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**Charlotte Bruckermann**

### **Longevity, Labor, and Care between Kin and State in China**

**Marijke de Pauw**

### **Global Population Aging from a Human Rights Perspective: The Need for a UN Convention on the Rights of Older Persons**



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**Abstract:** Global aging poses important questions about intergenerational care, frequently framed around the rising burden of the elderly as care dependents. By contrast, in rural China senior kin often perform essential work in families as care providers who tend to partners, support children, and nurture grandchildren. Between state welfare regimes and kinship obligations, senior citizens in rural China contribute work in fields, courtyards and homes into their old age. This article asks why this is the case and examines the effects this care has on the value of labor, kinship, and personhood. In doing so, it takes up issues of the invisibility of elderly rather than feminized care work. Local idioms of labor threaten to hide care ‘inside’ the village, overshadowed by remunerated, formal work performed ‘outside’ in the urbanizing economy by younger generations. By turning towards senior citizens performing everyday acts and hosting festive celebrations, aging villagers stake recognition for their caring labor to their kin, neighbors, and community. Senior citizens thus claim recognition for the care work they perform in the Chinese countryside.

**Key words:** Aging, care, generations, welfare, rural China

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When addressing questions of age and ageing, the closely associated term of ‘generations’ looms large. The notion of generations enables researchers to group people together in relation to historical eras, life phases, or family networks. Hence we speak of generations as, for instance, the “baby boomers”, the middle-aged, or grandparents. However, different academic disciplines diverge on how far to cast the temporal net in considering intergenerational relations. While sociologists usually focus on the living, anthropologists often consider the ancestors, and analytic philosophers may even take into account the unborn. Especially when examining who holds a stake in decisions affecting multiple generations, choosing whom to include and exclude in generational analysis cannot be taken lightly.

States must constantly negotiate claims made by its citizens in allocating and distributing resources, making crucial budget allocations and setting institutional frameworks for age-related welfare provisions, including everything from pension schemes to childcare facilities. Families also frequently face dilemmas of how to distribute material resources, such as money, food, clothing, and accommodation, while maintaining their intangible connections of affection, attention, and discipline.

Welfare provision and mutual dependency are constantly being balanced across multiple generations. Inequalities in income, generation, and gender may come to the fore, while the transfer of assets, especially in the form of inheritance, often lurks in the background. Safeguarding the welfare of individuals, families, and populations across generations reveals clefts in who is responsible to whom, and when. States, markets, and families all come to bear in debates on demographic ageing and the necessity for intergenerational solidarity.

This article is situated along the theoretical crossroads of kinship, care, and labor in China’s rapidly aging population. Within a rural mountain community in the north-central region of Shanxi province, inequalities in gender and generation intersect to valorize particular forms of work, and even specific types of workers, above others. As a result, providing caring labor through both kin and state does not necessarily lead unequivocally to cohesion, belonging, and integration, but may also generate coercion, competition, and exclusion in rural China.<sup>1</sup>

In order to reveal the social organizations that develop alongside caring practices, this article attempts to question assumed dichotomies of public and private life that underlie many social

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1 Charlotte Bruckermann, “Caring Claims and the Relational Self across Time: Grandmothers Overcoming Reproductive Crises in Rural China.” *JRAI (Journal of the Royal Anthropological Institute)* 23 (2017): 356-375.

science approaches to care<sup>2</sup> and highlight the diversity of ‘multiple modernities’ that coexist around the world.<sup>3</sup> Instead, Chinese conceptions of ‘inside’ (*nei*) and ‘outside’ (*wai*) as gendered forms of labor<sup>4</sup> will be re-read through shifting generational divisions of labor in the countryside. Following Heike Drotbohm and Erdmute Alber, three varying perspectives on care as work, care as kinship, and care in the life-course will be simultaneously developed.<sup>5</sup>

The article begins by situating the shifts in the composition of the Chinese population within the larger global demographic context, in which China offers insights into rapid processes of population aging within a developing country. Turning to the caring labor of the rural Chinese elderly, senior citizens have emerged as not just care dependents, but care givers. Senior villagers have attempted to unite ideals of personal aging with state support and kinship obligations. The article argues that the partial and oscillating provision of care from kin and state create constellations that compel elderly villagers to contribute labor, in general, and care, in particular, into old age. Yet, senior rural residents refuse to allow this labor to go unrecognized in the ‘inside’ sphere of fields, courtyards, and houses. Instead, elderly villagers seek and create opportunities to make kin, neighbors, friends, and the wider community recognize this caring labor through both everyday acts and festive celebrations in front of audiences that acknowledge their work.

## Demographic aging in context

The UN defines an ‘aging population’ at a threshold where more than 10% of the population is over 60 years old. Population aging has long been predominantly associated with developed economies where declining birthrates and increasing lifespans coincide, due to improved state provisioning of family planning and medical care. However, there have been global shifts in this picture, not least due to China’s changing demographics, as many developing countries begin to experience population ageing. This trend of population ageing among developing nations is

2 Tatjana Thelen, “Care as Social Organization: Creating, Maintaining, and Dissolving Significant Relations” *Anthropological Theory*, 15, no. 4 (2015): 497-515.

3 Hans Bertram, “Die Plurale Moderne,” in *Familie, Bindungen und Fürsorge: Familiärer Wandel in einer vielfältigen Moderne*, eds. Hans Bertram and Nancy Ehlert (Opladen: Verlag Barbara Budrich, 2011), 11-30.

4 Ellen Judd, *Gender and Power in Rural North China* (Stanford: Stanford University Press, 1994).

Tamara Jacka, *Women’s Work in Rural China: Change and Continuity in the Era of Reform* (Cambridge: Cambridge University Press, 1997).

Susanne Brandtstädter, “The Gender of Work and the Production of Kinship Value in Taiwan and China” in *Chinese Kinship: Contemporary Anthropological Perspectives*, ed. Susanne Brandtstädter and Goncalo Duro Dos Santos (London: Routledge, 2009), 154-177.

5 Heike Drotbohm and Erdmute Alber, “Introduction,” in *Anthropological Perspectives on Care: Work, Kinship, and the Life-Course*, eds. Erdmute Alber and Heike Drotbohm (Basingstoke: Palgrave Macmillan, 2015), 1-19.

set to increase dramatically as the trend is accelerating, rather than decelerating as in developed countries. The UN projects that in developing regions the number of persons aged over 60 is set to quadruple from 376 million to almost 1.7 billion between 2000 and 2050, while in developed nations the increase will only be about 80% from 231 million in 2000 to 421 million in 2050.<sup>6</sup>

Chinese demographics have transformed at an incredibly rapid rate, and China became one of the first countries with a low GDP per capita to reach high levels of population ageing. China's population of over 60-year-olds surpassed 10% in 2000 when the GDP per capita was less than 8000 RMB or 1000 USD, and by 2015 that age bracket edged close to 15% of the population, an extremely rapid rise. Chinese citizens over sixty years of age now amount to over 200 million people, and, globally, nearly one in four people over the age of 60 now lives in China.<sup>7</sup> The major factors contributing to China's aging population are both the extension of lifespan through longevity and the lower rates of reproduction. These two transformations went hand-in-hand in China, as access to medical facilities, expertise, and treatment have increased since the 1950s and accelerated from the 1970s; this was the same period in which restrictions on reproduction gained pace through the Family Planning Policy (*Jihua Shengyu Zhengce*).

This makes China an incredibly important test case, as the country not only pioneered certain macro-economic shifts in demography, but also underwent important shifts on the ground in terms of family and state care under conditions of population aging. Evidence from ageing societies in developed economies predominantly focuses on the growing burden of elderly welfare dependents societies face as fertility rates decline and life spans increase. Moreover, the classic European model of welfare as a state responsibility is giving way to a neoliberal market-orientation and unwaged family dependencies.<sup>8</sup> This can lead to unexpected consequences: the moral value of volunteering as a social endeavor among aging Italians, for instance, may overshadow the work done by paid migrant workers, whose care is devalued as merely self-interested.<sup>9</sup>

6 United Nations, Department of Economic and Social Affairs (UNDESA), Population Division, *World Population Ageing*, UN Doc. ST/ESA/SER.A/390 (New York: United Nations, 2015), 9-10. [http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015\\_Report.pdf](http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Report.pdf).

7 United Nations, Department of Economic and Social Affairs (UNDESA), Population Division, *World Population Ageing*, UN Doc. ST/ESA/SER.A/390 (New York: United Nations, 2015), 16-17. [http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015\\_Report.pdf](http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2015_Report.pdf).

8 Bertram, "Die Plurale Moderne."

9 Andrea Muehlebach, *The Moral Neoliberal: Welfare and Citizenship in Italy* (Chicago: University of Chicago Press, 2012).



Although Chinese population policies have ushered in an extremely rapid process of population ageing within a developing economy, this has also resulted in many elderly people becoming care providers as well as welfare dependents.<sup>10</sup> With both parents working outside the home, for instance, grandparents frequently become carers for grandchildren.<sup>11</sup> Furthermore, when their children migrate for work or if they never had their own children, older generations often take care of each other in the absence of offspring.<sup>12</sup> At times, both grandparents and grandchildren may be left behind in the countryside, with remittances from parents supporting them financially<sup>13</sup>. In fact, the presence of elderly grandparents in need of care and the potential for grandparental childcare are important factors for Chinese couples in making reproductive decisions.<sup>14</sup>

The Chinese case could be indicative of processes that will occur in other developing countries under conditions of population aging. These developments therefore pose the question of how acute demographic ageing in an emerging economy affects intergenerational relations. The Chinese context offers interesting points of comparison from the situation often evoked in developed economies, where elderly people supposedly withdraw from labor contributions and become dependent on state and kin. Instead, an alternative perspective on ‘global ageing’ emerges from the developing economy situation within rural China, one in which elderly citizens and kin become crucial providers of, and not just dependents on, labor and care.

This research is based on over sixteen months of fieldwork in the mountain village of Sweeping Cliff in Shanxi Province, north-central China between 2009 and 2010, with a return visit in 2017. In the village intergenerational cooperation formed an important component of family interaction. Elderly family members were not just welfare dependents, but welfare providers who contributed labor to their families by tending to fields, houses, partners, parents, and grandchildren. This context provides an alternative account of ageing that challenges demographic projections and discourses which reduce elderly people to family burdens or state dependents, on the one hand, and the view of elderly people as isolated from wider social networks, on the other.

10 Esther Goh, *China's One-Child Policy and Multiple Caregiving: Raising Little Suns in Xiamen* (London: Routledge, 2011).

11 William Jankowiak, “Practicing Connectiveness as Kinship in Urban China,” in *Chinese Kinship: Contemporary Anthropological Perspectives*, eds. Susanne Brandtstädter and Goncalo Duro Dos Santos (London: Routledge, 2009), 67-91.

12 Ye Jingzhong, “Left-Behind Children: the Social Price of China’s Economic Boom,” *Journal of Peasant Studies* 38 (2011): 613-50.

13 Ye Jingzhong, “The Issue of Left-Behind Elderly People in the Context of China’s Modernization” in *Journal of Peasant Studies* 44, no.5 (2017), 971-999.

14 Bruckermann, “Caring Claims and the Relational Self across Time.”



# The value of work and the morality of aging

In relation to the phenomenon of elderly people providing care, recognition of this form of labor becomes eclipsed not so much by gender, but by generation. A consequence of the Family Planning Policy has been the intensification of concerns over care, as families face a situation with more elderly members and fewer children. Relaxation of the Family Planning Policy in recent years has had the explicit intention of creating a larger pool of adult children who can look after elderly generations in the future.<sup>15</sup> Many extended families are composed of four elderly grandparents, two middle aged parents, and one grandchild, also known as the 4-2-1 problem. This has resulted in challenges within families who have to manage care across multiple generations, leading to balancing acts of care.

