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## **Background Paper**

**Andrew Byrnes and Titti Mattsson**

**20<sup>th</sup> Informal ASEM Seminar  
on Human Rights**

**Human Rights of Older Persons**

22-24 February 2021

Virtual / Seoul, Republic of Korea

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**BACKGROUND PAPER**

**Andrew Byrnes\* and Titti Mattsson\*\***

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## SUMMARY

This background paper provides an overview of the fundamental concepts and some of the important current issues relating to the human rights of older persons at the international, regional and national levels. The COVID-19 pandemic has brought into high relief social attitudes and institutional practices that existed before the pandemic that embody ageist assumptions and result in the denial of equality in the enjoyment of human rights by older persons.

The paper first reviews the demographic background to the discussion and the accompanying narratives of population ageing which primarily see these developments as posing significant economic and social drawbacks and challenges but which oversimplify and underestimate the existing often unacknowledged contributions of older age cohorts to their communities and the potential opportunities that population ageing offers. The paper then outlines the human rights based approach it adopts: this stresses that a fundamental part of the policy responses to demographic ageing should be based in the existing human rights framework and that older persons must be seen as the holders of rights and active agents in the conduct of their lives, not the recipients of charity or welfare or having decisions made for them.

The paper then notes how ageism is a widespread, deeply embedded, and accepted form of discrimination in our societies. It is both a reflection of and contributor to inequality and discrimination against older persons on the basis of their older age. The paper also explores the challenges of defining who is an 'older person' or when 'older age' begins, noting that the significance of age is largely socially constructed, that persons in the later stages of life are enormously diverse and experience ageing differently, and that different criteria for determining 'older age' or 'older persons' need to be applied in different contexts and need to have regard to this diversity and the fact that particular groups of older persons may face intersectional discrimination.

The paper then provides a description of the existing human rights framework relevant to older persons, in particular the binding treaties and non-binding instruments that exist at the international level and in the European and Asian regions. It shows that while there is some protection in the form of general human rights treaties at the universal level and in the case of Europe at the regional level, there are significant gaps – in particular there are no dedicated binding treaties at the international level or in Europe or Asia that comprehensively and coherently protect the rights of older persons or the rights of persons to enjoy all human rights without discrimination on the basis of older age.

The paper then proceeds to a review of issues and developments in four important areas of concern, while stressing that these are illustrative and that the human rights of older persons are interrelated and interdependent. These thematic areas are: the autonomy and independence of older persons; social protection and the human rights of older persons; age discrimination against older persons focusing on labour markets; and empowerment of older persons through education, training, lifelong learning and capacity building. The paper draws attention to the impact of the COVID-19 pandemic and responses to it in relation to a number of these areas. The paper also notes the continuing challenges with obtaining comprehensive disaggregated data relating to older persons in many contexts.

Finally, the paper makes a number of recommendations to ASEM Partners and other stakeholders as to the steps that they may wish to consider in their efforts to improve the enjoyment by all older persons of their human rights without discrimination on the basis of older age. These are collated at the end of the paper as well as appearing in the course of the discussion.

## **I. INTRODUCTION**

### **a. Structure of this background paper**

1. This background paper is intended to provide a human rights-based description and analysis of a number important themes relating to the human rights of older persons, and to stimulate reflection on and discussion of positive measures that might advance the better enjoyment by older persons of their human rights in these areas and more generally.

2. In this Introduction we revisit briefly the demographic background to discussions about the implications of ageing in the modern world, outline the more common narratives that frame these discussions for policymakers, and describe what we mean by a human rights-based approach and the paradigm shift that is underway in many circles about how issues of ageing and the rights of older persons should be approached.

3. In Part II of the paper we outline some core concepts that are central to discussions about ageing and the human rights of older persons – the nature of ageing, its social construction and the phenomenon of ageism, definitions of ‘older persons’ and ‘older age’, terminology used to describe older persons, and the diversity of older persons and the concept of intersectionality or multiple or cumulative discrimination and its importance when approaching this topic. Finally, we describe the relevance and impact of the COVID-19 pandemic on older persons and its implications for our approach to the human rights of older persons.

4. In Part III we provide an overview of the international framework for the protection of the human rights of older persons that applies to ASEM members from all regions. We also describe the systems of human rights protections that exist at the regional level within Europe, in particular within the Council of Europe with its 47 members and the European Union with its 27 members. There are no direct equivalents within the Asian region; however, the paper outlines relevant developments at the subregional level within ASEAN and SAARC. The paper also notes regional developments of specific importance to the rights of older person in the African and Americas regions, each of which has adopted a binding treaty on the human rights of older persons that forms part of a regional system of monitoring and enforcement of human rights.

5. In Part IV of this background paper we take up four thematic areas of importance. These are among the themes recently considered by the United Nations Open-Ended Working Group on Ageing<sup>1</sup> and that are of central importance for many older persons, for legislators and policymakers and, indeed, for all of us whatever our age or role.

6. In Part V of the paper we consider the way forward, describing a number of current initiatives to improve the rights of older persons – in particular developments relating to the possible elaboration of a new convention on the human rights of older persons – and identify and make recommendations about possible actions at international, regional and national levels.<sup>2</sup>

### **b. The demographic background**

7. Population ageing is a phenomenon found in almost every country in the world. The changing demographics of the world’s population has meant significant increases in the number and proportion of older persons in most countries and even larger numbers and

proportions are likely to occur in many countries in the next few decades.<sup>3</sup> In its 2020 report on the subject the Population Division of the United Nations Department of Economic and Social Affairs noted that the 703 million people over 65 in the world in 2019 were expected to increase to 1.5 billion by 2050; the largest numbers would be living in Eastern and South-eastern Asia and in Northern Africa and Western Asia.<sup>4</sup>

8. While populations have been or will be ageing in all regions, the faster rate of growth has been in Eastern and South-eastern Asia, and Latin America and the Caribbean.<sup>5</sup> Eastern and South-Eastern Asia is expected to see the largest increase in the number of persons aged 65 or over by 2050 (312 million), with the fastest increases in Northern Asia and Western Asia, followed by sub-Saharan Africa. Increases in Europe and Northern America and Australia and New Zealand are likely to be small; these regions already have populations that are significantly older.<sup>6</sup> Furthermore, the numbers of persons aged 80 or over have increased in all regions, with those numbers set to climb. The proportion of the overall population made up by persons aged 65 or over has increased and is predicted to increase across the world.<sup>7</sup>

9. Some 37 per cent of the world's population over 65 lived in Eastern and South Eastern Asia in 2019 and that figure is expected to remain much the same up to 2050.<sup>8</sup> Europe and North America was home to 29 per cent of the older population in 2019 but that percentage is expected to fall to less than 20 per cent by 2050.<sup>9</sup>

10. Life expectancy has also been increasing and is set to continue to improve in much of the world, with life expectancy at age 65 an additional 17 years in 2015-2020, increasing to 19 years in 2045-2050, though these figures vary among regions.<sup>10</sup> As women tend to live longer than men, including at older ages, they represent the majority of persons over 65 and a larger majority of persons in older cohorts.<sup>11</sup> Not only do these rates vary among regions, but they also vary within regions and countries and for individuals depending on factors such as socio-economic status, race, disability, and other factors that affect health at different stages of the life course.

11. Thus, while countries are at different stages in their population ageing, many common issues have arisen.

### **c. Narratives of population ageing**

12. Frequently, discussions of the implications of ageing are focused on the potential economic impacts of ageing on societies. A frequently expressed concern is that ageing societies are likely to experience severe strain on national budgets if they are expected to provide adequate health services, long-term care and support, social protection and the other services which are expected by their populations. In other words, the 'grey tsunami' will give rise to social problems and fiscal difficulties which may be beyond the ability of many societies to cope with. Such analyses lead to consideration of how to develop policies and structures which will be able to respond to the anticipated needs and problems.

13. Such analyses often focus only on economic matters – and even then a constrained economic view. Although macroeconomic considerations are obviously fundamental, they are often characterised by an approach that sees only the debit side of the balance sheet. Older citizens are seen only as a drain on resources – no longer economically productive

and no longer contributing to state revenue but just the recipients of expensive social benefits and services.<sup>12</sup>

14. There are different measures of population ageing,<sup>13</sup> some focusing only on chronological age. The more rapid the rate of ageing and the more extreme the disparity between the 'aged population' and the overall ('working' or productive) population, the more urgent seems the threat that such a process represents. Yet these measures, especially those that focus primarily on chronological age, are not always the most appropriate measure to assess the 'burden' about which policymakers should be concerned.<sup>14</sup>

15. These analyses are often supported by references to measures such as dependency ratios – measures of the proportion of the presumptively unproductive, older section of the community and the not yet productive younger section to the productive working age section of the community. There are different types of dependency ratio. When they draw only on chronological age, they provide 'a poor proxy for the level of dependency in a population, since older persons are quite diverse with respect to economic activities, including in terms of labour force participation.'<sup>15</sup>

16. Such measures have been shown to be limited in their own terms. For example, they assume that persons over a particular chronological age threshold are not engaged in remunerated employment, even as an increasing number of older people do so. Secondly, they neglect the participation of older workers, especially women and workers in developing countries, who continue to participate in the informal economy well after they reach a standard 'retirement' age. Thirdly, they fail to reflect the importance of intergenerational wealth transfers from old to young, and the fact that paid employment may not be the only source of income.

17. Equally importantly, these narratives neglect important social and economic functions that older persons perform, ones that are often not reflected in the national statistics that count, for example the calculation of GDP. Among these categories of contributions are the volunteer work that is performed by many older persons in their community, as well as the unpaid care work performed for other family members (both older and younger), the latter overwhelmingly performed by women who have often provided unpaid care work of different sorts throughout their lives. This lack of recognition in relevant statistics and policy calculations of the unremunerated but economically and socially valuable work performed by many older persons has parallels with the similar neglect of such work, especially by women, at earlier stages of life. If one is to make any credible assessment of contributions to society by older persons, these types of activity must be documented and counted.

#### **d. A human rights approach**

18. These approaches focus on economics and cost-benefit analyses in money terms. They tend to ignore, marginalise or discount important economic contributions that many older persons make and give little weight to other important social functions that they perform. They reflect a view of ageing and older persons as a time of decline, of non-productivity and non-contribution; this is a view that needs to be critically examined in light of the reality of older persons' lives and the fact of their contributions to their communities.



19. In parallel to this pattern of economically-focused discourse on the impact of ageing populations and concerns about the sustainability of health, retirement and social support systems, a *human rights-based approach* has emerged. Efforts to apply international human rights standards and principles to the situation of older persons and even to formulate instruments that explicitly address those rights have a long history. However, it is only in the last thirty years that more concerted activism around this issue has grown at the international level: the last decade has seen an increase in calls for the development of a comprehensive, integrated and explicit binding international framework on the human rights of older persons.

20. A human rights-based approach starts from the rights of older persons to benefit from the rights listed in the major international human rights treaties; these are described in more detail below. Thus, older persons are rights holders who are entitled to expect from their State respect for their human rights and the adoption of legal and policy measures that actively promote the enjoyment of their civil, political, economic, social and cultural rights. This reflects a change in thinking about older persons, from seeing them as feeble, recipients of social benefits, a problem just of social development, to viewing older persons as equal citizens entitled to participate fully in society and who enjoy rights rather than being recipients of charity or discretionary government support.

#### *Paradigm shift from charity to rights*

21. This paradigm shift, which is underway but which has by no means been comprehensively adopted at the international or national levels when issues of ageing population are considered, has many similarities with the fundamental shift in thinking that took place in relation to persons with disabilities, one that is reflected in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) that was adopted in 2005. That shift saw a move from thinking about disability as a medical issue with the ‘problem’ of impairment located in the individual that might be ‘fixed’ or otherwise accommodated within existing structures, to a ‘social model’ of disability that saw disability primarily as a result of the interaction between an individual with an impairment and their environment (in other words, disability was in fundamental respects ‘socially constructed’). This shift in thinking involved a change ‘from viewing persons with disabilities as objects of charity and recipients of welfare to recognising them as the holders of rights and full participants in society’.<sup>16</sup> A human rights model based on this social model of disability – reflecting the shift – is now the predominant framework for dealing with the rights of persons with disabilities at the international law, as reflected in the CPRD.<sup>17</sup> Such an approach involves ‘taking active measures against ageism and reconceptualising the way in which societies view older persons, from passive receivers of care and assistance and an impending burden on welfare systems and economies, to active contributors to society’.<sup>18</sup>

22. There are a number of reasons for applying a human rights-based approach in the context of older persons. In the first place, the principal human rights treaties guarantee many of the rights and values already embodied in many national constitutions. Secondly, where States have accepted relevant international treaties or are bound by customary international law obligations relating to human rights, they are formally bound by international legal obligations to respect, protect and fulfil those rights. All ASEM States have accepted a range of international obligations, though the exact list varies. Not all States are

subject to exactly the same treaty obligations, but all States are subject to the most important obligations, in particularly in the field of economic and social rights.

23. A third reason is that a human rights approach has at its heart participation by those affected in policy and decision-making – both as a value of its own but also as a means to an end of reaching better-informed and more transparent and accountable decision-making. A human rights-based approach can both temper and enrich analyses which draw on other frameworks. Finally, adoption of a human rights approach will assist in the realisation of the goals of both the Madrid International Plan of Action on Ageing and the 2030 Framework for Sustainable Development and the Sustainable Development Goals.

24. The approach taken in this paper is a human-rights based approach – one that is informed by the principal international standards and that insists that the experiences of older persons, their voices and their rights need to be central to policymaking, not just in relation to ageing but also in relation to other matters. There are many examples of national legislation and policy that seek to engage with ageing issues and to support older citizens in the later stages of their lives, and often these have represented significant improvements on what went before. At the same time some of these reflect ideas about ageing and role of older persons that are based on ageist assumptions (both positive and negative) and which are arguably therefore inconsistent with the human rights of older persons. Of course, even where laws and policies are in harmony with and promote human rights standards, implementation is often a challenge: no matter how good one's laws and policies are, their adoption may be the easier step while implementation is often more difficult to achieve.

25. While this background paper does not attempt to undertake an exhaustive assessment of the human rights consistency or laws and policies in ASEM countries or of the problems with implementation, it does seek to identify questions that might be considered as countries develop or revise their laws and policies on ageing or those that otherwise have an impact on older persons. This process is underway in many countries and there are good practices to be shared.

#### **e. Terminology**

25. An important issue in thinking about ageing and social responses to it is the language used to refer to people who have reached the middle or later stages of life and the attitudes that it expresses. While ageing has its 'objective' elements – the chronological aspect of ageing is the most obvious – the significance of older age comes in important respects from how society views the process of ageing and those who have reached older age and how this is reflected in social arrangements.

26. In many earlier international and regional human rights documents the term 'elderly' was and continues to be used to refer to persons who have reached the later stages of life (itself a flexible concept).<sup>19</sup> The term is frequently used in public discussions of older persons, especially those who might be described as having reached the cohort of the 'oldest older person' (70+, 75+ or 80+). The term connotes vulnerability, weakness and incapacity and is now generally viewed as an inappropriate way of referring to a diverse population group, many of whose members do not possess the characteristics often attributed to these population groups. The use of the term thus perpetuates harmful ageist stereotypes in relation to older persons; the prevalence and impact of ageism on the enjoyment by older persons of their human rights is discussed below.

27. In 1995 the UN General Assembly decided<sup>20</sup> that for the purposes of the United Nations, the term ‘older persons’ would be used instead of ‘the elderly’, in line with the *United Nations Principles for Older Persons*.<sup>21</sup> In this background paper we use the term ‘older persons’ except when quoting from instruments or other sources that use ‘the elderly’ or similar terms.

28. The meaning of particular terms in a language is contextual and the connotations of a term such as ‘the elderly’ may be viewed differently by speakers of the same language. Language is both a marker and a reinforcer of ageist attitudes.<sup>22</sup> What is important in the context of language when referring to older members of society, including in the naming of official laws, public bodies and policies, is to examine the language used to see whether it embodies or perpetuates harmful stereotypes, attitudes or practices that fail to respect the autonomy, independence, equality as a fellow citizen and participant in one’s community and a bearer of rights.

## II. CORE CONCEPTS

### a. Ageing, ageism and human rights

29. Ageism<sup>23</sup> is a term that is often used to describe certain stereotypes, prejudice and/or discrimination against older persons based on their chronological age or of a perception of older persons being ‘old’ or elderly.<sup>24</sup> It can be implicit or explicit. It can be expressed on different levels, such as micro-, meso-, or macro-levels.<sup>25</sup> Ageism may be negative or positive (apparently benevolent) and can take many different forms. In times of world public health emergencies due to the COVID-19 pandemic, an example has been the discussion in some countries on whether older persons should or should not have equal rights to access care in intensive care units due to scarcity of ventilators or other acute health care resources.

30. A classic definition of ageism by the person who coined the term,<sup>26</sup> Robert Butler, describes the phenomenon as:

the systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin colour and gender. Old people are categorized as senile, rigid in thought and manner, old fashioned in morality and skills/.../ageism allows the younger generation to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.

Ageist stereotypes or assumptions may be embodied in and reinforced by the enactment or enforcement of a particular law, practice in a public community or other behaviour in society toward an (age-based) group of people. In those cases where the aim of the differential treatment is intended to benefit the group in focus (such as offering lower fares for transportation, discounts on the cost of other public services or special housing arrangements for persons above a certain age), the age-based approach may be non-discriminatory, either because it involves permissible positive measures adopted in order to fulfil particular needs of the ageing population groups or to redress existing disadvantage and discrimination. Even these measures, though, may be problematic, if they are based on stereotypical assumptions and have the effect of marginalising or stigmatising older persons.

31. Behaviour which is based on ageist assumptions is a form of discrimination against older persons and in conflict with fundamental human rights of dignity and equal worth. Irrespective of its origin, the common aim should therefore be to combat such ageism in contemporary societies. Despite its prevalence and documented effects on the enjoyment by older persons of their human rights, including the right to health, no international human rights treaty specifically requires States parties to take steps to eliminate ageism; nor has practice under those treaties focused on ageism as a critical element in the elimination of age discrimination. This is in stark contrast to the provisions in a number of UN human rights treaties that expressly require States parties to take steps to eliminate racism, sexism and ableism, and the steps taken by States under them to give effect to those obligations.

32. Ageism is pervasively entrenched in today's societies across the world. It is sometimes suggested that some societies, including collectivist societies in Asia which place significant value on elders and the roles that they play, show a lesser level of ageism. This probably overstates the position and neglects the negative attitudes to some aspects of ageing shown to be present in those societies. Conversely, it may also discount the traditional and continuing valuing of elders in other societies (which also co-exists with ageism). Scholars have debated whether in societies which have traditionally valued elders and their experience, rapid modernisation, urbanisation, increased longevity and changes in family structures with fewer children and a move away from multigenerational living arrangements<sup>27</sup> has led to a devaluing of older members of the community and a rise in ageism at the personal, social and institutional level. Whatever the explanations for ageism, it is present in all our societies, though it may take different forms depending on the specific and cultural context.<sup>28</sup>

33. Tragically, the coronavirus pandemic has aggravated negative stereotypes and resentment towards older persons when the public discourse is focusing on older persons' vulnerability as a ruinous cost for the health care services. The UN has observed that hate speech targeting older persons has emerged on social media and that there is a common lack of solidarity in these difficult times. States must acknowledge this as an alarming, structural issue, which may impede the realisation of human rights development and certainly their general well-being during this crisis. As long as the stigma and negative stereotypes of older persons are not addressed, this group will continue to be marginalised or hidden from the public eye in many aspects of life.

34. Unlike in the cases of racism, sexism and ableism, there is no international human rights treaty that contains explicit obligations requiring States parties to address the existence and effects of ageism. The term 'ageism' has been rarely used by UN human rights bodies, with the exception of the Independent Expert on the human rights of older persons and the Special Rapporteur on the Rights of Persons with Disabilities, though there have been references to stereotypes based on age or age in combination with characteristics such as sex. Nor do the European binding standards refer explicitly to ageism or impose an explicit obligation to address it, though the non-binding instruments do.

35. It would be possible to derive an obligation to address and eliminate ageism under existing treaties by analogy to sexism, ableism and racism. The concept of discriminatory treatment includes dealing with persons on the basis of group-based stereotypes and ideas of superiority or a particular group. Accordingly, States' obligations to prevent discrimination on the basis of 'other status' or 'age' specifically could be interpreted to extend to

obligations to eliminate ageism. However, little progress has been made on this front under general human rights treaties; this may be contrasted with the specific provisions of the Convention on the Elimination of All Forms of Discrimination against Women (Article 5(a)) and the Convention on the Rights of Persons with Disabilities (Article 8(1)) that address sexism and ableism and the measures taken under those treaties.

