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AFRICA IS AGEING: PROSPECTS IN THE IMPLEMENTATION OF THE PROTOCOL ON THE RIGHTS OF OLDER PERSONS IN AFRICA

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Abstract:

Africa's demographic aspects are variously described as 'the youngest continent', 'the youth bulge' and 'the children's continent'. Lost in this terminology is the issue of older persons in Africa. Recent data shows a projected increase in life expectancy in Africa by 2050, pointing to a significant rise in the number of older persons on the continent and bringing to the fore their recognition as a vulnerable group in society, meriting special protection.

At the global level, despite considerable debate on the vulnerability of older persons, initiatives toward a legally binding treaty to protect the rights of older persons have been slow-paced. At the regional level, progress has been made in Africa and the Inter-Americas with the adoption of legally binding treaties. Pointedly, these treaties signify a nuanced appreciation of the contextual realities of older persons in different regions of the world in the normative framework. Conversely, the European Court of Human Rights (European Court) has, over the years, adjudicated cases relating to the rights of older persons and thus evolving jurisprudence on rights relating to older persons. At the national level, a number of countries in Africa, such as Ethiopia, Ghana,

Kenya, South Africa, Uganda, Tanzania, and Zimbabwe protect the rights of older persons in their domestic legal and policy framework.

In light of the above, this chapter concerns itself with the Protocol to the African Charter on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons), adopted in 2016, while acknowledging the delayed entry into force. The chapter explores the prospects for the implementation of the Protocol on the Rights of Older Persons by reviewing evolving norms and jurisprudence on the rights of older persons. The chapter further analyses the Protocol's normative framework and comparatively examines the Inter-American Convention on Protecting the Human Rights of Older Persons (Inter-American Convention on Older Persons) and the European Union. It also explores the jurisprudence of the European Court on cases touching on the rights of older persons. Drawing from the European Court and the Inter-American Court's normative content and jurisprudence, this chapter highlights the evolving jurisprudence that can be contextualised to the application and interpretation of the Protocol on the Rights of Older Persons.

1 Introduction

The plight of elderly persons in society has occupied international debates since 1948, including in policy documents of the United Nations (UN) General Assembly.¹ Pointedly, the Universal Declaration of Human Rights referenced elderly people's rights.² Even then, within the UN, attention to the welfare of the aged in society remained incidental and sporadic until the 1978 adoption of a UN Resolution to convene 'a World Assembly on Ageing'.³ The 1982 World Assembly culminated in the Vienna International Plan of Action on Ageing (Vienna Plan of Action), which urged states to take action on the socio-economic aspects of elderly persons, including housing, food and nutrition, social security, and employment.⁴ The second 'World Assembly on Ageing' was held in 2002, where the Political Declaration and Madrid Plan of Action on Ageing (Madrid Plan of Action) was adopted. It recognises as its goal the promotion and protection of all rights of older persons and urges states to prioritise the development of older persons and their well-being in old age.⁵ In between the two World Assemblies, the UN undertook

1 United Nations General Assembly Declaration of Old Age Rights (4 December 1948) UN Doc A/RES/213 (1948) (Declaration of Old Age Rights).

2 Declaration of Old Age Rights (n 1) art 25.

3 United Nations Report of the World Assembly on Aging (6 August 1982) UN Doc A/CONF.113/31 (1982).

4 As above.

5 Political Declaration and Madrid Plan of Action on Ageing, adopted at the 2nd

several initiatives, including the UN Principles for Older Persons, the Proclamation on Ageing, and the UN declaring 1999 as the International Year of Older Persons. The Proclamation on Ageing was launched on 1 October 1998, the International Day of Older Persons.⁶ It is also worth mentioning the Committee on Economic, Social and Cultural Rights (CESCR) General Comment 6, which elaborates on the application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to older persons.⁷

Turning to Africa, the drafters of the African Charter on Human and Peoples' Rights (African Charter) sought to embrace the African legal philosophy and tradition by anchoring the protection of rights in African values and civilisation.⁸ Drawing from this, the drafters of the African Charter recognised the collectivism of African societies and sense of kinship and expressly incorporated a right to the protection of the aged within the context of the family,⁹ with a corresponding individual duty for the respect of elders.¹⁰ Africa was thus the first to protect the rights of older persons in a legally binding document. Nonetheless, the provisions of the African Charter have been criticised for seemingly bundling the rights of older persons with kinship and culture.¹¹ Moreover, from a practical standpoint, these provisions are questioned since the African Commission has never explicitly referenced the rights of the elderly in its application.¹²

World Assembly on Ageing, held at Madrid, Spain 8-12 April 2002, www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf (accessed 24 July 2023).

- 6 United Nations Principles for Older Persons, adopted pursuant to UNGA Res 46/91, Implementation of the International Plan of Action on Ageing and related activities (16 December 1991) UN Doc A/RES/46/91 (UN Principles); United Nations General Assembly Proclamation on Ageing (16 October 1992) UN Doc A/RES/47/5 (1992) para 3; United Nations General Assembly Implementation of the International Plan of Action on Aging and Related Activities (14 December 1990) UN Doc A/RES/45/106.
- 7 United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment 6, Rights of Older Persons, 13th session, 1995, E/C.12/1995/16/Rev.1 (General Comment 6).
- 8 African Charter (n 7) Preamble.
- 9 African Charter (n 7) art 18 (4).
- 10 African Charter (n 7) art 27 (1).
- 11 PE Oamen & EK Okhator, 'The impact of COVID-19 on the socio-economic rights of older persons in Africa: The urgency of operationalising the Protocol on the Rights of Older Persons in Africa' (2021) 21 *African Human Rights Law Journal* at 796.
- 12 MA Taher & MAZ Kanak, 'Are the rights of elderly people well-protected? Revisiting the existing global and regional human rights frameworks' (2020) 3 *Southeast University Journal of Arts and Social Sciences* at 109.

