
OLD AGE IS NOT JUST IMPAIRMENT: THE CRPD AND THE NEED FOR A CONVENTION ON OLDER PERSONS

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ABSTRACT

Old age is often associated with vulnerability, abuse, and denial of human rights. The United Nations has recognised the urgency caused by a rapidly aging population coupled with widespread denial of rights and formed an Open-Ended Working Group on Ageing to consider options. One option considered is the adoption of a specialised United Nations Convention on Older Persons. Is a new specialised convention required? Would it advance the rights debate for this group? Would it improve enforcement of existing rights? Would policy interventions focusing on improving realization of existing rights be a more effective approach? These are some of the questions troubling the working group. Central to answering these questions is the intersection between older age and disability. A significant portion of older persons who are abused experience harm because they are made vulnerable when their aging bodies experience a reduction in abilities. The impaired body already enjoys recognition under a specialised human rights convention: The Convention on the Rights of Persons with Disabilities (CRPD).¹ This paper will analyse the extent to which the CRPD provides older persons protection, and considers whether a Convention on the Rights

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¹ Convention on the Rights of Persons with Disabilities, opened for signature Mar. 30, 2007, 2515 U.N.T.S 3.

of Older Persons would provide sufficient protection to justify the financial and political resources to advance a new convention to adoption. This paper argues that the operation of the CRPD is the greatest barrier to the adoption of a convention on the rights of older persons but that there remains sufficient coverage gaps to warrant the adoption of a new human rights convention.

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1. INTRODUCTION

The combination of reduced abilities and age stereotypes causes older people to experience a range of inequalities.² Some of these inequalities can result in massive denials of human rights and even death. Older people often find that they are provided inappropriate or inadequate health care.³ In order to obtain the help they require, older people often find themselves in situations where they are exposed to substantial economic, emotional, and physical subordination and abuse. This abuse is perpetrated by health practitioners in health facilities, such as nursing homes, and by family and friends when older people live in the community.⁴ Beyond groups who

² U.N. Secretary-General, *Follow-Up to the Second World Assembly on Ageing: Rep. of the Secretary-General*, U.N. Doc. A/64/127 (July 6, 2009) (discussing how ageism reinforces a negative image of older persons as dependent people with declines in intellect, cognitive and physical performance. Older persons are often perceived as a burden, a drain on resources, and persons in need of care); see generally JAMES T O'REILLY, *HOW TO PROTECT ELDERS FROM HARM* (2009) (analysing a range of age specific harms, including home injury, traffic related harms, hospital harms, risks in nursing homes, elder abuse, and financial harms).

³ E.g., RUTH BARTLETT & DEBORAH O'CONNOR, *BROADENING THE DEMENTIA DEBATE* (2010) (arguing that the health sector fails to adequately respond to people with dementia and that a more socio-political understanding of the situation of people with dementia would provide an approach that maximises their social citizenship). The devaluing of older persons is formalised when medical policies determine it is not worth saving the life of a person who is in their sixties or seventies and instead allocates resources to younger people in the community. For an example of this process, see Benjamin Eidelson, Comment, *Kidney Allocation and the Limits of the Age Discrimination Act*, 122 *YALE L.J.* 1635 (2013) (analysing the debate pertaining to kidney transplants and arguments to curtail transplants to older persons).

⁴ See JOHN BRAITHWAITE, TONI MAKKAI & VALERIE BRAITHWAITE, *REGULATING AGED CARE* (2007) (analysing the abuse experienced by people living in nursing homes and the problems in improving regulatory interventions); LISA NERENBERG, *ELDER ABUSE PREVENTION: EMERGING TRENDS AND PROMISING STRATEGIES* (2008) (arguing that often elder people lose their power and end up in relationships that are analogous to domestic violence relationships with siege mentality, dependence, helplessness, and lack of outside support); THOMAS T. WAN ET AL., *IMPROVING THE QUALITY OF CARE IN NURSING HOMES: AN EVIDENCE-BASED APPROACH* (2010) (asserting that the basic standards set out in the Nursing Home Care Reform Act of 1987 have only changed minimally following the enactment of this statute; and that as a

older people should be able to trust, the elderly reportedly experience violence from criminals who target them due to their vulnerability.⁵ People who retain sufficient abilities to participate in society still find their capacity to exercise their rights denied to them. The built environment is designed for people with full abilities. People who have reduced abilities are often unable to utilize public transport, access buildings, use on-line services or even live in homes that have not embraced universal design.⁶ Even if an older person retains all their abilities, people who reach a certain chronological age often find that their employment prospects are substantially reduced or denied to them.⁷ In summary, old age is not just a biological stage in the human life cycle; it is a period of life where a person experiences significant inequalities.