36. **Recommendation (a)** (paragraph 235 below)

**ASEM Partners should identify and adopt appropriate legal, administrative, educational and other measures to address the existence and effects of ageism in their societies, taking into account the intersection of age with other characteristics such as sex, race, gender, disability and other statuses.**

b. **Defining ‘older persons’ or ‘older age’**

37. One of the challenges in seeking to ensure that no one is discriminated against on the basis of their older age is defining ‘older age’ or ‘older persons’, in light of the fact that a person’s chronological age is only one element of a person’s ageing. As the European Union Agency for Fundamental Rights noted in its 2018 report:

Age and ageing are usually discussed and addressed from four distinct but intersecting perspectives:

- chronological age based on date of birth;
- biological age, linked to physical changes;
- psychological age, referring to mental and personality changes during the life cycle;
- social age, which defines the change of an individual’s roles and relationships as they age.<sup>29</sup>

38. Working definitions of ‘older persons’ vary considerably and demographic statistical categories have tended to be dominant in discussions about ageing, although they do not capture the multidimensionality of ageing. The category of older persons is sometimes defined as those aged 60 or more, sometimes 65 plus. The United Nations generally uses the age of 60 as the threshold for defining ‘older persons’, though recognises that this may be inappropriately high in certain circumstances and especially for some developing countries.<sup>30</sup> For example, one study noted that the understanding of when a person became ‘old’ or reached ‘older age’ involved a combination of chronology, changes in social role and changes in capabilities, and that using a government stipulated retirement age developed for employment and pension purposes was not appropriate in other contexts.<sup>31</sup> In some countries where the life expectancy of indigenous people is less than that of other members of the community, access to social benefits and other forms of support tied to the standard retirement or pension age may make little sense.<sup>32</sup>

39. The age of 60 does not align with other classifications which take the age of 65 as a rough proxy for the termination of participation in the paid labour force and/or eligibility for a state-financed pension, thus underlining both the arbitrariness of a chosen chronological threshold and the need for flexible definitions for different purposes.

40. The productive working population is often assumed for statistical purposes to be 15 (or even 20) to 64, linked to an assumed/common age of ‘retirement’, or at least eligibility for a state or other pension at age 65 –though that is not necessarily the statutory age for retirement or pension eligibility in countries in which it once was, nor is it necessarily

indicative of when people withdraw from participation in the formal labour market, let alone from participation in the informal economy.

41. Setting a chronological threshold at which a person becomes an 'older person' and treating all persons above that age as belonging to the group of 'older persons' also has its limitations, given the increasing number of persons living into their 70s, 80s and 90s. Frequently, statistical information does not break down the different cohorts above the 'older age' threshold. Given diversity within the various cohorts and between different cohorts a much more nuanced approach is required.

42. Governments understandably have a preference for a precise criterion for determining whether a person has reached older age: where public policy provides specific benefits such as an old-age pension to a person once they have reached a later stage of life, a specific age threshold provides a clear basis for eligibility for that benefit. Such precision also helps governments to estimate changes in revenue and expenditure that are likely to result from a specific cohort reaching the age threshold for the benefit.<sup>33</sup>

43. On the other hand, for other purposes a precise chronological age may not be appropriate for determining whether a person has been denied the equal enjoyment of their rights on the basis of older age. For example, in the labour market in many developed countries discrimination on the basis of age in hiring, promotion or access to other career opportunities is often found to exist against those in their 40s and 50s, with women often experiencing such discrimination earlier than men. Thus, a law that is designed to protect against discrimination on the ground of older age in work may need to use a different threshold<sup>34</sup> or no threshold at all (prohibiting discrimination on the basis of age).<sup>35</sup>

44. The difficulties of defining 'older age' or 'older persons' are also important for the elaboration of any new binding international instrument on the subject. While current proposals speak of a convention to guarantee the human rights of 'older persons', others have suggested that the better approach is to develop a treaty that guarantees protection and enjoyment of all human rights without discrimination on the basis of 'older age'. The latter approach does not 'reify' the group of older persons and better reflects the diversity of the group, the social construction of older age and the limitations of setting a chronological threshold defining the groups of beneficiaries for some or all purposes of the treaty.

45. But in either case some definition or description of 'older age' or 'older person' would arguably be required to clarify the extent of State parties' obligations and who benefits from the treaty's guarantees at what stage in life. Flexibility will be required in any such definition, both to allow individual States parties to tailor the definition to local contexts but also in relation to different areas of life.

46. Only two of the existing human rights treaties that refer explicitly to age or to 'older persons' or 'the elderly' include a definition of older persons. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa defines 'older persons' as aged 60 or above.<sup>36</sup> The Inter-American Convention on the Protection of the Rights of Older Persons defines an older person more flexibly as a 'person aged 60 or older, except where legislation has determined a minimum age that is lesser or greater, provided that it is not over 65 years.'<sup>37</sup> The Inter-American Convention in particular recognises the

socially constructed nature of ‘older age’, defining old age as the ‘social construct of the last stage of the life course’ and ‘ageing’ in the following terms:

‘Ageing’: A gradual process that develops over the course of life and entails biological, physiological, psychosocial, and functional changes with varying consequences, which are associated with permanent and dynamic interactions between the individual and their environment.

**c. Diversity of older persons and intersectionality**

47. Older persons are extremely diverse in their characteristics, thus making reliance on broad chronological categories or stereotypes about the attributes of all or most older persons problematic. Plainly all persons aged over 60 – which includes people straddling potentially four decades of life – are likely to vary as cohorts and individuals. In comparison there would be few purposes for which one would consider a cohort comprising everyone aged from one to forty lumped together in one cohort given the enormous diversity of such a population cohort. Older persons’ situation may vary according to factors such as sex, gender, disability, race, indigeneity, country, employment status, caring responsibilities, socio-economic status, urban/rural status, ethnicity, home ownership status, and many other factors.<sup>38</sup>

48. This diversity means that a focus on chronological age is often not an effective proxy for identifying the attributes possessed by subgroups of older persons. Use of chronological age alone will not ensure adequate attention to the intersection of other statuses and attributes with a person’s chronological age which will frequently be important to understanding their situation and the specific forms of discrimination or exclusion that they face. This affects many aspects of policy development and implementation – from identifying the subgroups that need to be consulted and to participate in policymaking, to ensuring that laws that provide for remedies for age discrimination allow claims of intersectional discrimination based on age as well as other factors.<sup>39</sup>

**d. The COVID-19 pandemic and its relevance to the human rights of older persons**

49. Although the living conditions of almost all persons in the world have been affected due to the COVID-19 pandemic, older persons appear to be the largest affected group of people. The situation has been especially critical for many older persons since the risks of disease and mortality following infections have proved to be higher compared to the population in total.<sup>40</sup>

50. The disproportionate number of deaths of older persons in certain countries and regions compared to others (particularly in care homes)<sup>41</sup> raises questions of access to medical care. According to the Madrid International Plan of Action on Ageing, older persons can experience age-based discrimination in the provision of services when their treatment is perceived to have less worth than the treatment of younger persons. The refusal of health care is a violation of the right to life. For instance, the ECtHR repeatedly decided in cases connected with the functioning of health services and social care in the context of violations of the right to life (Article 2). The court held that in certain circumstances, such as no access to medical care or limited access to medications, violations of Article 2 ECHR may occur.<sup>42</sup>

51. The implications of the pandemic for older persons are more than the disproportionately high risk of mortality. Many of the measures taken in response to the

pandemic give rise to particular consequences for older persons. The essential care and medical services that older persons often rely on are under pressure, including care and support services for older person living in their own homes; and the abuse and neglect of older persons living in institutional aged care tend to escalate when the oversight or monitoring of are weakened due to social distancing. Furthermore, older persons experience similar difficulties to other age groups, for example deteriorating mental health and economic well-being as a result of lockdowns or other restrictions on social interactions. Older persons are also health workers, caregivers and volunteers. Thus, older persons play multiple roles in this crisis just as they do in everyday life. However, the differential needs among older persons have been overlooked, and these circumstances illustrate the broader situation of human rights issues for older persons.

52. The impact of the pandemic on older populations in the world may be a consequence and a reflection of the weak social and legal position that older people still have in many societies. It is not only the fact that many older persons belong to risk groups. Despite recurring proposals for measures to strengthen the living conditions for this social group nationally, regionally and internationally, more is yet to be accomplished - this is reflected in the poor situation for older people during the pandemic in many parts of the world.

53. Social exclusion contributes to a higher risk of further deterioration in public health. Even when there is no global pandemic all countries have to contend with many health risk factors for older persons, but hardly at the same explosive pace and above all not with so much uncertainty about the future conditions to be able to respond to them.

54. The vulnerability of older persons during the crisis signals a structural public health problem in many parts of the world. The difficult conditions for older persons may be an indicator of poor living conditions for older people as a social group. This also applies in countries where health and prosperity generally is taken for granted regardless of age group. The high death and illness rates of the older population reflect a vulnerable group in most societies. Vulnerability is not just about old age and an increased disease picture. There are also social protection needs that may contribute to the vulnerability. These are particularly the living conditions of older persons, such as forms of housing, care and nursing which have proved insufficient to protect the old population.

55. The pandemic has highlighted the high public health risks faced by older persons, with great care and support needs. There is reason to pay attention in the coming years to this group in the population whose ability to influence its situation may be limited, especially the responsibility to scrutinise and provide good housing, care and nursing interventions for these groups. It is evident that persons over 60 are a group significantly affected by the COVID-19 virus and its side effects, although the impact has varied among subgroups. Yet, the vulnerabilities and differential needs have been overlooked in some States' responses to the crisis. 'Older persons remain chronically invisible despite pandemic spotlight' a UN expert explains.<sup>43</sup> Indeed, many States have mismanaged the protection of older persons and there has been a reluctance to older persons' participation in the response process. Moreover, as COVID-19 has been increasingly characterised as an 'older people's disease', there is a risk that older persons are increasingly affected by ageism and social stigma resulting from this.<sup>44</sup> The UN has urged better protection of older persons since the beginning of the crisis<sup>45</sup> and concerns have been raised about decisions on access to scarce critical medical services being based on age.<sup>46</sup> For example, there is a need to examine why



such a large proportion of COVID-19 deaths in Europe and other countries (such as Canada and Australia<sup>47</sup>) has occurred in long-term care settings.<sup>48</sup>

56. There is a risk for the negative consequences of physical isolation and far-reaching lockdowns. The UN OHCHR Guidance has emphasized that limiting contacts with families as a part of emergency measure may result in older persons being further exposed to neglect and abuse.<sup>49</sup> Mental health is just as important for older persons as their physical health. Measures that exclusively rely on social isolation may jeopardize their mental health due to that many older persons live alone. They also often rely on home and community services and support. The light shed on older persons in these times of crisis may risk magnifying ageism. Nevertheless, the situation may also distinguish the normalised patterns which impede the recognition of older persons' rights. States' approaches towards older persons are being conceptualised in light of the COVID-19 crisis and it reveals outdated views on older persons at times. Since the adoption of the Madrid International Plan of Action on Ageing, the international community has been facing a paradigm shift from a welfare approach to a human rights approach, recognizing older persons as subjects of human rights rather than passive benefit and welfare recipients. Some early State responses demonstrated a paternalistic approach to older persons, failing to recognise them as rights holders.<sup>50</sup> Thus, the much-vaunted paradigm shift, which advocates for older persons' rights, has not completely triumphed. With this acknowledgement, it is imperative for States to actively work for the complete recognition of older persons' rights.

57. The fatal direct consequences of the pandemic for older population will most likely require major efforts both during the remaining ongoing health crisis and thereafter during several years ahead for continued trust and legitimacy.

### **III. INTERNATIONAL, REGIONAL AND NATIONAL PROTECTION**

#### **1. Rights of older persons at the international level**

58. There is no legally binding international agreement that explicitly and comprehensively addresses the human rights of older persons or that guarantees equality and non-discrimination on the basis of older age. There are a number of non-binding universal human rights instruments such as the *United Nations Principles for Older Persons*<sup>51</sup> and some non-binding instruments relating to particular sectors such as employment;<sup>52</sup> many policy documents have been adopted, the most prominent of which is the Madrid International Plan of Action on Ageing 2002.<sup>53</sup>

59. The extent of coverage under universal instruments is of particular importance for countries in the Asia and Pacific region because there is no binding regional human rights treaty or comprehensive regional monitoring mechanism in relation to human rights generally or to the rights of older person in particular, and the sub-regional instruments and mechanisms in the ASEAN region do not provide explicit international binding guarantees (see Section III.c below).

60. Despite the lack of a comprehensive binding instrument that explicitly protects the human rights of older persons in international human rights law, older persons enjoy protection of their human rights under other general and thematic human rights treaties. The guarantees contained in treaties such as the International Covenant on Civil and

Political Rights 1966<sup>54</sup> and the International Covenant on Economic, Social and Cultural Rights 1966<sup>55</sup> apply to ‘everyone’ and include persons of any age. These include the classic civil and political rights such as the rights to life, freedom from torture, freedoms of expression, assembly, thought and belief, the right to respect for privacy, home and family, the right to participate in political and public life, equality and non-discrimination, rights to education, an adequate standard of living, social security and work, among others. In some cases the older age of a person may be relevant to how a right is interpreted and applied in a given instance – for example, in relation to the need to expedite a civil proceeding, or what constitutes inhuman or degrading treatment.

61. In addition to the protection afforded by free-standing rights, implicit guarantees of equality and non-discrimination on the ground of older age are contained in the general non-discrimination provisions of some international human rights treaties. For example, both the ICCPR and the ICESCR guarantee the enjoyment of the rights listed in those conventions without discrimination on a number of grounds such as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status’.<sup>56</sup> The category of ‘age’ does not explicitly appear in these guarantees but the phrase ‘other ‘status’ has been interpreted as extending to age discrimination, including discrimination on the basis of older age.

#### *Adequacy of the international human rights law framework*

62. Despite the theoretical and formal coverage of some of the human rights of older persons by the international human rights framework, it has been argued by scholars,<sup>57</sup> older persons’ advocates,<sup>58</sup> United Nations independent experts<sup>59</sup> and some governments that international human rights norms and mechanisms have not been sufficient to contribute significantly to stimulating changes at the national level that will improve the enjoyment by older persons of their human rights.<sup>60</sup> There is general agreement that many older persons suffer violations of their human rights and dignity across the range of human rights.

63. The reasons identified for the inadequacies include the conceptual limitations of existing guarantees, their failure to address explicitly specific violations suffered by older persons, and a failure to adequately interpret and apply existing guarantees in relation to the situation of older persons.

64. Concern that the performance of the international human rights framework was not doing all that it could to improve older persons’ enjoyment of their human rights in their daily lives led the United Nations General Assembly in 2010 to establish an Open-ended Working Group to explore how the position might be improved.<sup>61</sup> Member States of the United Nations, national human rights institutions, non-governmental organisations and other stakeholders have all participated in the work of the OEWGA, which has held ten sessions since its establishment. The OEWGA has received hundreds of submissions from stakeholders, held dozens of panel discussions and engaged in other forms of plenary deliberation during that time.

65. One of the main issues considered by the OEWGA has been whether it should recommend to the General Assembly the adoption of a new normative instrument on the human rights of older persons and, if so, what the elements of such an instrument should be. After a number of sessions at which there were general discussions of the state of older

persons' human rights in the world, the OEWGA moved to a sequenced discussion of central issues with a substantive discussion in one year followed by a focus on possible normative elements (that is matters that might be included in a treaty) relating to that particular area in the next. This approach was undertaken in the hope that by focusing on specifics, the inadequacies of the existing framework would be made even clearer, thus strengthening the case for a new binding human rights instrument.

66. Although there is significant support from many member States, national human rights institutions and non-governmental organisations for the elaboration of a new convention on the subject, a significant number of member States are not persuaded of this. As a result as of the end of the tenth session of the OEWGA member States as a whole had not yet reached a consensus on the issue and thus the question has not yet been resolved in favour of developing a new instrument.<sup>62</sup>

67. **Recommendations (b) to (f)** (paragraph 235 below)

**ASEM Partners should consider taking a number of steps in relation to better maintenance and further strengthening of the international human rights system, including: considering the ratification of or accession to treaties to which they are not yet party, supporting the elaboration of a new United Nations convention on the human rights of older persons and participating constructively in the UN Open-ended Working Group on Ageing, and ensuring that they include material, including disaggregated data on older persons in their reports under UN human rights treaties and their progress reports on implementation of the Sustainable Development Goals.**

**b. Rights of older persons at the regional level: Europe**

68. When speaking of the rights of older persons at the regional level in Europe, there are two important overlapping political communities and corresponding human rights regimes. These are the European Union, with its 27 member States (28 until the recent departure of the United Kingdom) and the Council of Europe, an organisation committed to enhancing cooperation in legal, human rights and social affairs that has a membership of 47 member States including all EU members but others as well, ranging from Iceland to Azerbaijan and Russia in the east. The 53 ASEM Partners include all members of the EU and 32 of the 47 members of the Council of Europe.

69. The EU can in many respects be described as an ageing society. For many years, demographic ageing has been identified as a major challenge for the future of the Union. Increased life expectancy combined with declining birth rates is a cause for concern, not least as regards the future costs of supporting the older population will be, but also who will care for and provide care for older persons. Another concern within the EU is that a number of EU countries have a large proportion of young workers who migrate for employment; this can lead to difficulties for the support of older family members when they are left without their younger family members in the home country. To meet these challenges concerning the growing older population, various policy approaches have been discussed within the EU over the last two decades. In its regular reports, the European Commission has, for example, analysed the expected effects of Europe's aging population, focusing in particular on the long-term economic and fiscal consequences.<sup>63</sup>

## ***Legal frameworks and monitoring mechanisms***

### *The Council of Europe*<sup>64</sup>

70. Within the Council of Europe, the principal general human rights treaties are the European Convention on Human Rights (ECHR), which has been supplemented by a number of additional protocols, and the Revised European Social Charter of 1996.<sup>65</sup> All member States of the Council of Europe (and thus all member States of the EU) are parties to the ECHR; acceptance of that instrument is effectively a precondition for EU membership. Acceptance of the Revised European Social Charter, however, is not required and as of the end of 2020, 34 members of the Council of Europe were parties to the Revised Social Charter, with 11 States having signed the treaty but not proceeded to ratification, and two not having signed the treaty.

71. Other human rights treaties adopted by the Council of Europe are the Convention on Human Rights and Biomedicine adopted in Oviedo in 1997, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987, and the Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) adopted in 2011. Furthermore, the Council of Europe is a forum in which a variety of non-binding documents related to the rights of older persons has been adopted.<sup>66</sup>

72. The European Court of Human Rights was established under the ECHR to adjudicate on complaints that States parties to the Convention have violated the rights guaranteed in the Convention and its additional protocols. The Court, based in Strasbourg, has the power to issue judgments that are binding on States under international law and has developed a vast body of case law interpreting the Convention.

73. The European Social Charter establishes the European Committee on Social Rights, a committee of independent experts that has responsibility for monitoring implementation of the Charter in contracting States by reviewing their reports and, more recently, considering collective complaints alleging violations of Charter obligations.<sup>67</sup> Although the Committee's views are not legally binding judgments, States are required to give due weight to their implementation. As with judgments of the European Court of Human Rights, the implementation of decisions of the Committee is subject to the supervision of the Council of Ministers of the Council of Europe.

### *The European Union*

74. The European Union embodies a supranational legal framework in which norms of European law will normally prevail over provisions of national law; the fundamental treaties of the EU, as well as EU Regulations and Directives, are the major forms of binding norms. There are a number of human rights guarantees in the fundamental treaties, but for present purposes the most important binding document is the EU Charter of Fundamental Rights (EU Charter), adopted in 2000 but made explicitly binding in an amended form by the Treaty of Lisbon (2009) from 2010. The EU Charter binds the institutions of the EU and its member states when implementing EU law.

75. The Court of Justice of the European Union (CJEU), based in Luxembourg, is the judicial institution of the EU and it has power to provide binding rulings on matters of EU law and their relation to national laws: this includes the effect of the EU Charter and of various

EU Directives that require member States to give effect to EU human rights standards. the field. It has developed an extensive jurisprudence on human rights. Although it has held that non-discrimination in respect of age is a general principle of EU law,<sup>68</sup> the Court's jurisprudence in relation to issues of age discrimination is rather limited, with many of its most prominent cases concerning the permissibility of mandatory retirement ages or laws regulating eligibility for retirement benefits.<sup>69</sup>

*Substantive norms explicitly protecting the rights of older persons in the Council of Europe and the European Union*

76. At present there is no comprehensive, detailed and integrated legally regional instrument guaranteeing older persons' human rights in place for the European region, whether defined as the Council of Europe region or the European Union.

77. Moreover, the ratification of treaties embodying social and economic rights, for example the European Social Charter, remains less than universal. This is concerning since social rights play a significant role for many of the issues older persons are facing. Thus, the human rights protection stemming from legally binding obligations is limited in terms of group-specific rights and falls short in those material rights especially important for older persons.