In the last three decades, a demographic shift in the world population has pointed to an increase in the number of older persons. For instance, for the first time in 2018, the number of persons older than 65 surpassed the number of children younger than 5,¹³ while globally, life expectancy increased by 7 years in the last three decades.¹⁴ In Africa, life expectancy increased by eight years from 1990 to 2021. In addition, the 2015 UN projections indicated that most of the growth in the ageing population is in Africa and that the aged population will triple by 2050 to an estimated 220 million persons.¹⁵ These numbers disrupted the settled understanding of Africa as a young continent and called into question the adequacy of the existing legal framework to protect older persons. The various reasons for this demographic shift are varied and outside the scope of this chapter.

This shift renewed interest in older persons as a vulnerable group within society requiring protection of their rights, akin to other vulnerable groups such as indigenous persons, women, children, and persons with disabilities. At the UN level, a number of measures were implemented to enhance the protection of the rights of older persons. For example, in 2010, an open-ended Working Group on Ageing (Working Group) was established to study aspects of strengthening the protection of older persons' rights.¹⁶ Further, in 2013, the UN established the mandate of the Independent Expert on the Enjoyment of All Human Rights by Older Persons.¹⁷ Even so, this renewed interest has not resulted in a global treaty on the rights of older persons, despite enduring debate within the UN.

At the African regional level, despite the above-mentioned provisions of the African Charter, the African human rights institutions variously identified normative gaps in the protection of the rights of elderly persons in Africa. For instance, in the 1999 and 2000 Final Communiqués, the African Commission on Human and Peoples' Rights (African Commission) noted the human rights violations of vulnerable groups,

13 United Nations Population Division 'World population prospects 2022: Summary of results' 7 www.un.org/development/desa/pd/content/World-Population-Prospects-2022 (World Population Prospects 2022) (accessed 24 July 2023).

14 World Population Prospects 2022 (n 13) 19.

15 United Nations Department of Economic and Social Affairs 'World population prospects: The 2015 revision, key findings and advance tables' 6-7 https://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf (accessed 8 July 2023).

16 United Nations General Assembly Follow-up to the Second World Assembly on Ageing (4 February 2011) UN Doc A/RES/65/182 (2011).

17 Office of the High Commissioner for Human Rights, Independent Expert on the Enjoyment of All Human Rights by Older Persons (27 September 2013) A/HRC/Res/24/20 para 5.

including the aged, in countries experiencing armed conflicts.¹⁸ At the political level, two initiatives were undertaken. First, in response to the Madrid Plan of Action, the African Union (AU) developed the 2007 AU Policy Framework and Plan of Action on Ageing. Second, the 2003 AU Ministerial Conference on Human Rights in Africa noted the human rights violations of elderly persons in situations of armed conflict and called for a specific protocol to elaborate on their rights.¹⁹ Against this background, the AU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons or Protocol), which is the subject of this article.

This chapter examines the prospects for the implementation of the Protocol on the Rights of Older Persons. It proceeds from the premise that this Protocol has not entered into force and that the African Court on Human and Peoples' Rights (African Court) and the African Commission have not adjudicated any cases on the rights of older persons. Thus, this chapter concerns itself with how existing jurisprudence from other human rights regional systems could be deployed and contextualised for the interpretation and application of the Protocol on the Rights of Older Persons. In view of the criticism directed at this Protocol for lacking to enumerate substantive rights for older persons, the main contribution of this chapter is distilling the other regional understandings and jurisprudence on the rights of older persons for contextualisation in the implementation of the Protocol on the Rights of Older Persons. In this endeavour, the chapter adopts a comparative approach. It explores, for instance, the rights provided in the Inter-American Convention on Protecting the Human Rights of Older Persons (Inter-American Convention on Older Persons) and the European Union Recommendation on the Rights of Older Persons (Recommendation on the Rights of Older Persons)²⁰ as well as the jurisprudence of the Inter-American Court of Human Rights (Inter-American Court) and the European Court of Human Rights (European

18 African Commission on Human and Peoples' Rights Final Communiqué of the 26th Ordinary Session of the African Commission on Human and Peoples' Rights' 1st-11th November 1999, Kigali, https://www.achpr.org/public/Document/file/English/achpr26_fincom_1999_eng.pdf (accessed 24 July 2023) para 10; Final Communiqué of the 27th Ordinary Session of the African Commission on Human and Peoples' Rights 27th April - 11th May, 2000, Algiers, www.achpr.org/public/Document/file/English/achpr27_fincom_2000_eng.pdf (accessed 24 July 2023) para 6.

19 Kigali Declaration on Human Rights adopted by the 1st African Union (AU) Ministerial Conference on Human Rights in Africa held in Kigali, Rwanda 8 May 2003 paras 17 & 20.

20 European Union Recommendation CM/Rec (2014) 2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons, adopted by the Committee of Ministers on 19 February 2014 at the 1192 Meeting of the Ministers Deputies (Recommendation on the Rights of Older Persons).

Court) on aspects of rights of older persons. It is envisaged that the comparative approach will highlight the scope of rights for older persons and their interpretation and application.

To achieve the above, the chapter is structured as follows: Part two sets the background by reviewing the Protocol on the Rights of Older Persons and outlining its normative framework; part three provides a brief overview of the Inter-American Convention on Older Persons and the Recommendation on Rights of Older Persons and presents cases decided by the Inter-American and European Courts; part four conducts a comparative analysis of the normative provisions of the Inter-American Convention on Older Persons, the Recommendation on Rights of Older Persons and the Protocol on the Rights of Older Persons and of the case law from the Inter-American and European Courts and highlights good practices that the African system could adopt. Finally, part five concludes the chapter and presents some recommendations.

For clarity, while this chapter discusses the normative standards and jurisprudence of the European human rights system, the Recommendation on the Rights of Older Persons and the jurisprudence of the European Court represent a distinct institutional framework. The Recommendation on the Rights of Older Persons is an initiative of the European Union, while the European Court is established under the Council of Europe and monitors the implementation of the European Convention on Human Rights and Fundamental Freedoms. The chapter is moreover limited in that it does not analyse all the rights provided in the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons. The rights analysed in this chapter are limited to those resonating with the state obligations contained in the Protocol on the Rights of Older Persons. In addition, while acknowledging that the Protocol on the Rights of Older Persons uses the term older persons, scholarship on the subject uses the terms 'aged', 'elderly persons' and 'older persons' interchangeably. Therefore, this chapter also deploys these terms interchangeably.