There is substantial evidence that the rights of older people are regularly abused. As analysed in part I, whether a specialised human rights convention is required to address this crisis is a disputed question. The main argument advanced by opposition states is that there are already human rights conventions protecting older persons and accordingly no new convention is required.⁸ Similar arguments were mounted and defeated when the United Nations was debating its most recent adopted specialised convention, the CRPD. Advocates for the CRPD successfully argued while persons with disabilities were protected by existing general and specialised human rights conventions, none of these conventions provided specific protections to redress the most substantial causes of disablement.⁹

consequence, good facilities remain good while bad facilities continue to operate).

⁵ BRIAN K. PAYNE, *CRIME AND ELDER ABUSE: AN INTEGRATED PERSPECTIVE* (3d ed. 2011) (discussing, in Chapter 3 especially, how older people can be targeted by criminals).

⁶ See generally Sue Adams, *No Place like Home? Housing Inequality in Later Life*, in *UNEQUAL AGEING: THE UNTOLD STORY OF EXCLUSION IN OLD AGE 77* (Paul Cann & Malcolm Dean eds., 2009).

⁷ *AGE DISCRIMINATION AND DIVERSITY: MULTIPLE DISCRIMINATION FROM AN AGE PERSPECTIVE* (Malcolm Sargeant ed., 2011) (analysing the significant role ageism has in the employment lives of older people).

⁸ For discussion, see U.S. Statement by Kathy Greenlee, Open-Ended Working Group on Ageing (July 30, 2014), available at <http://social.un.org/ageing-working-group/documents/fifth/United%20States.pdf> [perma.cc/LZ3K-UVRV].

⁹ Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 *B.U. INT'L L.J.* 249, 251 (2009) (explaining how the CRPD advances social rights in a way that may profoundly

To demonstrate the need for a convention on the rights of older persons, this paper will analyse how older persons are protected by existing human rights regimes and argue that there is a sufficient gap that justifies the adoption of a convention on the rights of older persons.

This paper argues that the operation of the CRPD is the greatest barrier to the adoption of a convention on the rights of older persons. As illustrated in part II of this paper, excluding the adoption of the CRPD, there are no binding human rights instruments that provide adequate protection to older persons. The CRPD differs from all other human rights conventions as it specifically deals with the vulnerabilities of older persons when they are most disempowered. Martha Fineman has observed that “[v]ulnerability is inherent in the human condition”.¹⁰ The nature of that vulnerability for older persons is often a reduction in abilities. A reduction in abilities can also be described in terms of disablement. This paper contends that there is a strong intersection between how the state and legal institutions respond to the vulnerabilities associated with old age and disability. Most people in western society progress through biological stages that are associated with birth, childhood, adulthood, old age, and death. Often, abilities deteriorate as a person progresses from adulthood to old age.¹¹ This reduction in abilities often requires additional health care and adjustments in how they interact with society and the built environment. Arguably, older persons who experience physical or mental impairments form the most vulnerable group of older persons. As members of this group are largely protected by the CRPD, is there a case for creating a conven-

affect the development of emergent social rights jurisprudence, and advance human rights advocacy); Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37, 42 (2007) (explaining that the development of the CRPD involved disability person organizations more than other treaty discussions and was marked by a degree of transparency, enthusiasm, lack of politicization, and cooperation unparalleled in UN treaty negotiations or general meetings).

¹⁰ Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: GENDER IN LAW, CULTURE, AND SOCIETY 13 (Martha Albertson Fineman & Anna Grear eds., 2013).

¹¹ Irving K. Zola, *Ageing and Disability: Toward a Unifying Agenda*, 55 AUSTRALIAN DISABILITY REVIEW 6, 6-8 (1988).

tion to protect older persons when such people are already protected by the CRPD?

In part III this paper will analyse the extent to which the CRPD addresses the inequalities experienced by older persons with and without disabilities. Both age and disability scholars have identified two broad public policy models that cause disadvantage. The first public policy model criticises the role the medical profession and legal institutions have in using a reduction in abilities as a trigger for a denial of human rights.¹² As the trigger for the denial of rights is a reduction in ability, the CRPD arguably extends protection to older persons who are disadvantaged by the medical model. While the CRPD can help combat inequalities associated with the medical model, arguably the CRPD provides limited protection in combating institutions and attitudes in society that lead to ageism. Below, this paper will illustrate that the CRPD aims to combat negative attitudes towards disability, but provides very limited protection for older persons who confront ageist attitudes that are based upon age rather than actual or perceived impairments. Arguably, the significant denial of rights that flows from ageism, and the failure of the existing human rights regime to adequately combat this form of discrimination, is itself a justification for developing a specialised human rights convention which can generate age specific jurisprudence.