78. Although a number of treaties provide protection against discrimination in the enjoyment of rights set out in those instruments, not all refer expressly to age as a prohibited basis of discrimination. Article 14 of the European Convention on Human Rights guarantees protection in the enjoyment of the rights set out in the Convention and its additional protocols....<sup>70</sup> 'Age' is not explicitly included in the list, although 'other status' has been understood as including age-based discrimination.<sup>71</sup> Article 1 of Protocol 12, adopted in 2000, expanded protection against discrimination under the Strasbourg system by providing for a freestanding guarantee of non-discrimination, but did not explicitly add 'age' as a ground to the list of enumerated ground in Article 14.<sup>72</sup>

79. However, the exclusion of such a basis, together with the lack of material rights for older persons, indicates a perspective that neglects equality for older persons in this framework. As discrimination solely based on age has been proven common in the context of employment (as well as age in combination with other grounds such as sex), the ECHR regime also fails to cover this area as with many other social issues. To date, the Court has not articulated a clear and persuasive interpretation of substantive equality as it relates to age, including imposing an obligation upon States to take positive compensatory measures in areas where older persons tend to be systematically disadvantaged.<sup>73</sup>

80. Article E of the Revised Social Charter<sup>74</sup> provides protection against discrimination on grounds that largely track those in Article 14 and Protocol 12, adding 'health' as a prohibited ground but not explicitly referring to age. The phrase 'other status' has also been interpreted to apply to discrimination on the basis of (older) age.<sup>75</sup>

81. Age discrimination is a form of inequality that in a number of respects is normalised and seen as justifiable within legislation and policies of the European Union. For instance, it is the only ground of discrimination for which EU law stipulates that direct discrimination can be objectively justified. While Europe has a well-developed discrimination regime in relation to a number of grounds of discrimination, that is not the case in relation to older

persons and age discrimination. Instead, there is rather a widespread acceptance of policies and strategies that directly distinguish between people of different ages, without any considerations what this means for the equal enjoyment of rights by older persons.

82. On the other hand, Article 21(1) of the EU Charter explicitly includes 'age' as a prohibited basis of discrimination.<sup>76</sup> Furthermore, the Employment Equality Directive<sup>77</sup> adopted in 2000 provides protection against discrimination in employment and occupation) on a number of grounds including age, though its provisions setting out the circumstances in which mandatory retirement have been criticised as permitting unjustifiable discrimination. However, this protection is limited to the field of work, and a decade-long effort to achieve the adoption of a new Directive, which would have been legally binding and would have extended protection against discrimination on the basis of age as well as on other grounds beyond the area of employment<sup>78</sup> was abandoned in 2020.

83. There are few provisions in European law that go beyond a simple reference to age discrimination. Both the EU Charter of Fundamental Rights and the Revised Social Charter include a provision relating specifically to older persons (described as 'the elderly' in each case). Article 25 of the EU Charter recognises 'the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'. However, this mainly relates to European regulation.<sup>79</sup>

84. A similar provision is found in the Revised Social Charter, which guarantees the right of older persons to social protection (Article 23).<sup>80</sup> That provision calls for a flexible, wide interpretation and its material content thus overlaps with other social rights articulated in the Charter.<sup>81</sup> The European Committee on Social Rights has described the provision as pointing 'towards a new and progressive notion of what life should be like for elderly persons'.<sup>82</sup>

85. The ECHR, as interpreted and applied by the ECtHR, is considered one of the most effective instruments of human rights protection in Europe. However, its downside is that its coverage does not explicitly extend to most social and economic rights (though it has been interpreted to address some indirectly),<sup>83</sup> and thus the ECtHR is therefore extremely limited in its ability to consider complaints that raise many of the important violations of the human rights of older persons. Nevertheless there are a number of cases involving older persons before the ECtHR, in some of which the fact that the applicant is an older person or the situation in which they find themselves is considered in deciding whether there is a violation of a specific right such as cruel, inhuman or degrading treatment.<sup>84</sup> However, it cannot be said that the ECtHR has developed a coherent, comprehensive and detailed jurisprudence on the human rights of older persons, including application of the concept of substantive equality in such cases, even though it has considered many cases involving 'older' applicants.<sup>85</sup>

86. Nor has the CJEU performed much better in this regard. Few cases have come before it involving age discrimination other than mandatory retirement cases. Its decisions in mandatory retirement cases, while reflecting the policy choice of the legislator to legitimise some forms of direct age discrimination, have not done a great deal to develop understanding of age discrimination and ageism or to change established stereotypes. For example, it has concluded that it is acceptable to force older workers to retire in order to

prevent inquiries into employees' fitness to work beyond a certain age,<sup>86</sup> something which itself embodies ageist assumptions.

87. Finally, the two apex European courts have struggled to come to terms with the concept and realities of intersectionality in relation to older persons.<sup>87</sup> This concept has been influential in developing discourse about discrimination for many targeted groups in Europe, yet a one-dimensional view has prevailed in terms of older persons. Intersectionality, which acknowledges the multiple and combined grounds for discrimination against older persons, is extremely important for the achievement of equality. This is generally the case, and thus certainly important in Europe with its many minority groups, economic standards, ethnicities and long fight for women's emancipation – which evidently also exists amongst older persons.

88. The European Committee on Social Rights has considered only a small number of cases involving discrimination on the ground of older age, but in those cases has done a reasonable job of dealing with the issue.<sup>88</sup>

*Recent policy developments in the EU context*

89. Efforts have been made both within the Council of Europe and the EU to expand the legal protection of the human rights of older persons and also to develop policy measures to enhance their realisation. In 2014, the Council of Europe adopted a non-binding recommendation for the promotion of older persons' rights, which covers issues including autonomy and participation, social protection and employment and protection from violence and abuse.<sup>89</sup> This 'soft law' (that is, not legally binding) document, while a useful reference point and stimulus to action, does not have the same power or legal effect as a legally binding instrument does, but these generally lack the perspective of older persons.

90. Although efforts to adopt a new anti-discrimination Directive that would have extended protection against age discrimination as well as other forms of discrimination beyond work did not succeed, there is nonetheless considerable interest in European institutions in enhancing the frameworks for protecting the human rights of older persons.<sup>90</sup> The European Pillar of Social Rights, adopted by the EU institutions in 2017, is a non-binding statement of principles and aspirations that addresses a range of social issues and rights particularly relevant to older persons.<sup>91</sup> More recently, the Council of the European Union adopted Council Conclusions which endorsed the taking of additional measures informed by a human rights approach to better ensure the human rights of older persons.<sup>92</sup> In addition, the Governments of Germany, Portugal and Slovenia – the member States holding the six-month Presidency of the EU consecutively from mid-2020 to the end of 2021 – adopted the Trio Presidency Declaration on Ageing adopted in 2020, which affirmed the importance of 'an age-integrated, rights-based, life-course perspective approach to ageing', mainstreaming ageing and a number of other objectives, though in neither of these documents is there a clear commitment to supporting the elaboration of a new binding instrument. Most recently, in January 2021 the European Commission issued a *Green Paper on Ageing*<sup>93</sup> intended to stimulate 'a broad policy debate on the challenges and opportunities of Europe's ageing society'.<sup>94</sup> It covers many areas, but does not explicitly refer to the relevance of human rights to ageing policy or to the desirability for strengthening international and regional frameworks for the protection of the human rights of older persons.

**c. Rights of older persons at the regional level: Asia**

91. The Asian region has the least developed regional human rights law framework generally and also in relation to the human rights of older persons. Whilst the United Nations human rights treaties and conventions adopted within the framework of bodies such as the International Labour Organization (ILO) and UNESCO apply to Asian and Pacific States if they have ratified them, the substantive and procedural limitations of the UN human rights framework apply in this region as well elsewhere and are not supplemented by regional initiatives.

92. There is no regional human rights treaty of general application that applies throughout all or most of Asia and the Pacific. Nor are there any thematic regional treaties that engage explicitly with the rights of older persons. The same is true at the subregional level. Although a number of treaties adopted within the framework of the South Asian Association for Regional Cooperation (SAARC), including the SAARC Social Charter and the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, have human rights-oriented goals, they are not formulated as rights-conferring instruments and provide no mechanism for individuals to enforce their rights under them. Nor is there any specific mention of older persons in those treaties, and there is no SAARC treaty that addresses in detail the human rights of older persons.

93. Within the Association of Southeast Asian Nations (ASEAN) there has been progress both in terms of the development of non-binding human rights instruments and specific human rights mechanisms applicable to ASEAN member States.

94. Article 1(7) of the Charter of the Association of Southeast Asian Nations stipulates that one of ASEAN's fifteen purposes is ‘

to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of member States of ASEAN’.<sup>95</sup>

95. ASEAN and its Member States commit to act in accordance with fourteen principles including ‘respect for fundamental freedoms, the promotion and protection of human rights and the promotion of social justice’.<sup>96</sup> The Charter does not, however, specifically confer any rights on individuals or establish any human rights mechanisms.

96. On 18 November 2012 the member States of ASEAN adopted the non-binding *ASEAN Declaration on Human Rights*. Article 2 of the Declaration provides that every person ‘is entitled to the rights and freedoms set forth [in the Declaration], without distinction of any kind such as . . . age . . .’, while Article 4 states that ‘the rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms’, and the Declaration guarantees a range of other civil, political, economic, social and cultural rights. There is no ASEAN declaration or similar instrument on the human rights of older persons.

97. ASEAN has established three bodies with specific human rights mandates: the ASEAN Intergovernmental Commission on Human Rights (AICHR) (2009), the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) (2010) and the ASEAN Committee on Migrant Workers (2007), the last body established to



promote and monitor the implementation of the 2007 ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers.

98. The AICHR has a broad mandate, including the promotion of the implementation of the ASEAN Declaration. However, the human rights of older persons have not been a major priority for the AICHR since its establishment. There has been some reference to older persons in the thematic studies prepared by AICHR: the 2019 AICHR study on legal aid considered the position of 'the elderly' among other social groups on the availability of legal aid in ASEAN member States and similarly in its 2017 thematic report on women in natural disasters. However, the AICHR made no mention of older persons or 'the elderly' in its report on the right to education and promoting access to tertiary education or on corporate social responsibility and human rights in ASEAN.<sup>97</sup> Nonetheless, issues relating to older persons, generally mentioned in the context of other groups such as persons with disabilities, are included in the latest work plan of the Commission for the period 2021-2025.<sup>98</sup>

99. The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) has focused in particular on the elimination of violence against women and children and trafficking in women and children. The human rights of older women do not appear as a particular priority in its work plans.<sup>99</sup> The ASEAN Declaration on the Elimination of Violence against Women and the Elimination of Violence against Children, adopted on 9 October 2013, contains no explicit reference to older women or 'elderly' women, though in its Preamble it lists seventeen other groups of women and children who may be particularly affected by violence (preambular paragraph 9).<sup>100</sup>

#### **d. Rights of older persons at the regional level: the Americas and Africa**

100. Although the ASEM seminar focuses on the international level and the regions of Europe and Asia, it is not possible to describe the international framework for the protection of the rights of older persons without referring to recent developments in the Americas and in Africa, as explicit and wide-ranging protection of the human rights of older persons is provided in each of those regions by a comprehensive thematic treaty. In 2015 the Organization of American States adopted the Inter-American Convention on Protecting the Human Rights of Older Persons,<sup>101</sup> while in 2016 the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.<sup>102</sup>

101. There are also other regional treaties in these two regions that guarantee the rights of specific social groups and explicitly refer in some provisions or optimally have an operation in relation to some sub-groups of older persons. These include the African Union's Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003,<sup>103</sup> which contains provisions specifically addressing the position of older women or issues likely to affect older women disproportionately.<sup>104</sup> In both the Americas and Africa the regional organisations have adopted thematic treaties guaranteeing the rights of persons with disabilities, which would include protection for the rights of older persons with disabilities.<sup>105</sup> There appears to be little literature assessing the practical impact of these regional treaties on enhancing the rights of older persons.

**e. International standards, national protections and practical implementation**

102. In this report we focus on international and regional human rights standards. These provide important frameworks for the design of national laws, policies and programmes, and in some cases these international and regional norms may be directly applicable as part of national law. This is so in the case of certain norms of EU law and in many European countries, international treaties – including the European Convention on Human Rights and other UN and regional human rights treaties – may part of domestic law, although the practical impact of this varies. The existence of these regional frameworks that are directly enforceable or that provide strong policy frameworks for national level developments are features of the EU and the Council of Europe.

103. While there are challenges in making general statements about protection in Europe, those challenges are even greater in the context of Asia. The diversity in legal systems, stages of development and cultural traditions is enormous among the different regions and countries of the Asian and Pacific region. The absence of a binding regional human rights framework or, indeed, subregional frameworks – in particular a regional system such as the EU in which the primacy of EU law over of national legal systems – means that the most important international human rights frameworks are those set out in UN human rights instruments. Most ASEM Partners in the Asia and Pacific region have accepted the principal general UN human rights treaties (ICCPR and ICESCR) and all of them have accepted important thematic treaties such as CEDAW, CRC and CRPD. [acceptance of complains procedures] Yet the monitoring and enforcement procedures for these UN treaties are more diffuse than those in place for EU and Council of Europe treaties, especially in the field of civil and political rights but also economic and social rights. The place of international treaties in domestic legal systems varies among the many legal systems of Asia and even in those jurisdictions where treaties are formally part of domestic law, the practical impact of that formal position before courts and tribunals is often unclear.

104. Our focus on international and regional norms takes as its starting point that these legally binding norms are important because they provide a universally endorsed framework for developing and assessing national laws and policies, monitoring progress in their implementation and stimulating the provision of remedies for failure to respect the rights guaranteed. Laws and policies implementing human rights treaty obligations must, of course, be developed in the specific national context. By setting up systems for external monitoring on a regular basis, international treaties also provide a framework by which governments can get independent expert feedback and have an opportunity to develop capacity and knowledge in the field, and according to which national bodies such as legislatures, courts and other public bodies, as well as the broader community, can assess governments' actions and hold them accountable for ensuring the full realisation of rights and the provision of remedies in case of violations.<sup>106</sup>

105. Of course, national constitutions and laws often have much greater influence on national courts, legislatures, government bodies and the community than international treaties. Thus the ultimate goal is to ensure that these provide protection that is at least as good as international standards and ideally even better. In both Europe and Asia there are varying levels of constitutional and legislative protection of the human rights of persons in older age: these include specific guarantees that explicitly refer to old age or older persons

and general guarantees of non-discrimination or equality that are interested as applying to older persons or older age.

106. Explicit protection in constitutions and legislation is uneven across the world, including in Europe and Asia and the Pacific. Summarising submissions to the Open-ended Working Group which responded to the question whether the State's constitution guaranteed equality 'explicitly' for older persons or for persons of all ages or prohibited discrimination 'explicitly' on the basis of age, the UN Department of Economic and Social Affairs (UNDESA) reported:

Very few countries provide explicit guarantees of equality and non-discrimination on the basis of age. The majority of responses indicated that the general principle of equality and non-discrimination is covered in most Constitutions and national laws. Most of them do not make explicit reference to age as a ground for discrimination to be prohibited, or guarantee equality explicitly for older persons. Where such explicit reference to age or older persons exist, the scope of coverage tends to be limited to employment and does not extend to other spheres of life.<sup>107</sup>

107. At the same time UNDESA also noted, drawing on a 2013 ILO report, that in relation to protection against discrimination in employment, 'there has been steady progress in the adoption of legal provisions prohibiting discrimination on the basis of age.'<sup>108</sup> Nonetheless, even where protection does exist, 'the scope and coverage are uneven compared to guarantees against discrimination on other grounds.'<sup>109</sup>

108. This uneven constitutional and legislative protection of the human rights of older persons or against older age discrimination is seen in countries across the Asia Pacific region, though comprehensive comparative data and analysis is not readily available. In its 2017 submission to the OEWGA, UNESCAP reported that responses from 25 Asia Pacific countries<sup>110</sup> to a MIPAA review survey suggested that 'only 40 per cent of the respondent countries have national legislation on older persons' rights or have specific provisions for older persons in universal rights legislation, such as laws on domestic violence.'<sup>111</sup> The same contribution noted that 'age-based discrimination is part of constitutions and universal rights legislation[] in a majority of 25 respondent countries',<sup>112</sup> which suggests that there is some level of general or specific constitutional protection in those countries as well.

109. In any case, it appears that even in relation to those countries that responded there is a significant shortfall of explicit constitutional legislative and protection of older persons or against discrimination on the grounds of older age (though an examination of whether such guarantees as do exist are in practice applied to older age). Further, not every piece of legislation that is claimed to provide protection is necessarily based on sound non-ageist human rights principles. Implementation is also an issue: UNESCAP noted that '[e]ven when legislative measures are available their effectiveness is often curtailed by the lack of institutional mechanisms to report and record discrimination cases, as well as measures to prevent their re-occurrence.'<sup>113</sup>

110. This brief review suggests that there is much more to be done in terms of providing explicit protection against discrimination on the basis of older age in constitutional law, employment and other areas.

111. Recommendations (g) and (h) (paragraph 235 below):

**ASEM Partners should consider strengthening existing regional or subregional human rights frameworks, institutions and procedures, including through the adoption of legally binding instruments and complaint procedures where these do not already exist or are not sufficiently comprehensive in coverage or are ineffective in providing adequate remedies to older persons; and ensure that human rights monitoring bodies at the international regional and subregional levels have sufficient resources to effectively carry out their mandates.**

#### IV. THEMATIC FOCUS

112. In this section of the background paper we take up four thematic areas that have been identified as important for the realisation of the human rights of older persons. These are a selection from a much longer list of areas identified in documents such as the Madrid International Plan of Action on Ageing and which are being considered by the UN Open-ended Working Group on Ageing and in other fora focusing on ageing and human rights.

113. We also emphasise the interrelatedness of these areas and rights with other rights. It is a common slogan that all human rights are interrelated and interdependent: in the case of the human rights of older persons this is also evident. For example, the ability of older persons to enjoy the right to non-discriminatory access to work may depend on their enjoyment of the right to education insofar as it guarantees them access to lifelong learning permitting them to update their skills to respond to technological and other changes in the workplace. The right of an older person to an adequate standard of living will depend in part on the extent to which they enjoy the rights to work or social protection and the right to adequate housing. Ageism has been shown to have detrimental impact on older persons' physical and mental health, so a right to be free from being treated on the basis of ageist stereotypes and practices is important to the realisation of that right as well as other rights. There are many other examples that illustrate the interactions and interdependence.

114. The issues and rights discussed are a subset of those that are important for the realisation of the human rights of older persons: they both influence the enjoyment of and are affected by the realisation of other rights. This discussion is therefore intended both as a substantive discussion of the themes chosen but also underlines the importance of applying a human rights-based analysis that draws on the perspectives of older persons to other areas as well.

115. In each case we give a brief description of some of the principal challenges and barriers that older persons face in particular areas. We refer to existing human rights standards that clearly apply to these areas and the extent to which older persons actually enjoy those rights. We also indicate limitations or gaps in coverage or instances in which a more explicit formulation of a right that is tailored to the particular circumstances of older persons or a relevant subgroup would enhance the enjoyment of their human rights and fundamental freedoms.

## a. Autonomy and independence of older persons

116. The concepts of autonomy and independence of the individual are fundamental to the international human rights framework. The two concepts, though related, have different meanings, as noted by the UN Human Rights Council's former Independent Expert on the human rights of older persons:

Autonomy and independence are mutually reinforcing and are often used interchangeably in legal instruments and frameworks. While autonomy refers to the ability to exercise freedom of choice and control over decisions affecting one's life, including with the help of someone if needed, independence means to live in the community without assistance or, at least, where the amount of help does not subject older persons to the decisions of others. In that sense, the concept of independence is broader than autonomy....<sup>114</sup>

117. No explicit guarantee of autonomy and independence appears in the principal UN human rights treaties, although the CRPD states as one of the general principles of that treaty 'respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons . . .'.<sup>115</sup> Nonetheless, autonomy and independence are implicit in, indeed fundamental to, many of the rights that are explicitly guaranteed, such as the right to liberty and security of the person, the right to respect for one's private life, the right to recognition as a person before the law; right to health (and to make decisions about whether and what treatment to consent to), among others.

118. A UNDESA report summarising stakeholder submissions to the Open-ended Working Group on Ageing on autonomy and independence concluded:

the concept of autonomy itself, certainly when paired with that of independence, is not only a general statement of the right to take one's own decisions and to have them respected, but also the right to enjoy conditions that make it possible for older persons in practice to exercise that decision-making capacity, carry out their decisions and have those decisions respected, thus ensuring participation in a broad range of social activities according to the will and preferences of the person concerned.<sup>116</sup>

119. The autonomy and independence of older persons is often undermined as a result of ageist assumptions about the capacities, interests and needs of older persons, with a consequent disregard of their desires and views. A related area has been laws, such as guardianship laws, that remove the legal capacity of older persons on the grounds of asserted lack of capacity.

120. Earlier in this report, the complexity of the concept of 'older persons' has been discussed previously (under 'Terminology' at page 8 above). In a discussion of the autonomy and independence of older persons, this becomes particularly relevant, and therefore deserves a few additional comments here. Using the term 'older persons' as a general category of classification risks reflecting certain stereotypes people from a particular age cohort, their abilities and their needs and desires. In the media, politics, culture and community discussions older persons are often portrayed as either constantly dependent – in need of state protection because of illness, weakness, loneliness and sometimes lack of money – or not dependent at all, being in good health and with financial and personal resources which enable them to conduct their daily life independently.