There is a paucity of ethnographic studies on the Chinese elderly that explore the subjective experiences of old age and contest negative views of the elderly. However, there have been challenges to demographic projections that reduce elderly people to family burdens or to isolated population segments outside of family networks.<sup>16</sup> The Chinese case reveals how state intervention into demography intersects with kinship logics formally associated with ancestor reverence and patrilineal descent. Drawing on analyses of Chinese intergenerational labor between parents and children through reciprocal caring cycles, this links exchanges beyond the nuclear family to shifting extended family networks.<sup>17</sup>

Flows of care moving up, down, or across generations are not just material, but include emotional and ethical forms of interaction.<sup>18</sup> In China, intergenerational obligations are frequently framed through discourses of sacrifice and gratitude<sup>19</sup>, as filial piety and ancestral reverence continue to inform understandings of aging, as ideals remain that seniority and status should increase with age.<sup>20</sup> However, the quasi-retirement many elderly Chinese formerly enjoyed often fails to materialize and old-age poverty, neglect, and depression are rampant in rural areas.<sup>21</sup>

<sup>15</sup> In November 2013 the Chinese government announced a significant amendment to its so-called One-Child-Policy by allowing two children to married couples in which one partner is an only child. In October 2015 the Communist Party issued another statement that effectively extended the right to have two children to all married couples. As couples confront the potential of two children in need of care, grandparents' roles will become even more important.

<sup>16</sup> Goh, *China's One-Child Policy and Multiple Caregiving*.

Anna Boermel, "'No Wasting' and 'Empty Nesters': 'Old Age in Beijing,'" *Oxford Development Studies* 34, no. 4 (2006): 401-418.

<sup>17</sup> Charles Stafford, "Chinese Patrilineality and the Cycles of Yang and Laiwang," in *Cultures of Relatedness: New Approaches to the Study of Kinship*, ed. Janet Carsten (Cambridge University Press, 2000), 37-54.

<sup>18</sup> Drotbohm and Alber, "Introduction."

<sup>19</sup> Harriet Evans, *The Subject of Gender: Daughters and Mothers in Urban China* (Lanham: Rowman & Littlefield, 2008).

<sup>20</sup> Liu, "The state through its mirrors."

<sup>21</sup> Yan Yunxiang, *Private Life under Socialism: Love, Intimacy, and Family Change in a Chinese Village 1949-1999* (Stanford: Stanford University Press, 2003).

Elderly Chinese people often continue to contribute work into old age, at times even expressing pride at their capacity to provide labor to their families.<sup>22</sup>

Theoretically, analyses of elderly caring labor nonetheless resonate with recent approaches by feminist sociologists and economists of care who criticize the invisibility of certain forms of caring labor and caution against drawing rigid boundaries between economic transactions and intimate exchanges.<sup>23</sup> This article explores this dynamic by engaging with the following three dimensions: first, social security provisions between state and personal networks; second, the compulsion and obligation to contribute labor into old age; third, ritual conceptions of aging and the life course in recognizing caring labor.

## Social security provisions between state and personal networks

“All the elderly shall be properly taken care of” (lao you suo yang)

Confucian doctrine

Various state projects since the founding of the People’s Republic of China in 1949 have usurped, appropriated, and praised the Confucian mandate for elderly care in line with different phases of governance.<sup>24</sup> The history of both family-based care and institutional facilities must be considered in examining how transformations in care-giving to and by the elderly unfolded over time. Under Maoism (1949–1976), family-based care supplemented institutional childcare and elderly support provided by urban work units and rural brigades.

The 1950s was a period of complete overhaul of local community organization across China as rural brigades and urban work units began to organize most aspects of citizens’ lives through their workplaces. While urbanites increasingly enjoyed welfare provisions, from housing to medical facilities that their rural counterparts could only dream of, communities in the countryside promoted social security for the most vulnerable segments of the population through the Five-Guarantees (*wubao*) welfare system.<sup>25</sup> The five guarantees included in the scheme were the provision of food, clothing,

<sup>22</sup> Goh, *China’s One-Child Policy and Multiple Caregiving*.

<sup>23</sup> Viviana Zelizer, *The Purchase of Intimacy* (Princeton: Princeton University Press, 2005).

<sup>24</sup> Liu Xiaoqian, “The State through its Mirrors: an Anthropological Study of a ‘Respect-the-Elderly Home’ in Rural China at the Turn of the 21st Century” (PhD diss., London School of Economics and Political Science, 2013), 46-47.

<sup>25</sup> Liu, “The State through its Mirrors,” 20-23.

medicine, housing, and burial. The elderly, disabled, and children who were on the *wubao* system were also referred to as the Three-Nos (*san wu*), as they were included in the scheme due their inability to work, the absence of adult sons, and the lack of a means of livelihood.<sup>26</sup> The elderly on these schemes were generally cared for individually in their homes or collectively in seniors' residences, but the provision of assistance varied across regional differences and urban-rural inequalities in China.

In the Market Era (1978-present), many of these formal care institutions have been dismantled or marketized and migration has blurred the fault lines between rural and urban China. These changes have exacerbated inequality between families in accessing institutional and marketized forms of care. Simultaneously, rising standards of living and aspirations for the future have pushed more ambitious caring targets onto families. In attempts to safeguard general welfare, China has been establishing rural state-sponsored social security provisions. Of particular note are the rural medical insurance and pension schemes that the state has extended into the countryside in recent years.

As many rural collectives collapsed under increasing marketization in the 1980s and 1990s, so did their communal support for the elderly, with responsibilities for elderly care thrust on neighbors and kin.<sup>27</sup> To counteract rising inequality in rural areas, the new millennium saw Hu Jintao's government increasing efforts to expand social insurance schemes and strengthen safety networks, such as the abolition of agricultural tax, investing in a rural medical scheme, introducing village pensions, and even income support measures.<sup>28</sup> With the rehabilitation of much Confucian doctrine and concomitant re-traditionalization of Chinese society under Xi Jinping, both community and kin efforts have been strengthened.

The pressure to provide high quality care has become particularly acute since the aim of the population policy has shifted away from simply decreasing population quantity through restricting fertility. In recent decades, China's developmental paradigm has changed towards improving 'population quality' (*renkou suzhi*) as a set of physical, intellectual and moral characteristics.<sup>29</sup> This ambition becomes particularly visible in policies directed at providing children with 'education for quality' (*suzhi jiaoyu*), where imperatives of improving health and education come together through new, family-based responsibilities for care.<sup>30</sup>

26 Liu, "The State through its Mirrors," 30.

27 Liu, "The State through its Mirrors," 20-23.

28 Liu, "The State through its Mirrors," 27.

29 Susan Greenhalgh, *Cultivating Global Citizens: Population in the Rise of China* (Cambridge: Harvard University Press, 2010).

30 Andrew Kipnis, *Governing Educational Desire: Culture, Politics, and Schooling in China* (Chicago: University of Chicago Press, 2011).

Less visible to the public eye than children spilling out of schoolyards on their way home, China's elderly often find themselves side-lined, or even devalued, by the discourse of 'population quality.' The devaluation of some elderly people's 'quality' in terms of education, health, and rural or urban background thereby creates social inequality across generations.<sup>31</sup> Furthermore, rendering the elderly's work as invisible or unproductive because it is unremunerated amplifies this inequality and further emphasises the role of the elderly as welfare recipients, while eclipsing their contributions as welfare providers.

There are a growing number of institutional care facilities for both grandparents and grandchildren emerging throughout China, at least for those who can afford them. Nonetheless, these institutions cannot always meet the needs of the vulnerable elderly, who may be priced out of marketized care or neglected by their relatives, particularly when they live far away. Elderly neglect, both financial and emotional, has emerged as a serious problem with the increase in both physical and occupational mobility across China. These negative consequences have arisen despite the Confucian values of filial piety that stipulate respect and even reverence for older generations. One reaction by the government has been to issue laws for the protection of the rights and interests of elderly people, mandating family support for ageing relatives.

Since 2008, Sweeping Cliff has offered residents state-sponsored health insurance under the implementation of the national New Rural Cooperative Medical System (*Xinxing Nongcun Yiliao Hezuo*). In 2008, the village committee supplied the funds for the health insurance scheme, but since 2010 villagers themselves contribute to the insurance as well. Depending on the care needed, the insurance policy usually covers between 50% and 75% of medical care at public hospitals in the municipal area. The government official in charge of the insurance program in Sweeping Cliff explained to me that "before this policy, people had to take out their own insurance or they had to pay the bills themselves. Often, people would borrow money from relatives and friends, or, sometimes, they felt that they could not afford to see the doctor and would just give up (*fangqi*) [on seeing a doctor]."

Sweeping Cliff also has two pharmacies and a doctor's office, as well as vaccination drives for children through schools. However, the doctor working in Sweeping Cliff actually opened the practice in his parents' house to offer villagers services for their small illnesses (*xiao maobing*) so that they do not always have to go to the hospital in the township capital several kilometers away. The doctor and his wife work in the city and own an apartment there, but their son lives with his grandparents in the village. In fact, the small Sweeping Cliff practice operates out of a side-building of their

<sup>31</sup> Ann Anagnost, *National Past-Times: Narrative, Representation, and Power in Modern China* (Durham: Duke University Press, 1997).

residential courtyard and the doctor's mother helps with a lot of the administrative paperwork necessitated in registering all the villagers for the New Rural Cooperative Medical System.

Older people's compulsion to work and contribute labor to others changed through the state provision of financial assistance. While the care provisions for the elderly and children were frequently unpaid, this new form of state-sponsored support was explicitly monetary. Since 2000, the village committee operates a pension scheme for those over 60 years of age, who receive 60 *Renminbi* a month towards their living costs. Additional claims could be made on the basis of hardship, especially in the absence or lack of children, especially sons. However, many villagers pointed out the contradiction that sons were supposed to care for them, but responsibility effectively fell to their daughters or daughters-in-law as they were more frequently present in the village during the day due to their limited participation in outside wage labor. In addition, elderly people often did agricultural work to feed themselves, although they usually also receive financial support from their relatives with remunerated employment. This led to a simultaneous feminizing and aging of agricultural work, as in the eldest village generation, many women outlived their husbands, as the wives not only enjoyed longer life expectancies but were often additionally between five to ten years younger than their spouses.

While older people often refused financial contributions from personal connections, and especially close kin, they were keen to take advantage of the new forms of state assistance. Universal coverage for the medical system and pension scheme meant that these initiatives suffered from far less stigma and loss of face than the former hardship programs. Indeed, rural elderly still supported by the *wubao* system were embarrassed to discuss the assistance they received. By contrast to hiding any dependence on the state beyond the universal provision of support, elderly villagers enjoyed showing off the filial kindness they received from their offspring, while simultaneously often denying its necessity. Daughters were expected to help out as a matter of 'conscience' (*liangxin*) while sons were bound by the duties of 'filiality' (*xiao*) to provide support or enlist their wives to the task.<sup>32</sup>

This reveals a differential evaluation of financial assistance from personal networks and state support in relation to social security. Elderly people justified receiving financial assistance from the pastoral state as part of its mandate to provide care to its vulnerable citizens, while they would demonstrate reluctance to accept support from their families in ways that could be

<sup>32</sup> Compare with Ellen Oxfeld, *Drink Water, but Remember the Source* (Berkeley: University of California Press, 2010).

construed as a burden. In return for favors, especially in terms of cash support, they often provided agricultural goods and home-made foods, which they produced by working for as long as possible in the fields, courtyard, and home to provide for their kin through their subsistence, but unremunerated, labor.

The complete absence of support by close junior kin could nonetheless result in bitter accusations of neglect and ensuing hardship. An elderly neighbor in his seventies complained that he struggled with the small amounts of financial support from his family and the local government. He explained that this was the reason he tended a vegetable garden in his courtyard to produce food for himself, despite his advancing age. By contrast, his granddaughter pointed out that her family mainly supported him through providing him with food, and particularly noodles, as flour needed to be purchased and therefore necessitated cash income. Visiting this neighbor over several months, he oscillated between pride in his capacity to continue doing agricultural labor and admonishments of his son and daughter-in-law for not making his continued work unnecessary by taking over more work in his fields and courtyard. What are the origins of this compulsion and obligation to contribute labor into old age?

## The compulsion and obligation to contribute labor into old age

‘Old people lack knowledge and therefore do not have a good footing to stand on. Old people have a mentality of efficiency (*xiaoneng yishi*), but nowadays what is required is an agile mentality (*lingkuai yishi*). You don’t need this to grow things in the fields, but you need this to work in the city.’

Village primary school teacher

The quotation from Sweeping Cliff’s primary school teacher reveals how villagers attribute value to different kinds of work. On the surface, the variables in this evaluation are the location of work in either a rural or urban setting, as well as the way of thinking necessary to attain and complete this work stratified by generation. However, beneath this simple statement lie a number of assumptions about the differing value of work, in terms of both the financial remuneration received and the desirability of work. Sweeping Cliff villagers claimed that ‘all good jobs are in the city’ (*hao gongzuo dou zai shi heli*).