2. MOVES TO ADOPT A CONVENTION ON THE RIGHTS OF OLDER PERSONS

Following resolution 65/182, the United Nations Open-Ended Working Group on Ageing was formed. The Open-Ended Working Group on Ageing has held five working sessions, with the last working session being held from July 30 to August 1, 2014.¹³ Support for

¹² Paul Harpur & Heather Douglas, *Disability and Domestic Violence: Protecting Survivors' Human Rights*, 23 GRIFFITH L. REV. 405 (2014) (exploring how CRPD and the medical model have impacted laws and institutions affecting survivors of domestic violence who have disabilities); Jody Hemann, Michael Ashley Stein & Gonzalo Morena, *Disability, Employment and Inclusion Worldwide*, in *DISABILITY AND EQUITY AT WORK* (Jody Hemann et al. eds., 2014) (considering how the medical profession controls the criteria which determine if a person is categorized as either able or disabled).

¹³ *Open-ended Working Group on Ageing*, UNITED NATIONS, <http://social.un.org>.

the development of a new United Nations convention was not strong during early sessions.¹⁴ The main stumbling block to the development and adoption of a Convention on the Rights of Older Persons was the view that the rights of older persons were adequately protected under existing international human rights laws and that there were no normative gaps.¹⁵ During the first working sessions, states such as Canada, the United States of America and states represented by the European Union, argued that the rights existed and that the problem was a critical implementation gap.¹⁶ These states maintained their objection to a new convention through the 2011,¹⁷

org/ageing-working-group/.

¹⁴ Israel Doron & Benny Spanier, *International Convention on Rights of Older Persons: Where We Were, Where We Are and Where Are We Going?*, 8 GLOBAL AGEING 7 (2012).

¹⁵ *Id.* at 12.

¹⁶ See generally Chair of the Open-ended Working Group on Ageing, *Chair's Summary: Open-Ended Working Group on Ageing for the Purposes of Strengthening the Protection of the Human Rights of Older Persons: General Assembly Resolution 65/182* (April 18-21, 2011).

¹⁷ The Chair of the second working group in 2011 commented that a number of "delegations noted existing international standards are sufficient but have been under-utilized. There are no normative gaps but rather gaps in the implementation of existing instruments to the particularities of older persons." Open-Ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons (August 1-4, 2011), http://social.un.org/ageingworking-group/documents/Chair_summary_2nd_session_OEWG_final.pdf [perma.cc/T87B-MT9H].

2012,¹⁸ 2013¹⁹ and 2014 sessions.²⁰

Support for a new convention was evident when, following the

¹⁸ The Chair of the third session observed that

[i]n their general statements, several countries observed that existing international human rights standards and principles apply to older persons, including the right to health and social security as well as the prohibition of violence and discrimination, and that current deficiencies in the protection of the rights of older persons could be addressed by more effective implementation of the existing mechanisms. . . .

Rapporteur of the Open Ended Working Group on Ageing, *Rep. of the Open-ended Working Group on Ageing*, U.N. Doc. A/AC.278/2012/1 (Sep. 19, 2012), <http://social.un.org/ageing-working-group/documents/AAC27820121English.pdf> [perma.cc/B746-9K2B].

¹⁹ The chair of the third session observed: "Other Member States stated that while protection and implementation gaps exist, they are not of a normative nature. In addition, existing legal instruments cover the rights of older persons already and there is no consensus on a convention among Member States." Chair's Summary, Chair of the Open-ended Working Group on Ageing, *Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons* (G.A. Res. 65/182 and 67/139 (Aug. 12-15, 2013).

²⁰ Statement by Sara Jiwani,, *Employment and Social Development Canada*, Independent Working Group on Ageing (July 30, 2014), http://social.un.org/ageing-working-group/documents/fifth/Canada_Opening%20Statement_En.pdf [perma.cc/SPZ2-8NXH] ("It is important to reflect that human rights are inclusive, indivisible and interdependent, and that no human right guaranteed by international treaty is subject to an expiry date based on a person's age. . . . We believe that the option of a new international convention on the human rights of older persons is not currently supported by a broad consensus. . . ."); European Union, *Open-ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons Fifth Working Session* (July 30, 2014), http://eu-un.europa.eu/articles/en/article_15336_en.htm [perma.cc/9RA6-Q3AC] ("At the same time we are convinced that in order to achieve concrete progress for older people, our efforts and our inherently limited resources should focus on the implementation of the existing instruments. Like many others, we share the concern about the actual situation of older persons and concur that much more attention must be paid to address the existing problems that range from abuse and discrimination, poverty and insufficient care levels, to more specific health issues and other challenges that older persons face. In our perspective, much of this could be described as human rights violations, or the lack of fulfilment of human rights."); U.S. Statement by Kathy Greenlee, Open-Ended Working Group on Ageing (July 30, 2014), available at <http://social.un.org/ageing-working-group/documents/fifth/United%20States.pdf>. ("Since the outset of the Open-Ended Working Group, some member states have supported negotiating a new international legal instrument on the rights of older persons. The United States continues to have serious concerns about this proposal. We question what a new convention would add to the protections already present in existing human rights treaties, which apply to persons of all ages, including older persons.").

