequently enhance and guide the work that international organizations and bodies carry out on behalf of the older persons.

III. Possible contents of a future convention

The review of existing standards affirming the rights of the older persons facilitates the identification of 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 synthesis, which does not pretend to be exhaustive, of the main content of the rights of older persons according to those standards, which does not pretend to be exhaustive, and which should be subject for further elaboration during the drafting process of an international convention regarding those rights.

A. The right to equality and non-discrimination

A new convention on the rights of the older persons should reaffirm the basic principle of equality and non-discrimination 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,’ allowing for the differential treatment of older persons; and ‘reasonable accommodation,’ allowing for adjusting general State regulations to the specific needs of the older persons.

B. Awareness-raising

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

- (a) the recognition of older persons’ authority, wisdom, productivity and other important contributions to society;
- (b) the promotion of a dignified and respectful treatment of the older persons;
- (c) the promotion of a positive and realist image about 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 States measures in order to guarantee the effective enjoyment of this right by the older persons. Existing or developing standards regarding the right to a dignified death include:

- (a) the limitation of the imposition of the death penalty or life prison by reason of age;
- (b) the right of access to palliative treatment in order ensure terminal or dying patients a dignified and painless death; and
- (c) 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 normative consensus exists with regards to the right of older persons to receive a dignified treatment and to not to be subject to abuse, an issue that was specifically addressed by WHO Toronto Declaration on the Global Prevention of Elder Abuse and by PAHO Plan of action on the health of older persons, including active and healthy aging. A new convention on the rights of the older persons may cover, among other issues:

- (a) the right of older persons to be free from any kind of physical, mental, emotional or financial abuse, exploitation and abandonment;

- (b) States measures to prevent, stop and punish the responsible for those actions;
- (c) 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;
- (d) the protection of the rights and dignity of older persons living in assistance institutions, both public and private, including through periodic visits to medical and psychiatric institutions; and
- (e) 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 include measures allowing for:

- (a) the separation of older persons men and women in different sections within penitentiary establishments;
- (b) the provision of adequate provisions and services as required in order to meet the special needs of the older persons, particularly regarding their physical and mental health, and
- (c) allowing 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 prisoners of war on account of their age.

F. Legal personality and capacity

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

- (a) affirm the full rights and legal entitlement of these persons, on an equal footing with any other persons;
- (b) recognize their entitlement to exercise their rights or otherwise bestow other persons with the necessary permissions to act on their behalf;
- (c) prohibit limiting their legal capacity excepting after a judicial decision.

G. Right to participate in the social, cultural and political life of community

The active participation by the older persons in society 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. The rights of the older persons to participate in the life of the community are affirmed in relation to:

- (a) 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;
- (b) the right to establish their own movements or associations, and to receive State supports through legal or financial measures;

- (c) the promotion of participation by older persons in volunteer and in inter-generational activities; and
- (d) the development of social, cultural or leisure programs and activities specifically designed for older persons, particularly those living in care institutions.
- (e)

H. Right to an adequate standard of living and social services

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

- (a) the adoption of an age-specific perspective into social services, promoting the preservation, to the maximum extent as possible, of their active functions;
- (b) the facilitation to older persons of physical accessibility and transportation to social services;
- (c) special protection to prevent poverty among the older persons;
- (d) 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, and particularly the Vienna and Madrid plans of action and the WHO policy on active ageing and PAHO Plan of action on the health of older persons, including active and healthy aging have already developed the special measures required to ensure the enjoyment of the right to health by the older persons. These include, among others:

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

J. Right to education and culture

As affirmed by international standards, older persons should enjoy the rights to education in both formal and informal institutions, within a paradigm of life-long learning. In addition, States should strive to take measures aiming at:

- (a) the promotion of active policies oriented to fight against illiteracy, particularly among older women;
- (b) the promotion of older persons' access to and active participation in cultural institutions and activities, including through volunteer activities.

- (c) the promotion of educational programs allowing the 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 and specific needs of the older persons, as important factors contributing to their independence and health. Existing international standards affirm, in this regard:

- (a) the right to enjoy an adequate housing, particularly in situations of crisis, emergency, displacement, or development-based evictions, and to be prioritized in the assignment of houses or land in those situations.
- (b) the right to live in a secure and healthy environment, including access to clean water and air, and to be free from exposure to pollution.
- (c) the right to 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 the older persons is labor. 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:

- (a) the right of older persons to work and have access to other income-generating activities;
- (b) the right to equal treatment and opportunity, particularly with regards to access to equal remuneration, labor conditions, professional orientation and vocational training, and employment placement;
- (c) the adoption of active employment policies that promote the participation or re-entry into the labor market by older workers;
- (d) the right to freedom of association without discrimination based on age;
- (e) the promotion of legal reforms and financial incentives in order to 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;
- (f) the diffusion of information about retirement rights and benefits, as well as of 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 loss of their means of subsistence for involuntary reasons. States should further ensure, within their availability of resources, 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.