Not taking into account the workers' particular dispositions and situations, there was a general stratification of labor across the urban-rural area. The least coveted way of making a living was through hard, physical, manual labor (*laodong*), for instance by tilling the fields or breaking rocks in a stone quarry. Slightly more prestigious was occasional, piecemeal labor that involved some skill but not necessarily qualifications (*xiaogong*), such as working in construction or transporting goods. More regular and secure shift work in offices or businesses (*shangban*) was held in high esteem due to the low toll it took physically, although having to answer to a boss did not suit everyone. Contractually secured formal labor (*gongzuo*) held the prestige formerly reserved for urban work unit employees, although many of the housing, medical, and pension benefits had been cut since the 1980s. To avoid a hierarchical relationship to a superior and become one's own boss, an insecure and yet potentially lucrative alternative was to 'dive into the ocean' (*xia-hai*) of doing business (*zuo shengyi*) by becoming an entrepreneur (*getihu*).

People's preferences for these different types of work often depended on their gender and age cohort, with older people often taking pride in agricultural labor, while younger generations shun this type of work in favor of office jobs. In addition to these remunerated jobs, there were many kinds of unpaid work that included household labor for the family and interpersonal work for friends and colleagues, as well as agricultural work. These activities were not necessarily viewed as doing work (*ganhuo*) but could be part of maintaining a livelihood (*zuo shenghuo*).

In addition to the rural and urban differentiation already discussed, a second contrast between work lies between categorizing activities as 'inside' (*nei*) and 'outside' (*wai*) work. This differentiation has been historically gendered with women working in the inner realm of the domestic sphere of the courtyard, although their products from embroidered clothing to silkworms were frequently sold in markets. By contrast, men's work was seen to lie beyond the home, tilling the fields, conducting business, or becoming a bureaucrat in the wider world. These characterizations of an economy where 'men plough, women weave' (*nangeng nüzhì*) as an ideal of gendered divisions of labor were more of an ideal than a reality for most of Chinese history, especially for households where the necessity of making ends meet meant sending female members out to work.<sup>33</sup>

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<sup>33</sup> Francesca Bray, *Technology and Gender: Fabrics of Power in Late Imperial China* (Berkeley: University of California Press, 1997).



Characterizing work as inside or outside labor also often becomes aligned with whether the work is unpaid or paid.<sup>34</sup> Agriculture in particular has increasingly been brought into the domain of inside work.<sup>35</sup> This expansion of the inner sphere to include agriculture is linked to rural women's mandatory participation in agriculture within village brigades as communities tended to the fields collectively through People's Communes in the countryside. Increasingly, those engaging in this area of hard labor not only tend to be female, but considerably more senior in age than was previously the case. Inside work in the fields and household tend towards the subsistence of lives and livelihoods, areas less prestigious and visible than remunerated work in the outside world.

Notably, in many Sweeping Cliff families a new intergenerational division of labor has been occurring, with the eldest generation often taking on agricultural and domestic duties in the village, while the middle generation works for an income in the city. The closest urban center can be reached within thirty minutes, making many parents in the village into commuters, while their children receive daycare from their grandparents during the day. Most of the parental generation received middle school or higher qualifications, thereby receiving formal skills to enter the urban labor market their parents were excluded from due to low levels of formal education. Bitter complaints arise when this form of intergenerational support breaks down, with the situation often blamed on death, divorce, or even difficult daughters-in-law.

As young women increasingly enter the waged labor market outside the village after finishing school, these labor dynamics are shifting. Women with adult sons would often complain that bringing in a daughter-in-law no longer meant that they would help in the home, as young women went out to do shift-work (*shangban*) or sell their labor (*dagong*) rather than contribute to the household. Older women even complained that bringing in a daughter-in-law just meant another mouth to feed. In addition, they claimed that young women often had very high material demands and were a burden to the family despite contributing most of their income to the household.

The situation could become even more complicated for elderly men who were not embedded within wider kin networks. An example that brings together the difficulties of holding an intergenerational cooperation together is the family of Hanlian, whose parents were immobile due to various ailments. After losing his job in one of the local mines, Hanlian turned to drinking, which

34 Rachel Rosenfeld, "What is Work? Comparative Perspectives from the Social Sciences," in *Re-Drawing Boundaries: Work, Households, and Gender in China*, eds. Barbara Entwisle and Gail Henderson (Berkeley: University of California Press, 2000), 51-66.

35 Judd, *Gender and Power in Rural North China*.

drove his wife away, taking their daughter with her and moving back to her hometown. Hanlian's parents were not eligible for social support beyond the minimum pension, as the presence of their son excluded them from the more generous Five Guarantees scheme. Hanlian could, on occasion, contribute to the household income by taking on day jobs, although his drinking made him an unreliable worker to his neighbors. Fortunately, Hanlian's sister's family also supported their household with food and cash, although Hanlian vehemently denied that this was in any way payment, as he cared for his parents to fulfill his filial duties, despite all his hardships.

Another elderly man in a similar situation was a man named Dacao whose wife had died of cancer and whose daughter had married out into another township. Dacao made ends meet by collecting medicinal plants and insects in the surrounding countryside, selling them to local traders or directly to visiting tourists and passers-by on the village's main street. Upon enquiry about his mixture of healing goods and some plant substances said to protect children's health, Dacao once summarized: 'Nowadays people think children are more important than adults and ignore the health of the elderly,' thereby pithily summarizing the hardships faced by the rural elderly in gathering the necessary elements for even their basic livelihoods.

## Gaining recognition for 'inside' work

Care work often lacks visibility. Between kin this often arises due the unremunerated nature of the work despite its being embedded in capitalist economic processes, therefore sidestepping the monetary terms that nominally quantify, solidify, and render labor legible. In more formal labor settings, the location of care work within residential institutions, health facilities, or domestic homes as well as inequalities between those who can afford to pay for care and those who must sell their caring labour often minimizes acknowledgment.<sup>36</sup> In China the conceptualization of care as part of the 'inside' work similarly undervalues the contributions carers make to the long-term reproduction of lives and livelihoods in China. In the 2000s, this caring work in the Chinese countryside predominantly fell to the elderly and female proportions of the population, vulnerable segments of the population who often did this work without any direct form of remuneration; a situation that often contributed to undermining the formal recognition for this work.

Although rural elderly care and elderly carers' work within Sweeping Cliff occurred outside of the bright lights and bustling sphere of the nearby urban environment, elderly people in Sweeping

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<sup>36</sup> Drotbohm and Alber, "Introduction."

Cliff creatively sought ways to make their labor contributions visible, legible, and recognized. Furthermore, when they received recognition for their ‘inside’ work in providing food, caring for children, or taking care of elderly kin, they wanted to share this appreciation with others through everyday conversation, material evidence, and even grand celebrations.

The recognition could take on very mundane material forms, such as the fulfilment of requests for domestic comforts or household luxuries from those earning incomes to purchase washing machines, electric blankets, or even heating installations.<sup>37</sup> These forms of care, attention, and intimacy form part of an emotional and material expression of affection that the older generation, in particular, often avoid verbalizing.<sup>38</sup> Instead, physical labour, material goods, and considerate actions become paramount in fostering and maintaining relationships.<sup>39</sup> The following three examples trace some of the ways senior villagers in Sweeping Cliff gain recognition for their ‘inside’ work in agricultural and household domains, as well as the work they do in creating and sustaining the wellbeing of their children and grandchildren.

Le, a woman with two sons in their mid-twenties, admired her best friend’s situation of inter-generational work distribution. She pointed out that this friend, Sheng, also had to shoulder the agricultural work, but had her mother-in-law doing the housework and three daughters to subsidize the household income. Le dismissed the possibility that bringing in daughters-in-law would lighten her workload of tilling the family’s land and doing all the household chores. Le claimed that young women now exclusively work outside the home and feel their responsibilities to the household are met through financial contributions rather than sharing the housework.

On one occasion, Le gave me a tour of one of the courtyards she and her husband had built. Swelling with pride at the recently constructed buildings, Le drew special attention to the underfloor heating (*dinuan*) that had been installed beneath the glossy white tiles of the main building where she spends much of her time. Despite the high cost of this coal-fuelled installation at 5200 RMB of the total house construction cost of 64,000 RMB, her husband and eldest son had insisted on this modern convenience. Although some villagers were now installing central heating (*nu-anqi*) in their houses, this novelty of underfloor heating was unique in Sweeping Cliff homes at the time.

<sup>37</sup> Wu Xiujie, “Men Purchase, Women Use: Coping with Domestic Electrical Appliances in Rural China,” *East Asian Science, Technology and Society: an International Journal* 2 (2008): 211-234.

<sup>38</sup> Yan Yunxiang, *Private Life under Socialism*.

<sup>39</sup> Andrew Kipnis, *Producing Guanxi: Sentiment, Self, and Subculture in a North China Village* (Durham: Duke University Press, 1997).

When enquiring why her husband and son wanted to add this new system when they already have the heated bed-platform<sup>40</sup> in both living rooms, she exclaimed with a boisterous air as she threw up her arms: ‘I’m growing old! [I] want heat! Sometimes it’s insufferably hot, but it’s beneficial for my body!’ Le continued to explain that despite being only one person, she tills 20 *mu* (1.334 hectares) of land by herself, prepares the food, and takes care of both her sons’ courtyards while the men go to work. Le insisted that she was a hard worker and thus her husband and sons insisted on taking care of her. Her sons, in particular, were thereby being ‘virtuous’ (*daode*) and ‘filial’ (*xiao*) towards her. In summarizing their attentive care, she told me that the men in her family took her to city to buy whatever she wanted for the house saying that “If [I] want something, they bring it!”

The article now turns to Le’s neighbor and friend, Sheng, who has adult daughters, rather than sons. On a late summer evening, Sheng’s family were eating bowls of noodles and picking at the dishes on the low living room table as the evening news blared in the background. Erdan, the family’s second daughter, and her husband had come to visit from the city where they worked as service personnel in a hotel. As was usually the case when one of the daughters, and particularly one of their husbands, came to visit, a variety of dishes were served, such as sliced spam, scrambled eggs with tomatoes, boiled string beans, fried aubergine, or salted vegetables.

On this occasion the common practice of sharing dishes as a way of expressing intimacy between diners was in full swing. As Erdan was heaping meat slices on her husband’s bowl of noodles, Sheng was pouring the rest of the string beans into her daughter’s bowl. When Erdan realized what her mother was doing, she began fending off the bowl of greens with her chopsticks, arguing: ‘Ma, you should finish up the beans. You’re supposed to eat more vegetables. Doctor’s orders!’ Erdan took the bowl out of her mother’s hands and emptied the remaining beans on top of her mother’s noodles.

When asked why the doctor wanted Sheng to eat more vegetables, Erdan raised her eyebrows and tightened her lips in preparation for the argument that she knew was about to ensue. In a curt tone meant for her mother’s ears she explained: ‘My mother’s got high blood pressure, the doctor says

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40 The *kang* is a raised bed platform made of brick that is attached to the stove in Northern Chinese homes. The heat generated by the stove travels through airways in the *kang* before being released through a chimney vent that protrudes from the roof. The *kang* therefore acts as the main source of heat in the home. For detailed information about this technological device, see Mareile Flitsch, “Knowledge, Embodiment, Skill and Risk: Anthropological Perspectives on Women’s Everyday Technologies in Rural Northern China,” *East Asian Science, Technology and Society: an International Journal* 2 (2008): 265-288.; Mareile Flitsch, *Der Kang: Eine Studie zur materiellen Alltagskultur bäuerlicher Gehöfte in der Manjurei* (Wiesbaden: Harrassowitz, 2004).

she eats too many noodles and she should eat lots of vegetables, but she won't eat enough of them.' With the air of an often rehearsed defence her mother snapped in irritation: 'Well, vegetables are expensive.' Now Erdan waved her chopsticks and raised her voice in defiant dismissal: 'Expensive?! What do you mean expensive?! You grow the vegetables yourself, there is no cost!' Sheng sighed in exasperation and pulled out her final retort: "No cost?! No cost?! Didn't I work hard in the fields for these vegetables?!" Her daughter conceded the point, thereby acknowledging her mother's hard work in the fields and at the stove in growing, preparing, and feeding her family.