121. Such portrayals do not take into account the fact that like any other age group, perhaps even more so, 'older persons' comprises diverse groups of individuals. It seems

unlikely that the majority of people who are 'older' fit either of these 'standard' views – of constant and significant dependency or complete independence. Rather, many of these persons have varying degrees of (in)dependence and live in very different situations, just like the rest of the population. This diverse range of persons and situations must be taken into account when analysing what 'autonomy and independence' means for older persons so as to avoid simplistic and discriminatory measures.

#### *Autonomy, independence and decision-making*

122. An emphasis on autonomy and independence creates demands on participation and activity on the part of the individual. As noted, very many older persons are as capable of participating in and making independent decisions on all matters concerning political issues, local concerns or their daily life as younger generations are.

123. Due to age-related or situation-based changes, some older persons may, however, have difficulties in participating, expressing their opinions and making decisions about important matters involving their interactions with the authorities. At the same time, as at earlier stages of their lives, older age often presents people with difficult decisions, such as where they live, and whether and how they arrange for any care or support that they may need. It is in such contexts that too often family members, public authorities and others in the community too readily assume that older persons do not wish to or are not able to take decisions that serve their best interests, and may seek to take over that function to ensure 'the best interests' of the person, rather than ensuring that older persons can exercise their own decision-making power, with support if necessary.

124. This tendency is seen in its most extreme form in the case of guardianship laws – laws that formally remove the legal capacity and repose it in another person, that is a form of substituted decision-making. Always problematic in theory and in practice, many such laws are inconsistent with current human rights standards. These have been articulated in particular in the Convention on the Rights of Persons with Disabilities, which enacts a model of supported decision-making rather than that of substituted decision-making that has historically underpinned guardianship laws in many countries. All ASEM Partners are bound by the CRPD.

125. The CRPD applies to all persons with disabilities, including older persons with disabilities. It is important to note that, although many older persons live with disability, many older persons do not, so that older age is not synonymous with disability. Further, even if an older person lives with a disability is treated disadvantageously, this does not mean that the disadvantageous treatment is in every case necessarily based on that person's older age or disability. It may, for example, be based on the person's sex or gender, though in such contexts it is important to be sensitive to the role of intersectional discrimination and the way in which discrimination on the basis of age, disability and sex or race may come together in an incident of disadvantageous treatment.

126. Article 12 of the CRPD contains an important guarantee of autonomy and independence.<sup>117</sup> It is worth quoting the provision in full:

#### **Article 12 – Equal recognition before the law**

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

127. Article 12(1) and (2) affirm the right to recognition before the law of all (older) persons with disabilities, and Article 12(3) embodies the model of supported decision-making rather than one of substitute decision-making.<sup>118</sup> Article 12(4) obliges States parties to put in place strict safeguards to avoid any abuse, and requires safeguards that respect the rights, will and preferences of the person.

128. The meaning of the provision has been contentious in some respects, with some interpreters (including the UN Committee on the Rights of Persons with Disabilities) taking the view that Article 12 does not allow for substituted decision-making in any form and that supported decision-making that gives effect to the known or inferred wishes and values of the person is required. Others take the view that there may be a small number of exceptional instances in which substituted decision-making may be permissible. Notwithstanding the debate, there is a large measure of agreement that laws that permit substituted decision-making are frequently too broad and fail to provide support for the persons to take their own decision when such support is able to be provided.<sup>119</sup>

129. The Committee on the Rights of Persons with Disabilities has set out its understanding of the article in its *General Comment No 1*. The Committee notes that often the concepts of legal capacity and mental capacity have been conflated 'so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed.'<sup>120</sup> As a result, 'a person's disability and/or decision making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.'<sup>121</sup>

130. The concept of support is 'a broad term that encompasses both informal and formal support arrangements, of varying types and intensity' and could include support persons, advocacy support, communication support, universal design and accessibility measures, and advance planning measures, among others.<sup>122</sup>

131. Given that all ASEM Partner Countries are parties to the CRPD, they should already have undertaken a review of any laws that permit the removal of a person's legal capacity and its exercise by another person, or should have such a review planned, so as to ensure that domestic law is consistent with the international obligations set out in the CRPD.

#### *Autonomy, independence and rights to participation*

132. There are also some potential problems with participation rights versus the public limitations in providing opportunities to act independently in all matters (political, social or personal); therefore also bringing to the fore the interrelation of balancing the right to autonomy with the rights to dignity and integrity.

133. A challenge for some older persons is that many parts of the world have become increasingly computerised; parts of the older population can suffer from significant exclusion in this regard in many societies.<sup>123</sup> The technical designs and rapid development seldom accounts for the large group of people who lack the ability to actively shape their lives or agree to receive support or service from various vendors. Also, here there are some potential problems with participation rights versus the public responsibility to provide societal support and services for everybody independent of age and capacity.

134. At the same time, the voices of older people are very much needed in public discussions and debates, to make credible both problems and solutions relating to the society's responsibility for living conditions and the quality of later life. Therefore, there is a need for political and public discussions and debates regarding how to realise participation for older persons in matters of daily life and personal relations, personal integrity issues, capabilities and legal security issues.

#### *International standards*

135. To be able to act independently and autonomously is a way to uphold one's dignity. Or, expressing it the other way around: by not being listened to or getting to participate in a decision concerning oneself, may create feelings of neglect or being ignored (for example whilst receiving care). Therefore, a closely related basic human rights principle is the right to dignity. The right to dignity and integrity is the same regardless of age. Article 1 of the Universal Declaration of Human Rights affirms that all human beings are born free and equal in dignity and rights. This fundamental principle is repeated in many other international and regional human rights documents. For example, in the first chapter of the EU Charter on Fundamental Rights 2000, made a part of primary law of the European Union after the Lisbon Treaty, it is stated that the dignity and integrity of all persons must be respected and protected by member States.<sup>124</sup> In terms of the recognition and respect for the rights of the older persons to lead a later life of dignity and independence, this is further emphasised in Article 25 of the EU Charter of Fundamental Rights.

136. Efforts have been made both within the Council of Europe and the EU to expand the legal protection of the autonomy and independence of older persons and also to develop policy measures to enhance their realisation. In 2014, the Council of Europe adopted a non-binding recommendation<sup>125</sup> for the promotion of older persons' rights, which covers issues including autonomy and participation, social protection and employment and protection from violence and abuse.<sup>126</sup> This 'soft law' (that is, not legally binding) document, while a useful reference point and stimulus to action, does not have the same power or legal effect



of a legally binding instrument. It is easily over-shadowed by many of the legally binding documents, although they generally lack the perspective of older persons.

137. Independence and autonomy have mainly been considered by the ECtHR through Article 1 of the Protocol No 1 to the ECHR, which guarantees the individual's right to the peaceful enjoyment of his possessions, Article 5(1), the prohibition on arbitrary deprivation of liberty and Article 6, the right to a fair trial. The overall tendency is that the court has been taking a rather strict, pragmatic approach.

138. At times the Court's decisions arguably demonstrate a paternalistic view. For instance, in a case concerning the choice of a place of residence of an older woman who wished to remain at home under the care of her son, the Court not see any violation of the right to liberty in ordering the removal of the woman against her will to a nursing home on the basis of the conditions in which she was living and her state of health. It considered that this did not involve a deprivation of liberty and that even if it did, because of her mental state and senile dementia that it was a justified restriction that fell within the category of permissible detention of persons 'of unsound mind'.<sup>127</sup> The ECtHR came to this conclusion in part because the applicant did not take advantage of other possibilities of care she was offered. In other cases, though, the court has upheld the importance of independence and autonomy of older persons; such as in a case where it was found that the 80-year-old applicant had suffered from unreasonably long administrative proceedings in relation to a refusal to install a telephone line.<sup>128</sup> However, the court came to this conclusion given the subject matter of the case, where the court noted the applicant's advanced age and disability in deciding that she had not had enjoyed the right to a prompt determination of the proceedings. While a reasoning made by the premises of vulnerability might give a much-vaunted conclusion, the court conclusion could be criticised on the ground that rights relating to autonomy and independence should not entirely be dependent on such a subjective and constructed notion.

#### *Participation through representation – representation and remedies*

139. There seems to be an international consensus that there is a need for different forms of public representation in order for some older persons to realise their rights to participation and independence, particularly those without ability to speak for themselves or at least those who are perceived to be incapable. This is based on the idea that many older persons need some kind of representation to promote their individual or group interests. In addition, there is a concern that some older persons need representation because they are particularly dependent and vulnerable to poor decision-making and unfair treatment. Persons suffering from dementia, diminished capacity or mental illness, or other severely dependent individuals, are sometimes given as examples. Another group in the older population mentioned in such discussions is that of persons who have been subjected to elder abuse.

140. There are different forms of public representation of the rights and interests of individual older persons and older persons as a group. One well-established public model is the ombudsman. Ombudsperson offices often have the role of promoting and protecting human rights against infringements that may result from particular age-related or situation-based dependency. During the 20th century, the institution of the Ombudsman office has increasingly been adopted in many countries across the world and also by some

intergovernmental organisations (such as the European Union). Special Ombudsman offices with a mandate relating to the rights of certain groups of individuals or to particular issues have emerged, including ombudsmen for older persons.

141. For example, in the United States, local Long-Term Care Ombudsman Programs set up under the federal Older Americans Act provide representation by ombudsmen for senior citizens making individual complaints about the quality of later life in nursing homes and long-term care. Finland is an example of a country with a national ombudsman office for older persons.<sup>129</sup> Australia also has a dedicated Age Discrimination Commissioner as one of the thematic Commissioners in its national human rights institutions, the Australian Human Rights Commission,<sup>130</sup> whose role includes education and awareness-raising and identifying areas where older persons suffer from discrimination and recommending and supporting policy measures to address this.<sup>131</sup>

142. The Ombudsman institution was originally a way to supervise the exercise of discretionary powers by administrative authorities in situations where the courts cannot provide legal remedies. Since its origins in 1809,<sup>132</sup> the system has expanded and many other kinds of national ombudsperson offices have developed. The Ombudsman Committee of the International Bar Association proposed the following definition of an ombuds institution some years ago:

An office provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent, high-level public official who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees, or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.<sup>133</sup>

143. This definition reflects the independence of the office and its duties to represent individuals or groups of individuals within its field of responsibility. It also reflects the different roles and responsibilities that such an office may have.

144. The institution of the ombudsman highlights some universal concerns for every human being, such as participation, influence and dignity. These principles are of fundamental importance for all persons, in particular at a time when the emphasis on influence and self-determination creates demands on participation and activity on the part of each individual. Public means for upholding these principles therefore seem essential. Many older people (as others) may be in need of help at some point, to be listened to and assisted by someone else. Thus, an argument in favour of creating institutional arrangements for safeguarding individual and collective actions in favour of older persons would be that such arrangements may fulfil the aim of creating a just and responsive state for older persons.<sup>134</sup>

145. However, there may be reasons for not establishing a specific ombudsman institution for older persons: one is the problems involved in the description of different generations as distinct groups in society, with separate needs and interests due to vulnerability. Such a group approach ignores the universal vulnerability we all experience throughout life and creates unnecessary distance and differences between individuals and groups in society.<sup>135</sup> The designation of older persons as a vulnerable population reinforces the inferior position of individuals in this group in relation to the putative independent and self-sufficient person who falls outside this group. It also creates the risk of intergenerational rivalry and

unnecessary and unproductive competition among different groups in society, for example over whether younger generations or older generations are getting a disproportionate and unfair share of social benefits. This risk is relevant because many societies today face challenges in prioritising distribution of their scarce economic, social and other resources, although sometimes this is played up in a misleading and distorted way in the media.

146. A general problem of grouping people due to their age into established organisations for increased participation is reflected in the fact that there seems to be little group identity between older persons. Compared to women, ethnic minorities and other groups which have created various civil rights movements around the world, older persons act in groups in the societal context less frequently. It has been suggested that one reason for this is that older adults do not have a cohesive group identity; their age-based identity is often secondary to other identities based on family, religion, occupation, political affiliation or other factors.<sup>136</sup>

147. Older persons are a complex and varied population, and just as for anybody else, with large differences and variations of dependency during their lives. Older persons, like everyone else, live with changing needs and circumstances on a daily basis. This makes their needs as complex and varying as the individuals themselves. Putting this together, it seems relevant to observe the complexity of older persons as a group and the need for many different fora for participation and assistance for independence and autonomy.

148. **Recommendations (i) and (j)** (paragraph 235 below)

**(i) ASEM Partners should review their current legislation to ensure that there is explicit constitutional and/or legislative protection against discrimination on the basis of older age (including in conjunction with sex, race, gender identity, migration status and other relevant characteristics) and that legislation in all areas is consistent with fundamental standards of human rights and their treaty obligations as those apply to older persons.**

**(j) ASEM Partners should review the mandates of their national human rights institutions or other similar bodies to ensure that those mandates cover the rights of older persons (and subgroups of older persons) and provide protections against discrimination in older age and ensure that the work of those institutions in those areas is adequately funded; and they consider establishing independent NHRIs or similar independent dedicated mechanism if they do not already exist.**

## **b. Social protection and the human rights of older persons**

### *The concept of social protection*

149. The International Labour Organization has described social protection as ‘the set of policies and programmes designed to reduce and prevent poverty and vulnerability across the life cycle’.<sup>137</sup> The concept is firmly based in existing international human rights and labour law, in particular the right to social security and the right to an adequate standard of living,<sup>138</sup> but according to broader understandings it also draws on other human rights including the right to health, equality and non-discrimination.<sup>139</sup>

150. A former Special Rapporteur of the UN Human Rights Council on extreme poverty, Magdalena Sepúlveda Carmona, described social protection as ‘encompassing a wide range

of policies designed to address the risks and vulnerabilities of individuals and groups, irrespective of whether they can or cannot work’;<sup>140</sup> social protection measures seek ‘to help them cope with, and overcome, situations of poverty, especially when they result from circumstances beyond their control.’<sup>141</sup> The Special Rapporteur noted that there were two main forms of social protection – social insurance (schemes of support based on contributions) and social assistance (non-contributory forms of support such as unemployment or disability benefits or social pensions including old age pensions ).<sup>142</sup>

151. Another former Special Rapporteur on extreme poverty and human rights, Philip Alston, noted in a 2014 report that the main debate to that time about the meaning of social protection had been ‘between those who support what are termed “social safety net” approaches and those who seek “social inclusion” and acknowledged “social citizenship”.’<sup>143</sup> He noted that the safety net approach had been subject to criticism ‘for failing to devote enough attention to structural poverty and inequality, and for its emphasis on the narrow targeting of groups for assistance.’<sup>144</sup> He also noted that human rights-based approaches had been adopted by the human rights community but also by various development institutions and scholars.<sup>145</sup>

#### *Social protection and human rights law*

152. The concept of social protection has a solid basis in international human rights law, in particular the right to social security and the right to an adequate standard of living. The rights encompassed by the ‘right to social protections’ are affirmed by Article 25 of the Universal Declaration of Human Rights (right to an adequate standard of living and the right to security in relation to social protection). Articles 9 and 11 of the ICESCR guarantee the right to social security and the right to an adequate standard of living, while Article 12 guarantees the right to the enjoyment of the highest attainable standard of physical and mental health. While the rights do not explicitly identify older persons as beneficiaries,<sup>146</sup> they are just as applicable and relevant to older persons and some are tailored to the specific situations that older persons may be more likely to face.<sup>147</sup> Other principal United Nations human rights treaties and regional human rights treaties<sup>148</sup> also guarantee some aspects of these rights.<sup>149</sup>

153. The ICESCR monitoring mechanism, the UN Committee on Economic, Social and Cultural Rights, has referred to these issues in a number of its general comments, in particular its *General comment 6 (1995) on the economic, social and cultural rights of older persons*<sup>150</sup>, offering the first detailed interpretation of the specific obligations of States parties to the International Covenant on Economic, Social and Cultural Rights regarding older persons and their rights. In its *General comment No 19 on the right to social security* adopted in 2008<sup>151</sup> the CESCR largely adopted the framework set out in ILO conventions and recommendations on the topic, with specific reference to old age as one branch of social security.<sup>152</sup> In 2010, the Committee on the Elimination of Discrimination against Women adopted *General recommendation No 27 on older women and the protection of their human rights under the Convention* that also addresses this issue.

154. In Europe, the only treaty provisions that explicitly address older age or the ‘special’ needs or position of older persons are Article 25 of the EU Charter and Article 25 of the Revised European Social Charter. In cases before the European Court of Human Rights, the

functioning of health services and social care has been considered by the court for instance in relation to the right to life (Article 2) and some procedural guarantees (Article 6).

155. At the regional level Article 23 of the Revised European Social Charter explicitly guarantees ‘the right of elderly persons to social protection’.<sup>153</sup> The Social Charter provision is expressed broadly, requiring the State to ensure that older persons remain full members of society and have the resources ‘to lead a decent life and play an active part in public, social and cultural life’ and to enable older persons ‘to choose their life-style freely and to lead independent lives in their familiar surroundings’, though each of these is qualified by the somewhat problematic phrase ‘for as long as possible’. The European Committee on Social Rights has interpreted this provision broadly.

156. There is no binding regional or subregional instrument in the Asian region that guarantees the right to social protection either generally or in relation to older persons. However, at a subregional level, ASEAN adopted in 2013 the ASEAN Declaration on Strengthening Social Protection under which ASEAN member States committed to building an ASEAN community that is ‘socially responsible and people-oriented’ through establishing nationally-defined social protection floors.

#### *International labour standards*

157. In addition to the guarantees in the human rights treaties, the concept of social protection also draws on a body of international labour standards relating to social security. However, the principal reference point for the concept of social protection is a non-binding instrument, ILO Recommendation No 202.<sup>154</sup> This provides guidance to States on how they should go about ‘establish[ing] and maintain[ing] social protection floors as a fundamental element of their national social security systems’ and that they should ‘implement social protection floors within strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible . . .’.<sup>155</sup>

158. Article 1(2) of ILO Recommendation No 202 defines social security floors as ‘nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion.’ The Recommendation sets out 18 general principles to be applied by States when implementing social protection, including universality, adequacy and predictability, non-discrimination, gender equality, social inclusion, and respect for the rights and dignity of people covered by social security guarantees<sup>156</sup>

159. Social protection guarantees should include at least essential health care services, basic income security for ‘persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability’ and ‘for older persons’.<sup>157</sup>

160. Apart from the Social Protection Floors Recommendation, 2012 (No 202) the International Labour Organization has more generally been an important source of binding and non-binding international standards on the right to social security and social protection. the Social Security (Minimum Standards) Convention, 1952 (No 102),<sup>158</sup> the Old-Age, Invalidity and Survivors’ Benefits Convention, 1967 (No 128),<sup>159</sup> and its accompanying Recommendation No 131, are the most important ILO instruments in this context. They have been described as providing ‘an international reference framework setting out the range

and levels of social security benefits that are necessary and adequate for ensuring income maintenance and income security, as well as access to health care in old age.<sup>160</sup> While ILO Recommendations are important sources of policy guidance to Member States of the ILO, they are not legally binding instruments, and the two main conventions in this area have not been widely ratified (59 and 17 ratifications respectively on out of 187 members of the ILO as of the end of 2020).

*Extent of enjoyment of the right to social protection: social security*

161. The discussion about whether older persons enjoy the right to social protection often focuses only on whether workers who have passed the ‘standard retirement age’ are receiving a pension, whether financed from a contributory scheme, a state-supported scheme or both, and whether any such pension is adequate to maintain a decent standard of living by itself or in combination with other resources to which the person has access. This is of critical importance, though it overlooks the situation of those older persons who are in the paid labour force or who wish to be working but have lost their job, or who cannot obtain paid employment.

162. Of course, adequacy of income support for the maintenance of an adequate standard of living may not be able to be assessed purely in numerical terms by reference to some national poverty level (for example whether it reaches a certain percentage of average income). Factors such as housing costs, health care costs and other care and support costs may also have an impact on the sufficiency of the person’s resources. This draws into discussions about social protection the extent of enjoyment of these other rights.

163. Two general points may be made about the adequacy of coverage of contributory, generally employment-related pension schemes. First, they are frequently available only or primarily to those employed in the formal economy; workers in the informal economy are frequently not covered by such schemes. As is noted below, a significant percentage of workers in Asia (especially in some regions of Asia) works in the informal sector and therefore ensuring the right to social protection means extending pension coverage to the informal economy.