fourth session of the Open-Ended Working Group on Ageing, the United Nations General Assembly passed resolution 67/139 empowering the working group to consider proposals on developing a new convention.²¹ Support for resolution 67/139 was far from strong, with 118 member states abstaining from voting, 56 voting in favour and five voting against.²² European Union members, despite expressing doubts about the need for a convention through all working sessions, did not vote against resolution 67/139.²³ Canada and the United States, along with Israel, Seychelles and South Sudan, voted against resolution 67/139.²⁴

In the 2014 Fifth Open-Ended Working Group on ageing session, countries such as Brazil, argued that there is a gap under international law and that the vulnerabilities experienced by older persons is sufficiently similar to the position of persons with disabilities, prior to the adoption of the CRPD, to justify the adoption of a new specialised convention.²⁵ Persons with disabilities, it is argued, have benefited from the CRPD in a way that the elderly would benefit from a convention protecting the rights of older persons. The CRPD however protects some of the most vulnerable older persons: older persons with disabilities. Is a convention protecting the rights of older persons necessary after the adoption of the CRPD? Countries, including Brazil,²⁶ the Dominican Republic,²⁷ Indonesia,²⁸ Kenya,²⁹

²¹ G.A. Res. 67/139, U.N. Doc. A/RES/67/139 (Dec. 20, 2012).

²² G.A. Res. 67/139, at 3–4, U.N. Doc. A/67/PV.60 (Dec. 20, 2012).

²³ *Id.* at 3–4.

²⁴ *Id.* at 3.

²⁵ Permanent Mission of Brazil to the United Nations, *Open-Ended Working Group on Ageing Fifth Session* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816256/brazil.pdf> [perma.cc/GPS9-GF5Y].

²⁶ *Id.*

²⁷ Statement by Nathalie Maria, Executive Director, Nacional Council For the Elderly Persons, *Fifth Session of the Open-Ended Working Group on Ageing* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816276/dominican-republic-eng-.pdf> [perma.cc/EJ5P-36NT].

²⁸ Statement by Masni Eriza, Counsellor, Permanent Mission of the Republic of Indonesia, U.N., *5th Session of the Open Ended Working Group on Ageing: General Debate* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816279/indonesia.pdf> [perma.cc/6KRA-PM3R].

²⁹ Statement by Lydia Muriuki, *Presentation of Kenya's Country Position Paper at the Fifth Session of the Open-Ended Working Group on Ageing (OEWG)* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816253/kenya.pdf>

Malawi,³⁰ Malaysia,³¹ the Philippines,³² and the Kingdom of Saudi Arabia,³³ argue “yes.” African countries have done more than simply support the development of a United Nations convention in all sessions. African states have adopted a protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa during the Fourth Session of the AU Conference of Ministers of Social Development held in Addis Ababa, Ethiopia in May, 2014.³⁴

State parties adopt divergent positions on whether or not there is a normative gap in the protection of older persons under international law. How are these opposite positions reached? State parties make statements to the United Nations based upon a large range of factors, including political, economic, state, and legal cultural differences towards United Nations human rights conventions. To advance scholarship, and to provide guidance to future debates, this paper will now adopt a black letter law method to analyse the international position to determine whether there is a gap under international law which requires filling by a convention on the rights of older persons.

[perma.cc/E8BX-6SFS].

³⁰ Statement by Charles P. Msosa, Ambassador/Permanent Representative of the Republic of Malawi, U.N., *At the 5th Working Session of the Open-Ended Working Group on Ageing* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816240/malawi.pdf> [perma.cc/Q862-MRW7].

³¹ Statement by Hussein Haniff, H.E. Ambassador/Permanent Representative *At the Fifth Open Ended Working Group on Ageing* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816278/malaysia.pdf> [perma.cc/WP4A-XN5H].

³² Libran N. Cabactulan, *Agenda Item 4: Existing International Framework on the Human Rights of Older Persons and Identification of Existing Gaps at the International Level: 5th Working Session of the Open-Ended Working Group on Ageing* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816233/philippines.pdf> [perma.cc/FDT6-BE3E].

³³ Rania Talal Abdul-Baqi, *Statement of the Kingdom of Saudi Arabia Before the Fifth Working Session of the Open Working Group on Ageing* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816261/saudi-arabia-eng-.pdf> [perma.cc/99KM-MW6G].