Beyond these domestic exchanges to gain recognition for their labor, some senior kin took it into their own hands to organize a grand celebration of themselves as the apex of a wide network of kin, of which they are the creators. Gathering kin, friends, and neighbours in the celebrants' courtyard for a banquet frequently marks sixtieth birthdays, which completes a full round of five zodiac cycles of twelve years. After this year, people are generally considered to have led a full adult life, and passing away becomes an event to be mourned with great sadness rather than as a tragedy. For the sake of the audience assembled at these birthday celebrations, as well as for memories in posterity of this future ancestor, photograph sessions generally occur to document who assembled.

At an elderly matriarch's sixtieth birthday celebration, I acted as the photographer for her various kin networks. She gathered relatives together in a wide array of constellations that followed logics of kinship and descent, including exclusive photos with her sons, with her sons and their wives, with her grandchildren, and a particularly impressive group shot of all thirty-four relatives in attendance. The photographs reveal a keen awareness and documentary intent for various kin by gender, age, generation, and proximity of relatedness to the celebrant. Asked about the plans for these photographs, attendees referred to the already impressive wall of family photographs this great-grandmother had amassed in her home. These photographs, too, would soon go up for all to marvel at the many descendants she had created.

In these three very different ways, these three senior residents of Sweeping Cliff received recognition for their labor contributions in the fields and homes, through material installations, verbal confirmation, and visual documentation. All three of these women depended on other kin, particularly children but also husbands, to generate monetary income for household expenses such as coal and electricity. However, the work they did in creating, nourishing, and caring for their families was recognized in diverse ways beyond monetary means as part of establishing the value and dignity of their work.

# Longevity as extending labor in China

Longevity is generally conceived of as a sign of social health and the long life of an individual person is generally considered a cause for celebration. Nonetheless, demographic aging at the social level is seen as cause for concern; as a threat to economic growth due to the weight and cost of growing elderly care needs. This article has shed light on an often neglected domain of the elderly population across the globe, the role of elderly workers as welfare providers, and not just dependents. In the Chinese village of Sweeping Cliff, many senior citizens were unable or unwilling to retire from subsistence labor and care work, often turning this into a virtue and demanding recognition for their efforts.

As outlined earlier, China forms a specific case due to the rapid speed and demographic scale at which longevity and aging coincided, particularly for a developing economy. While the post-Maoist period saw the roll-back of certain livelihood guarantees by local communities since the 1980s, other forms of state-sponsored institutional welfare provisioning were only just getting started in the 2000s. However, these logics of financial support often followed family logics of absent descendants as a support network, and family-based care was frequently considered an ideal, especially for the elderly, but also sometimes by the elderly, as they supported each other and their offspring through their care.

This article brought together kinship, care, and labor concerns in China's rapidly aging society, to examine how senior members of a rural community contribute to larger social organization. To dissolve Eurocentric tropes of public and private, as well as modern and traditional, the article engaged with local understandings of affective, intimate, and reproductive labor as care located in the 'inside' domain. As the parameters of what 'inside' spheres entails shift, senior residents created new ways to make their labor acknowledged, recognized, and valued by kin and the wider community through everyday interactions and festive celebrations. Furthermore, this revealed how mutual obligations between kin to cooperate in maintaining livelihoods stretches beyond remunerated labor to other forms of support that may take monetary, material, emotional, and even ethical forms. As global aging gains pace, the situation in Sweeping Cliff raises a concern for elderly care as an issue that must be appreciated within the facets of multiple modernities, in which seniors do not unequivocally represent a caring burden, but must also be recognized for their many caring contributions.

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Marijke de Pauw  
**Global Population Aging  
from a Human Rights Perspective:  
The Need for a UN Convention  
on the Rights of Older Persons**

**Abstract:** Global population aging constitutes one of the greatest challenges societies face today. Projected demographic shifts will have far-reaching consequences on social security and health care systems around the globe. Not surprisingly, aging has therefore long been approached from a development perspective. In recent years, however, an international human rights approach to aging has emerged as well. It is increasingly recognized that the well-being and inclusion of older persons in society depends on the promotion and protection of their fundamental rights. While great efforts have been made towards a new UN Convention on the Rights of Older Persons, many states remain critical when it comes to the adoption of category-specific rights for older adults, especially in the form of legally binding instruments. This contribution thus aims to clarify why a rights-based approach to aging remains crucial and why it is important to clarify how fundamental rights apply to older persons in an international human rights treaty.

**Key words:** Population aging, human rights law, fundamental rights of older persons, age discrimination, ageism

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# Introduction

Population aging constitutes one of the most significant demographic transformations of the twenty-first century. For the first time in history, humankind will reach a point at which there are fewer children than older persons in the world.<sup>1</sup> Although increased longevity is in itself a positive development, population aging as such also constitutes a great challenge. The rapid growth of the elderly population is considered to pose a significant risk to global prosperity due to its potential effects on society politically, socially and economically.<sup>2</sup> Global population aging has therefore long been considered an important issue from an international development perspective. Going back to as early as the 1954 World Population Conference in Rome,<sup>3</sup> the economic and social consequences of population aging have been at the forefront of the international agenda.<sup>4</sup>

Despite the importance of such a development perspective, population aging also poses a significant human rights issue, as projections of demographic changes cause significant concern about the enjoyment of human rights in old age. Indeed, older men and women have been identified as a group that faces many human rights violations.<sup>5</sup> There is no longer any doubt as regards the vulnerable position older persons often find themselves in, created not necessarily by old age itself, but by the barriers and obstacles resulting from societal age limits, prejudice and discrimination. Today, a comprehensive human rights text on the fundamental rights of older adults does not exist at UN level as it does for other groups.<sup>6</sup> Nevertheless, an international human rights approach to aging has gradually developed over the last few decades through the adoption of UN principles and declarations,<sup>7</sup> plans of action,<sup>8</sup> treaty body recommendations,<sup>9</sup> and other soft law instruments. It gained particular momentum in 2010, when the UN Open-Ended Working Group

1 See United Nations, Department of Economic and Social Affairs (UNDESA), Population Division, *World Population Ageing 2017: Highlights*, UN Doc. ST/ESA/SER.A/397 (New York: United Nations, 2017) [http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017\\_Highlights.pdf](http://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Highlights.pdf).

2 Klaus Schwab, "Preface," in *Global Population Ageing: Peril or Promise?* ed. John R. Beard et al., (Geneva: World Economic Forum, 2011), 2.

3 UNDESA, *Proceedings of the World Population Conference in Rome, 31 August – 10 September 1954, Summary Report*, UN Doc. E/CONF.13/412 (New York: United Nations, 1955), 1-3.

4 *Ibid.*, 90-92. Additional UN meetings have since then been held approximately every ten years addressing population aging, increasingly as part of the international development agenda, rather than just a demographic issue.

5 United Nations Economic and Social Council (ECOSOC), *Report of the United Nations High Commissioner for Human Rights*, UN Doc. E/2012/51 (New York: United Nations, 2012), paras. 2-4.

6 Such as the UN Convention on the Elimination of Discrimination against Women; the UN Convention on the Rights of the Child (CRC) and, more recently, the UN Convention on the Rights of Persons with Disabilities (CRPD).

7 Such as the 1991 UN Principles on Older Persons and the 1992 UN Proclamation on Ageing.

8 Such as the 1982 Vienna International Plan of Action on Ageing and the 2002 Madrid International Plan of Action on Ageing.

9 For a recent overview, see UN Open-Ended Working Group on Ageing (UN OEWGA), *Compilation of Existing International Legal Instruments, Documents and Programmes that Directly or Indirectly Address the Situation of older Persons, Including those of Conferences, Summits, Meetings or International or Regional Seminars Convened by the United Nations and Intergovernmental and Non-Governmental Organizations*, UN Doc. AC/AC.278/2013/CRP.1 (New York: United Nations, 2013).

on Ageing was established with the aim of considering the existing international framework of the human rights of older adults and identifying possible gaps and how best to address them, including by considering the feasibility of further instruments and measures.<sup>10</sup> Civil society, UN experts and an increasing number of States are convinced that the best way to improve the human rights situation of the older population is the adoption of a new UN Convention on the Rights of Older Persons. However, no international consensus exists yet regarding the need for such a binding international treaty, with European States in particular emphasizing the existence of numerous human rights instruments already applicable to this specific group.

It is of course true that the core UN human rights treaties of a more general scope *ratione personae* apply to older persons as well.<sup>11</sup> In theory, older adults can thus make a claim to their fundamental rights in the same way as everyone else. I argue, however, that in practice there are specific obstacles faced in old age that create particular challenges for this group and makes them more susceptible to human rights violations. At the same time, broad and vague formulations of human rights leave much room for interpretation and thus create legal uncertainty about how these apply to older persons specifically and what the exact scope is of State obligations in that regard.

In the following sections, I will first provide a short overview of the emergence of the human rights of older persons on the international agenda, from the adoption of the Madrid International Plan of Action on Ageing (MIPAA) in 2002 to the work of the UN Open-Ended Working Group on Ageing towards a new UN Convention. Thereafter, the paper aims to clarify what sets older adults apart as a group and consequently substantiates the need for a comprehensive rights-based approach to aging. I will first elaborate on the underlying phenomenon of ageism that exposes older persons to persistent and deep-rooted bias and stereotypes. Although we are not always conscious of our feelings and behavior towards older adults, research shows that ageism affects the societal status of this particular group to a great extent. Secondly, I will clarify how ageism and ageist bias in practice often result in discriminatory behavior and treatment, and how this permeates all aspects of older persons' lives. Ageism and age discrimination are among the root causes of many other human rights violations suffered in old age,<sup>12</sup> such as – but not limited to

<sup>10</sup> United Nations General Assembly (UNGA), Resolution 65/182, Follow-up to the Second World Assembly on Ageing, 21 December 2010, UN Doc. A/RES/65/182.

<sup>11</sup> Such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

<sup>12</sup> UNDESA, *Report of the Expert Group Meeting “Rights of Older Persons”* (New York: United Nations, 2009), 4-5.

– elder abuse, limited access to employment and social security, inadequate health care and long-term care, lack of autonomy, legal capacity and access to justice; these will be discussed further below. Finally, a comparative assessment of selected human rights issues and international binding human rights provisions will help demonstrate how the current UN human rights framework falls short when it comes to the human rights of older adults.

## The Ongoing Debate on the Need for a New UN Convention

One of the most important international instruments to address the well-being of older persons is the Madrid International Plan of Action on Ageing (MIPAA), adopted at the 2002 Second World Assembly. Although it is a policy document drafted from an international development perspective, the MIPAA constituted a turning point as to how the international community addressed the key challenges for older adults. It was the first time that States came to a consensus on linking the population aging debate to existing human rights frameworks.<sup>13</sup>

Five years later, the Brasilia Declaration was adopted during the Second Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean. In this Declaration, States explicitly expressed their support for the drafting of a UN Convention on the Rights of Older Persons.<sup>14</sup> Additional regional meetings were held on this topic in the following years<sup>15</sup> and Latin American States have since been a driving force in the negotiations at UN level. By this time, the UN Convention on the Rights of Persons with Disabilities (CRPD) had also been adopted, which set an example for States striving for better protection of older persons' rights.<sup>16</sup> Gradually, the debate on the need for a new treaty also emerged within the UN bodies, resulting in a number of expert meetings and reports on the topic. These concluded that a normative gap exists within the

<sup>13</sup> United Nations, Political Declaration and Madrid International Plan of Action on Ageing (MIPAA), *Second World Assembly on Ageing, Madrid, Spain, 8-12 April 2002*, Foreword by Kofi A. Anan (New York: United Nations, 2002).

<sup>14</sup> Economic Commission for Latin-America and the Caribbean (ECLAC), Brasilia Declaration, Adopted at the Second Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean: towards a Society for all Ages and Rights-Based Social Protection, 6 December 2007, paras. 25-26, [http://www.un.org/esa/socdev/ageing/documents/regional\\_review/Declaracion\\_Brasilia.pdf](http://www.un.org/esa/socdev/ageing/documents/regional_review/Declaracion_Brasilia.pdf)

<sup>15</sup> ECLAC, Follow-up Meeting on the December 2007 Brasilia Declaration, 16-17 September 2008, Rio de Janeiro, Brazil; ECLAC, Second Follow-Up Meeting of the Brasilia Declaration Towards a Convention on the Rights of Older Persons, 21-22 May 2009, Buenos Aires, Argentina; ECLAC, Third Follow-Up Meeting to the Brasilia Declaration of 2007 calling for a UN Convention or a Special Rapporteur on the Rights of Older Persons, 5-6 October 2009, Santiago, Chile.