164. Secondly, such schemes that are linked to paid work of any sort tend to discriminate against women, who often have interrupted workforce participation, tend to work in the informal economy in Asia and earn less than men. The result is that fewer women are covered by pension schemes and their entitlements are generally lower, notwithstanding the fact that women generally live longer than men on average.<sup>161</sup> While many pension systems in Asia and the Pacific reflect these inequalities, in a number of countries efforts have been made to reform pension systems to make schemes more gender-responsive. Similarly, some developed countries in Europe and Asia have introduced child credits that act as contributions to a pension scheme.<sup>162</sup>

165. The ILO’s *World Social Protection report 2019-2021* noted that as of 2017, 67.6 per cent of the working age population world-wide were covered under existing laws regulating contributory or non-contributory pension schemes,<sup>163</sup> and 68 per cent of people above retirement age received a pension.<sup>164</sup> However, ‘for many of those who do receive a pension, pension levels are not adequate.’<sup>165</sup> In the Asia Pacific region old-age pension coverage has improved significantly, but there are still significant disparities within the

region, with some countries providing universal pension coverage, while a small number of countries had an effective coverage of less than 6% of the older population.<sup>166</sup>

166. Recommendations (k) and (l) (paragraph 233 below)

(k) ASEM Partners should continue take all necessary measures to ensure that their systems of social protection (including unemployment benefits, sickness benefits, social security benefits and pension benefits) are extended to all older persons, including those in the informal sector and those performing unpaid care work, so that they have access to the resources needed for them to enjoy the right to an adequate standard of living and decent conditions of life.

(l) ASEM Partners should take all necessary measures to ensure that women's patterns of participation in the paid labour force, their representation in the informal economy and their performance of unpaid care work in the community and the family, do not lead to the continued exclusion from or disadvantage in access to forms of social security, including pensions.

*Broader aspects of the right to social protection*

167. At some point, many older persons become dependent on extensive and continuous help from national welfare systems. Different countries have a varied range of more or less extensive public care services for older people. Through home-help services, mobility support services, daytime activities and other social services, many people who want to remain in their homes can live independently for a long period of time in their homes. For older persons who are not able to stay in their homes, local, regional or national public or private services are often responsible for arranging special forms of accommodation and support that includes care and nursing.

168. At times support provided by other reliable persons may be of great importance for control, dignity and well-being for the person. The ways of participating in and influencing the daily life may vary for different persons and may also be very difficult to realise for individuals. Taking into account the dependency and vulnerability of some older persons, who lack the ability and means to vindicate their rights, there are reasons to argue for having someone else to provide them with support in that regard.

169. Public services, such as social services and health care are most often based on the person's consent. In addition, personal choices about and individual influences on the care and service to receive increasingly dominate the agenda on how to increase quality of life in relation to public service.

170. There is a need to define the policies required to ensure an appropriate quality of life for persons in need of such care. As mentioned earlier in this report, the prognosis of many experts is that future financing of the health and medical care system may cause severe difficulties. Because of growth in the ageing population worldwide, discussions in many countries concerns the urgency of addressing the rights and roles of older persons. The worry is much due to the presumption that rising number of older persons means increasing dependency on the social welfare system and therefore increasing costs and responsibilities.

171. Alarming reports of severely maltreated older people in public or private welfare care that are being high-lighted from time to time in different countries and call attention to the need for increased supervision of accommodation offering care and nursing for older persons.

172. There can be no question that the provision of social protection has a bearing on the enjoyment of a broad spectrum of human rights. This means that the various human rights violations in this aspect correlate, e.g. when there is an issue of elder abuse, there might probably follow a violation of the highest attainable standard of health. At the same time, poor living conditions may have significant impact on one's health. All rights connected to social protection must be considered with a holistic approach for the ultimate well-being of older persons.

173. While the social protection available to older persons differs in various countries and contexts, there is a common lack of resources and facilities to cope with increasing demands of residential centres, home-care programmes or geriatric services etc. These issues cannot be met without budget allocations for the purpose of responding to the increasing demand.

#### *Right to health*

174. Article 12 of the ICESCR guarantees the right to the enjoyment of the highest attainable standard of physical and mental health. This applies to be benefit for all persons, including older persons. Other international human rights conventions reinforce and supplement this general statement of the right: for example, Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, and Article 25 (b) of the Convention on the Rights of Persons with Disabilities, which explicitly mention older persons.

175. In interpreting Article 12 of the ICESCR the UN Committee on Economic, Social and Cultural Rights has reaffirmed the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment, based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.<sup>167</sup>

176. Other rights can also be relied on to support some dimensions of the right to health. This has often been necessary because it has not been possible to complaint directly to an international court or other body about violation of the right to health. Sometimes a civil and political right will guarantee one aspect of the right to health, for example, Article 7 of the ICCPR and Article 3 of the European Convention on Human Rights both guarantee that no one shall be subjected to torture or to cruel, inhuman or degrading treatment and specifically guarantee that a person shall not be subject to medical or scientific experimentation without free consent.

177. The European Committee on Social Rights has also had the opportunity to interpret and apply the right to health under Article 11 of the European Social Charter in its reporting procedure and its adjudication of a number of collective complaints, although it does not appear to have addressed in a focused way issues of discrimination against older persons under this article.<sup>168</sup>



178. The European Court of Human Rights has held that in certain circumstances, denial of or failure to provide access to medical care or limited access to medications constitute violations of Article 2 ECHR. The court takes into consideration, however, the fact that the level of guaranteed medical care, including the accessibility of refunded medicaments, depends on the financial capacity of the state.<sup>169</sup> Other rights also offer the opportunity to protect some elements of the right to health within the civil and political rights framework; one commentator has suggested that the ECtHR ‘has etched out a small space within the Convention for such a right, at least in certain circumstances, whilst setting up fertile ground for further development.’<sup>170</sup> The ECtHR has drawn in particular on Article 2 (the right to life) and Article 8 (right to private life) in this context.

*Dimensions of the right to health – the right to health care*

179. From the human rights documents it can further be interpreted that older persons should benefit from family and community care and protection in accordance with each society’s system of cultural values. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness. They should also have access to social and legal services to enhance their autonomy, protection and care. Older persons should be able to utilise appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment. Further, they should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.<sup>171</sup>

180. The extent of the responsibilities of States in relation to the right to health were articulated in a report prepared by the UN as part of the Follow-up to the Second World Assembly on Ageing. The report noted that there is a positive obligation for the States to invest in research and to take positive measures. “The health sector is central to the situation of older persons. Government responses have focused on various issues, including subsidies for medicines, user fee exemptions, health insurance schemes, special services, including geriatrics specific departments, focused attention on certain chronic diseases, training of personnel and research and policies to address mental health issues, notably dementia and, specifically, Alzheimer’s disease.”<sup>172</sup>

181. The report also emphasises that there is a need for affordable healthcare and a care on equal terms. “Some national health policies have been adjusted to address the increasing level of chronic diseases that affect older persons disproportionately. Some countries have taken steps to ensure that every person older than 65 is entitled to a free medical check-up on a regular basis, including diagnosis of and treatment of chronic diseases. In-house services as well as itinerant services are reportedly available in urban and rural centres. A few governments have also established national health funds, handing out health cards to claim reduced costs for medication, while others have developed mechanisms to ensure adequate consent for services and treatment by older patients.”<sup>173</sup>

182. The report also emphasises affordable healthcare. “Older persons tend to approach health-care centres at advanced stages of an illness. This is often the result of lack of access to health care, including the distance and cost of travelling to a facility, especially in rural

areas where infrastructure is underdeveloped, distances are vast and transportation is problematic; overcrowding of primary health centres.”<sup>174</sup>

### *Palliative care*

183. There is no explicit provisions in the general human rights treaties that guarantee the right to palliative health.<sup>175</sup> The argument has been made that the right can be derived from the right to health; it has also been argued that a denial of palliative care might also amount to cruel, inhuman or degrading treatment contrary to Article 7 of the ICCPR, the Convention against Torture and other international and regional treaties. The Committee on Economic, Social and Cultural Rights has referred briefly to palliative care in a number of its general comments.<sup>176</sup>

184. The submissions provided to the OEWGA have shown that while the position varies considerably showed that there were frequently ‘deficiencies in ensuring access to such services for all without discrimination.’<sup>177</sup> The limitations included:

a lack of legislative or policy frameworks, failure to integrate palliative care services into existing health policy and insurance systems, insufficient funding and resources generally and within public health systems in particular, an insufficient number of trained physicians and other health professionals to provide palliative care services, restriction of palliative care services to a limited number of diseases while not including others that were appropriate for palliative care services, inadequate access to medicines required for pain relief, unequal access to palliative care services on the basis of economic status, residence in a rural area or on other bases.<sup>178</sup>

185. Any shortcomings of States’ palliative care policy need to be addressed. A deficient palliative care policy creates the risk that older people undergo unnecessary hospitalisations and admissions to intensive care, sometimes against their will. In other cases, there is a risk of palliative care being decided on at an unsuitable stage on the mere basis of the person’s age. Furthermore, when it comes to palliative care, WHO underlined how pain levels experienced by older persons are consistently underestimated. It is particularly critical for persons with dementia, where there is a widespread failure to inform and involve patients in decision-making, and for other people living in residential homes, where access to specialist services may be limited.

### *The rights to home, housing and care and support*

186. The right of a person to decide where and with whom they live and to have access to a reasonable range of affordable housing options and the necessary resources is based in a combination of international human rights, in particular the right to respect for one’s private life, family life and home (variously expressed in Article 17 of the ICCPR and Article 8 of the European Convention on Human Rights and cognate treaties) and the right to adequate housing derived from the right to an adequate standard of living in Article 11 of the ICESCR.<sup>179</sup> Of potential importance to some older persons is the guarantee in Article 19 of the Convention on the Rights of Persons with Disabilities, which guarantees the right of older persons with disabilities to live independently and being included in the community.

187. The UN Committee on Economic, Social and Cultural Rights has emphasised the entitlements of older persons with regard to the right to an adequate standard of living (Article 11). This article articulates the right to have basic human needs met, such as the right to food, water, shelter and clothing. A similar standard is set out in the United Nations

Principles for Older Persons, principle 1, which also included ‘health care through the provision of income, family and community support and self-help’.

188. Recommendations 19 to 24 of the Vienna International Plan of Action on Ageing emphasise that housing for older persons must be viewed as more than mere shelter and that, in addition to the physical, it has psychological and social significance which should be taken into account. Accordingly, national policies should help older persons to continue to live in their own homes as long as possible, through the restoration, development and improvement of homes and their adaptation to the ability of those persons to gain access to and use them (recommendation 19). Recommendation 20 stresses the need for urban rebuilding and development planning and law to pay special attention to the problems of the ageing, assisting in securing their social integration, while recommendation 22 draws attention to the need to take account of the functional capacity of the elderly in order to provide them with a better living environment and facilitate mobility and communication through the provision of adequate means of transport.

*(Long-term) care and support*

189. The issue of how and where older persons should be able to access the different forms of care and support that they need to conduct their everyday lives independently is an important one, particularly as it affects the provision of institutional care for older persons who need high levels of support. Given the horrifying numbers of older persons who have died in congregate care settings – care homes, long-term care (LTC) or aged care facilities – the human rights implications of such arrangements, already problematic, have become even more pressing and indeed have been a matter of life and often death for residents in those care homes. There is serious examination to be undertaken as to whether such large-scale institutional provision of care and support are consistent with human rights. It is striking that in the case of persons with disabilities generally the case for deinstitutionalisation has prevailed and the rights in the CPRD (including Article 19) have been an important support for those moves. Yet, given that a significant proportion of older persons living in congregate care settings are persons with disabilities, it is striking that these issues have not been more fully explored in relation to older persons.<sup>180</sup>

190. The issue of long-term care (generally taken to involve institutional care) needs to be considered in the broader context of what care (not always long-term) and support needs to be provided to older persons wherever they live in order that they may continue living where they wish and to do the things that they want to do. The focus should be on supporting persons in exercising their autonomy and for most persons that means supporting them to live in their own home or with family.

191. Nonetheless, it is a reality that many older persons must face increasing frailty as a natural consequence of the ageing process. This process sometimes occurs together with cognitive impairments. This creates need for assistance with daily tasks, preferably in our own homes, with family, though sometimes that becomes difficult or impossible and the institutional option appear to be the best (or indeed only real) option.

192. However, even if we are prepared to accept that some form of congregate care institutional setting is an appropriate option for some people (a proposition currently under challenge in some countries), long-term care needs a human rights approach. The European Network of National Human Rights Institutions (ENNHRI) conducted a project on the human

rights of older persons in long-term care from 2015-2017. The project report published in June 2017<sup>181</sup> reported on the findings of the monitoring work carried out by six of its member institutions (the National Human Rights Institutions in Belgium, Croatia, Germany, Hungary, Lithuania and Romania). The report shows that, in spite of good practices and the hard work and dedication of many care workers, human rights concerns were found in care homes in all six countries, notably due to a lack of resources and the failure to use a human rights-based approach in the design and delivery of long-term care.

193. Long-term care is not limited to residential settings and persons requiring it should be offered the possibility to choose their living arrangements, with adequate supports. Of particular relevance in this respect is the United Nations Convention on the Rights of Persons with Disabilities (CRPD), ratified by 45 of the 47 member states of the Council of Europe and by the EU. In addition to its Article 25 on health which acknowledges the needs of older persons, the CRPD also provides for the right to live independently and to be included in the community in its Article 19. This right, along with dignity and self-determination, provide guiding principles for the design of long-term care services, including in residential settings, where the majority of care recipients are estimated to have a form of disability.

194. **Recommendation (m)** (paragraph 235 below)

**(m) ASEM Partners should review their national systems for the provision of care and support to older persons, both those living in their own homes and those living in care homes, including assessing whether these arrangements are consistent with existing human rights treaty obligations.**

*Elder abuse, health and social protection*

195. It is recognised that some older persons are highly vulnerable to abuse, including in the home, in the community and in long-term care. The World Health Organization (WHO) has estimated that at least 4 million older persons experience elder abuse<sup>182</sup> in the European region every year. In a case concerning a geriatric nurse who was dismissed for having brought a criminal case against her employer alleging deficiencies in the care provided,<sup>183</sup> the European Court of Human Rights recognised this problem, stating that “in societies with an ever growing part of their elderly population being subject to institutional care, and taking into account the particular vulnerability of the patients concerned, who often may not be in a position to draw attention to shortcomings in the provision of care on their own initiative, the dissemination of information about the quality or deficiencies of such care is of vital importance with a view to preventing abuse”. Further, Article 16 (2) of the Convention on the Rights of Persons with Disabilities requires ‘age-sensitive’ assistance and support for persons with disabilities and their families to prevent exploitation, violence and abuse, thereby recognising the particular situations where older persons are vulnerable.

196. However, as ‘dignity’ has such a central role within the human rights regime, neglect and abuse have naturally fallen within the wide scope of civil and political rights of the European Convention, namely the prohibition on inhuman or degrading treatment (Article 3) or the right to privacy (Article 8).

197. Violations of the prohibition of inhuman or degrading treatment due to older age have not been expressly raised before any of the regional European courts. However, there are

decisions from the ECtHR in cases concerning the rights of the members of groups the Court categorises as ‘vulnerable’ (for example, children or persons with disabilities). One can therefore argue that the same doctrine would apply to older persons. The court’s jurisprudence would then indicate that Member States must act with due diligence in carrying out their positive obligation to prevent violations of physical and mental integrity by both public and private actors against older persons. However, since there may be infinite variety of ways of violating a person’s dignity, the court has stated that each of them must therefore be examined on a case-by-case basis.

198. While the cases involving violence against older persons are few, the problem is tangible outside the courtroom. Thus, the need for an improvement in the protection of abuse and neglect of older persons is common for all European countries and most urgent. Nevertheless, if one is optimistic, one can conclude some positive trends in the narrow case law from the ECtHR. Essentially, it acknowledges violence towards vulnerable groups, both from institutions and from private actors, as a human rights priority. In addition, the issues of neglect and abuse are highly interlinked with other issues regarding the dignity of older persons, such as autonomy and independence and various forms of care of older persons.

#### *Stigma and discrimination in time of a pandemic*

199. The recognition of the vulnerability of certain people can lead to a strengthening of the protection of the specific group and has historically done so. However, recognition may also risk stigmatising the group in question and therefore allow a paternalistic approach. Every person has their own needs and is the bearer of rights inherently, irrespective of age or health. Even during a time when the COVID-19 virus has been challenging the communities in the world, it cannot permit us to challenge these principles.

200. At the time of writing, horrifying numbers of fatalities of older persons due to COVID-19 have been reported globally. The disproportionate number of deaths in certain countries and regions compared to others triggers questions of access to medical care. As the Madrid International Plan of Action on Ageing has previously recognised, older persons can experience age-based discrimination in the provision of services when their treatment is perceived to have less worth than the treatment of younger persons. However, (there is universal consensus in that) no life is expendable. Since we know that a case of COVID-19 may end one’s life, the refusal of health care is a violation of the right to life as is the allocation of acute health care services purely on the basis of age. For instance, the ECtHR repeatedly has decided in cases connected with the functioning of health services and social care in the context of violations of the right to life (Article 2.)

#### **c. Age discrimination against older persons focusing on labour markets<sup>184</sup>**

##### *Older persons and work*

201. Older persons engage in work for the same reasons as most other persons, including a desire to ensure or contribute to an adequate income for oneself and one’s family, out of a desire for self-fulfilment or a desire to continue to participate actively in economic life, and to enjoy the other benefits that work can bring. At the same time some older persons who are working might prefer not to be doing so but may not be able to make that choice for financial or other reasons. Stopping paid work may not be possible because the person does not have adequate individual or family assets, savings or access to a private or public

pension that will permit the maintenance of a decent standard of living in retirement. For those with no accumulated resources there may be no or no adequate government-funded age pension or other forms of social support. Experience has shown that the availability and adequacy of a government-funded pension can be critical factors in the decision of many older persons to withdraw from paid labour force participation.

202. Conversely, there are many older workers who are frustrated because they cannot obtain work that they want for financial or other reasons, or whose opportunities for development and promotion in existing employment are limited because of their age. Mandatory retirement ages are one clear form of age-based distinction in employment, but many other are to be found in ageist attitudes and practices embodied in laws, the provisions of collective agreements, individual contracts, and corporate and workplace cultures. The limitation of opportunities on the basis of age and ageist stereotypes begins relatively early in many workforces, with people in their forties in some countries reporting that they have been disadvantaged on the ground of their age.

203. The extent and nature of older persons' participation in the paid labour market is influenced by many factors, including the structure of the labour market, the changing nature of work, demand for labour in a given economy, the skills required, the availability of training or retraining for older workers, the adequacy of retirement support from private or public sources or both, and the other unpaid care and domestic work that older persons, particularly women, undertake in the family or in the community.

204. Another important influence has been the response of many governments to the ageing of their populations and concerns about the percentage of the population who are 'not economically productive' because they are no longer in the paid labour force undermining the ability of the state to provide the services expected of it by its citizens. Many governments have responded to population ageing by encouraging people to work for longer, full-time or part-time. This has often involved raising the 'retirement age', generally correlated in people's minds with the age at which one becomes eligible for any state-funded pension. Ironically some of these retirement ages were set quite low in order to ensure that, particularly in the public sector, there was a pipeline of employees of all ages, so that younger employees get opportunities and can come up through the system. Now, however, older persons are often encouraged to work for longer, but may have difficulty in finding suitable employment and, if they cannot find paid work, may be only entitled to social support that is inadequate.

*Work: formal, informal, unremunerated and unrecognised*

205. The concept of 'work' and 'access to the labour market' that forms the focus of many discussion about work-related rights and is the primary focus of the binding international and regional human rights is that of work in the formal economy, in the paid labour force. As a general matter, that privileges particular forms of social activity (paid work) and fails not only to remunerate but also to recognise other forms of labour, in particular unpaid care work and domestic work, still largely performed by women. Older persons also engage in a significant amount of such work, as well as providing other economically valuable but not economically valued work in the form of volunteering.

206. Furthermore, a focus on the formal economy tends to neglect the large amount of economic activity that takes place in the informal economy, an area of particular importance

in developing countries. According to the ILO, more than 61 per cent of the world's employed population aged 15 or over (or two billion people) work in the informal economy.<sup>185</sup> The ILO describes the 'informal economy' in these terms:

The term 'informal economy' refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that – although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs.<sup>186</sup>

207. The proportions of different sections of the community who work in the informal economy vary according to region and within regions, level of development of the country, sector, gender, age, education, among other factors. Africa has the highest percentage of workers in the informal economy (85.8 per cent), while Asia and the Pacific sits as 68.3 per cent and Europe and Central Asia at 25.1 per cent. Much informal work takes place in agriculture and persons living in rural areas are almost twice as likely to be engaged in informal work as those living in urban areas.

208. Both younger workers (77.1 per cent) and older workers (77.9 per cent for people aged over 65) have higher levels of informal employment than other age groups. In the Asia Pacific region 59.2 per cent of the employed population engage in non-agricultural informal employment.<sup>187</sup> Within the region Southern Asia and Southeastern Asia and the Pacific have higher shares of informal employment, with 87.8 per cent and 75.2 per cent respectively when including agriculture, and 77.6 per cent and 63.9 per cent excluding agriculture. The varying levels of development of countries in the Asia and Pacific region are reflected in the difference levels of the informally employed: they range from over 90 per cent in Nepal, Lao PDR and Cambodia to a low of below 20 per cent in Japan, with an overall average of 71.4 per cent in developing and emerging economics and 21.7 per cent in developed economies.<sup>188</sup> These differences have implications for policy priorities and the nature of legislative and policy reform needed to effectively ensure the enjoyment by older persons of their human rights in the field of work.