The jurisprudence of human rights bodies have further contributed to elaborating upon some of these standards, including:

- (a) the equality of retirement conditions for men and women;
- (b) the proscription of the reduction of retirement benefits by subsequent State regulations;

- (c) the State's duty to provide an "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 a particularized attention to situation and needs of older women is common to international instruments regarding the older persons, which have unmistakably taken a gender perspective. Particularly worth-mentioning in this regard are General Assembly resolutions 31/113, 49/162, and 58/177, as well as CEDAW Decision 26/III, referring specifically to the rights of older women. A new convention on the rights of the older persons should also reflect the existing commitment by the international community to

- (a) eliminate all kinds of discrimination based on age and ensure the full recognition of and respect for the rights of older women;
- (b) prevent all forms of violence against older women, including sexual violence
- (c) abolish widow rites and other harmful traditional practices that may affect the integrity of older women;
- (d) 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 the rural milieu;
- (e) 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, and
- (f) guarantee the rights to property and possession of 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. These instruments:

- (a) identify indigenous elders as specific groups within indigenous communities requiring of special protection in view of their special needs, particularly against all kind of violence against them.
- (b) protect indigenous family systems, particularly the extended family, based on criteria of gender and generational equality.

IV. Proposed strategy to advance towards an international convention

The last section of this document analyses the basic elements that should be taken into account in order to elaborate a strategy to advance towards the adoption of an international convention on the rights of the 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

a. Revision of previous standard-setting initiatives by United Nations

The drafting and negotiation of a convention regarding the rights of the 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 the process of 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.

Integrated by 18 members, the Advisory Committee acts as the ‘think tank’ of the Human Rights Council, taking over the functions of the former Sub-commission for the Protection and Promotion of Human Rights. However, in contrast with the Sub-commission, the Advisory Committee has not the authority to act upon 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,⁷⁰ while the principles and guidelines on discrimination against persons affected by leprosy is being prepared by an individual expert of to the committee.⁷¹ 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 expectedly subject to negotiation 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.

c. Follow-up on the Advisory Committee study on the rights of the older persons

In 2009, at its third session, the Advisory Committee held a general discussion regarding the rights of the older persons as one of its new priority areas for its 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 the older persons.” As pointed out above, the study noted the absence of a single international instrument regarding the rights of the older persons and recommended the Human Rights Council to 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 the older persons.”⁷²

At its fourth session, the Advisory Committee took note of Ms. Chung’s preliminary study on the rights of the older persons 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 older persons of existing United Nations human rights instruments and any possible gaps in the current legal framework.”⁷³

In response to the Advisory Committee’s additional study on the issue, Human Rights Council State Members, particularly those belonging to the Latin American and Caribbean region, may wish to instruct the committee to continue the consideration of the issue on its program of work, with a view to advance in the preparation of a draft text of an international convention regarding the rights of the older persons, as previously done already in relation to the issues of human rights education and leprosy. As in relation to these cases, the institutional channel to be expectedly 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 a view to 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

⁷⁰ Human Rights Council Advisory Committee recommendation 1/1: “Drafting Group on human rights education and training: Programme of work” (5 August 2008)

⁷¹ Human Rights Council Advisory Committee recommendation 1/5: “Elimination of discrimination against persons affected by leprosy and their family members” (7 August 2008).

⁷² *The necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person, supra*, at para. 65.

⁷³ Human Rights Council Advisory Committee recommendation 4/1; “Human rights and older persons” (29 January 2010, OP 1).

The Brasilia Declaration also calls upon State Members to promote the establishment, within the Human Rights Council's special procedures, of the mandate a Special Rapporteur on the rights of the older persons.⁷⁴ In addition to many other important benefits that it may imply for the international protection of the rights of these persons, a thematic mandate regarding the older persons may also play a relevant role in advancing towards the adoption of an international instrument in this regard.