³⁴ African Commission on Human and Peoples' Rights, *Comments Invited on Draft Protocol on the Rights of Persons with Disabilities in Africa* (Mar. 14, 2014), <http://www.achpr.org/news/2014/04/d121> [perma.cc/XBJ7-93D7].

The effectiveness of human rights bodies often attracts criticism.³⁵ Arguably, non-binding declarations and international instruments are not sufficient to motivate state parties to advance the rights of people experiencing disadvantage. The highest forms of international agreements are conventions that have binding targets and an oversight body which can pass judgments.³⁶ While states can still elect to ignore these judgments, these bodies carry significant moral force.³⁷ In contrast, declarations are often regarded as lower order instruments which only become binding after considerable acceptance by states.³⁸ Accordingly, this paper does not engage with the debate surrounding whether older persons should receive protection from a United Nations human rights convention that contains complaint procedures or not. This paper analyses whether or not the existing human rights conventions provide older persons adequate protection.

3. EXCLUDING THE CRPD, WHAT INTERNATIONAL INSTRUMENTS PROTECT THE RIGHTS OF OLDER PERSONS?

3.1. *The Protection of Older Persons under International Declarations*

International law can be separated into hard law, those which enshrine rights and oblige states to act, and soft law, those that do not create rights or impose obligations upon states.³⁹ The majority of international instruments which concern older persons can be de-

³⁵ JULIE MERTUS, *THE UNITED NATIONS AND HUMAN RIGHTS* 154 (2d ed. 2009).

³⁶ MICHAEL K. ADDO, *THE LEGAL NATURE OF INTERNATIONAL HUMAN RIGHTS* 41 (2010).

³⁷ Malcolm Langford & Mac Darrow, *Moral Theory, International Law and Global Justice*, in *GLOBAL JUSTICE, STATE DUTIES* (Malcolm Langford et al. eds., 2013).

³⁸ For example, despite being a declaration, the UDHR has such a wide acceptance by nations that it has been contended that most rights in the UDHR constitute customary law. See generally Penelope Mathew, *Human Rights*, in *PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE* 268-269 (Sam Blay et al. eds., 2nd ed. 2005); Scott L. Porter, *The Universal Declaration of Human Rights: Does It Have Enough Force of Law to Hold "States" Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice?*, 3 *TULSA J. COMP. & INT'L L.* 142 (1995).

³⁹ Sumudu Atapattu, *International environmental law and soft law: a new direction or a contradiction?*, in *NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS* 200, 202-03 (Cecilia M. Bailliet ed., 2012).

defined as soft law. The 1991 United Nations Principles for Older Persons is an example of an early soft law instrument to protect the interests of older persons.⁴⁰ These principles encourage “[g]overnments to incorporate [a range of] principles into their national programmes whenever possible”.⁴¹ The United Nations Principles for Older Persons explain that states “[s]hould” attempt to achieve aspirational targets in relation to independence,⁴² participation,⁴³ care,⁴⁴ self-fulfilment,⁴⁵ and dignity.⁴⁶ These targets are not cast as inalienable rights nor is there any capacity for older persons to compel the state to achieve these targets as there would be in a human rights convention.

The Madrid International Plan of Action on Ageing, signed by 156 countries, is arguably the leading international instrument protecting the rights of all older persons.⁴⁷ The Madrid International Plan of Action on Ageing marked “[a] turning point in how the world addresses the key challenge of ‘building a society for all ages.’”⁴⁸ The Madrid International Plan of Action on Ageing “[f]ocuses on three priority areas: [1] older persons and development; [2] advancing health and well-being into old age; and [3] ensuring enabling and supportive environments.”⁴⁹ While the Madrid Plan focuses on protecting people against age discrimination, the instrument does consider the intersection of old age and disability.⁵⁰ For example, the Madrid Plan advises states, when recognising the

⁴⁰ G.A. Res. 46/91, U.N. Doc. A/RES/46/91 (Dec. 16, 1991).

⁴¹ *Id.* pmb1.

⁴² *Id.* princs. 1-5.

⁴³ *Id.* princs. 7-9.

⁴⁴ *Id.* princs. 10-14.

⁴⁵ *Id.* princs. 14-15.

⁴⁶ *Id.* princs. 17-18.

⁴⁷ Second World Assembly on Ageing, Political Declaration and Madrid International Plan of Action on Ageing (Apr. 8-12, 2002), http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf [perma.cc/GU2B-38T6]; European Union, *Open-ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons Fifth Working Session* (July 30, 2014), http://eu-un.europa.eu/articles/en/article_15336_en.htm [perma.cc/TW25-MFCX]

⁴⁸ *Id.* at 5.