2 Protocol to the African Charter on Rights of Older Persons in Africa: Substance and implications

As discussed earlier, the Protocol on the Rights of Older Persons has its roots in article 18(4) of the African Charter and the calls within the African human rights system and political institutions to fill the normative gaps in this provision. In 2007, the African Commission appointed a focal point to conduct studies on strengthening the rights of older persons

in Africa.²¹ In 2009, the mandate of the focal point was expanded to a Working Group on the rights of older persons and persons with disabilities tasked with preparing a concept note which would guide the drafting of a protocol to the African Charter on the rights of older persons and persons with disabilities.²² The draft Protocol on the Rights of Older Persons was submitted for approval by the AU Assembly in 2014 and adopted in January 2016.²³ However, as of July 2023, the Protocol on the Rights of Older Persons has yet to enter into force. It will only do so 30 days after the deposit of the 15th instrument of ratification by a member state.²⁴

The significance of the Protocol on the Rights of Older Persons lies in its utility value. First, it liberates ageing from the private domain and makes it a public issue while requiring states to make structural and cultural changes for older persons in Africa. Viewed in light of the African Charter, the Protocol on the Rights of Older Persons dissociates the rights of the elderly from familial attachment and obligates states to guarantee their rights. Second, it reconceptualises old age as a human rights issue by emphasising the concepts of equality, non-discrimination, and self-autonomy. However, the text places more emphasis on the vulnerability of older persons; their incapacity, dependence, and weak status, thus portraying them as needy rather than as holders of rights. Doron points out that this portrayal of the elderly from a needs perspective is likely to perpetuate ageism, which is inimical to the human rights discourse.²⁵

Notwithstanding, for the Protocol on the Rights of Older Persons to achieve its utility value, it must be enforceable within the continent. Since its adoption in 2016, it has received 11 ratifications against 20 signatures from the 55 AU member states.²⁶ Pointedly, less than half of the AU member states have neither signed nor ratified the Protocol. And of the

21 African Commission Resolution on the establishment of a focal point on the rights of older persons in Africa ACHPR/Res. 118 (XXXXII) 07 2007.

22 African Commission Resolution on the transformation of the focal point on the rights of older persons in Africa to the working group on the rights of older persons and persons with disabilities in Africa ACHPR/Res. 143 (XXXXV) 9 May 2009.

23 Decisions, Declarations and Resolutions, AU/Dec.588-604 (XXVI), as adopted by the Assembly of the African Union at the Twenty-Sixth Ordinary Session, Addis Ababa, Ethiopia, 30-31 January 2016, ; see also Protocol on the Rights of Older Persons.

24 As above art 26(1).

25 I Doron & I Apter 'The debate around the need for an International Convention on the Rights of Older Persons' (2010) 50 *The Gerontologist* at 592.

26 African Union 'List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons' 11 April 2023 https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_OLDER_PERSONS.pdf (accessed 30 June 2023).

signatory states, a little less than half have not ratified it.²⁷ This disparate negative correlation between the number of signatures and ratifications implies a general acceptance by the signatory states of the recognition of the rights of older persons while not making binding commitments at the regional level.

Under international law, signature in treaty-making marks a first step towards ratification, and for the ratification process to be complete, the instrument of ratification must be deposited with the AU Commission.²⁸ Writing on the ratification of AU treaties by member states, Maluwa invites the AU to revisit history and draw from the practices of the League of Nations and the International Labour Organization (ILO) on closing the gap between signature and ratification.²⁹ He points to a resolution of the League of Nations that required member states to submit reports on their intentions to the Secretary-General for any treaty not ratified one year after signature.³⁰ Similarly, the ILO requires states to submit to their domestic structures on all ILO Conventions they sign for implementation as domestic legislation or any other action.³¹ Undoubtedly, such measures would make an impact in closing the gap between the 20 signatures and 11 ratifications and ultimately result in the Protocol on the Rights of Older Persons entering into force to generate the intended impact.

In relation to the majority of the 55 AU member states that have yet to sign the Protocol on the Rights of Older Persons, there are continuous efforts by domestic players like non-governmental organisations and civil society groups. These entities are actively working to encourage AU members to ratify the Protocol from within their respective countries. The most notable and sustained initiative is the #AgeWithRights Campaign, which has been running since 2018.³² While acknowledging that states are motivated by different factors in deciding whether or not to ratify treaties, it is interesting to note that all the ratifications have occurred after this campaign, thus giving credence to the role of advocacy campaigns for ratification.

27 As above.

28 Protocol on the Rights of Older Persons art 25 (2).

29 T Maluwa, 'Ratification of African Union treaties by member states: Law, policy and practice' (2012) 13 *Melbourne Journal of International Law* at 37-38.

30 Maluwa (n 29) 38-39.

31 Maluwa (n 29) 37-38.

32 University of Pretoria, Centre for Human Rights, #AgeWithRights Campaign, available at <https://www.chr.up.ac.za/agewithrights> (accessed 28 April 2023).

2.1 The nature and content of the rights of older persons in the Protocol on the Rights of Older Persons

The Protocol on the Rights of Older Persons consists of a Preamble, provisions articulating normative principles, and implementation mechanisms. The Preamble grounds the Protocol within the African human rights system by echoing the provisions of the African Charter and other African legal instruments on the rights of older persons. Further, the Preamble recognises article 18(4) of the African Charter, clearly signalling the intention of the Protocol to complement the African Charter and address the normative gaps in the existing framework. As pointed out, the provisions of the African Charter have been criticised for, on the face of it, appearing to vest the duty to care for the aged in individuals and the family unit.³³

The Protocol on the Rights of Older Persons demarcates the group of persons whose rights it addresses by defining ‘older persons’ as persons 60 years old and above, drawing its definition from the Vienna Plan of Action.³⁴ At the outset, it is noteworthy to point out that the Protocol does not enumerate the rights of older persons; rather, it lays down state obligations. In article 2(1), it echoes the general obligations clause contained in the African Charter.³⁵ It further, in article 2(2), incorporates the UN Principles for Older Persons and directs states to make them legally binding under national law. The question that presents is whether incorporating the UN Principles in the framework of the Protocol on the Rights of Older Persons serves to address the substantive rights gap in the Protocol. The UN Principles for Older Persons are organised along the concepts of independence, participation, care, self-fulfilment, and dignity. Megret points out that although the Preamble to the UN Principles references human rights, its focus is on the concepts of independence, participation, care, self-fulfilment, and dignity, which are not *per se* reflective of known rights.³⁶