In the absence of specific human rights instruments and mechanisms, United Nations special procedures play particular relevant role in attending human rights issues or the rights of specific groups that are not sufficiently covered by existing instruments, as well as in the systematization of existing standards. This is the case, for instance, of 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 further on the content and scope of corporate responsibility to respect human rights and State duties in this regard.⁷⁵ Similarly, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people was also mandated to contribute to the drafting of the 2007 United Nations Declaration on the Rights of Indigenous Peoples.⁷⁶ While not formally part of the special procedures machinery, the Special Rapporteur on disability of the Commission for Social Development played also a major contributing role in the process of drafting and adoption of the United Nations Convention on the Rights of Persons with Disabilities.⁷⁷

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.⁷⁸ These criteria are met in relation to the specific issue of the rights of older persons.⁷⁹

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 a renovation for a period of other additional three years. The procedure for appointment of mandate-holders is based on a threefold mechanism. First, nomination by Governments, international and non-governmental organizations, other human rights bodies or self-nominations for inclusion in a public list of eligible candidates. Second, selection of a shortlist by a consultative group integrated by representatives of the United Nations regional groups. And third, appointment by the President of the Human Rights Council.⁸⁰

A Special Rapporteur on the rights of the 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 operationalising the existing international consensus regarding those rights, while also contributing to fill the international gap regarding the protection of these persons.⁸¹

⁷⁴ Brasilia Declaration, *supra*, at para 26.

⁷⁵ 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).

⁷⁶ 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).

⁷⁷ 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.

⁷⁸ *United Nations Human Rights Council: Institution-building, supra*, at para. 58.

⁷⁹ Luis Rodríguez-Piñero, *Los retos de la protección internacional...*, *supra*, at 42-44.

⁸⁰ *United Nations Human Rights Council: Institution-building, supra*, at paras. 39-53.

⁸¹ Luis Rodríguez-Piñero, *Los retos de la protección internacional...*, *supra*, at 44-46.

C. Follow-up on regional standard-setting initiatives

The initiative, supported by Latin American and Caribbean States and other Member States, to advance towards 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, of the current discussion recently opened by the OAS General Assembly with a view to exchange information and good practices concerning the protection of the rights of older persons, as well as to examine the “viability” of elaborating and inter-American convention in this realm.⁸² A similar initiative is currently ongoing within the framework of the African human rights system. The Declaration of Kigali, adopted in 2003 by the First Inter-Ministerial Conference on Human Rights of the African Union (AU), called upon AU Member States to work towards the adoption of a protocol to the African Charter regarding “the protection of the rights of people with disabilities and the older persons.”⁸³ This request was followed-up by the African Commission on Human Rights (ACHPR) with the establishment in 2007 of a Focal Point on the Rights of Older Persons in Africa.⁸⁴ 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, inter alia, for contributing to the preparation by the ACHPR of a new protocol to the African Charter, as mandated by the Declaration of Kigali.⁸⁵

Ongoing discussions within the Inter-American and the African human rights systems are important initiatives that are complementary with and reinforce the work towards 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 the IACHR to pay a particularized attention to the rights of the older persons within its mandate of promotion and protection of human rights in the Americas; and (3) further request the Human Rights Council Members to forward the study to the Advisory Committee for its consideration in the future preparation on an international convention on the rights of the older persons.

D. Follow-up on the Brasilia Declaration

ECLAC Member States, through the Committee on Population and Development, should continue engaged with the follow-up of the Brasilia Declaration as part of their wider efforts towards the implementation of the Madrid Plan of Action at the regional level. As called for by the forty-eight session of the Commission for Social Development, action at the regional level should include the development of “regional and sub regional networks of experts and practitioners, government, and non-governmental organizations, academia and the private sector in order to increase the potential for policy action on ageing.”⁸⁶ 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.

⁸² Resolution AG/RES. 2455 (XXXIX-O/09), *supra*, OP 3.

⁸³ Declaration of Kigali, adopted by the First AU Interministerial Conference on Human Rights, MIN/CONF/HRA/Decl.1 (I) (3 March 2003), at para. 20.

⁸⁴ Resolution of the African Commission on Human and Peoples’ Rights ACHPR/Res.118(XXXXII)07: “Establishment of a Focal Point on Older Persons in Africa” (2009).

⁸⁵ Resolución 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 Disability in Africa” (2009).

⁸⁶ Draft resolution submitted to ECOSOC; “Future implementation of the Madrid Plan of Action on Ageing,” Commission for Social Development. Forty-eight session (3-12 February 2010), E/CN.5/2010/L.6 (11 February 2010), at para. 6.

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 towards the adoption of an international convention in this realm, in cooperation between other relevant Government sectors, including Ministries of Foreign Affairs.