209. In the ILO Europe and Central Asian region, figures are significantly lower, with the lowest figures in Northern, Southern and Central Europe, followed by higher figures in Eastern Europe and higher figures still in Central and Western Asia.<sup>189</sup>

210. The disadvantages of working in the informal economy are many. As ILO Recommendation No 204, *The Transition from the Informal to the Formal Economy* acknowledges, 'most people enter the informal economy not by choice but as a consequence of a lack of opportunities in the formal economy and in the absence of other means of livelihood'<sup>190</sup> and that 'decent work deficits – the denial of rights at work, the absence of sufficient opportunities for quality employment, inadequate social protection and the absence of social dialogue – are most pronounced in the informal economy.'<sup>191</sup> The ILO has identified a rights deficit, a social protection deficit and a representational deficit in the informal economy;<sup>192</sup> Recommendation 204 represents a framework for trying to move workers from the informal economy to the formal economy so far as possible.

*International human rights related to work*

211. International human rights and labour law has long guaranteed the right of persons to have access to work. Articles 23 and 24 of the Universal Declaration of Human Rights affirms the right to work, just and fair conditions of employment, and rights to organise in support of labour rights. Article 6 (1) of the ICESCR guarantees ‘the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’. Article 6(2) obliges State parties to take measures to support the realisation of this right by taking, among other measures, technical and vocational training programmes. Article 7 of the ICESCR guarantees the ‘right to just and favourable conditions of work’: this includes fair wages and equal remuneration for work of equal value, safe and healthy working conditions equal opportunities for promotion and the right to rest leisure and reasonable limitation of working hours. Article 8 of the ICESCR also guarantees certain rights related to freedom of association, participation in trade unions and the right to engage in collective bargaining.

212. In addition to the specific guarantees of equality for women workers, everyone is entitled to enjoy the rights guaranteed by Articles 6 and 7 without discrimination. Article 2(2) of the Covenant obliges States parties to guarantee that the rights will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion national or social origin, property, birth or other status.’

213. At the regional level, elements of the right to work are protected under the Revised European Social Charter (Articles 1-6, 9-10 and 24-29) and under the EU Charter of Fundamental Rights (Articles 15, 27-31). In each case the general guarantees of equality in each of those instruments would include the right to enjoy those rights without discrimination on the basis of age, whether age is explicitly stated or because it is understood as falling within the guarantee of non-discrimination on the ground of ‘other status’. The EU Employment Equality Directive referred to earlier prohibits direct and indirect discrimination in employment on grounds that include age, as well as other discriminatory acts. However, it also provides for exceptions in the case of age discrimination, in particular in relation to mandatory retirement ages.<sup>193</sup>

214. The non-binding ASEAN Human Rights Declaration affirms the economic, social and cultural rights in the Universal Declaration of Human Rights. Article 27 of the ASEAN Declaration includes ‘the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed’, as well as trade union rights. The Declaration also guarantees protection for children and young persons against economic and social exploitation.

215. Article 18 of the Inter-American Convention on Protecting the Human Rights of Older persons and Article 6 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa also guarantee the right to work of older persons.

216. Thus, while there is explicit coverage of older workers in a number of binding regional instruments in Europe, there is no such coverage in the Asian region and one has to fall back on the guarantees of the ICESCR and its guarantees of non-discrimination on the ground of ‘other status’.



### *International labour standards*

217. The International Labour Organization has also adopted a number of binding and non-binding instruments guaranteeing the right to work without discrimination. Two ILO conventions provide protection against discrimination in employment and occupation and in the termination of employment:<sup>194</sup> Other ILO conventions of general application would also apply to older workers,<sup>195</sup> as would the various ILO conventions relating to social security and social support.

218. The Discrimination (Employment and Occupation) Convention and Recommendation, 1958<sup>196</sup> does not explicitly include age among the prohibited grounds of discrimination, although it is open to States parties to include that in grounds for impermissible discrimination at the national level and some States have done this.

219. The Termination of Employment Convention, 1982 (No 158)<sup>197</sup> stipulates a number of grounds as invalid reasons for terminating a person's employment. The list includes 'race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin', temporary absence due to illness or injury, various union-related activities and 'absence from work during maternity leave'.<sup>198</sup> Once again, it makes no explicit reference to age as an impermissible ground for termination of employment. However, Article 4 of ILO Convention No 158 provides that a person's employment may not be terminated 'unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.' This may provide some protection for workers being dismissed on the basis of age.

220. The main instrument adopted by the ILO that addresses older workers is the non-binding recommendation, the Older Workers Recommendation, 1980 (ILO Recommendation No 162). 'Older workers' in the ILO context generally refers to person who are aged 50 or over. The instrument recommends that older workers should, without discrimination based on their age enjoy access to all the benefits of employment, including access to promotion, training conditions of work, society security and other employment-related benefits, housing and other employment related benefits provided to other workers.

221. The ILO has also adopted other non-binding instruments that address the informal economy explicitly, in particular the non-binding *Transition from the Informal to the Formal Economy Recommendation*, 2015 (ILO Recommendation No 204). Many other obligations under other ILO conventions apply to workers in the informal economy even if those instruments do not expressly refer to workers in that part of the economy.<sup>199</sup>

222. **Recommendation (n)** (paragraph 235 below):

**(n) ASEM Partners should ensure that older person and their organisations are fully involved in the planning and implementation of economic and social recovery strategies for exiting from or living with COVID-19, and more generally in the preparation for and execution of disaster response and recovery strategies.**

**(o) ASEM Partners should ensure that policymaking with respect to or that affects older persons is informed by evidence-based knowledge.**

**d. Empowerment of older persons through education, training, lifelong learning and capacity building**

223. The right to education is a fundamental social and economic right. Affirmed by Article 26 of the Universal Declaration of Human Rights 1948,<sup>200</sup> it is guaranteed by Article 13 of the International Covenant on Economic, Social and Cultural Rights, as well as affirmed by regional treaties and many non-binding instruments and policy documents. The right is a broad one: it includes but is not limited to formal primary, secondary and tertiary education. Its purposes go beyond the narrowly instrumental one of equipping individuals with the skills to work and include both the goal of educating individuals to be informed and engaged citizens and members of their communities and to the development of their own potential to the full. As the ICESCR puts it in Article 13 (1):

education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.<sup>201</sup>

224. Article 13 does not itself refer to the concept of lifelong learning, though it does guarantee the right of persons who have missed out on the opportunity to acquire basic education to acquire that at a later stage in life (ICESCR, art (13(2)(d)).<sup>202</sup> There is no explicit guarantee against discrimination on the basis of older age in the ICESCR, and one has to draw on the category of 'other status' in Article 2(2) of the ICESCR to source the right to equal enjoyment of that right notwithstanding a person's older age. In practice, though, much of the focus of efforts on implementing the right to education has been on younger sections of the population, with the goal of preparing them for their adult lives as workers and members of their communities.<sup>203</sup>

225. The only explicit mention of 'lifelong learning' in one of the principal UN human rights treaties appears in Article 24(5) of the Convention on the Rights of Persons with Disabilities. This requires States parties to ensure that persons with disabilities are able to access 'general tertiary education, vocational training, adult education and lifelong learning' without discrimination.

226. The concept of adult education and lifelong learning has been given more detailed content by the activities and instruments of UNESCO,<sup>204</sup> as well as in ILO instruments. The concept of lifelong learning goes beyond vocational and technical education at various stages of life. These are primarily focused on ensuring a person's ability to participate in the labour market and are certainly important for older workers who wish to remain in work or who wish to rejoin the paid labour force. But life-long learning is broader and contributes to the goals of individual fulfilment that is a core part of the right to education:

Life-long learning needs to be understood as the provision or use of both formal and informal learning opportunities throughout people's lives in order to foster the continuous development and improvement of the knowledge and skills needed for employment and personal fulfilment. The concept of life-long learning recognises that learning is not confined to childhood or the classroom but takes place throughout life and in a range of situations.<sup>205</sup>

227. A more expansive formulation has been offered by UNESCO:

Although lifelong learning is a very broad concept, it is generally understood in a limited way, and often as interchangeable with narrower terms such as adult education, elder education, continuing education or skills for work. A fuller understanding of the concept of lifelong learning emphasizes that learning is lifelong and life-wide, from birth to death (any time) and exists in and out of the education system (anywhere). Learning is undertaken by people of all ages (anyone), takes place through a range of modalities, including face to face, at distance and, increasingly, online, and concerns all domains of knowledge (anything).<sup>206</sup>

228. The concept is endorsed in the Madrid International Plan of Action on Ageing 2002, which sets as a goal the provision of opportunities for individual development, self-fulfilment and well-being throughout life as well as in late life, through for example, access to lifelong learning and participation in the community while recognising that older persons are not one homogenous group.<sup>207</sup> Sustainable Development Goal 4 commits member States to 'ensure inclusive and equitable quality education and promote lifelong learning opportunities for all'.

229. It is clear therefore that the concept of adult education or lifelong learning applies over many decades of a person's lifespan, from the end of the person's youth and basic education to the later stages of their life. The important question here is the extent to which the notion has been developed and implemented at the international and national levels in relation to persons who are older persons. As noted above, defining who is older is a difficult and fluid exercise, it would certainly include persons who are in the later stages of their workforce participation as well as those who have left the paid labour force – that would certainly include those classified as older persons at the age of 60 or even earlier where pension or retirement ages are set lower.

230. Even though lifelong learning applies to persons of all ages, its application in relation to older persons has been patchy. For example, in the context of SDG4 the Independent Expert on the human rights of older persons has noted that while the Goal refers to lifelong learning for all, it is not accompanied by 'targets and indicators that can effectively improve opportunities for lifelong learning', with the actions envisaged 'clearly targeted towards children, youth, women and persons with disabilities';<sup>208</sup> none of the targets or indicators specifically mention older persons, although they do mention other groups.<sup>209</sup>

231. **Recommendation (p)** (paragraph 235 below)

**(p) ASEM Partners should review existing adult education, including technical and vocational training and other lifelong learning initiatives to ensure that these are in practice available to older person, including those in the paid labour force or those who wish to enter or re-enter the paid labour force; and also to ensure that lifelong learning initiatives include access to opportunities for older persons to improve their digital literacy and to learn other skills relating to their life transition as well as for the continuing enrichment of their lives.**

## VI. OTHER MATTERS

### a. Data gaps

232. Although a significant amount of statistical and other data is available about the situation of older persons, in many instances data or disaggregated data allowing the position of older persons of specific subgroups of older persons is not available. The former Independent Expert on the human rights of older persons, Rosa Kornfeld-Matte has drawn attention to these issues, in particular in her 2020 thematic report to the Human Rights Council. She noted:

To date, there is a serious gap in the data available to capture the lived realities of older persons and the enjoyment of their human rights. Inequalities faced by older persons therefore often remain invisible. The exclusion of older persons from surveys and national censuses affects the ability to understand the extent to which they are able to participate in society and enjoy their human rights on an equal basis with others. This lack of significant data and information on older persons is, in itself, an alarming sign of exclusion and renders meaningful policymaking and normative action practically impossible.<sup>210</sup>

233. The current United Nations Independent Expert on the human rights of older persons has also noted that the COVID-19 crisis ‘had revealed important gaps in the availability of age-specific data.’<sup>211</sup> The United Nations Secretary-General also drew attention to these data deficiencies in his Policy Brief on *COVID-19 and older persons*, noting that the invisibility of older persons in public data analysis’ and the need for ‘[i]nnovative approaches, backed by evidence and data disaggregated by age, but also sex and relevant socio-economic characteristics . . . essential to effective public policy making that is inclusive of older persons.’<sup>212</sup> There are many examples but a particularly relevant one relates to COVID-19 related deaths in care homes, with one report finding that ‘[o]fficially available data on the numbers of deaths among care homes residents linked to COVID-19 is not available in many countries.’

### 234. Recommendation (q)

**(q) ASEM Partners should (continue to) work collaboratively with international and national bodies to improve the quality and coverage of statistics and data relating to older persons to ensure that high-quality disaggregated data is available for all aspects of policymaking in relation to older persons.**

## V. THE WAY FORWARD: OPPORTUNITIES AND RECOMMENDATIONS

### ASEM PARTNERS

235. All ASEM Partners should:

- (a) identify and adopt appropriate legal, administrative, educational and other measures to address the existence and effects of ageism in their societies, taking into account the intersection of age with other characteristics such as sex, race, gender, disability and other statuses;
- (b) review their position on the desirability of a new United Nations convention on human rights in older age, consulting closely with national human rights institutions, and organisations of older persons, experts and other interested parties at the national level;

- (c) engage or continue to engage substantively and constructively with the work of the United Nations General Assembly Open-ended Working Group on Ageing, including supporting the adoption of recommendations or other agreed clearly conclusions at the next session of the OEWGA in April 2021;
- (d) consistently raise issues relating to equality and non-discrimination in relation to older age in the Universal Periodic Review (UPR) and ensure that specific and detailed material about the situation of older persons in their diversity is included in their reports under United Nations human rights treaties, relevant regional human rights treaties or other processes and applicable ILO instruments;
- (e) review the extent to which they have included disaggregated data relating to older persons (including in age cohorts above 65 and disaggregated according to sex, race, socio-economic, status, gender, disability and other relevant factors) in their reports of progress in implementing the Sustainable Development Goals and take appropriate steps to ensure that such data is included under all relevant Goals, targets and indicators, supplementing the existing targets and indicators if necessary;
- (f) consider ratifying those principal UN human rights treaties and optional protocols and regional human rights treaties that they have not yet ratified or acceded to and accept procedures providing for the receipt of individual or collective complaints or communications relating to allege serious or systematic violations of human rights;
- (g) strengthen existing regional or subregional human rights frameworks, institutions and procedures, including through the adoption of legally binding instruments and complaint procedures where these do not already exist or are not sufficiently comprehensive in coverage or are ineffective in providing adequate remedies to older persons;
- (h) ensure that human rights monitoring bodies at the international regional and subregional levels have sufficient resources to effectively carry out their mandates;
- (i) review their current legislation to ensure that there is explicit constitutional and/or legislative protection against discrimination on the basis of older age (including in conjunction with sex, race, gender identity, migration status and other relevant characteristics) and that legislation in all areas is consistent with fundamental standards of human rights and their treaty obligations as those apply to older persons; this includes labour and employment legislation, criminal and other laws relating to elder abuse, social security, social insurance and pension laws, laws relating to the exercise of legal capacity (eg guardianship laws), health legislation, housing laws legislation regulating long-term care and other laws;
- (j) review the mandates of their national human rights institutions or other similar bodies to ensure that those mandates cover the rights of older persons (and subgroups of older persons) and provide protections against discrimination in older age and ensure that the work of those institutions in those areas is adequately funded; and they consider establishing independent NHRIs or similar independent dedicated mechanism if they do not already exist;
- (k) take all necessary measures to ensure that their systems of social protection (including unemployment benefits, sickness benefits, social security benefits and pension benefits) are extended to all older persons, including those in the informal sector and those performing unpaid care work, so that they have access to the

resources needed for them to enjoy the right to an adequate standard of living and decent conditions of life;

- (l) take all necessary measures to ensure that women's patterns of participation in the paid labour force, their representation in the informal economy and their performance of unpaid care work in the community and the family, do not lead to the continued exclusion from or disadvantage in access to forms of social security including pensions;
- (m) review their national systems for the provision of care and support to older persons, both those living in their own homes and those living in care homes, including assessing whether these arrangements are consistent with existing human rights treaty obligations;
- (n) ensure that older person and their organisations are fully involved in the planning and implementation of economic and social recovery strategies for exiting from or living with COVID-19, and more generally in the preparation for and execution of disaster response and recovery strategies;
- (o) ensure that policymaking with respect to or that affects older persons is informed by evidence-based knowledge;
- (p) review existing adult education, including technical and vocational training and other lifelong learning initiatives to ensure that these are in practice available to older person, including those in the paid labour force or those who wish to enter or re-enter the paid labour force; and also to ensure that lifelong learning initiatives include access to opportunities for older persons to improve their digital literacy and to learn other skills relating to their life transition as well as for the continuing enrichment of their lives; and
- (q) work collaboratively with international and national bodies to improve the quality and coverage of statistics and data relating to older persons to ensure that high-quality disaggregated data is available for all aspects of policymaking in relation to older persons.

## **CIVIL SOCIETY ORGANISATIONS**

Civil society organisations should

- (r) apply a rights-based approach to their work with older persons and on ageing, by building older persons' understanding of their human rights, supporting them to claim those rights, and working with authorities and service providers to ensure that laws, policies, practice and services uphold older persons' rights, dignity and autonomy and ensure their full participation in society;
- (s) build relationships and work together with national human rights institutions to ensure the rights of older persons are better addressed;
- (t) accredit their organisation to the UN Open-ended Working Group on Ageing to ensure older persons and their civil society organisations inform and participate in its work and outcomes of the OEWGA;
- (u) engage with their national governments and recommend that they support the elaboration of a new United Nations convention on the human rights of older persons.

## **NATIONAL HUMAN RIGHTS INSTITUTIONS AND THEIR REGIONAL NETWORKS**

The Global Alliance of National Human Rights Institutions (GANHRI) and the regional networks of NHRIs should:

- (v) promote comparative research on the extent to which the rights of older persons are formally included in the mandates of NHRIs, the nature of their work on those issues, and areas where that work might be enhanced; and
- (w) together with individual NHRIs continue to engage actively with the UN Open-ended Working Group on Ageing and to contribute the experience of NHRIs to its work.

## **OTHER STAKEHOLDERS**

Universities and other research institutions should:

- (x) in collaboration with other partners and stakeholders, especially in the Asian region, consider establishing new networks such as the European Law and Ageing Network or building on existing networks on research into ageing and human rights and related issues, to advance research and policy analysis on the human rights of older persons; and
- (y) encourage and support the conducting of research into elder law, ageing issues from human rights perspective, and cross-disciplinary research in this field, with an emphasis on research in the design and conduct of which older persons and their organisations.

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## ENDNOTES

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<sup>1</sup> <https://social.un.org/ageing-working-group/>.

<sup>2</sup> A number of recommendations addressed to ASEM Partners appear at the end of the section discussing the particular topic. Further recommendations, directed to national human rights institutions, civil society organizations and other institutions, appear only at the end of the paper where all recommendations appear in one place.

<sup>3</sup> United Nations Department of Economic and Social Affairs, Population Division, *World Population Ageing 2019 (2020)*, UN Doc ST/ESA/SER.A/444, 2.

<sup>4</sup> *Id* at 5.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Id* at 7.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Id* at 9.

<sup>11</sup> *Id* at 10.

<sup>12</sup> The United Nations notes the prevalence of the use of a model of age-based accounting flows in order to predict the impact of ageing populations:

12. . . . Such a model describes a flow of resources over time and across generations and assumes that individuals experience long periods of dependency at the beginning and the end of their lives, in which they rely on resources produced by the labour of the working age adults. In this model, older persons are categorized as dependent, with the assumption that all people of the chronological age of 60–65 years and older consume more resources than they produce through their own labour.

13. . . . Population ageing, it is argued, will irrevocably increase expenditures on health, social protection and long-term care schemes, while reducing the number of working age adults. Such analyses, however, are rooted on a fixed image of what old age looks like, as well as on assumptions based on current labour force participation rates.

United Nations, *Follow-up to the International Year of Older Persons: Second World Assembly on Ageing, Report of the Secretary-General*, UN Doc A/75/128, paras 12-23 (2020).

<sup>13</sup> Vegard Skirbekk, Ursula M Staudinger and Joel E Cohen, 'How to Measure Population Aging? The Answer Is Less than Obvious: A Review' (2019) 65(2) *Gerontology* 136-144. These authors distinguish between measures based on current chronological age structure and those that involve use of remaining life expectancy (RLE) based on period life tables. The former involve measurement according to 'the proportion of the population below a given chronological age or above a threshold considered "old" or ratios of these measures' or determine 'the onset of old age by the relative position (e.g., among the top 15% in age distribution (i.e., relative age) instead of a cutoff age.' (*id* at 137). The latter type of measures 'calculate how many years the average person of a given chronological age has left to live'; countries with higher life expectancies would have 'a smaller fraction of people with RLE below 10 or 15 years than the fraction of people with chronological age above 60 or 65 years.' A long-lived population would thus be relatively young even though it would be 'older' if the simple chronological age threshold were used. (*id* at 137). The usefulness of the different measures depend on the purpose for which the age of a person or overall population ageing is being considered.

<sup>14</sup> Skirbekk et al (above n 13, 136) write:

Usually, population aging is measured to inform fiscal and social planning because it is considered to indicate the burden that an elderly population presents to the economic, social security, and health systems of a society. Measures of population aging are expected to indicate shifts in the distribution of individuals' attributes (e.g., chronological age, health) within a population that are relevant to assessing the burden. We claim that chronological age – even though it is the attribute most broadly used – may frequently not be the best measure to satisfy this purpose. A distribution of chronological age per se does not present a burden. Rather, burdens arise from the characteristics that supposedly or actually accompany chronological ages. We posit that in addition to chronological age, meaningful measures of population aging should reflect, for instance, the distribution of economic productivity, health, functional capacities, or biological age, as these attributes may more directly assess the burden on the socioeconomic and health systems.'