⁴⁹ *Id.*

⁵⁰ *Id.*

social, cultural, economic and political contribution of older persons, that they should take actions including treating older persons “[f]airly and with dignity, regardless of disability or other status”⁵¹ While the Madrid Plan contains provisions protecting older persons with and without disabilities, this instrument does contain protections that are particularly relevant to older persons. Article 27, for example, explains that states should ensure that older workers with disabilities can access “[a]ppropriate adjustments . . . to the workplace environment This suggests that employers, workers organizations and human resource personnel should pay closer attention to emerging workplace practices, both domestic and international, that might facilitate the retention and productive fulfillment of older workers in the workforce.” Despite its value, the Madrid Plan does not enshrine rights, include a mandatory reporting regime or enable complaints to be lodged about non-compliance. Based on its limited enforcement, the Madrid Plan should be regarded as a valuable statement which does not enshrine the human rights of older persons.

3.2. *The Protection of Older Persons under International Conventions*

There are no specialised human rights conventions which enshrine the rights of older persons.⁵² Older persons, however, are expressly recognised under a range of existing United Nations human rights conventions.⁵³ The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration on Human Rights each protect all persons regardless of their age.⁵⁴ In addition to these

⁵¹ *Id.* at 20.

⁵² Diego Rodríguez-Pinzón & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT’L L. REV. 915, 917-18 (2003) (describing the lack of legal attention given to elderly persons); 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*, 25 GA. ST. U. L. REV. 527 (2009).

⁵³ Office of the High Commissioner for Human Rights, Normative Standards in International Human Rights Law in Relation to Older Persons: Analytical Outcome Paper (Aug. 2012), <http://social.un.org/ageing-working-group/documents/OHCHRAnalyticalOutcomePaperonOldePersonsAugust2012.doc> [perma.cc/5RU2-7MN6] (the OHCHR published a review of how older persons are protected under international laws).

⁵⁴ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999

general protections, older people also benefit from specialised human rights conventions. For example, older people who are also women have their right to social security protected during retirement and old age.⁵⁵

In addition to protection under existing United Nations regimes, older persons also receive protection under instruments from specialised institutions. For example, the International Labour Organization has adopted a number of conventions, which provide protection for older workers. While the ILO has a range of general protections which apply equally to older persons,⁵⁶ the ILO does have some conventions and recommendations which are especially relevant to older workers.⁵⁷ For example, the ILO Convention 102 requires state signatories to provide workers minimum standards of social security;⁵⁸ ILO Recommendation 162 calls upon members to prevent workplace discrimination on grounds including age;⁵⁹ and

U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. UN Doc. A/810 (Dec. 12, 1948).

⁵⁵ Convention on the Elimination of All Forms of Discrimination against Women, art. 11(1)(e), Dec. 18, 1979, 1249 U.N.T.S. 13.

⁵⁶ For example, the ILO Convention no. 155 protects the occupational health and safety of all workers regardless of their age. Convention Concerning Occupational Safety and Health Convention and the Working Environment, June 22, 1981, 1331 U.N.T.S. 279.

⁵⁷ Vinicius Pinheiro, *Fifth Session of the Open-ended Working Group on Ageing: Agenda item 4: Existing International Framework on the Human Rights of Older Persons and Identification of Existing Gaps at the International Level* (July 30, 2014), <https://papersmart.unmeetings.org/media2/3816274/ilo.pdf> [perma.cc/K523-MXJG].

⁵⁸ Social Security (Minimum Standards) Convention, 1952 (No. 102) at art. 25 & 26, June 28, 1952, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312247:NO [https://perma.cc/458Q-VRWB]:

Article 25: Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of old-age benefit in accordance with the following Articles of this Part.

Article 26: 1. The contingency covered shall be survival beyond a prescribed age. 2. The prescribed age shall be not more than 65 years or such higher age as may be fixed by the competent authority with due regard to the working ability of elderly persons in the country concerned.

⁵⁹ R162 - Older Workers Recommendation, 1980 (No. 162), at art 3, June 23, 1980, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R162 [https://perma.cc/43PV-X6V5] (“Each Member should, within the framework of a national policy to promote

Recommendation 166 provides that old age is not a valid reason for termination of employment.⁶⁰ The leading ILO convention on discrimination at work, ILO Convention No. 111, interestingly does not include age discrimination in its list of protected attributes.⁶¹ While all of these conventions have some application to older people, dealing with the interests of older persons in a piecemeal manner is an approach that, based upon specialised United Nations conventions which have been adopted, has been rejected when considering how to protect the rights of children, people with disabilities and women. This paper argues that a specialised convention is required to deal with the specific issues of older persons. The question this paper will next address is whether the rights of older persons are already sufficiently particularized and protected by the CRPD.

equality of opportunity and treatment for workers, whatever their age, and of laws and regulations and of practice on the subject, take measures for the prevention of discrimination in employment and occupation with regard to older workers.”).