The Protocol on the Rights of Older Persons enumerates state obligations in the context of both civil and political and economic, social and cultural rights and under the respect, protect and fulfil typology. In the realm of civil and political rights, states are required to prohibit discrimination against older persons and eradicate social and cultural

33 Oamen & Okhator (n 11) 766.

34 Vienna Plan of Action art 1.

35 Protocol on the Rights of Older Persons art 25(2).

36 F Megret ‘The human rights of older persons: A growing challenge’ (2011) 11 *Human Rights Law Review* at 48.

stereotypes that marginalise and stigmatise older persons.³⁷ Further, states have obligations to guarantee equal protection before the law and access to justice,³⁸ freedom of opinion and expression,³⁹ liberty and security of the person and physical integrity from any form of violence, including violence related to traditional harmful practices.⁴⁰ In the context of economic, social and cultural rights, the state obligations extend to the right to access to employment;⁴¹ social security, including the requirement to universalise social protection to take into account persons who did not contribute to social protection schemes,⁴² access to care,⁴³ health services,⁴⁴ education,⁴⁵ and recreational programmes.⁴⁶

The Protocol on the Rights of Older Persons contextualises state obligations to African realities by addressing gender and poverty in old age and the weakened position of older persons in situations of conflict and natural disaster. Comparatively, the Recommendation on the Rights of Older Persons and the Inter-American Convention on Older Persons do not provide for such normative rights. In the context of gender, specifically older women, the Protocol on the Rights of Older Persons is awake to the reality that women in Africa live longer and often do not own property in their names. Furthermore, many women dedicate their lives to unpaid domestic work, which means they do not participate in contributory social security schemes.⁴⁷

On poverty in old age, the Protocol on the Rights of Older Persons addresses older persons with caregiving responsibilities. Studies attest to this phenomenon in Africa, mainly occasioned by the inter-generational effects of the HIV/AIDS pandemic, thus relegating elders as the new caregivers to their grandchildren.⁴⁸ Further, in keeping with the conflict situations in Africa, the Protocol also enumerates specific state obligations towards older persons in conflict and disaster situations.

37 Protocol on the Rights of Older Persons art 3.

38 Protocol on the Rights of Older Persons art 4.

39 Protocol on the Rights of Older Persons art 5

40 Protocol on the Rights of Older Persons art 8

41 Protocol on the Rights of Older Persons art 6.

42 Protocol on the Rights of Older Persons art 8.

43 Protocol on the Rights of Older Persons art 10.

44 Protocol on the Rights of Older Persons art 15.

45 Protocol on the Rights of Older Persons art 16.

46 Protocol on the Rights of Older Persons art 17.

47 I Doron, B Spanier & O Lazar 'The rights of older persons within the African Union' (2016) 16 *Elder Review* at 14-16.

48 Doron et al (n 47) 17.

Finally, the Protocol on the Rights of Older Persons revisits the concept of duties and, in line with African values and civilisation, imposes a set of duties on older persons. Older persons have duties of inter-generational mentorship and passing knowledge to younger generations, conflict resolution, and fostering inter-generational dialogue and solidarity within the family and community.⁴⁹ While a debate on the concept of duties in the African human rights system is outside the scope of this chapter, it is worthwhile to note that African scholarship views these duties as both a consequence and a pre-requisite for community membership.⁵⁰ In this instance, older persons, as members of communities, have a duty to share their wealth through knowledge and traditions.

As stated earlier, while the Protocol on the Rights of Older Persons is significant for unshackling ageing from the private sphere and bringing it to the public domain by enumerating state obligations, the enduring question is whether its enumeration of state obligations rather than older persons' rights connotes a welfarist approach to older persons in Africa. First and contrastingly, the other Protocols to the African Charter – that is, the Protocol on the Rights of Persons with Disabilities in Africa and the Protocol on the Rights of Women in Africa – enumerate actual rights for these vulnerable groups.⁵¹ Second, discussions on the construction of the elderly as a distinct group identify the power/vulnerability paradox. Megret points out that the elderly may be construed as a powerful group in society based on their wealthy status, societal networks and accomplishments in life, which inhere respect from society. On the other hand, the elderly may be viewed as a vulnerable group in society based on vulnerability to disease, need for support and care, increased susceptibility to poverty, consequences of armed conflict and political and social disruptions.⁵² A review of the background documents informing the drafting of the Protocol on the Rights of Older Persons paints the vulnerable view as shaping and informing the conception of older persons in Africa. For instance, the African Charter refers to the need for 'special measures of protection'.⁵³ This may thus lend credence to the argument

49 Protocol on the Rights of Older Persons art 20.

50 A Devereux 'Should "duties" play a larger role in human rights? A critique and Western liberal and African human rights jurisprudence' (1995) 18 *University of New South Wales Law Journal* at 474-476.

51 See generally, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Protocol to the African Charter on Human and Peoples' Rights on Rights of Persons with Disabilities in Africa.

52 Megret (n 36) 46.

53 African Charter art 18 (4).

that the Protocol adopts a welfarist approach as opposed to a human rights approach.