<sup>16</sup> Jennifer Dabbs Sciubba, "Explaining Campaign Timing and Support for a UN Convention on the Rights of Older People," *The International Journal of Human Rights* 18, no. 4/5 (2014): 471.



international human rights law framework, resulting in the ‘invisibility’ of older persons, and increasingly expressed their support for a new Convention.<sup>17</sup>

The calls by States, UN experts and civil society to consider ways to improve the human rights situation of older persons ultimately led to the creation of the UN Open-Ended Working Group on Ageing (OEWGA) in 2010.<sup>18</sup> Eight annual working sessions have taken place so far, each focusing on specific themes regarding the rights of older adults, in addition to the identification of gaps and how to move forward at the international level. From the first session, however, the work of the OEWGA has been characterized by the division between those in favor of a new binding treaty,<sup>19</sup> and those who wish to focus on the implementation of existing norms and the integration of older persons’ rights in human rights monitoring mechanisms already in place, such as the Universal Periodic Review and Periodic State Reports.<sup>20</sup>

By its third session in 2012, the participation of African and Asian States in the OEWGA, as well as civil society organizations, increased significantly.<sup>21</sup> Growing participation of developing countries was particularly important considering the much faster rate of population aging in those regions. Despite the continued disagreement among participants, the UN General Assembly expanded the Working Group’s mandate on 20 December 2012<sup>22</sup> to start considering proposals for a new international legal instrument on the rights of older persons.<sup>23</sup> Decided by 54 votes to 5, and with 118 abstentions, it must be noted that this hardly reflects an international consensus on

<sup>17</sup> See, for instance, UNDESA, *Report of the Expert Group Meeting “Rights of Older Persons”*; HRC Advisory Committee, *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*, UN Doc. A/HRC/AC/4/CRP.1 (Geneva: United Nations, 2010).

<sup>18</sup> UNGA, Resolution 65/182.

<sup>19</sup> See statements by Argentina, Chile, and the Republic of Korea, available at:

<http://social.un.org/ageing-working-group/govstatement.shtml>. This position was backed up by participating NGOs, such as HelpAge International, who argued that a Convention would clarify the rights of older persons for the rights-holders and duty-bearers. UN OEWGA, *Report on the First Working Session, 18-21 April 2011*, UN Doc. A/AC.278/2011/4, (New York: United Nations, 2010), 9. Also see the joint statement submitted by American Association of Retired Persons (AARP), Global Action on Aging, HelpAge International, International Association of Gerontology and Geriatrics, International Federation on Ageing and the International Network for the Prevention of Elder Abuse, available at:

<http://social.un.org/ageing-working-group/csostatement.shtml>

<sup>20</sup> Switzerland, for instance, explicitly opposed such a new instrument, stating that no normative gap exists, but rather an implementation, monitoring and information gap, and efforts should therefore be focused on the implementation of existing instruments, such as the MIPAA. See statement by Switzerland, available at:

<http://social.un.org/ageing-working-group/govstatement.shtml> Other delegations stressed the diversity of aging populations and the different economic, social, historical and cultural backgrounds of States. See statement by China, available at: <http://social.un.org/ageing-working-group/govstatement.shtml>

<sup>21</sup> UN OEWGA, *Report on the Third Working Session, 21-24 August 2012*, UN Doc. A/AC.278/2012/1 (New York: United Nations, 2012), 6.

<sup>22</sup> UNGA, Resolution 67/139, *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons*, 20 December 2012, UN Doc. A/RES/67/139.

<sup>23</sup> Ibid.

the need to draft a new convention.<sup>24</sup> As a result, by the end of the OEWGA's most recent session in 2017, still no concrete steps were undertaken towards the drafting of a UN Convention on the Rights of Older Persons. Contrary to important regional standard-setting efforts, it thus seems that the work of the OEWGA is stuck at a standstill.

Despite this slow negotiation process, it should also be noted that in the meantime, States have come to an agreement on the need for a new human rights mandate on the rights of older adults. The Human Rights Council thus decided to appoint a UN Independent Expert on the enjoyment of all human rights by older persons.<sup>25</sup> In May 2014, Ms. Rosa Kornfeld-Matte took up the new mandate and has since completed a series of country visits and detailed reports on the human rights of older persons.<sup>26</sup>

## The Persistence of Ageism and the Complexity of Age Discrimination

If it is to be argued that specific human rights for older adults are necessary, it must be determined first in which way older persons differ from other social groups to the extent that such a categorization of rights can be justified. This is where the persistence of ageism in societies worldwide plays a crucial role; how ageist bias that largely remains invisible and thus unaddressed negatively affects older persons' lives. Palmore, for instance found there to be an "epidemic of ageism – a spreading negative attitude toward older people, which basically consists in humiliating them." The term "ageism" itself – as first coined by Robert Butler in 1969 – refers to "the subjective experience implied in the popular notion of the generation gap. Prejudice of the middle aged against the old [...]. Ageism reflects a deep-seated uneasiness on the part of the young and middle-aged – a personal revulsion to and distaste for growing old, disease, disability; and fear of powerlessness, 'uselessness,' and death."<sup>27</sup> Butler later specified that ageism consists of "three distinguishable, yet interconnected" components:

1. Prejudicial attitudes towards older people, old age and the aging process, which includes attitudes held by older adults themselves;
2. Discriminatory practices against older people; and

<sup>24</sup> UNGA, 60th Plenary Meeting, Thursday, 20 December 2012, New York, UN Doc. A/67/PV.60, 3-4.

<sup>25</sup> Human Rights Council (HRC), Resolution 24/20, The Human Rights of Older Persons, 27 September 2013, UN Doc. A/HRC/RES/24/20.

<sup>26</sup> These are available at <http://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/Reports.aspx>.

<sup>27</sup> Robert Neil Butler, "Ageism: Another Form of Bigotry," *The Gerontologist* 9, no. 4 (1969): 243.

3. Institutional practices and policies that perpetuate stereotypes about older adults, reduce their opportunity for life satisfaction and undermine their personal dignity.<sup>28</sup>

According to Butler, ageism thus includes both negative perceptions or feelings about the aged, and our actions towards them on the basis of those negative feelings. Another specific characteristic of ageism which distinguishes it from other forms of bias such as racism and sexism, is that ageism is in many cases accepted by society and social sanctions against it are close to non-existent.<sup>29</sup> Moreover, it has been demonstrated that ageism can be unintentional, without any awareness or intention to harm.<sup>30</sup> Needless to say, this lack of visibility and understanding makes it all the more difficult to tackle ageism and significantly increases the importance of awareness-raising efforts among all stakeholders.

Ageism itself is based on negative stereotypes about older adults, such as “older persons are bad drivers”, “older persons are not as productive in the work force” or “older persons don’t like change”.<sup>31</sup> Without going into much detail here, it should be noted that different causes have been identified as lying at the root of those negative stereotypes. According to Modernization Theory, these have developed over time as historically, older persons were highly respected in many societies. Their position thus changed with the modernization of those societies.<sup>32</sup> As regards employment and social security specifically, an MT approach considers that an increasingly aging population has led to the institutionalization of retirement in various regions. No longer being part of the active work force, older adults are thus perceived to have lost their original social status and are instead looked upon in a negative way.<sup>33</sup> In addition, due to the serious economic consequences of population aging, weighing on social security systems as the old-age support ratios decline, younger persons have become more aware of the burden of supporting older persons when they retire.<sup>34</sup> Fineman thus refers to the creation of “a dichotomy between the interests of the young and the interests of the old, causing the image of the elderly to devolve from ‘deserving’ to greedy and destructive.”<sup>35</sup>

28 Robert Neil Butler, “Ageism: A Foreword,” *Journal of Social Issues* 36, no. 2 (1980): 8.

29 Becca Levy and Mahzarin Banaji, “Implicit Ageism,” in *Ageism: Stereotyping and Prejudice against Older Persons*, ed. Todd Nelson (Massachusetts: MIT Press, 2004): 50.

30 International Longevity Centre, *Ageism in America* (New York: International Longevity Centre, 2006), 21.

31 Todd Nelson, “Ageism: The Strange Case of Prejudice Against the Older You,” in *Disability and Aging Discrimination: Perspectives in Law and Psychology*, ed. Richard L. Wiener and Steven L. Willborn, (New York: Springer, 2011), 38.

32 Donald Cowgill and Lowell Holmes, *Ageing and Modernization* (New York: Appleton-Century-Crofts, 1972).

33 Amy Cuddy and Susan Fiske, “Doddering but Dear: Process, Content and Function in Stereotyping of Older Persons,” in *Ageism: Stereotyping and Prejudice against Older Persons*, ed. Todd Nelson (Massachusetts: MIT Press, 2004), 13.

34 Jody Wilkinson and Kenneth Ferraro, “Thirty Years of Ageism Research,” in *Ageism: Stereotyping and Prejudice against Older Persons*, ed. Todd Nelson (Massachusetts: MIT Press, 2004), 364.

35 Martha Albertson Fineman, “Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility,” *Elder Law Journal* 20, no. 1 (2012): 75-79.

Another possible explanation, as suggested by Terror Management Theory (TMT)<sup>36</sup>, is that “by blaming older persons, stereotyping them, and treating them with pity, anger, irritation or patronizing speech, people are able to trick themselves into believing that they will not eventually die.”<sup>37</sup> In other words, an innate fear of aging and death affects our perception of older persons, as they are a constant reminder of our own fate and mortality. Greenberg, Schimel and Martens refer to the option of physically and/or psychologically distancing ourselves from older adults. The first may then result in avoiding visiting our elderly relatives or even attempting to keep older people out of the workplace, whereas the latter may consist in viewing them as essentially different from ourselves.<sup>38</sup>

From a legal perspective, it is important to emphasize the role that ageism and ageist stereotypes can play in cases of differential treatment, as the latter may result in age discrimination. Taking into account Butler’s definition of ageism, discrimination against older adults is thus likely to stem from negative feelings towards them, despite a lack of awareness or intention to harm. This is what makes it particularly challenging to identify and tackle age discrimination against older persons. Moreover, age discrimination is particularly complex as, contrary to other discrimination grounds, our age changes throughout our lifetimes.<sup>39</sup> There is thus no simple way of determining who is old and who is not, which considerably complicates determining in which cases a difference of treatment actually constitutes a case of age discrimination. Finally, age differentiations continue to be very common in social, health care and employment policies. We are expected to attend school in the early stages of our lives, followed by a period of employment, and after a certain age it is expected we leave the labor force again. Retirement schemes, for instance, often do not consider the older persons’ specific professional abilities or their own wish to remain employed after reaching the legal retirement age. The use of age limits to organize society thus promotes the view that treating older adults differently is not that problematic.<sup>40</sup> Finally, in many cases age-based differentiations aim to strike a balance between the interests of different generations.<sup>41</sup> In this sense, the interests of older persons are weighed against the interests of younger generations. In combination with an innate ageist bias, this can easily lead to discriminatory health insurance regulations and practices, for instance, thus limiting older persons’ access to health care.

36 Jeff Greenberg, Jeff Schimel and Andy Martens, “Ageism: Denying the Face of the Future,” in *Ageism: Stereotyping and Prejudice against Older Persons*, ed. Todd Nelson (Massachusetts: MIT Press, 2004), 30-32.

37 Nelson, “Ageism: The Strange Case of Prejudice”, 40. Also see Greenberg, Schimel and Martens, “Ageism: Denying the Face of the Future,” 29; Andy Martens, Jamie Goldenberg and Jeff Greenberg, “A Terror Management Perspective on Ageism,” *Journal of Social Issues* 61, no. 2 (2005): 223.

38 Greenberg, Schimel and Martens, “Ageism: Denying the Face of the Future,” 37-38.

39 *Ibid.*, 60.

40 *Ibid.*, 59.

41 *Ibid.*, 70, 72.