⁶⁰ 166 - Termination of Employment Recommendation, 1982 (No. 166), at art. 5, June 22, 1982, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R166 [<https://perma.cc/QY9J-WCW5>] (“In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination: (a) age, subject to national law and practice regarding retirement . . .”). See also C168 - Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), at art 8, June 21, 1988, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312313:NO [<https://perma.cc/6Y5K-XKH9>]:

Each Member shall endeavour to establish, subject to national law and practice, special programmes to promote additional job opportunities and employment assistance and to encourage freely chosen and productive employment for identified categories of disadvantaged persons having or liable to have difficulties in finding lasting employment such as women, young workers, disabled persons, older workers, the long-term unemployed, migrant workers lawfully resident in the country and workers affected by structural change.

⁶¹ Art 1 provides that “[f]or the purpose of this Convention the term discrimination includes-- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin” C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111), at art. 1, June 25, 1958, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312256:NO [<https://perma.cc/ZYF7-4B29>].

4. THE ROLE OF THE CRPD IN PROTECTING OLDER PERSONS

Both age and disability scholars have recognised the value of promoting equality through a human rights discourse.⁶² The existence of the CRPD is a key difference between the status of the rights of older persons and persons with disabilities. While age and disability scholars utilize similar theoretical models and arguments to promote rights, the CRPD has significantly transformed the rights of people with disabilities under international law.⁶³

This part will first illustrate that many older persons meet the definition of disability under the CRPD and that the CRPD provides a range of provisions that specifically protect older persons with disabilities. Does the protection afforded to older persons with disabilities mean that the CRPD sufficiently covers the field so that there is no need for a convention on the rights of older persons? This part will secondly analyse situations where the CRPD would not protect older persons without disabilities. This part concludes that there re-

⁶² See Michael Ashley Stein & Penelope J.S. Stein, Symposium, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007), for a disability perspective, which argues that human rights discourse should be promoted from an alternative approach to a purely civil rights focus. For old age, see for example, the emergence of active citizenship discourse, which emerged first from the writings of Laslett. See, e.g., P. LASLETT, *A FRESH MAP OF LIFE: THE EMERGENCE OF THE THIRD AGE* (1991) (arguing that later life is an opportunity and that disengagement should be actively resisted). More recently, active ageing has become a key component in global policy responses to promote the rights of older persons. See, e.g., Alan Walker, *Commentary: The Emergence and Application of Active Aging in Europe*, 21 J. OF AGING & SOC. POL'Y 75 (2009) (describing the European origins of active aging and posing a new strategy for it).

⁶³ Eve Hill & Peter Blanck, *Future of Disability Rights Advocacy and "The Right to Live in the World,"* 15 TEX. J. C.L. & C.R. 1, 29-30 (2009) (arguing the implementation of the Convention will succeed or fail depending on whether it is implemented as merely a technical standard, or recognized as a roadmap for transformation). See also Gerard Quinn, *Resisting the "Temptation of Elegance": Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 215 (Oddny Mjöll Arnardóttir & Gerard Quinn eds., 2009) (observing that the adoption of the CRPD by the United Nations and this convention's rapid ratification has created a "dynamic of change"); see also Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation Of Human Rights Law And The United Nations Convention On The Rights Of Persons With Disabilities*, 83 WASH. L. REV. 449, 467 (2008) (explaining that to achieve the social change, potential advocates must engage in a three pronged comprehensive human rights practice).

mains a sufficient protection gap to justify the introduction of a specialised convention to protect the rights of older persons.

4.1. *When Are Older Persons Regarded as "Disabled" for the CRPD?*

While the CRPD provides specific protection to older persons in two articles,⁶⁴ overall the CRPD aims to protect persons with disabilities. Older persons would need to be categorized as "disabled" to fully utilize the CRPD. How disability definitions are interpreted is a hotly contested area.⁶⁵ It is likely that the definition of "disability" in the CRPD will attract similar critique in the future.

Arguably, many older people are currently entitled to assert rights under the CRPD. Article 1 of the CRPD provides that: "[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

When is a person old or disabled? Historically a person was regarded as elderly when their abilities decreased to a point at which they were regarded as crippled or infirm.⁶⁶ During this time, the definitions of old age and disability were largely conflated. Medical science has altered this position and now pathologises old age and disability.

⁶⁴ CRPD, *supra* note 1, at art. 25 & 28.

⁶⁵ For example, The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) was enacted to afford broader protections to people with disabilities following United States Supreme Court decisions that narrowed the definition of "disability". See, e.g., Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008); see also Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203 (2010) (arguing that the ADAAA strikes a balance between the universal and minority group approaches to defining disability); see also Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187 (2008) (providing an overview of the advocacy effort that has resulted in restoring the original intent of the ADA and destroying the barriers of discrimination that prevent people with disabilities from fully participating in society). Cf. Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509 (2011) (arguing that the ADAAA has largely failed to address the ADA's "reasonable accommodation" mandate and to redress the damage done by courts' ADA jurisprudence).