Conversely, it is acknowledged that it is not old age that hinders the enjoyment of rights; instead, it is societal perceptions and attitudes towards ageing that deny older persons full enjoyment of rights. Developing this argument in relation to the Protocol on the Rights of Older Persons, what is then required is not the enumeration of their rights, but rather the elaboration of measures – in this case, what states should do to eliminate perceptions and attitudes which inhibit older persons from fully enjoying their rights. In addition, borrowing from the UN Convention on the Rights of Persons with Disabilities, there is a tendency to address the limitations of the human rights language by emphasising state obligations and rights for further clarity.⁵⁴

2.2 Obligations to respect, protect and fulfil

As mentioned above, the Protocol on the Rights of Older Persons enumerates state obligations within the respect, protect and fulfil typology. In this regard, states must eliminate workplace discrimination in private sector institutions, guarantee freedom of expression and exercise political rights by older persons. In addition, states are to enact legislation to eliminate discrimination in the private spheres and criminalise violence and harmful traditional practices, including witchcraft accusations and dispossession of property of older women. Finally, in relation to the obligation to fulfil, states are to put in place measures for social security, education, health services and mobility for older persons. States are required to submit periodic reports to the African Commission to ensure the national implementation of these obligations. Additionally, if there are any complaints regarding the violation of the rights of older persons, they can be filed with both the African Commission and the African Court.⁵⁵

3 Regional protection of the rights of older persons

As stated earlier, efforts towards a global convention for the protection of the rights of older persons have since 2009 remained shackled by polarising debates on whether a specific treaty is necessary. The arguments against this point to the fragmentation of the rights discourse,⁵⁶ the fact that there exist ample soft law instruments that address the rights of older persons⁵⁷

54 Megret (n 36) 65.

55 Protocol on the Rights of Older Persons art 22.

56 Megret (n 36) 38-41.

57 Doron et al (n 47) 591.

and the implementation gap that characterises treaty implementation in international human rights law.⁵⁸

At the regional level, akin to Africa, there is significant progress in the Inter-American and European regions in specific recognition and protection of the rights of older persons. In June 2015, the Organization of American States adopted a specialised treaty, the Inter-American Convention on Older Persons, which entered into force in January 2017.⁵⁹ Six member states have ratified this Convention.⁶⁰ In Europe, the European Union Council of Ministers in 2014 adopted the Recommendation on the Rights of Older Persons. Though not binding, this Recommendation is important as it normatively articulates the rights of older persons, which are not articulated in the European human rights treaties. In addition, it supplements the Charter of Fundamental Rights of the European Union, which has a provision respecting and recognising the rights of the elderly to live in dignity and participate in social and cultural life.⁶¹

The following part examines the normative provisions of the Inter-American Convention and the Recommendation on the Rights of Older Persons, as well as related judicial decisions with a view to distilling understandings that can be contextualised for Africa.

3.1 Normative provisions on the rights of older persons

3.1.1 *Inter-American Convention on Older Persons*

The Inter-American Convention on Older Persons lists a number of rights to which older persons are entitled and general and specific state obligations. With regard to the rights of older persons, the Convention guarantees the right to equality and non-discrimination. It defines age discrimination in old age as any distinction, exclusion or restriction based on age that restricts the enjoyment of human rights on an equal basis, whether occurring in the public or private sphere.⁶² It further guarantees the right to safety and freedom from physical, mental and financial

58 Doron et al (n 47) 590.

59 Organization of American States 'Inter-American Convention on the Rights of Older Persons, Press Release' 12 December 2016, www.oas.org/en/media_center/preshttps://au.int/en/decisions-3s_release.asp?sCodigo=E-198/15 (accessed 18 July 2023).

60 Organization of American States 'Inter-American Commission on Human Rights, Rapporteurship on the Rights of Older Persons' <https://www.oas.org/en/iachr/r/pm/bdocuments.asp> (accessed 22 July 2023).

61 Charter of Fundamental Rights of the European Union art 25.

62 Inter-American Convention on Older Persons art 2.

violence, including protecting the inherent dignity of older persons.⁶³ In addition, it guarantees the right to receive long-term care, which should promote their right to health, the ability to live in their own home and autonomy and provision of specialised care.⁶⁴ The right requires states to guarantee that older persons exercise the right to free and express will in decisions on long-term care and the availability of specialised personnel. The scope of the right to work extends to non-discrimination in relation to rights, benefits, and protections in the workplace.⁶⁵ The right to health incorporates mental, physical and social health and a right to a healthy ageing process takes into account sexual and reproductive health, palliative care and integrated services for diseases that result in dependence.⁶⁶ The right to housing encompasses access to home loans, safety and healthy housing, and to be protected from illegal evictions. The right requires states to progressively ensure that architectural housing designs adapt to accommodate the needs of older persons.⁶⁷ The right to accessibility guarantees independence and participation in society in all aspects of life, touching on physical mobility and access to information, including electronic information.⁶⁸

3.1.2 European Recommendation on the Rights of Older Persons

The Recommendation on the Rights of Older Persons guarantees older persons freedom from discrimination and requires states to outlaw discrimination by including age as a protected ground in their national anti-discrimination legislation.⁶⁹ It guarantees the right to inherent dignity the scope of which covers the self-determination of older persons in relation to their income, finances, place of residence, medical care and funeral arrangements and the enjoyment of legal capacity. The other limb of dignity encompasses privacy in their family life and sexual intimacy.⁷⁰ In addition, older persons are guaranteed the right to freedom from violence and abuse, which includes freedom from intentional and unintentional neglect, whether in the private or public sphere and the right from financial abuse through fraud and deception.⁷¹ Further, older persons have a right to a fair trial, which extends to being tried within a reasonable time, taking

63 Inter-American Convention on Older Persons art 9.

64 Inter-American Convention on Older Persons art 12.

65 Inter-American Convention on Older Persons art 18.

66 Inter-American Convention on Older Persons art 20.

67 Inter-American Convention on Older Persons art 24.

68 Inter-American Convention on Older Persons art 26.

69 Recommendation on the Rights of Older Persons (n 20) paras 6 & 7.

70 Recommendation on the Rights of Older Persons (n 20) paras 9-12.

71 Recommendation on the Rights of Older Persons (n 20) paras 16 & 17.

into account their age to accommodate them in judicial proceedings and in the event of detention, it should not amount to inhuman and degrading treatment.⁷²

In the realm of socio-economic rights, older people have a right to social protection, which entitles them to receive resources for an adequate standard of living, adaptable housing, mobility and supplementary services such as adult day care and nursing services.⁷³ In addition, older persons have a right to employment, which protects them from discrimination in recruitment, training, working conditions such as dismissal and remuneration and trade union membership.⁷⁴ Finally, older persons are entitled to care, based on the principle of free and informed consent to medical care, to residential and institutional care in which freedom of movement is guaranteed and a right to access palliative services in the event of long-term or life-limiting illness.⁷⁵

3.2 Interpretation and application of the normative provisions

In this part, the analysis focuses on the only case that the Inter-American Court has so far adjudicated based on the Inter-American Convention on Older Persons and three cases decided by the European Court that relate to the rights of older persons. The cases from the European Court are those where the Court found a breach of a state obligation, while cases in which the Court did not find a violation of the rights of older persons have been excluded.