# The Human Rights Situation of Older Persons and the UN Human Rights Framework

Despite widespread ageist stereotypes and ageist bias, there has overall been little regard for the specific needs of older persons in international human rights law. Very few explicit references exist as regards aging, older adults or age discrimination in the core UN human rights treaties. This is not surprising, as at the time most treaties were adopted, there was little awareness or available data on the human rights situation of older persons. Today, however, it has become clear that older persons face a wide variety of obstacles that are – at least in part – rooted in ageist perceptions of older persons. The following paragraphs therefore provide an assessment of the human rights situation of persons in old age – based on a selection of a few specific issues – and how these are dealt with in international human rights law.

## Age Discrimination

It should first be recalled that as a legal concept, discrimination can take place in the form of direct or indirect discrimination. Direct discrimination occurs when a person is treated less favorably than another is, has been or would be treated in a comparable situation.<sup>42</sup> This is the case, for example, when a person is refused employment, education, or health insurance on the basis of his or her age. Indirect discrimination occurs when an apparently neutral provision puts a person or group of persons at a particular disadvantage compared with other persons.<sup>43</sup> This is the case, for instance, when only women up to 50 years old are included in breast cancer prevention campaigns and called upon to go for breast cancer screenings. In practice, age discrimination permeates almost all aspects of older persons' lives, including in employment, education and training; health care services; social security; insurance; financial services; housing; the media; access to public spaces, transport and modern technologies; measurement in statistics and monitoring information; participation in political life; and taxation.<sup>44</sup> In fact, age discrimination itself is both one of the most common human rights violations faced by older persons,<sup>45</sup> as well as one of the root causes of many other human rights infringements affecting the elderly population<sup>46</sup>, as will be discussed throughout the following paragraphs.

42 Article 2(a) European Union Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ.L. 303, 22 December 2000 ('EU Employment Equality Directive') 16–22.

43 Article 2(b) EU Employment Equality Directive.

44 European Older People's Platform, *Age Barriers: Older People's Experience of Discrimination in Access to Goods, Facilities and Services* (Brussels: European Older People's Platform, 2004).

45 See UNDESA, Report of the Expert Group Meeting "Rights of Older Persons", 4-5; HRC Advisory Committee, *Working Paper Prepared by Ms. Chinsung Chung*, 4-5; UNGA, *Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General* (2011), UN Doc. A/66/173 (New York: United Nations, 2011), 5; HelpAge, *International, International Human Rights Law and Older People: Gaps, Fragments and Loopholes* (London: HelpAge International, 2012), 8-9.

46 UNDESA, Report of the Expert Group Meeting "Rights of Older Persons", 4-5; HRC Advisory Committee, *Working Paper Prepared by Ms. Chinsung Chung*, 5.

When looking at the international human rights framework, however, it must be concluded that there exists a serious protection gap when it comes to age discrimination. Other than the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, no explicit prohibition of age discrimination exists in the core UN human rights treaties. The Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) include a non-exhaustive list of discrimination grounds, referring to ‘other status’,<sup>47</sup> which can of course be interpreted as encompassing discrimination on the basis of age. In practice, however, States parties are generally granted considerable leeway as regards age differentiations, especially in employment. In the case of *Solís*, for instance,<sup>48</sup> the Human Rights Committee (HRC) considered ‘age’ to be an objective distinguishing criterion for redundancies of civil servants, without even assessing whether there were reasonable and objective grounds to justify an age differentiation.<sup>49</sup> Even the Committee on Economic, Social and Cultural Rights (CESCR) recognized that not all cases of age differentiations amount to discrimination when it comes to employment and retirement,<sup>50</sup> and it remains to be seen which position it will take when addressing the issue as part of its individual communications procedures. The lack of visibility of ageism and age discrimination within the UN human rights framework thus remains problematic, as the effective protection of older adults’ right to equality depends on a broad interpretation of non-discrimination clauses.

### **Elder Abuse**

Although elder abuse has a detrimental effect on older persons’ lives, it did not develop into an issue of public concern until the last quarter of the 20th century.<sup>51</sup> According to the World Health Organization (WHO) elder abuse is ‘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.’<sup>52</sup> Elder abuse is also intrinsically linked to ageist behavior. Social

<sup>47</sup> See Article 2 Universal Declaration of Human Rights (UDHR); Articles 2(1) and 26 International Covenant on Civil and Political Rights (ICCPR); Article 2 (2) International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>48</sup> HRC (Views), *Rubén Santiago Hinojosa Solís v. Peru*, 27 March 2006, Communication No. 1016/2001. The case concerned the redundancy of civil servants based on their time in service and their age.

<sup>49</sup> The Committee simply stated that ‘the age limit used in the present case for continued post occupancy was an objective distinguishing criterion and that its implementation in the context of a general plan for the restructuring of the civil service was not unreasonable. Under the circumstances, the Committee considers that the author has not been the subject of a violation of article 25 (c).’ HRC (Views), *Rubén Santiago Hinojosa Solís v. Peru*, para. 6.4.

<sup>50</sup> CESCR, *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, UN Doc. E/1996/22, para. 12.

<sup>51</sup> WHO, *World Report on Violence and Health* (Geneva: United Nations, 2002).

<sup>52</sup> It includes physical abuse (including physical coercion, or physical or drug induced restraint;); psychological or emotional abuse; financial or material abuse; sexual abuse; and neglect. *Ibid.*

structure and negative attitudes towards aging and older persons contribute to their marginalization, which encourages and enables the abuse to take place.<sup>53</sup> Older adults are also often regarded to be frail, weak and dependent, making them appear less worthy of care.<sup>54</sup> Today, however, elder abuse remains one of the most neglected forms of abuse; it is one of the least investigated types of violence in national surveys, and one of the least addressed in national action plans.<sup>55</sup> A particular problem is the lack of reliable data due to underreporting, and a lack of studies in less developed regions and rural areas.<sup>56</sup> There is an even greater lack of data regarding elder abuse in institutional settings. Nevertheless, mistreatment has been identified in nursing homes, residential care, hospitals and day care facilities in almost every country where such institutions exist.<sup>57</sup> A Special Eurobarometer Report, for example, showed that over half of Europeans with experience in the long-term care system feel that poor treatment, neglect and even abuse of dependent older persons are widespread in their country.<sup>58</sup>

Although the core UN human rights treaties include the right to life;<sup>59</sup> the right to liberty and security;<sup>60</sup> and the prohibition of torture and inhuman or degrading treatment,<sup>61</sup> there is a clear normative gap as regards the prohibition of elder abuse specifically, including domestic violence. This is not entirely surprising, as not even gender-based violence was adequately addressed at the international level.<sup>62</sup> It is also not clear from the human rights provisions in a general scope whether these could apply in cases other than physical abuse, such as psychological and financial abuse.<sup>63</sup> The CRPD was the first international treaty to address the issue of abuse of a particularly vulnerable group in a comprehensive manner. It specifies that States Parties have the obligation to protect persons with disabilities from all forms of exploitation, violence and abuse, both

53 Jonathan Herring, “Elder Abuse: A Human Rights Agenda for the Future,” in *Beyond Elder Law*, ed. Israel Doron and Ann Soden (Berlin, Heidelberg: Springer, 2012), 185.

54 *Ibid.*, 131-132.

55 WHO, *Global Status Report on Violence Prevention* (Luxemburg: United Nations, 2014), 46, 78.

56 Commission for Social Development Acting as the Preparatory Committee for the Second World Assembly on Ageing, *Abuse of Older Persons: Recognizing and Responding to Abuse of Older Persons in a Global Context*, Report of the Secretary-General, UN Doc. E/CN.5/2002/PC/2 (New York: United Nations, 2002), 3.

57 WHO, *World Report on Violence and Health*, 133.

58 European Commission, *Special Eurobarometer: “Health and Long-Term Care in the European Union”* (Brussels: European Commission, 2007), 108.

59 See Article 3 UDHR; Article 6 ICCPR.

60 See Article 3 UDHR, Article 9 ICCPR.

61 See Article 5 UDHR; Article 7 ICCPR; Articles 2 and 16 CAT; Article 15 CRPD.

62 No relevant provisions were included in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to tackle gender-based violence and abuse. It was the CEDAW Committee that eventually interpreted Article 1 of the Convention (non-discrimination) as including a prohibition of violence against women. See CEDAW, *General Recommendation No. 19: Violence against Women* (Geneva: CEDAW Committee, 1992), para. 6.

63 See Herring, “Elder Abuse,” 180.



within and outside the home.<sup>64</sup> It is thus recognized that abuse goes beyond the State-individual relationship.<sup>65</sup> Furthermore, Article 16 CRPD specifies a wide range of measures to be taken by States to prevent and protect victims of abuse. A similar provision aimed at the older population could thus help put in place prevention and support mechanisms as regards elder abuse at the national level, as well as raise general awareness and promote data collection on the issue.

### Employment

Negative stereotypes also affect older employees in the work place to a great extent, as they are assumed to be less flexible, lack initiative, and to be unable to acquire the necessary skills and knowledge in light of new technologies.<sup>66</sup> Such stereotypes impact management and hiring decisions, as well as promotion and compensation of older workers, regardless of their skills and qualifications.<sup>67</sup> An additional barrier is that age discrimination in employment is often regarded to be an economic issue, rather than a violation of fundamental rights<sup>68</sup> and age differentiation is therefore legally permitted in many cases. It is also important to note that the number of persons working in old age varies enormously depending on the region.<sup>69</sup> In developing countries, the older population often has no choice but to continue working in old age, in order to contribute to the family income or support sick relatives.<sup>70</sup> An issue in more developed regions, on the other hand, has been that of compulsory retirement, which denies older persons the right to work after they have reached the pensionable age. Being forced to leave the work force not only leaves older adults with a considerably smaller income, but has significant psychological effects as well.<sup>71</sup>

In addition, many older persons in low- and middle-income countries are active in the informal economy, which is often characterized by long and irregular working hours for a very low wage.<sup>72</sup> Older women face particular obstacles due to the intersection of age and gender, often carrying

64 Article 16 CRPD.

65 Frédéric Mégret, “The Disabilities Convention: Rights of Persons with Disabilities or Disability Rights?” *Human Rights Quarterly* 30, no. 2 (2008): 509-510.

66 UNDESA, *Report of the Expert Group Meeting “Rights of Older Persons”*, 4.

67 Helen Dennis and Katherine Thomas, “Ageism in the Workplace”, *Generations* 31, no. 1 (2007): 86-87; HRC Advisory Committee, *Working Paper Prepared by Ms. Chinsung Chung*, 7; UNDESA, *Report of the Expert Group Meeting “Rights of Older Persons”*, 4.

68 Laurie McCan, *Age Discrimination in Employment Legislation in the United States Experience* (Washington D.C.: AARP Foundation Litigation, 2003), 11.

69 UNDESA, Population Division, *World Population Ageing 2013* (New York: United Nations, 2013), 49.

70 *Ibid.*, 60; HRC Advisory Committee, *Working Paper Prepared by Ms. Chinsung Chung*, 6; UNDESA, Population Division, *World Population Ageing 2013*, 60; HelpAge International, *Forgotten Workforce: Older People and their Right to Decent Work* (London: HelpAge International, 2010), 7.

71 Elaine Fox, “Mandatory Retirement – A Vehicle of Age Discrimination”, *Chicago-Kent Law Review* 51, no. 1 (1974): 120-121.

72 HelpAge International, *Working for Life: Making Decent Work and Pensions a Reality for Older People* (London: HelpAge International, 2009), 14, 20; HelpAge International, “*Forgotten Workforce*”, 9.

out unpaid care work and thus limiting their opportunities for paid employment.<sup>73</sup> This also affects their access to social security – particularly old-age pensions – and health insurance, as these are linked to paid, formal-sector employment.<sup>74</sup> Such limitations caused by care responsibilities also contribute to the concentration of older women in low-waged, precarious, unprotected employment, in hazardous or unhealthy conditions with high risk to their health and well-being.<sup>75</sup>

As noted above, there is no clear international prohibition of age discrimination in employment, which is particularly problematic as the use of age barriers in employment policies is often accepted. Being of a socio-economic nature, the ICESCR provides the right to work, including the opportunity to gain a living by work of choice and the right to just and favorable conditions of work.<sup>76</sup> No particular provisions are to be found in the core human rights treaties, however, as regards the particular needs of older employees in the same way they exist for migrant workers, women and persons with disabilities.<sup>77</sup> The CRPD provides some protection in the sense that it prohibits discrimination on the basis of disability in all matters regarding employment and requires that reasonable accommodation be provided to persons with disabilities in the workplace.<sup>78</sup> These obligations are of no relevance, however, for older persons without disabilities.