<sup>15</sup> United Nations, *Follow-up to the International Year of Older Persons: Second World Assembly on Ageing, Report of the Secretary-General*, UN Doc A/75/128, para 14 (2020). See also Skirbekk et al (above n 13), 137.

<sup>16</sup> See generally Maya Sabatello, 'A Short History of the International Disability Rights Movement' in Maya Sabatello and Marianne Schulze (eds), *Human Rights and Disability Advocacy* (University of Pennsylvania, 2014) 1.



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<sup>17</sup> Theresia Degener, 'Inclusive equality and the human rights model of disability – 10 years jurisprudence of the United Nations Committee on the Rights of Persons with Disabilities ', Theo van Boven Lecture, University of Maastricht, 3 December 2018, Theresia Degener, 'A New Human Rights Model of Disability' in Valentina della Fina, Rachele Cera and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017) 41-59.

<sup>18</sup> United Nations, *Report of the Independent Expert on the human rights of older persons*, UN Doc A/HRC/39/50, para 82 (2018).

<sup>19</sup> See, for example, the Revised Social Charter 1966 of the Council of Europe, art 23; Charter of Fundamental Rights of the European Union, art 25.

<sup>20</sup> UN General Assembly resolution 50/141, para 14.

<sup>21</sup> UN General Assembly resolution 46/91 of 16 December 1991.

<sup>22</sup> Tracey L Gendron, E Ayn Welleford, Jennifer Inker, John T White, 'The Language of Ageism: Why We Need to Use Words Carefully' (2016) 56(5) *Gerontologist* 997-1006'; Joan C Chrisler, Angela Barney and Brigida Palatino, 'Ageism can be Hazardous to Women's Health: Ageism, Sexism, and Stereotypes of Older Women in the Healthcare System' (2016) 72(1) *Journal of Social Issues* 86-104.

<sup>23</sup> Thomas Nicolai Iversen, Lars Larsen and Per Erik Solem, 'A conceptual analysis of Ageism' (2009) 61(3) *Nordic Psychology* 4-22.

<sup>24</sup> There are various concepts of ageism, a number of which include all forms of treatment based on assumptions about a person's age, whether young or old. We focus on this phenomenon in relation to persons who are in the later stages of their lives, although some scholars have noted the danger that focusing only of older age ageism may create an 'us-them' perspective that reinforces marginalization of older persons: Frederik Snellman, 'Whose ageism? The reinvigoration and definitions of an elusive concept' (2016) 68 *Nordic Psychology* 148-159.

<sup>25</sup> Israel Doron and Nena Georgantzi (eds), *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons* (2018), 4.

<sup>26</sup> Robert N Butler, 'Age-ism: Another Form of Bigotry' (1969) 9(4) *The Gerontologist* 243.

<sup>27</sup> See discussion in Xue Bai, Daniel W L Lai and Aimei Guo, 'Ageism and Depression: Perceptions of Older People as a Burden in China' (2016) 72(1) *Journal of Social Issues* 26, 27-28 and see generally Sandra Torres, 'Cross-cultural differences in ageing', Chapter 12 in Ian Stuart Hamilton (ed), *An Introduction to Gerontology* (Cambridge University Press, 2012), 340, 342-344 and for a critique see Wouter Tavernier, Laura Naegelé and Moritz Hess, 'A Critical Perspective on Ageism and Modernization Theory' (2019) 7(3) *Social Inclusion* 54-57.

<sup>28</sup> See, e.g. Aysecan Boduroglu, Carolyn Yoon, Ting Luo and Denise C Park, 'Age-Related Stereotypes: A Comparison of American and Chinese Cultures' (2006) 52(5) *Gerontology* 324-333; Corinna E Löckenhoff, 'Perceptions of Aging Across 26 Cultures and Their Culture-Level Associates' (2009) 24(4) *Psychology and Aging* 941-954.

<sup>29</sup> European Union Agency for Fundamental Rights, 'Shifting perceptions: Towards a rights-based approach to ageing', Chapter 1 in *Fundamental Rights Report 2018* (2018) [FRA Report 2018] 9, 10 (citation omitted).

<sup>30</sup> Paul Kowal and J Edward Dowd, 'Definitions of an older person, Proposed working definition of an older person in Africa for the MDS Project', *Research on Ageing in Africa*, January 2001.

<sup>31</sup> Id at 2.

<sup>32</sup> For example, Indigenous Australians (whose life expectancy is significantly less than that of non-Indigenous Australians) are eligible to access the aged care system from the age of 50, whereas for non-Indigenous members of the community the age of eligibility for those services is set at 65: Australian Government Productivity Commission, 'Report on Government Services 2020' (2020), [www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/aged-care-services](http://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/aged-care-services).

<sup>33</sup> At the same time, such criteria have a certain arbitrariness to them because they are likely to be over- and under-inclusive. For example, if access to a universal old age pension at a specific age is to ensure that a person has sufficient income to ensure an adequate standard of living, this may include persons who are continuing to work in paid employment.

<sup>34</sup> For example, the US Age Discrimination in Employment Act uses the threshold of 40.

<sup>35</sup> For example, the Australian federal Age Discrimination Act 2004 (Cth), which protects against discrimination on the basis of 'age', includes but is not restricted to discrimination on the basis of older age: <https://www.legislation.gov.au/Details/C2014C00009>.

<sup>36</sup> <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons> (not yet in force).

<sup>37</sup> Article 2: [www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp)

<sup>38</sup> 'Harnessing population ageing for economic progress requires that assumptions and stereotypes regarding old age be challenged. Central to this is acknowledgement that diversity is a defining characteristic of old age, and the consequent reflection of this heterogeneity in public policies, including in employment and labour market policies. Heterogeneity among older persons is observed in needs, capacities, preferences and health and economic status,

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among other factors, suggesting that a successful response to population ageing and longevity needs to be multifaceted.’ United Nations, *Follow-up to the International Year of Older Persons: Second World Assembly on Ageing, Report of the Secretary-General*, UN Doc A/75/128, para 31 (2020).

<sup>39</sup> For example, some laws prohibiting discrimination on the ground of age provide or have been interpreted as requiring the complainant to show that their age was the sole criterion for the adverse treatment rather than allowing a claim where age was one of the grounds on which the adverse treatment was based.

<sup>40</sup> WHO has classified older persons and, in particular, those with underlying health problems such as high blood pressure, heart problems or diabetes, as being more at risk of becoming seriously unwell with COVID-19 (WHO, Q&A on Coronavirus).

<sup>41</sup> Sarah Fraser et al, ‘Ageism and COVID-19: what does our society’s response say about us?’ (2020) 49(5) *Age and Ageing* 692-695; Adelina Comas-Herrera et al, *Mortality-associated-with-COVID-among-people-living-in-care-homes*, updated 4-October-2020, <https://ltccovid.org/wp-content/uploads/2020/10/Mortality-associated-with-COVID-among-people-living-in-care-homes-14-October-2020-3.pdf> .

<sup>42</sup> ECtHR, *Cyprus v Turkey*, Application No 25781/94, judgment of the Grand Chamber of 12 May 2014, para 219; ECtHR, *Hristozov and Others v. Bulgaria*, Applications Nos. 47039/11 and 358/12, judgment of 13 November 2012, para 106.

<sup>43</sup> ‘Older persons remain chronically invisible despite pandemic spotlight, says UN expert’, Statement by the United Nations Independent Expert on the human rights of older persons, Claudia Mahler, 1 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26319&LangID=E>

<sup>44</sup> Liat Ayalon, ‘There is nothing new under the sun: ageism and intergenerational tension in the age of the COVID-19 outbreak’ (2020) 32(10) *International Psychogeriatrics* 1221-1224.

<sup>45</sup> “Unacceptable” – UN expert urges better protection of older persons facing the highest risk of the COVID-19 pandemic’, Statement by the United Nations Independent Expert on the human rights of older persons, Rosa Kornfeld-Matte, 27 March 2020, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25748&LangID=E>

<sup>46</sup> United Nations Department of Economic and Social Affairs, *COVID-19 and Older Persons: A Defining Moment for an Informed, Inclusive and Targeted Response*, Policy Brief No 68, May 2020, [www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/PB\\_68.pdf](http://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/PB_68.pdf).

<sup>47</sup> Royal Commission into Aged Care Quality and Safety (Australia), *Aged Care and COVID-19: a special report*, 1 October 2020.

<sup>48</sup> World Health Organization, *Preventing and Managing COVID-19 across long-term care services*, Policy Brief, 24 July 2020.

<sup>49</sup> UN OHCHR, *Guidance COVID-19*, 13 May 2020, 3, [https://www.ohchr.org/Documents/Events/COVID-19\\_Guidance.pdf](https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf).

<sup>50</sup> United Nations Department of Economic and Social Affairs, above n 38; Fraser et al, above n 41.

<sup>51</sup> United Nations, *United Nations Principles for Older Persons*, UN General Assembly resolution 46/91 of 16 December 1991.

<sup>52</sup> International Labour Organization, *Older Workers Recommendation, 1980* (Recommendation 162).

<sup>53</sup> United Nations, *Madrid International Plan of Action on Ageing, Report of the Second World Assembly on Ageing—Madrid, 8–12 April 2002*, UN Doc A/CONF.197/9 (23 May 2002) annex II.

<sup>54</sup> All but five of the ASEM Partner Countries (Brunei Darussalam, China, Malaysia, Myanmar and Singapore) are parties to the ICCPR. China has signed the treaty but not ratified it; however, it applies to the Macao and Hong Kong Special Administrative Regions of the PRC: United Nations, *Status of Treaties deposited with the Secretary-General [Status of Treaties]*, <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=en> (as of 10 January 2021). There were 173 States parties to the ICCPR as of 10 January 2021.

<sup>55</sup> All but three of the ASEM Partner Countries (Brunei Darussalam, Malaysia and Singapore) are parties to the ICESCR, which has 171 States parties in total: *Status of Treaties*, above n 54, Chap IV.3, Eight ASEM Partners have ratified or acceded to the Optional Protocol to the ICESCR, while four others have signed but not ratified the treaty: id at Chap IV.3.a.

<sup>56</sup> ICCPR, art 2(1); ICESCR, art 2(2). Similar provisions appear in the European Convention on Human Rights, art 14 and Protocol 12, art 1; American Convention on Human Rights, arts 1(1), 24; African Charter on Human and Peoples’ Rights, arts 2, 3). Age is not included explicitly as a prohibited ground of discrimination in other important sectoral treaties such as the UNESCO Convention against Discrimination in Education 1960 or ILO Convention No 111 on Discrimination in Occupation and Employment 1958, though the latter treaty allows States parties to add age as a protected status in their domestic implementation framework and many have done so.

<sup>57</sup> Israel Doron and Itai Apter, ‘The Debate Around the Need for a New Convention on the Rights of Older Persons’ (2010) 50(5) *The Gerontologist* 586.

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<sup>58</sup> See, eg, Bridget Sleap, 'Why it's Time for a Convention on the Rights of Older People', Position Paper (HelpAge International, 2009), [www.helpage.org/download/4c3cfa0869630/](http://www.helpage.org/download/4c3cfa0869630/); International Network for the Prevention of Elder Abuse (INPEA) et al, *Strengthening the Rights of Older People: Towards a UN Convention: A resource for promoting dialogue on creating a new UN Convention on the Rights of Older Persons* (2010), [http://www.inpea.net/filemanager/cms/img/user\\_files/source/Strengthening\\_Rights\\_2010.pdf](http://www.inpea.net/filemanager/cms/img/user_files/source/Strengthening_Rights_2010.pdf); Bundesarbeitsgemeinschaft der Seniorenorganisationen (BAGSO) [German National Association of Senior Citizens' Organisations], 'Endorsing a UN Convention on the Rights of Older Persons', 2020 [https://www.bagso.de/fileadmin/user\\_upload/bagso/06\\_Veroeffentlichungen/2020/20200401\\_Konvention\\_der\\_UN\\_fuer\\_die\\_Rechte\\_aelterer\\_Menschen\\_engl.pdf](https://www.bagso.de/fileadmin/user_upload/bagso/06_Veroeffentlichungen/2020/20200401_Konvention_der_UN_fuer_die_Rechte_aelterer_Menschen_engl.pdf); Bridget Sleap et al, 'Time for a UN Convention on the rights of older persons: How the COVID-19 pandemic has shown the need to protect our rights in older age', Discussion paper, <https://www.age-platform.eu/publications/time-un-convention-rights-older-persons-discussion-paper>.

<sup>59</sup> Chinsung Chung, *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, UN Doc A/HRC/AC/4/CRP.1, para 59 (2010); *Report of the Independent Expert on the human rights of older persons*, Rosa Kornfeld-Matte, UN Doc A/HRC/39/50, para 88 (2018); *Report of the Independent Expert on the enjoyment of all human rights by older persons*, Rosa Kornfeld-Matte, UN Doc A/HRC/42/43, para 101 (2019); *Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons*, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, Claudia Mahler, UN Doc A/75/205, para 78 (2020).

<sup>60</sup> See generally Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons*, *Analytical Outcome Paper*, August 2012, submitted to the third working session of the Open-ended Working Group on Ageing, 21-24 August 2012, <https://social.un.org/ageing-working-group/documents/OHCHRAnalyticalOutcomePaperonOldePersonsAugust2012.doc>. An update to the 2012 paper is to be presented to the eleventh session of the OEWGA which takes place in March-April 2021.

<sup>61</sup> The mandate of the OEWGA was set out in UN General Assembly resolution 65/182, para 28 (21 December 2010) and has been updated in UN General Assembly resolution 67/139, para 1 (20 December 2012) and resolution 74/125, para 52 (18 December 2019).

<sup>62</sup> See generally Annie Herro and Andrew Byrnes, 'Framing contests over the human rights of older persons' (2020) 38 *Australian Yearbook of International Law* 253-284.

<sup>63</sup> See, eg, European Commission, *The 2018 Ageing Report: Economic & Budgetary Projections for the 28 EU Member States (2016-2070)*, (Institutional Paper 079, May 2018).

<sup>64</sup> For an overview of the Council of Europe and its human rights system, with a focus on how it deals with ageism and the rights of older persons, see Barbara Mikołajczyk, 'The Council of Europe's Approach towards Ageism' in Liat Ayalon and Clemens Tesch-Römer (eds), *Contemporary Perspectives on Ageism* (Springer, 2018) 321-339.

<sup>65</sup> The European Social Charter was first adopted in 1961 and added to by a substantive additional protocol in 1988; the Revised Charter adopted in 1996 is a consolidated version of those two instruments.

<sup>66</sup> Mikołajczyk, above n 64, 331-335.

<sup>67</sup> Pursuant to the *Additional Protocol of 1995 providing for a system of collective complaints* (CETS No. 158), entered into force on 1 July 1998.

<sup>68</sup> European Union Agency for Fundamental Rights, European Court of Human Rights and Council of Europe, *Handbook on European non-discrimination law, 2018 edition*, 192-196.

<sup>69</sup> See Israel Doron, 'Older Europeans and the European Court of Justice' (2013) 42(5) *Age and Ageing* 604-608.

<sup>70</sup> Article 14 provides protection against discrimination on the basis of any ground such as 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

<sup>71</sup> Council of Europe and European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of discrimination*, updated on 31 August 2020. For example, in *Schwizgebel v Switzerland*, Application No 25762/07, judgment of 10 June 2010, the Court held that refusing a single woman permission to adopt a second child on the ground that the age difference between her and the child would be greater than 45 years, was justifiable and not in breach of Article 14 of the convention in conjunction with Article 8 (right to family life).

<sup>72</sup> Article 1 of Protocol 12 guarantees freedom from discrimination 'on any ground such as sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

<sup>73</sup> Mikołajczyk, above n 64.

<sup>74</sup> Id at 329-331.

<sup>75</sup> European Committee of Social Rights, *Fellesforbundet for Sjøfolk (FFFS) v Norway*, Complaint No 74/2011, Decision on the merits of 2 July 2013.

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<sup>76</sup> Article 21(1) provides protection against discrimination based ‘on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.’

<sup>77</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>78</sup> European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, 2 July 2008, COM(2008) 425 final, 2008/O140 (CNS), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0426>.

<sup>79</sup> Part from the provision, many claim that older people’s rights and issues of discrimination are given a lower priority than those of other groups.

<sup>80</sup> Article 23 (‘The right of elderly persons to social protection’) provides:

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

–to enable elderly persons to remain full members of society for as long as possible, by means of:

- a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
- b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them;

–to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

- a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
- a. the health care and the services necessitated by their state;

–to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

<sup>81</sup> See Council of Europe, ‘Article 23: The rights of elderly persons to social protection’, *Digest of the case law of the European Committee of Social Rights*, December 2018, 197-202; Council of Europe, *Digest of the case law of the European Committee of Social Rights, Appendix: Relevant abstracts, decisions and conclusions of the European Committee of Social Rights*, December 2018, 270-273.

<sup>82</sup> *Digest of the case law of the European Committee of Social Rights, Appendix*, above n 81, 199.

<sup>83</sup> For example, in the early case of *Airey v Ireland*, Application No 6289/73, judgment of 6 February 1981, the ECtHR held that although the convention protects civil and political rights, many of them have a social or economic impact and should therefore be considered admissible. In that case the Court held that access to legal aid was required for a person to enjoy her right of access to a fair hearing in a complex matrimonial case.

<sup>84</sup> European Court of Human Rights, *Elderly people and the European Court of Human Rights*, Factsheet, February 2019, [https://www.echr.coe.int/Documents/FS\\_Elderly\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Elderly_ENG.pdf).

<sup>85</sup> See Benny Spanier, Israel Doron and Faina Milman-Sivan, ‘“Older Persons” use of the European Court of Human Rights’ (2013) 28(4) *Journal of Cross-Cultural Gerontology* 407-420; Mikołajczyk, above n 64, 327-328.

<sup>86</sup> *Gerhard Fuchs and Peter Köhler v Land Hessen*, Joined Cases C-159/10 and C-160/10, judgment of 21 July 2011.

<sup>87</sup> See, eg, European Court of Human Rights (Fourth section), *Carvalho Pinto de Sousa Morais v Portugal*, Application No 17484/15, Judgment of 25 July 2017 and Israel Doron, Benny Spanier and Eugenio Mantovani, ‘Ageism, Human Rights, and the European Court of Human Rights: A Critical Analysis of the *Carvalho v. Portugal* Case (2017)’ (2018) 11(2) *DePaul Journal for Social Justice* Article 3; *Parris v Trinity College Dublin and Others*, Court of Justice of the European Union, Request for a preliminary ruling from the Labour Court, Ireland, Judgment of the Court (First Chamber) of 24 November 2016 and D Schiek, ‘On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)’ (2018) 18(2-3) *International Journal of Discrimination and the Law* 82, 90-93; Shreya Atrey, ‘Illuminating the CJEU’s blind spot of intersectional discrimination in *Parris v Trinity College Dublin*’ (2018) 47(2) *Industrial Law Journal* 278-296.

<sup>88</sup> European Committee of Social Rights, *Central Association of Carers in Finland v Finland*, Complaint No 70/2011, decision on the merits of 4 December 2012; European Committee of Social Rights, *Central Association of Carers in Finland v Finland*, Complaint No 71/2011, decision on the merits of 4 December 2012; *Fellesforbundet for Sjøfolk (FFFS) v Norway*, Complaint No 74/2011, Decision on the merits of 2 July 2013; *International Federation of Associations of the Elderly (FIAPA) v France*, Complaint No 145/2017, decision on the merits of 22 May 2019.

<sup>89</sup> Recommendation of the Committee of Ministers to Member States on the promotion of the human rights of older persons (2014), CM/R(2014)2.

<sup>90</sup> See *FRA Report 2018*, above n 29, 17-24.



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<sup>91</sup> Id at 21-22.

<sup>92</sup> Council of the European Union, *Council Conclusions on Human Rights, Participation and Well-Being of Older Persons in the Era of Digitalisation*, 9 October 2020, <https://data.consilium.europa.eu/doc/document/ST-11717-2020-REV-2/en/pdf>.

<sup>93</sup> European Commission, *Green Paper on Ageing: Fostering solidarity and responsibility between generations*, COM(2021) 50 final, 27 January 2021, [https://ec.europa.eu/info/sites/info/files/1\\_en\\_act\\_part1\\_v8\\_0.pdf](https://ec.europa.eu/info/sites/info/files/1_en_act_part1_v8_0.pdf).

<sup>94</sup> European Commission, 'Commission launches debate on responding to the impact of an ageing population', Press release, 27 January 2021, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_191](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_191).

<sup>95</sup> ASEAN Charter, adopted 20 November 2007, entered into force 15 December 2008, <https://asean.org/storage/2012/05/The-ASEAN-Charter-14042020-final.pdf>.

<sup>96</sup> ASEAN Charter, art 2(2)(i).

<sup>97</sup> The thematic reports prepared by AIHCR are available at <https://aichr.org/reports/>.