3.2.1 *Inter-American Court*

In *Poblete*,⁷⁶ brought before the Inter-American Court in 2016, the victim, 76-year-old Poblete, died due to medical negligence in a public hospital in Chile. Poblete was admitted to the hospital on 17 January 2001, semi-conscious due to respiratory failure. Four days later, without his prior consent or that of his family, the hospital moved Poblete to the intensive care unit and performed a surgical procedure on him. He was discharged from the hospital on 2 February 2001. On 5 February 2001, he was readmitted to the same hospital in serious condition, with his clinical records indicating he needed an intensive care unit bed. However, as a result of what the hospital termed as a lack of an intensive care unit bed,

72 Recommendation on the Rights of Older Persons (n 20) paras 51-54.

73 Recommendation on the Rights of Older Persons (n 20) paras 21-24.

74 Recommendation on the Rights of Older Persons (n 20) para 26.

75 Recommendation on the Rights of Older Persons (n 20) paras 29-50.

76 *Poblete Vilches et al v Chile* (8 March 2018) Series C No 349.

Poblete was put in intermediate care. The hospital did not make any efforts to transfer him to another hospital where a bed was available. Poblete died on 7 February 2001 without receiving any intensive care.⁷⁷

Notably, the case was brought before the Inter-American Court before the entry into force of the Inter-American Convention on Older Persons; hence, it was mainly on violation of the Inter-American Convention on Human Rights. It was, however, decided in March 2018 after the entry into force of the Convention on Older Persons, with Chile also having ratified. In its judgment, the Inter-American Court drew the definition of older persons from the Inter-American Convention on Older Persons and interpreted the violation of rights in the context of older persons.⁷⁸ The Inter-American Court found, among others, a violation of the right to health, freedom from discrimination, dignity, and social care for older persons. In relation to discrimination, the Inter-American Court found that Poblete's advanced age was a factor in the hospital denying him intensive care following his readmission. The Court stated that a person's age should not restrict their development and access to health care. It pointed out that older persons are vulnerable; hence, the state has increased obligations to protect and guarantee their right to health, directly correlating with their right to life. In addition, older persons, on account of their age, require increased protection, hence the need for the state to adopt differentiated measures.⁷⁹ The Court thus found that the state discriminated against Poblete on account of age and thus failed to guarantee the right to health.⁸⁰ On the right to dignity, the Court stated that the Inter-American Convention on Older Persons recognises a dignified old age, which extends to autonomy.⁸¹ It enumerated the state obligation in this regard as prioritising policies that raise awareness and appreciation of older persons in society and adopting national plans to address ageing integrally.⁸²

3.2.2 *European Court of Human Rights*

In *McDonald*⁸³ the applicant was a 71-year-old woman who suffered from severe immobility. She needed a caregiver to assist her in using the toilet. From March 2007, the local authority provided her with a night-time

77 *Poblete* (n 76) paras 42-55.

78 *Poblete* (n 76) para 125.

79 *Poblete* (n 76) para 127.

80 *Poblete* (n 76) paras 139-143.

81 *Poblete* (n 76) para 127.

82 As above.

83 *McDonald v UK* (2015) 60 EHRR 1.

caregiver to assist her in using the toilet. In November 2008, the local authority informed her that her night caregiver would be withdrawn due to funding constraints, and instead, she would be provided with incontinence pads. She petitioned the European Court, arguing that she was not incontinent. Thus, denying her a caregiver and providing her with incontinence pads violated her right to privacy and human dignity under article 8 of the European Convention on Human Rights. The court found that as an elderly person, she was entitled to a caregiver and that the alternative of providing her with incontinence pads violated her privacy and dignity.⁸⁴

In relation to the right to a fair trial, the applicant in *Jablonská*⁸⁵ was 81 years old and complained that the length of proceedings in a civil case exceeded a reasonable time, hence a violation of her right to a fair trial provided in article 6 of the European Convention on Human Rights. She pointed out that the court appearances in her case required her to travel over long and tiring distances and that she had been required to appear in court numerous times. The court found that, in view of her age, the state should have exercised particular due diligence.⁸⁶

In *Vasileva*,⁸⁷ the 67-year-old applicant had an altercation with a bus inspector regarding the validity of her ticket. The police were called, and she was arrested for failing to disclose her name, identity, and date of birth. The police detained her for more than 13 hours. Upon disclosing her identity, the police released her, after which she fainted and was hospitalised.⁸⁸ She petitioned the European Court, alleging a violation of her right to liberty and security of the persons as guaranteed under article 5 of the European Convention. She argued that detention was not the appropriate means to make her reveal her identity and that the police should have conducted an independent investigation. Further, the detention impaired her health and was not proportionate.⁸⁹ The European Court, while acknowledging the need for police to obtain the identity of persons of interest, noted that the police made no efforts to identify her independently or to call a doctor as had been promised.⁹⁰ In the court's opinion, the involvement of a third party by the police would have resolved the communication stalemate, thus avoiding the need to detain

84 *McDonald* (n 83) para 51.

85 *Jablonská v Poland* (2003) 36 EHRR 27.

86 *Jablonská* (n 85) para 43.

87 *Vasileva v Denmark* (2005) 40 EHRR 27.

88 *Vasileva* (n 87) paras 8 & 9.

89 *Vasileva* (n 87) paras 24-25.

90 *Vasileva* (n 87) para 41

the applicant.⁹¹ The European Court thus found that the detention was disproportionate and a violation of the right to liberty.⁹²

4 Analysis of the normative provisions of the judicial decisions

As earlier indicated, the Protocol on the Rights of Older Persons provides no substantive rights. Rather, it enumerates state obligations in relation to the rights of older persons. This part offers a comparative analysis of the three instruments: the Inter-American Convention on Older Persons, the Recommendation on the Rights of Older Persons, and the Protocol on the Rights of Older Persons. The interpretation of normative provisions in the judicial decisions under discussion is intricately woven into the text, with the aim of defining the extent and comprehension of the protected rights. This understanding is then applied within the context of the Protocol on the Rights of Older Persons.