### **Social Security**

Sustainability of existing social security systems is another growing concern in light of the projections of population aging. Access to old-age pensions, however, is already a pressing issue at this point in time. Globally, almost half of the population older than the statutory pensionable age does not receive an old-age pension.<sup>79</sup> Substantial regional differences also exist in this area. In sub-Saharan Africa for example, only 16.9 per cent of the elderly population receives a

73 UN Special Rapporteur on Extreme Poverty and Human Rights, *Extreme Poverty and Human Rights*, UN Doc. A/68/293 (New York: United Nations, 2009), 4.

74 Magdalena Sepúlveda Carmona, *Report of the Independent Expert on the Question of Human Rights and Extreme Poverty*, UN Doc. A/HRC/14/31 (New York: United Nations, 2010), 6.

75 ILO, *World Social Protection Report 2014/15: Building Economic Recovery, Inclusive Development and Social Justice* (Geneva: ILO, 2014), xxiii.

76 Articles 6-7 ICESCR. Also see Article 23 UDHR.

77 See Article 25 International Convention on the Rights of Migrant Workers and their Families (ICRMW); Article 7(a) (i) ICESCR; Article 11 CEDAW; Article 27 CRPD. States also have an obligation under the Convention on the Elimination of Racial Discrimination (CERD) Convention to prohibit and to eliminate racial discrimination in employment. See Article 5(i) CERD.

78 Article 27 (a) and (i) CRPD.

79 *Ibid.*, 84.

retirement pension that would provide a certain level of income security during old age,<sup>80</sup> compared to 29.5 per cent of older persons in the Middle East; 36.7 per cent in North Africa; 47 per cent in Asia and the Pacific; and 56.1 per cent in America and the Caribbean.<sup>81</sup> Even when older adults do receive an old-age pension, it is not always sufficient to attain an adequate standard of living.<sup>82</sup> Income security in the form of old-age pensions is crucial as many older persons no longer have access to (well-) paid jobs, and as private savings or intra-family transfers are often insufficient to attain an adequate standard of living.<sup>83</sup> Consequently, lack of income security may further contribute to susceptibility to poverty.

Within the UN human rights framework, the right to social security is protected by the ICESCR<sup>84</sup> and was subsequently restated as regards particularly vulnerable groups, such as women, persons of different racial, national or ethnic origin, migrants, refugees and persons with disabilities.<sup>85</sup> Yet specific provisions do not exist for older persons. In addition, the ICESCR provides the right to an adequate standard of living, which includes access to food, clothing, housing, medical care and the necessary social services.<sup>86</sup> The CRPD also includes a very detailed provision in that regard, stipulating that States must take measures to ensure access to clean water; social protection and poverty reduction programs – particularly for older adults with disabilities; assistance with disability-related expenses; public housing programs; and retirement benefits and programs.<sup>87</sup> Again, this of course only applies to older persons without disabilities. It is also questionable whether such minimum standards are always sufficient and appropriate for all regions. Where these may create a challenging objective for developing countries, they may diminish any impetus in more developed regions to promote development and progress toward more beneficial social security norms for older persons. As provision of social security requires considerable allocation of State resources, a lot of leeway is generally also given to member States. There is therefore a need to more explicitly recognize at the international level that States have a continuing obligation to promote older persons' right to social security, albeit taking into account the available resources of each State.

80 Only South Africa, Namibia, Botswana, Lesotho and Mauritius provide universal pensions. Tavengwa Nhongo, "Age Discrimination in Africa" (paper, International Federation on Ageing Conference, Copenhagen, May 31, 2006), 9, [http://www.ifa-fiv.org/wp-content/uploads/2012/11/061\\_Age-Discrimination-in-Africa-Age-Concern-England-DaneAge-Association-IFA-2006.pdf](http://www.ifa-fiv.org/wp-content/uploads/2012/11/061_Age-Discrimination-in-Africa-Age-Concern-England-DaneAge-Association-IFA-2006.pdf).

81 ILO, *World Social Protection Report 2014/15*, 84.

82 *Ibid.*, xxiii.

83 *Ibid.*, 74.

84 Article 9 ICESCR.

85 Article 11 (e) CEDAW; Article 5 (e)(iv) CERD; Article 27 ICRMW; and Article 28 CRPD. Article 24 (1)(b) of the 1951 Convention relating to the Status of Refugees requires States to accord to refugees lawfully staying in their territory the same treatment as to nationals as regards social security, including for the contingency of old age.

86 Article 11 (1) ICESCR. Also see Article 13 CEDAW.

87 Article 28 CRPD.

## Health Care

Access to health care is particularly important in old age, as biological aging is also associated with increasing physical and mental health problems.<sup>88</sup> As people age, they are also more frequently faced with disability, loss of physical and cognitive functioning,<sup>89</sup> as well as geriatric syndromes, such as falls, frailty and dementia.<sup>90</sup> In practice, however, many older persons have no access to adequate and/or affordable health services.<sup>91</sup> Those living in rural areas face the obstacle of physically reaching health care facilities, which is more complicated for older adults with disabilities or limited mobility.<sup>92</sup> Even when health care facilities are in close proximity, effective treatment is not guaranteed. In many low- and middle-income countries, medication is also not available or affordable.<sup>93</sup> In addition, age discrimination affects the availability of health care for older persons, as health care policies still tend to be more aimed at treating women and children.<sup>94</sup> Ageist prejudice and behavior also persist among medical care professionals. Physicians have been shown to be less respectful, less patient, less engaged and less egalitarian with their old than with their young patients.<sup>95</sup> The risks of certain types of treatment also become a more important factor in assessing the need for treatment of older patients.<sup>96</sup> Their symptoms are often wrongly considered to be consequences of old age rather than treatable conditions.<sup>97</sup> In addition, older patients tend to face longer waiting periods before treatment than younger persons and receive less expensive hospital treatments.<sup>98</sup> Age barriers also exist in terms of health insurance policies, with costs increasing according to age or even resulting in the denial of insurance

88 UNDESA, Population Division, *World Population Ageing 2013*, 1. Also see Dawn Alley and Eileen Crimmins, "Epidemiology of Aging," in *The SAGE Handbook of Social Gerontology*, ed. Dale Dannefer and Chris Phillipson (London: SAGE Publications, 2010), 78.

89 *Ibid.*, 76.

90 *Ibid.*, 85.

91 HRC Advisory Committee, *Working Paper Prepared by Ms. Chinsung Chung*, 5.

92 UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Thematic Study on the Realization of the Right to Health of Older Persons*, UN Doc. A/HRC/18/37 (Geneva: United Nations, 2011), para. 40; HelpAge International, *Why Health Systems Must Change: Addressing the Needs of Ageing Populations in Low- and Middle-Income Countries* (London: HelpAge International, 2014), 4. Also see HelpAge International, *Primary Healthcare for Older People: A Participatory Study in 5 Asian Countries* (London: HelpAge International, 2008), 8.

93 See Dele Abegunde, *Background Paper: Essential Medicines for Non-Communicable Diseases* (NCDs) (Geneva: World Health Organization, 2011).

94 UNDESA, *Regional Dimensions of the Ageing Situation* (New York: United Nations, 2008), 25, 33; European Older People's Platform, *Age Barriers*, 8.

95 Michele Greene et al., "Ageism in the Medical Encounter: An Exploratory Study of the Doctor-Elderly Patient Relationship," *Language & Communication* 6, no. 1/2 (1986): 123.

96 Monisha Pasupathi and Corinna E. Löckenhoff, "Ageist Behaviour," in *Ageism: Stereotyping and Prejudice against Older Persons*, ed. Todd Nelson (Massachusetts: MIT Press, 2004), 205-208; ECOSOC, *Report of the United Nations High Commissioner for Human Rights*, para. 52; Helge Skirbekk and Per Nortvedt, "Inadequate Treatment for Elderly Patients: Professional Norms and Tight Budgets Could Cause 'Ageism' in Hospitals," *Health Care Anal.* 22 (2014): 195-196.

97 ECOSOC, *Report of the United Nations High Commissioner for Human Rights*, para. 52.

98 European Older People's Platform, "Age Barriers," 9.

altogether.<sup>99</sup> Moreover, older adults face the financial obstacles of health care fees and cost of medication, while living on a small monthly pension.<sup>100</sup>

Older persons need access to specific care for conditions caused by old age, such as frailty, falls and dementia.<sup>101</sup> Social stigma and difficulties in diagnosing dementia, however, often cause symptoms to be ignored.<sup>102</sup> A large number of older adults are also affected by age-related disabilities caused by, *inter alia*, visual impairment, osteoarthritis and hearing loss.<sup>103</sup> Many health care practitioners, however, lack the necessary training regarding geriatric medicine or age-related health problems.<sup>104</sup> Since developing countries are facing an unprecedented rapid growth of their elderly population in the coming decades, these countries in particular face a serious lack of geriatricians.<sup>105</sup> There also continues to be insufficient focus on treatment of non-communicable diseases and a lack of specialist palliative care services for older persons in general and within nursing and residential homes.<sup>106</sup>

Within the UN human rights framework, Article 12 ICESCR provides the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>107</sup> The right to health of certain vulnerable groups and the prohibition of discrimination against them in terms of access to health care is addressed in category-specific UN treaties<sup>108</sup>, which is again not the case for older persons. For older adults with disabilities, the CRPD does provide an important protection framework, articulating the right to health in five principles dealing with (i) equality of treatment; (ii) personalization of care; (iii) proximity to people's own communities; (iv) health care professionals' responsibilities and obligations; (v) and non-discrimination.<sup>109</sup> Moreover, Article 25 addresses the relationship between patients and medical professionals, creating the obligation to

99 One example is the limitation of free screening for breast cancer to persons below a certain age. *Ibid.*, 8.

100 European Union Agency for Fundamental Rights, *Inequality and Multiple Discrimination in Access to and Quality of Health Care* (Vienna: EU Agency for Fundamental Rights, 2013), 54.

101 WHO, *Good Health in Old Age* (Geneva: WHO, 2012), 20.

102 WHO, *Global Health and Ageing* (Geneva: WHO, 2011), 14.

103 WHO, *Good Health in Old Age*, 16.

104 European Older People's Platform, "Age Barriers," 10; UNDESA, *Regional Dimensions of the Ageing Situation*, 20; ECOSOC, *Report of the United Nations High Commissioner for Human Rights*, para. 14.

105 United Nations Population Fund (UNFPA) and HelpAge International, *Ageing in the Twenty-First Century: A Celebration and a Challenge* (New York, London: UNFPA, HelpAge International 2012), 73.

106 UNDESA, *Regional Dimensions of the Ageing Situation*, 20. Also see Thomas Lynch, Stephen Connor and David Clark, "Mapping Levels of Palliative Care Development: A Global Update," *Journal of Pain and Symptom Management* 45, no. 6 (2013): 1098-1099.

107 Article 12(2)(d) ICESCR.

108 See Article 12 CEDAW; Article 5(e)(iv) CERD; Articles 3(3), 23 and 24 CRC; Articles 28, 43(1)(e), 45(1)(c) and 70 ICRMW; Article 25 CRPD.

109 Article 25 CRPD; Office of the High Commissioner for Human Rights (OHCHR), *Normative Standards in International Human Rights Law in Relation to Older Persons: Analytical Outcome Paper* (Geneva: United Nations, 2012), 24.

ensure that the latter also provide care of equal quality, based on free and informed consent.<sup>110</sup> Older patients are mentioned explicitly, as health services must be provided with the aim of minimizing and preventing further disabilities among the elderly population.<sup>111</sup> It is particularly worrisome, however, that no such provisions exist for older adults without disabilities, nor a clear prohibition of age discrimination in health care or health insurance, or an international right to geriatric care.