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

E. Follow-up on the discussions at the Commission for Social Development

Ongoing discussions within the Commission for Social Development regarding the necessity to strengthen the international protection of the rights of older persons within the implementation Madrid Plan of Action include the possibility of establishment 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.”⁸⁷ Member States could also follow-up on this important initiative in order to contribute to further consensus-building within the Commission regarding 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

a. Civil society involvement

Civil society, both at the international and a domestic level, have 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 with a common concern to involve civil society organizations in the processes of drafting and negotiation of 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 in order to contribute to those processes through the organization of specific-issue networks, while gaining a valuable knowledge on the functioning of international human rights bodies. Among civil society actors, United Nations has paid a particularized attention to the involvement of representative organizations of the groups specifically concerned by the standards under discussion, including families of persons with disabilities, disappeared persons, and indigenous peoples.

The pattern described above should also be taken into account regarding the international discussion of specific standards regarding the rights of the older persons. All institutional steps towards 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 the older persons, organizations working in the promotion and protection of the rights of the older persons, as well as scientific and educational institutions active in this area. At the same time, State Members should actively seek to incorporate these actors in the definition of their own positions and strategies regarding international-processes.

⁸⁷ *Further implementation of the Madrid International Plan of Action on Ageing, 2002*, E/CN.5/2010/4 (25 November 2009), at para 28.

b. Involvement of National Human Rights Institutions

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

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

c. Involvement of international and other inter-governmental bodies and agencies

As discussed, several United Nations international organizations, bodies, agencies and regional commissions, as well as inter-governmental agencies have taken the lead the international involvement in the promotion of the rights of the older persons, and, in a number of cases, they have further contributed to this promotion with the adoption of 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 the participation of a consultation with specialized agencies and other inter-governmental organizations. State Members should ensure that the pertinent agencies and organizations and further actively involved in further discussions in this realm, including by contributing to the 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 older persons allows concluding 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 pertaining to these persons. Older persons have been distinctively identified by the international community as a group requiring of a special protection because of the various challenges they meet in their enjoyment of basic human rights, and that 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, as 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 clear enhance this protection, with the establishment of a separate mechanism in charge of the supervision of that convention. Moreover, a convention would further crystallize the commitment of the international community, moving forward the objectives marked in the Madrid International Plan on Ageing, and it would significantly contribute to clarifying the content of the existing normative consensus regarding the rights of the older persons, as well as of the obligations by State and other duty-bearers. A new United Nations convention would also enhance the adoption of domestic 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 with regards to the development of new international standards regarding older persons. These initiatives should be taken into account in defining a clear strategy towards the adoption of a convention, as called for in paragraph 26 of the Brasilia declaration, from the perspective of Latin American and Caribbean States.

In order to continue making progress towards the promotion of an international convention on the rights of older persons, it is highly important that Latin American and Caribbean countries concentrate their efforts in two strategic works.

The first area should focus on having an active participation in actions taken by different international and inter-governmental organizations at the global and regional scenario. Within the Inter-American field, it is essential that the States encourage the celebration of 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 promote that the results obtained at the said 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, particularly, to follow up on the establishment of an inter-sessional working group of the Commission regarding ways to strengthen the protection of rights of older persons within the implementation of the Madrid Action Plan. Further to the aforementioned — and as has been previously called for by the Brasilia Declaration—, it is greatly relevant that the States of the region join forces in promoting the establishment, within the Human Rights Council, of a Special Rapporteur on the human rights of older persons, who can contribute with important inputs for drafting of 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 the elaboration of a study on the rights of older persons.

Simultaneous with the first area described in previous paragraphs, 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 UN State Member —and particularly African, European and Arab States— with the purpose of promoting a wider international consensus on the need to advance, without delay, towards the adoption of a United Nations convention, taking into account the standards that have already been developed by United Nations itself, those of the African and European human rights systems, as well as the relevant provisions of the Arab Charter on Human Rights. At the same time, it is necessary to engage with civil society at the domestic and international level, and particularly with older persons' organisations, in order to seek their continuous support and advice in the process of advancing towards the adoption of an international convention. Latin American countries could explore the possibility of seeking the involvement of the FIO in this work.

The Ad Hoc Committee on Population and Development, in its capacity as an intergovernmental body in charge of the follow-up of the Brasilia Declaration could make a valuable contribution to the development of the abovementioned strategic areas. Firstly, 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, aimed to assess the national progress made regarding the Plan of Action in general, and particularly with respect to the promotion of an international convention on rights of older persons, to exchange experiences and good practices on strategies used in such a sense and to determine priorities for future action. Similarly, the Committee could request the Secretary to present to the Commission of Social Development the outcomes of that meeting in 2011. Secondly, the Committee could recommend the Secretary to continue working relationships between national focal points on ageing and ECLAC in order to: contribute to the design of common strategies

towards the adoption of an international convention; establish and reinforce existing regional and sub regional expert networks on ageing policy so that they are fully involved in the work done towards 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 Ad Hoc Committee on Population and Development to take place in 2012.