A textual analysis of the Inter-American Convention on Older Persons, the Recommendation on the Rights of Older Persons, and the Protocol on the Rights of Older Persons indicates common features and differences in the normative provisions. This discussion focuses on the concept of ageing; non-discrimination and multiple discrimination; dignity; autonomy and independence; access to services, in particular health, employment/work, administration of justice; and care.

At the outset, on the concept of age, the three instruments define age to delimit their scope of application. The Inter-American Convention on Older Persons and the Protocol on the Rights of Older Persons define old age chronologically. The Protocol on the Rights of Older Persons sets a minimum age of 60 years,⁹³ while the Inter-American Convention on Older Persons provides more latitude to states to set it below 60 years but not over 65 years.⁹⁴ In contrast, the Recommendation on the Rights of Older Persons moves away from chronological age and instead adopts a more open approach that individualises age to personal and environmental circumstances.⁹⁵ The Inter-American Convention on Older Persons elaborates further by defining old age as a social construct of the

91 As above.

92 *Vasileva* (n 87) paras 42 & 43.

93 Protocol on the Rights of Older Persons art 1.

94 Inter-American Convention on Older Persons art 2.

95 Recommendation on the Rights of Older Persons (n 20) Explanatory Memorandum paras 8 & 9.

later stages of life.⁹⁶ As discussed earlier, the international instruments define old age chronologically at 60 years, hence providing clarity and a reasonable justification for the approach of the Protocol on the Rights of Older Persons and the Inter-American Convention on Older Persons.

The instruments also give primacy to freedom from discrimination, which is enumerated as the first right. Notably, the Protocol on the Rights of Older Persons does not define age discrimination or discrimination in the context of older persons. Similarly, the African Charter does not expressly provide for age as a protected ground for non-discrimination.⁹⁷ The Inter-American Convention on Older Persons provides a definition of age discrimination as any exclusion or restriction that has the effect of restricting the enjoyment of rights. The Inter-American Court in *Poblete* further developed the right not to be discriminated against by elaborating on the social and cultural prejudices and stereotypes that restrict older persons' enjoyment of human rights. In this case, the Inter-American Court argued that Poblete was denied priority for an intensive care bed and a ventilator during the second admission on account of his age, which amounted to age discrimination.⁹⁸ The Recommendation on the Rights of Older Persons broadens the breadth of state obligations by requiring that states include age as a protected ground in their anti-discrimination legislation. In addition, both the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons identify multiple discrimination as discrimination against an older person based on two or more grounds of discrimination.⁹⁹ It is instructive that one of the normative gaps that have been identified at the international level is that a number of human rights treaties do not expressly list age as a protected ground for discrimination.

The Protocol on the Rights of Older Persons is silent on the right to human dignity and only mentions dignity in the context of access to a pension. The Inter-American Convention on Older Persons provides for an express right to dignity in old age. In *Poblete*, the Inter-American Court referred to a 'dignified old age' and outlined measures that states should take to guarantee a 'dignified old age'. These measures point to breaking down social and cultural stereotypes against old persons, promoting appreciation and respect for older persons in society, and ensuring social

96 Inter-American Convention on Older Persons art 2.

97 African Charter art 2.

98 *Poblete* (n 76) paras 139 & 142.

99 Inter-American Convention on Older Persons art 2; Recommendation on the Rights of Older Persons (n 20) para 8.

security.¹⁰⁰ The Recommendation on the Rights of Older Persons links dignity with the right to privacy, including respect for sexual intimacy. It also includes intentional and unintentional neglect as a violation of the right to dignity. The issue of neglect for older persons is an ever-present reality. Further, the European Court in *McDonald* emphasised dignity and privacy and stated that even in the context of the right to care, states have an obligation to ensure that older persons' dignity is respected.

On autonomy and independence, the three instruments recognise that old age does equate to loss of or diminished capacity. They similarly provide the right and ability of older persons to make their decisions in their own personal affairs and their capacity on an equal basis with other persons and the right to appoint a person of their choice to make decisions on their behalf in case of incapacity.¹⁰¹ The Protocol on the Rights of Older Persons extends the state obligation in this regard to include the right of older persons to participate in social and political life.¹⁰² The Inter-American Convention on Older Persons links independence and autonomy specifically to the living arrangements of older persons and vests older persons with the right to decide their place of residence and with whom to live.¹⁰³

In regard to access to services, specifically the right to health, the instruments include features that contextualise the right to health for older persons. The Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons emphasise free and informed consent to medical care. In this regard, both provide that older persons should freely agree to receive medical care and withdraw consent at any time.¹⁰⁴ In addition, they provide that consent should be obtained from authorised persons in case of medical emergencies.¹⁰⁵ The Protocol on the Rights of Older Persons requires states to guarantee access to health services for older persons in line with their needs.¹⁰⁶ The Inter-American Court in *Poblete* elaborated on the scope of the right to health in relation to older persons. First, it pointed out that older persons require increased protection; hence states are to adopt differentiated measures to fulfil their

100 *Poblete* (n 76) para 127.

101 See Protocol on the Rights of Older Persons art 5; Inter-American Convention art 7; and Recommendation on the Rights of Older Persons (n 20) paras 12-15.

102 Protocol on the Rights of Older Persons art 5 (3).

103 Inter-American Convention on Older Persons art 7 (a & b).

104 See Inter-American Convention on Older Persons art 11; Recommendation on the Rights of Older Persons (n 20) paras 36-39.