### **Long-term Care**

In many societies today, family members remain the main caregivers for the elderly population, as the latter have traditionally relied on their children for support and care rather than on the Government.<sup>112</sup> Even in Europe, the most common form of long-term care for older persons remains individual, informal, unpaid family care.<sup>113</sup> Several developments, such as urbanization, increased employment of women and migration of younger generations have, however, caused a decrease in family support globally.<sup>114</sup> In addition, informal caregivers do not themselves receive adequate support in the form of financial support or provision of formal care services.<sup>115</sup> Formal care workers' employment conditions, including low wages and irregular hours, also contribute to the lack of available formal home care.<sup>116</sup> Nevertheless, a reduction in formal home care services is seen in European long-term care policies, for example, whereas developing regions are faced with a far less developed long-term care system in the first place.<sup>117</sup>

Availability of adequate residential care for older persons also poses a serious issue in several regions.<sup>118</sup> Even in those countries where adequate long-term care is available, population aging will constitute a serious economic challenge. A main advantage of informal care is namely that it considerably reduces public care expenditure.<sup>119</sup> For older residents themselves, residential care in particular also constitutes a much greater financial cost than primary health care or informal

110 Article 25(d) CRPD.

111 Article 25 (b) CRPD. As regards older persons with disabilities, the MIPAA also includes as one of its objectives the maintenance of maximum functional capacity throughout the life course and promotion of the full participation of older persons with disabilities. See MIPAA, para. 90.

112 UNDESA, *Regional Dimensions of the Ageing Situation*, 23-33.

113 *Ibid.*, 31.

114 *Ibid.*, 20, 23, 27-28, 33; Emily M. Agree and Karen Glaser, "Demography of Informal Caregiving," in *International Handbook of Population Ageing*, ed. Peter Uhlenberg (Dordrecht: Springer, 2009), 647; F. Mégret, "The Human Rights of Older Persons", *Human Rights Law Review* 11, no. 1 (2011): 44.

115 UNDESA, *Regional Dimensions of the Ageing Situation*, 31.

116 Agree and Glaser, "Demography of Informal Caregiving," 647.

117 *Ibid.*

118 UNDESA, *Regional Dimensions of the Ageing Situation*, 34.

119 See e.g. Sari Kehusmaa et al., "Does Informal Care Reduce Public Care Expenditure on Elderly Care? Estimates Based on Finland's Age Study," *BMC Health Services Research* 13 (2013): 2.

care.<sup>120</sup> Even in Europe, up to two per cent of the elderly population would have to spend 100 per cent of their income in order to cover both health care and long-term care.<sup>121</sup> A further reduction in the number of informal caregivers could thus have serious consequences for those with limited financial resources. Where residential care is available, the quality of care may also be below standards due to shortage of staff or use of unlicensed staff. Nursing homes often employ tight routines leaving little space for personal wishes or social interaction.<sup>122</sup> Nursing home staff even tend to infantilize their residents.<sup>123</sup> Finally, lack of privacy poses a significant problem for older adults residing in care centers.<sup>124</sup>

Despite the importance of long-term care in old age, there exists no such right for older persons at the international level either. General provisions exist on the right to privacy<sup>125</sup>, yet they do not reflect the particular needs of older residents of care institutions. Any explicit provision regarding support for informal caregivers is missing in UN treaties as well. It is without doubt that the availability and allocation of State resources, and regional and cultural differences in terms of long-term care for older persons complicate the adoption of international binding norms in this regard. However, considering the projections of population aging and the expected effects on formal and informal care systems worldwide, it is particularly worrisome that there exists no comprehensive, binding international human rights framework that provides for the right to accessible, affordable and adequate long-term care in old age.

### **Legal Capacity and Access to Justice**

Finally, ensuring older persons' legal capacity lies at the basis of ensuring the effective enjoyment of their fundamental rights. In order for them to be able to claim their rights, it is essential that older adults continue to be regarded as autonomous human beings able to make their own decisions – albeit with the necessary assistance in the decision-making processes when they so require. Older adults' legal capacity and access to justice can, however, be complicated by diminished mental capacity and intimidation from abusers.<sup>126</sup> Particularly in cases where older

120 Edward C. Norton, Hua Wang and Sally C. Stearns, "Behavioral Implications of Out-of-Pocket Health Care Expenditures," *Swiss Journal of Economics and Statistics* 142, no. 5 (2006): 6.

121 Xenia Scheil-Adlung and Jacopo Bonan, "Gaps in Social Protection for Health Care and Long-Term Care in Europe: Are the Elderly Faced with Financial Ruin?" *International Social Security Review* 66, no. 1 (2013): 44.

122 Pasupathi and Löckenhoff, "Ageist Behaviour," 211; Tove Harnett, "Seeking Exemptions from Nursing Home Routines: Residents' Everyday Influence Attempts and Institutional Order," *Journal of Aging Studies* 24 (2010): 292.

123 Pasupathi and Löckenhoff, "Ageist Behaviour," 213.

124 Nathalie Van Leuven, "Recht op Privéleven in het Woonzorgcentrum," in *Fundamentele Rechten van Ouderen*, ed. Nathalie Van Leuven and Paul De Hert (Antwerpen: Intersentia, 2011), 165-198.

125 Article 12 UDHR; Article 17 ICCPR.

126 UNDESA, *Report of the Expert Group Meeting "Rights of Older Persons"*, 8.



persons suffer from cognitive or psychosocial disabilities – such as dementia – substitute decision-making regimes in the form of deprivation of legal capacity or guardianship are used as a means for family members or other guardians to manage older persons’ assets and decisions on, *inter alia*, health care and living arrangements. Limiting a person’s legal capacity is, however, subject to severe criticism as it deprives older adults of their right to decide independently on some of the most important aspects of their daily lives. This legal construction also entails a great risk of abuse when procedural safeguards are not respected by the legal apparatus and/or others involved.<sup>127</sup> At the same time, ageism may also affect perceptions of older persons’ capacities and dependence. This can lead to stigmatization and deprivation of certain liberties or rights even though they are still physically and mentally able to make their own decisions.<sup>128</sup>

The UN human rights framework protects everyone’s access to justice through the right to a fair trial,<sup>129</sup> the right to an effective remedy,<sup>130</sup> and the right to (equal) recognition before the law.<sup>131</sup> The latter is particularly important to protect older persons from deprivation of legal capacity. Whereas certain binding provisions exist that reiterate this right and clarify how it applies to women and persons with disabilities specifically,<sup>132</sup> this is not the case for older adults. Article 12 CRPD can provide protection for older persons with physical, mental or intellectual impairments, however. The Convention requires States parties to ensure access to the support they may need in exercising that legal capacity<sup>133</sup> and to ensure safeguards are in place to prevent abuse.<sup>134</sup> Article 12 CRPD thus represents an important shift from guardianship systems – or substituted decision-making – towards supported decision-making.<sup>135</sup> This is a very far-reaching provision as it allows for no restriction of legal capacity at all.

Overall, a normative gap thus exists at the international level regarding recognition before the law, the provision of appropriate legal assistance and other support or accommodations that take

127 Brenda K. Uekert and Thomas Dibble, “Guardianship of the Elderly: Past Performance and Future Promises,” *The Court Manager* 23, no. 4 (2008): 10; Charles P. Sabatino and Erica Wood, “The Conceptualization of Legal Capacity of Older Persons in Western Law,” in *Beyond Elder Law*, ed. Israel Doron and Ann M. Soden (Heidelberg, Dordrecht, London, New York: Springer, 2012), 43.

128 Albertson Fineman, “Elderly as Vulnerable,” 86-87.

129 See Article 11 UDHR; Article 14 ICCPR

130 See Article 8 UDHR; Article 2(3) ICCPR.

131 See Articles 6-7 UDHR; Articles 16 and 26 ICCPR; Article 12-13 CRPD.

132 Article 15 CEDAW and Article 12 CRPD.

133 Article 12, paras. 1-3 CRPD. This relates particularly to 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. Article 12 (5) CRPD.

134 Article 12(3) CRPD.

135 Robert D. Dinerstein, “Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making,” *Human Rights Brief* 19 (2011-2012): 8.



into account potential obstacles for older persons. Due to the broad definition of what constitutes a disability, the CRPD provides some valuable guarantees when they suffer from a psychological impairment, such as dementia.<sup>136</sup> For older adults without disabilities, however, it should be explicitly provided that they too may enjoy equal access to justice within a reasonable time, and have the right to the necessary support and legal assistance in light of their particular needs to enjoy that right. The same goes for their right to equality before the law. An international treaty on the rights of older persons could thus reaffirm the prohibition to deprive this particular group of their legal capacity and instead require States to provide the necessary support in decision-making processes. Finally, it should also be stressed that older persons enjoy an equal right 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 that States parties are to ensure that older adults are not arbitrarily deprived of their property.

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136 Arlene S. Kanter, “The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People under International Law,” *Georgia State University Law Review* 25, no. 3 (2009): 559.

## Conclusion

In the previous paragraphs, it was demonstrated that there is little regard for older persons and their specific needs in international human rights law. On the one hand, this lack of explicit references seriously complicates the identification of older persons' rights. On the other hand, and perhaps more importantly, this results in a serious lack of provisions that clarify the exact scope of States' obligations when it comes to the respect, protection and fulfillment of fundamental rights in old age. Of course, throughout the debate within the OEWGA on the need for a new binding international treaty on the rights of older persons, it has often been argued that there is no real normative gap, as human rights provisions of a general scope apply to older adults as well. Consequently, not even the precarious human rights situation many older persons find themselves in around the globe is considered to justify the adoption of such a binding instrument at the international level. In this paper I have argued, however, that it is not only the lack of explicit references to older persons in international human rights law that must be considered, but also the issue of widespread ageism and ageist bias that affects how older persons are perceived and treated.

At first sight, the different obstacles in old age seem very similar to those other groups face. Discrimination, abuse, poor working conditions, inadequate health care, lack of access to justice are human rights infringements that are most certainly not exclusively suffered by older adults. What distinguishes them as a group, however, is the underlying factor of ageist perceptions and behavior that to a great extent remains unnoticed or even accepted by society. Ageism was explicitly identified as a contributing factor to all the human rights infringements discussed above. In addition, age discrimination constitutes the core of most human rights infringements suffered by the older population. It significantly affects older adults' ability to exercise all their fundamental rights, and limits their access to a wide variety of goods and services. In other words, although human rights provisions of a more general scope *ratione personae* apply to older persons as well, older persons are confronted with specific obstacles in the enjoyment of those rights. This is why they are to be considered a particularly vulnerable group – not on the basis of their age *per se*, but due to societal and institutional age barriers – and their rights should be reaffirmed and State obligations clarified in a new instrument, as they have been for other social groups. Moreover, contrary to other groups, the human rights situation of older adults has to be considered with urgency, as there is no doubt that demographic changes will put a serious strain on existing social security and care systems, resulting in restricted access to pensions and basic goods and services.

Finally, it should be noted that despite the slow drafting process at the international level, important standard-setting efforts have been made at the regional levels. On 15 June 2015, the

Inter-American Convention on Protecting the Human Rights of Older Persons was adopted; this entered into force in January 2017. The American Convention was the first regional, binding instrument specifically focused on the fundamental rights of older persons. Soon after, at the African level, the African Protocol on the Rights of Older Persons was adopted by the Assembly in January 2016. Both treaties thus provide important clarification as to how fundamental rights apply to older persons specifically. More so, within the Council of Europe, the Parliamentary Assembly adopted Recommendation 2104 on the Human Rights of Older Persons and their Comprehensive Care in May 2017. The Recommendation explicitly calls to consider the necessity and feasibility of drawing up a legally binding instrument in this regard.

Today, it is likely the financial implications of the adoption of a UN Convention on the Rights of Older Persons that keep a significant group of States from supporting such an instrument. As population aging continues, however, and complementary standard setting and policymaking continues at the regional levels, it looks promising that this subject will continue to gain visibility and traction at the international level as well. Arguably, what would speed along the process considerably at this point is increased lobbying and pressure on Governments from within; that is from national and local human rights organizations. Considering the human rights violations suffered by many older persons worldwide, there is no doubt that considerable efforts must continue to be made at all levels and in all possible ways to further strengthen the human rights framework for older persons.

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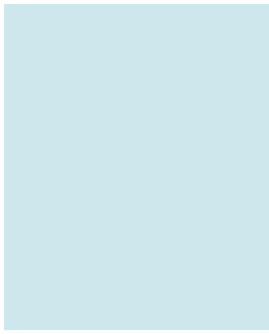
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