<sup>98</sup> Asian Intergovernmental Commission on Human Rights, *Five-year work plan of the AICHR 2021-2025* (2020), Priority Actions 2.1.4 and 3.2, <https://aichr.org/aichr-fywp-2021-2025-approved-at-53rd-amm-for-web/>.

<sup>99</sup> The ACWC included the preparation of a compilation of good practices on active ageing and women in ASEAN in 2012-2016, but the results of that work do not appear to be available on its website.

<sup>100</sup> [www.ohchr.org/Documents/Issues/Women/WG/ASEANdeclarationVaW\\_violenceagainstchildren.pdf](http://www.ohchr.org/Documents/Issues/Women/WG/ASEANdeclarationVaW_violenceagainstchildren.pdf)

<sup>101</sup> [www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp) The Convention entered into force on 11 January 2017: [www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons_signatories.asp).

<sup>102</sup> <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons> (not yet in force).

<sup>103</sup> [https://au.int/sites/default/files/treaties/37077-treaty-charter\\_on\\_rights\\_of\\_women\\_in\\_africa.pdf](https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf), adopted 1 July 2003, entered into force 25 November 2005.

<sup>104</sup> Article XXII of the Maputo Protocol guarantees 'Special protection for elderly women'; while Articles XIX and XX guarantee protection in relation to widow's rights and the right of inheritance, both of particular relevance to older women.

<sup>105</sup> Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted on 8 June 1999, entered into force 14 September 2001; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted on 29 January 2018, not yet in force.

<sup>106</sup> See C Creamer and B Simmons, 'The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties' (2020) 114 *American Journal of International Law* 1-50.

<sup>107</sup> UNDESA, 'Equality and non-discrimination', Background analytical paper, 1, [https://social.un.org/ageing-working-group/documents/eighth/Background%20analytical%20papers/Analysis\\_Equality.pdf](https://social.un.org/ageing-working-group/documents/eighth/Background%20analytical%20papers/Analysis_Equality.pdf)

<sup>108</sup> Id at 1, citing International Labour Office, *Employment and social protection in the new demographic context*, Report IV, International Labour Conference, 102<sup>nd</sup> session 2013, para 247.

<sup>109</sup> 'Equality and non-discrimination', above n 107, 1.

<sup>110</sup> UNESCAP has 53 member States (including France, the UK, the USA, the Netherlands, and the Russian Federation) and 9 associate members.

<sup>111</sup> UNESCAP, 'Input from UN-ESCAP', 8<sup>th</sup> session of the Open-ended working Group on Ageing (5-7 July 2017), 5 May 2017, 2, <https://social.un.org/ageing-working-group/documents/eighth/Inputs%20UN%20System/ESCAP.pdf>.

<sup>112</sup> Id at 3.

<sup>113</sup> Id at 4.

<sup>114</sup> *Report of the Independent Expert on the enjoyment of all human rights by older persons*, Rosa Kornfeld-Matte, UN Doc A/HRC/30/43, para 46 (2015).

<sup>115</sup> CRPD, Article 3(1). All ASEM Partners, as well as the European Union, are parties to the Convention on the Rights of Persons with Disabilities: United Nations, *Status of Treaties*, above n 54, Chap IV.15. As of 10 January 2021, 28 ASEM Partners had ratified or acceded to the Optional Protocol to the CRPD, while four others had signed but not ratified that treaty: id at Chap IV.15.a.

<sup>116</sup> *Substantive Inputs in the form of Normative Content for the Development of a Possible International Standard on the Focus Areas 'Autonomy and Independence' and 'Long-term and Palliative Care'* [Substantive inputs – Autonomy and Long-term care], Working document submitted by the Department of Economic and Social Affairs (DESA) in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), to the tenth session of the Open-ended Working Group on Ageing, UN Doc A/AC.278/2019/CRP.4, paras 12 (2019), [https://social.un.org/ageing-working-group/documents/tenth/A\\_AC.278\\_2019\\_CRP.4.pdf](https://social.un.org/ageing-working-group/documents/tenth/A_AC.278_2019_CRP.4.pdf).

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- <sup>117</sup> Lucy Series and Anna Nilsson, 'Article 12: Equal Recognition before the Law' in Ilias Bantekas, Michael A Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2019) 340-382.
- <sup>118</sup> For a description of the elements of a substituted decision-making, see Committee on the Rights of Persons with Disabilities, *General comment No 1 (2014): Article 12 – Equal recognition before the law*, UN Doc CRPD/C/GC/1, para 27 (2014).
- <sup>119</sup> Id at 363-368.
- <sup>120</sup> Id at para 15.
- <sup>121</sup> Ibid.
- <sup>122</sup> Id at para 17.
- <sup>123</sup> Titti Mattson, "'Participation" for all? Challenges and Tools to realise participation for vulnerable persons with a focus on health services' in Marlies Hesselman, Antenor Hallo de Wolf and Brigit Toebes (eds), *Socio-economic human rights in essential public services provision* (Routledge, 2016), 205-221.
- <sup>124</sup> Articles 1 and 3.
- <sup>125</sup> Recommendation on the Promotion of Human Rights of Older Persons in 2014. CM/R(2014)2.
- <sup>126</sup> Elizabeth B Herrington, 'Strengthening the Older Americans Act's Long-Term Care Protection Provisions: A Call for Further Improvement of the State Ombudsman Programs', (1997) 5(2) *Elder Law Journal* 321-358; Anna Kaluzny, 'The Patient Care Ombudsman: Who should it be?' (2010) 17(2) *Elder Law Journal* 343-373.
- <sup>127</sup> *HM v Switzerland*, Application No 39187/98, judgment of 26 February 2002. See the dissenting opinion of Judge Loucaides on the issue of whether there was a basis for finding that the complainant was a person of 'unsound mind'.
- <sup>128</sup> *Dewicka v Poland*, Application No 38670/97, judgment of 4 April 2000.
- <sup>129</sup> 'The Parliamentary Ombudsman supervises the rights of the elderly', [www.oikeusasiamies.fi/en/web/guest/rights-of-the-elderly](http://www.oikeusasiamies.fi/en/web/guest/rights-of-the-elderly). See, eg, Parliamentary Ombudsman, *Berättelse År 2019: Äldre personers rättigheter [Annual report 2019: The rights of older persons]*.
- <sup>130</sup> <https://humanrights.gov.au/our-work/age-discrimination>.
- <sup>131</sup> See, eg the Age Discrimination Commissioner's report, *Willing to Work: National Inquiry into employment Discrimination against Older Australians and Australians with Disability* (2016), <https://humanrights.gov.au/our-work/disability-rights/publications/willing-work-national-inquiry-employment-discrimination>.
- <sup>132</sup> The Office of the Parliamentary Ombudsman/Ombudsperson was established in Sweden in 1809. The system was introduced to be supervisory system that would allow the parliament some control over the exercise of the executive power.
- <sup>133</sup> The Ombudsman Committee of the International Bar Association, quoted in N E Holm, 'The Ombudsman – A gift from Scandinavia to the World' in Hans Gammeltoft-Hansen and Flemming Axmark (eds), *The Danish Ombudsman* (DJØF Publishing, 1995), 13.
- <sup>134</sup> Another form that such protection has taken is the modern national human rights institution that draws on the tradition of the Ombuds institutions but has a broader mandate encompassing a number of grounds of discrimination. There are now more than a hundred such institutions around the world, many established in conformity with the *Paris Principles* on national human rights institutions and including some Ombuds institutions with broad or combined mandates. Some of these have explicit mandates or programmes in relation to older persons (for example, the Philippines, Australia, Germany).
- <sup>135</sup> Martha Albertson Fineman, "'Elderly" as vulnerable: Rethinking the nature of individual and societal responsibility' (2012) 20(1) *Elder Law Journal* 71-111, 105.
- <sup>136</sup> Nina A Kohn, 'A Civil Rights Approach to Elder Law' in Israel Doron and Ann M Soden (eds), *Beyond Elder Law: New Directions in Law and Ageing* (Springer, 2012), 19-34.
- <sup>137</sup> International Labour Office, *World Social Protection Report 2017–19: Universal social protection to achieve the Sustainable Development Goals [World Social Protection Report]* (2017), 2.
- <sup>138</sup> Alston concludes that the right to social protection is not a novel human right and 'is no more than a combination of the right to social security and the right to an adequate standard of living', although one might argue that there is an additional on other rights, given the references to access to health services: United Nations, *Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston [Alston report]*, UN Doc A/69/297, para 34 (2014).
- <sup>139</sup> United Nations, *Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona [Sepúlveda Carmona report]*, UN Doc A/HRC/14/31, paras 37-46; *Alston report* above n 138, paras 33-39.
- <sup>140</sup> *Sepúlveda Carmona report*, above n 139, para 26.
- <sup>141</sup> Ibid.
- <sup>142</sup> See id at paras 28-36 for a discussion of the situation of older persons in this context.

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<sup>143</sup> United Nations, *Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston [Alston report]*, UN Doc A/69/297, para 21 (2014).

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> Other than in relation to the right to social security.

<sup>147</sup> The right to social security includes old-age benefits as one of its nine branches: ‘child and family benefits, maternity protection, unemployment support, employment injury benefits, sickness benefits, health protection, old-age benefits, disability benefits and survivors’ benefits.’ *World Social Protection Report*, above n 137, 2. Of course, older persons who are younger than the pension age and who satisfy the eligibility requirements for other benefits would be entitled to claim them.

<sup>148</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* 1988, Article 9; *Inter-American Convention on Protecting the Human Rights of Older Persons*, Article 17.

<sup>149</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Articles 11(1)(e), 11(2)(b) and 14(2)(c); *Convention on the Rights of the Child*, Articles 26 and 27(1); *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 5(e)(iv); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Articles 27 and 54; *Convention on the Rights of Persons with Disabilities*, Article 28.

<sup>150</sup> UN Doc E/1996/22, at 20 (1996).

<sup>151</sup> CESCR, *General comment No 19 (the right to social security (art 9))*, UN Doc E/C.12/GC/19 (2008).

<sup>152</sup> UN Doc E/C.12/GC/19, para 15 (2008).

<sup>153</sup> Article 17 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* provides that everyone ‘has the right to social protection in old age’; and the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa*, Article 7 (Social protection) requires States parties to ensure that the right of older persons to income security and other forms of social protection is ensured.

<sup>154</sup> International Labour Organization, *Social Protection Floors Recommendation, 2012* (No 202).

<sup>155</sup> *Id* at paragraph 1.

<sup>156</sup> *Id* at paragraph 3.

<sup>157</sup> *Id* at paragraph 5.

<sup>158</sup> Entered into force 27 April 1955.

<sup>159</sup> Entered into force 1 November 1969.

<sup>160</sup> *World Social Protection Report* above n 137, 77.

<sup>161</sup> United Nations Economic and Social Commission for Asia and the Pacific, *Ensuring Income security for Older women in Asia-Pacific: Designing Gender-responsive Pension Systems*, Social Development Policy Briefs, No 2019/01, 1-2.

<sup>162</sup> *Id* at 3.

<sup>163</sup> International Labour Office, *World Social Protection Report 2017–19: Universal social protection to achieve the Sustainable Development Goals*, Geneva, 2017, 78. The coverage of women is slightly lower.

<sup>164</sup> *Id* at 79.

<sup>165</sup> Social Protection Department International Labour Office, *Social protection for older persons: Key policy trends and statistics*, Social Protection Policy Paper No 11 (2014), ix

<sup>166</sup> *World Social Protection Report* above n 137, 152.

<sup>167</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 14, “The right to the highest attainable standard of health” (E/C.12/2000/4, paras. 25, 34 and 35).

<sup>168</sup> *Digest of the case law of the European Committee of Social Rights*, December 2018, 128-136; *Digest of the case law of the European Committee of Social Rights, Appendix*, above n 81, 164-178.

<sup>169</sup> *Vo v France*, Application No. 53924/00, judgment of 8 July 2004; *R R v Poland*, Application No 27617/04, judgment of 26 May 2011; *Cyprus v Turkey*, Application No 25781/94, judgment of 10 May 2001; *Pentiacova and others v Moldova* (complaint No. 14462/03 decision on admissibility of 4 January 2005; and *Nitecki v Poland*, Application No 65653/01, decision on admissibility of 21 March 2002. The cases concerned possibility of performing dialysis and refunding life-saving medications. But in *Dvořáček and Dvořáčková v Slovakia* Application No 30754/04, judgment of 28 July 2009, the Court decided that while there was a violation of Article 6(1) of the ECHR there was no violation of the right to life due to protracted medical procedures.

<sup>170</sup> Lewis Graham, ‘The European Court of Human Rights and the Emerging Right to Health’, Oxford Human Rights Hub Blog, 11 May 2017, <http://ohrh.law.ox.ac.uk/the-european-court-of-human-rights-and-the-emerging-right-to-health/>

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<sup>171</sup> Compare with Article 12 of the International Covenant on Economic, Social and Cultural Rights and *General Comment No 14 of the CESCR: The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4.

<sup>172</sup> *Id* at para 58, p 15.

<sup>173</sup> *Id* at para 59.

<sup>174</sup> *Id* at para 62.

<sup>175</sup> However, Article 6 of the Inter-American Convention on Protecting the Rights of Older Persons guarantees the right to access palliative care.

<sup>176</sup> *General comment No 14 on the right to the highest attainable standard of health* (2000), para 34; *General comment No 20 on non-discrimination in economic, social and cultural rights* (2009) (call to ensure 'even distribution in the availability and quality of primary, secondary and palliative health-care facilities', notwithstanding person's place of residence); *General comment No 22 on the right to sexual and reproductive health* (2016), para 7 (referring to statement in *General comment No 14* that the right to health includes 'the right to the provision of preventive, curative and palliative health care').

<sup>177</sup> *Substantive Inputs in the form of Normative Content for the Development of a Possible International Standard on the Focus Areas 'Autonomy and Independence' and 'Long-term and Palliative Care'* [Substantive inputs – Autonomy and Long-term care], Working document submitted by the Department of Economic and Social Affairs (DESA) in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), to the tenth session of the Open-ended Working Group on Ageing, A/AC.278/2019/CRP.4, para 44 (2019), [https://social.un.org/ageing-working-group/documents/tenth/A\\_AC.278\\_2019\\_CRP.4.pdf](https://social.un.org/ageing-working-group/documents/tenth/A_AC.278_2019_CRP.4.pdf).

<sup>178</sup> *Ibid*.

<sup>179</sup> Article 28 of the CPRD also guarantees the right to an adequate standard of living including the right to adequate housing; Article 31 of the Revised European Social Charter guarantees the right to housing.

<sup>180</sup> See Andrew Byrnes, 'Human rights unbound: An unrepentant call for a more complete application of human rights in relation to older persons - -And beyond' (2020) 39 *Australasian Journal on Ageing* 91-98,

<sup>181</sup> [http://ennhri.org/wp-content/uploads/2019/10/ennhri\\_hr\\_op\\_web.pdf](http://ennhri.org/wp-content/uploads/2019/10/ennhri_hr_op_web.pdf).

<sup>182</sup> The WHO defines elder abuse as a 'single or repeated act, or lack of appropriate action occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person'. It is common to categorize elder abuse into five non-exhaustive categories: physical, sexual, psychological or emotional, financial, and neglect. See WHO, 'Elder abuse', <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

<sup>183</sup> *Heinisch v Germany*, Application No 28274/08, judgment of 21 July 2011.

<sup>184</sup> This section draws on Andrew Byrnes, Israel Doron, Nena Georgantzi, Bill Mitchell and Bridget Sleaf, 'The Right of Older Persons to Work and to Access the Labour Market' (December 16, 2019), Submission to the twelfth session of the United Nations General Assembly Open-ended Working Group of Ageing (6 to 9 April 2020); UNSW Law Research Paper No. 19-101, available at SSRN: <https://ssrn.com/abstract=3504975>.

<sup>185</sup> Florence Bonnet and Vicky Leung, *Women and men in the informal economy: A statistical picture* (ILO, 3<sup>rd</sup> ed 2018), [https://www.ilo.org/wcmsp5/groups/public/--dgreports/--dcomm/documents/publication/wcms\\_626831.pdf](https://www.ilo.org/wcmsp5/groups/public/--dgreports/--dcomm/documents/publication/wcms_626831.pdf).

<sup>186</sup> ILO, *Conclusions concerning decent work and the informal economy*, International Labour Conference, 90<sup>th</sup> Session (Geneva, 2002), para 3. A more detailed technical description of how the formal and informal economies are defined can be found in *Women and men in the informal economy*, above n 185, 3-11.

<sup>187</sup> These and the subsequent figures in this paragraph are taken from *Women and men in the informal economy*, above n 185, 37.

<sup>188</sup> *Women and men in the informal economy*, above n 185, 3-11.

<sup>189</sup> *Women and men in the informal economy*, above n 185, 39-41.

<sup>190</sup> Preambular para 3.

<sup>191</sup> Preambular para 4.

<sup>192</sup> International Labour Office, *Decent work and the informal economy*, International Labour Conference, 90<sup>th</sup> session, 2002, Report VI.

<sup>193</sup> For a detailed discussion of the consistency of mandatory retirement ages with the principle of non-discrimination on the basis of age, see Byrnes et al, above n 184, 18-23.

<sup>194</sup> See also the *Employment Promotion and Protection against Unemployment Convention, 1988* (ILO No 168) which requires both the promotion of employment of opportunities for groups that include older workers (Article 8(1)), as well as ensuring that in providing support to workers who lose their jobs there is no discrimination on the basis of age (Article 6(1)). However, only eight States have so far ratified this Convention.

<sup>195</sup> In fact, any ILO instrument application of general application potentially applies and those related to social security may also be of relevance to older workers who often have care responsibilities.

<sup>196</sup> This Convention is in force for 175 States, including most of the ASEM partners.



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<sup>197</sup> This Convention is in force for only 35 States, and most ASEM partners in the Asian region are not parties to the Convention.

<sup>198</sup> ILO Convention No 156, Articles 5 and 6.

<sup>199</sup> . International Labour Office, *Transitioning from the informal to the formal economy*, International Labour Conference, 103<sup>rd</sup> session 2014, Report V (1), Chapter 2 ('The regulatory environment relating to the informal economy').

<sup>200</sup> Article 26 provides in part:

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. . . .

<sup>201</sup> See Committee on Economic, Social and Cultural Rights, *General comment 13: the right to education*. See also Article 29 of the Convention on the Rights of the Child which provides that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

Similar goals are set out in Article 24(1) of the CPRD.

<sup>202</sup> A similar obligation is contained in the UNESCO Convention against Discrimination in Education 1960, Article 4(c) of which requires States parties to 'encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity . . . '.

Article 43 of the International Convention on the Rights of Migrant Workers and Members of their Families provides that migrant workers are, subject to admission requirements, to enjoy equality of treatment with nationals in relation to access to educational institutions and services, to vocational training, placement services and retraining facilities.

<sup>203</sup> A similar focus appears in Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women, though it does also include an obligation to organise 'programmes for girls and women who have left school prematurely'.

<sup>204</sup> UNESCO, Convention on Technical and Vocational Education 1989, [https://unevoc.unesco.org/fileadmin/user\\_upload/pubs/conv-e.pdf](https://unevoc.unesco.org/fileadmin/user_upload/pubs/conv-e.pdf).

<sup>205</sup> International Labour Organization, Contribution of the Employment Policy Department, ILO for: Open-ended Working Group on Ageing: Education, training, life-long learning and capacity-building Geneva, March 2019, 1, <https://social.un.org/ageing-working-group/documents/tenth/Inputs%20UNS/ILO%20contribution%20LLL.pdf>

<sup>206</sup> UNESCO Institute for Lifelong Learning, *Embracing a culture of lifelong learning: contribution to the Futures of Education initiative* (2020), 21.

<sup>207</sup> Para 12(c). See also paras 21 (c), 35-36.

<sup>208</sup> *Report of the Independent Expert on the human rights of older persons*, UN Doc A/HRC/39/50, para 31 (2018) (noting Target 4.4 is linked only to jobs and employability but not broader notions of lifelong learning). Similarly, in the 2016 report on lifelong education of the Human Rights Council's Special Rapporteur on the right to education, calls on States call on States to 'develop a normative framework that reflects the right to education, [lifelong] learning and training' (A/71/358, para 103) but makes few substantial references to the relevance of the concept for older persons.

<sup>209</sup> See also the 2017 *Report of the Special Rapporteur on Education*, UN Doc A/72/496 (2017), which deals with 'the role of equity and inclusion in strengthening the right to education, in particular in the context of achieving the Sustainable Development Goals'. The report is silent on older persons but examines about a dozen other groups under the heading 'People and groups at risk of exclusion'.

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<sup>210</sup> *Human rights of older persons: the data gap, Report of the Independent Expert on the human rights of older persons, Rosa Kornfeld-Matte, UN Doc A/HRC/45 /14, at para 19 (2020).*

<sup>211</sup> *Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons, Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, A/75/205, para 66.*

<sup>212</sup> United Nations, *Policy Brief: The Impact of COVID-19 on older persons*, May 2020, 4.