105 As above.

106 Protocol on the Rights of Older Persons art 15.

obligation on the right to health for older persons.¹⁰⁷ Second, it stated that increased protection also refers to comprehensive care that is efficient and continuous to ensure the quality of life.¹⁰⁸ Third, it tied the right to health to consent, autonomy, independence and accessibility for older persons noting the imbalance of power in doctor-patient relationships, hence the need for access to information, including medical records for older persons.¹⁰⁹ Finally, borrowing from General Comment 6 of the CESCR, it noted that the right to health for older persons encompassed ‘preventive, curative and rehabilitative’ elements to guarantee them functionality, autonomy and dignified old age.¹¹⁰

On the right to work, the common thread in all three instruments is the prohibition of employment discrimination. Inter-American Convention on Older Persons outlines the normative provisions of the right to extend the prohibition against discrimination in benefits and pay labour and union rights.¹¹¹ Similarly, the Recommendation on the Rights of Older Persons extends to the scope of the right to protection against discrimination in all aspects of work, including recruitment, training, trade union membership, remuneration, and retirement.¹¹² The Protocol on the Rights of Older Persons also requires states to eliminate discrimination in access to employment while taking into account specific job requirements.¹¹³

On the administration of justice and equal protection before the law, the Inter-American Convention on Older Persons provides for access to bank loans, financial credit and mortgages without discrimination on the basis of age as a component of the right to equality before the law.¹¹⁴ The Recommendation on the Rights of Older Persons in the context of access to justice provides measures to accommodate older persons during judicial proceedings.¹¹⁵ Further, it provides for particular diligence by law enforcement agencies in handling cases involving older persons.¹¹⁶ In *Jablonská*, the European Court affirmed this requirement by finding that the law enforcement agencies in Poland should have put in place

107 *Poblete* (n 76) para 127.

108 *Poblete* (n 76) para 132.

109 *Poblete* (n 76) para 131.

110 *Poblete* (n 76) para 128.

111 Inter-American Convention on Older Persons art 18.

112 See Recommendation on the Rights of Older Persons (n 20) para 26.

113 Protocol on the Rights of Older Persons art 6.

114 Inter-American Convention on Older Persons art 30.

115 Recommendation on the Rights of Older Persons (n 20) para 51.

116 Recommendation on the Rights of Older Persons (n 20) para 52.

measures to accommodate the applicant in the case on account of her old age. The measures would have ensured that her case was adjudicated expeditiously to avoid the long and tedious travel. Further, the European Court emphasised the exercise of particular diligence by law enforcement agencies in *Vasileva*, in which the court found a violation of the right to liberty since the applicant was detained for 13 hours and the police officers did not conduct an independent investigation to establish her identity.¹¹⁷

Finally, in terms of care, both the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons contain elaborate provisions on the rights and state obligations. On the other hand, the Protocol on the Rights of Older Persons appears to shift the burden of care to families and the community, with the only tangible state obligation relating to preferential treatment in access to public services.¹¹⁸ The Inter-American Convention on Older Persons obligates states to ensure specialised personnel, prevent abuse of older persons in long-term care, ensure access to information, and protect older persons' privacy and intimacy.¹¹⁹ Equally, the Recommendation on the Rights of Older Persons requires states to provide adequate residential care for older persons unable to support themselves and to provide effective and accessible complaint mechanisms in the quality of care as well as remedies for deficiencies.¹²⁰

The foregoing demonstrates similarities and differences in the rights of older persons as protected in the Inter-American and European systems and the state obligations provided in the Protocol on the Rights of Older Persons. Notably, while not introducing new rights, the three instruments provide for existing rights, and in relation to the Protocol on the Rights of Older Persons, it enumerates state obligations in the context of older persons. Based on the analysis, the normative provisions of the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons offer insights into the scope of rights of older persons, which correspond to the state obligations enumerated in the Protocol on the Rights of Older Persons.

5 Conclusion

This chapter set out to conduct a comparative analysis of the protection of the rights of older persons in the Protocol on the Rights of Older Persons, the

117 See *Vasileva* (n 87) para 41.

118 Protocol on the Rights of Older Persons art 10.

119 Inter-American Convention on Older Persons art 12.

120 Recommendation on the Rights of Older Persons (n 20) paras 40-43.

Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons. Starting from the premise that the Protocol on the Rights of Older Persons does not expressly provide for rights, rather it enumerates state obligations, the article aimed to analyse the normative rights provided by the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons and the jurisprudence from the European and the Inter-American Courts to determine the scope of rights envisaged in the state obligations enumerated in the Protocol.

The key finding of the analysis in terms of approaches is that the Inter-American Convention on Older Persons provides an elaborate set of rights with corresponding state obligations concerning older persons. Further, the Inter-American Convention on Older Persons defines important concepts such as age discrimination, old age, and multiple discrimination, providing a foundation for protected rights. In addition, each of the three instruments contextualises older persons' rights to the region's specific realities. For instance, as pointed out, the Protocol on the Rights of Older Persons contextualises the rights of older persons as caregivers to orphaned grandchildren, which is common on the African Continent. Further, the judicial interpretation of the rights of older persons also contextualises the rights to specific realities and circumstances of older persons. For instance, the interpretation of the right to health by the Inter-American Court considers the social prejudices that interfere with the enjoyment of rights by older persons. Similarly, the European Court's interpretation of the right to a fair trial in *Jablonská* considers the realities and environmental circumstances of older persons.

The analysis of the decisions of the European Court based on the European Convention on Human Rights implicitly invokes the protracted debate at the global level on whether there is a need for a specialised treaty on the rights of older persons. The normative provisions of the three instruments demonstrate the added value in actual contextualisation of the existing rights and state obligations in relation to older persons based on their unique and peculiar circumstances associated with old age. The interpretation of the Inter-American Court of the right to health under the Inter-American Convention on Older Persons in *Poblete* is also illustrative of this proposition. While acknowledging that the European Court's decisions show the possibility of adjudicating the rights of older persons within general human rights treaties, the value in elaborating rights and state obligations contextualised to the realities of old age should not be overlooked.

Returning to the Protocol on the Rights of Older Persons and what the African human rights system could draw from the Inter-American

and European systems, the elaborate enumeration of rights in both the Recommendation on the Rights of Older Persons and the Inter-American Convention on Older Persons and the judicial interpretation provides a good starting point. For instance, concepts such as age discrimination, multiple discrimination, and the broad application of the right to human dignity in relation to older persons are relevant to the African system. Importantly, the African Charter allows the African Commission to draw from other human rights instruments in interpreting and applying the rights in the African Charter.¹²¹

121 African Charter art 60.

Table of abbreviations

AU	African Union
CESCR	Committee on Economic, Social and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UN	United Nations

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