⁶⁶ IRINA METZLER, A SOCIAL HISTORY OF DISABILITY IN THE MIDDLE AGES: CULTURAL CONSIDERATIONS OF PHYSICAL IMPAIRMENT 92-93 (2013).

While being old is not an impairment, as people age, their abilities reduce. Arguably, nearly every person will be disabled if they live long enough.⁶⁷ In the United States, statistics indicate that a substantial amount of older persons currently have impairments. The most vulnerable older persons are arguably those who live in nursing homes. Nursing homes operate to assist people with significant impairments.⁶⁸ There is an estimated 363 people over the age of 65 in nursing homes for every 10000 US citizens.⁶⁹ With a national population of 318, 881, 992,⁷⁰ this makes a nursing home population of approximately 11,471,540.34. Many older Americans that are not institutionalised live with impairments. Approximately 22% of Americans that are 65 and over are in fair or poor health,⁷¹ 6.4% require help with personal care from other persons,⁷² and 28.5% have diabetes.⁷³ Sub-sets of the older population have even higher rates of impairments. For example, 75.1% of men who are 75 and over have hypertension.⁷⁴ While millions of older persons will not have an impairment that is regulated by the CRPD, it is arguable that the CRPD does regulate some of the most vulnerable older persons.

4.1.1. How Does the Rights Regime Benefit Older Persons with

⁶⁷ Bradley A. Areheart, *GINA, Privacy, and Antisubordination*, 46 GA. L. REV. 705, 716 (2012) (advocating for non-discrimination against the disabled).

⁶⁸ The requirements for states and long term care facilities in the CFR provide that facilities must have admission orders from a physician for the resident's immediate care. See 42 C.F.R. § 483.20 (2014).

⁶⁹ Centers for Disease Control and Prevention, *The National Nursing Home Survey: 2004 Overview* 35 (2009), http://www.cdc.gov/nchs/data/series/sr_13/sr13_167.pdf [perma.cc/K2HR-CY9D].

⁷⁰ United States Census Bureau, *Current Population, U.S. AND WORLD POPULATION CLOCK* (Jan. 19, 2016, 14:16 UTC), <http://www.census.gov/main/www/popclock.html> [perma.cc/C66Y-V6EH].

⁷¹ Centers for Disease Control and Prevention & National Center for Health Statistics, *Health, United States, 2013, With Special Feature on Prescription Drugs* 178 (2013), [http://www.cdc.gov/nchs/data/13.pdf#052](http://www.cdc.gov/nchs/data/hus/13.pdf#052) [perma.cc/77HR-LNN7].

⁷² Centers for Disease Control and Prevention, *Early Release of Selected Estimates Based on Data From the 2012 National Health Interview Survey* (June 18, 2013), <http://www.cdc.gov/nchs/nhis/released201306.htm> [perma.cc/K6YF-2B78].

⁷³ National Center for Health Statistics, *supra* note 71, at 165.

⁷⁴ *Id.* at 215.

Disabilities?

How does the CRPD protect older persons with disabilities? Persons with disabilities are protected by rights found in CRPD Articles 3 to 9, which include universal rights, and Articles 10 to 30, which include substantive rights.⁷⁵ Finally, CRPD Articles 31 to 40 establish implementation and monitoring schemes, and Articles 41 to 50 provide rules governing the operation of the CRPD.⁷⁶

The CRPD does more than simply restate existing rights. The CRPD restates existing human rights in a way that is more relevant to people with disabilities. This process provides persons with disabilities, including older persons with disabilities, significant protection. Older persons with disabilities are at particular risk of having their rights to health, life, to be free from deprivation of liberty, to respect for privacy, and to family, violated.⁷⁷ The CRPD provides specific protection for all these rights in a way that specifically targets the needs of people with disabilities.⁷⁸

How the right to health is protected in the CRPD illustrates how this convention targets existing rights to the needs of persons with disabilities. The CRPD explains that persons with disabilities have a right to health and then explains what states need to do to ensure this right:

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

⁷⁵ CRPD, *supra* note 1, arts. 3–30.

⁷⁶ *Id.*, at arts. 31–50.

⁷⁷ See MICHAEL MANDELSTAM, SAFEGUARDING VULNERABLE ADULTS AND THE LAW (2009) (discussing the experience of denials of their rights to health and life, rights to be free from inhuman or degrading treatment, to be free from deprivation of a person's liberty, and rights to respect for a person's home, private and family life).

⁷⁸ See CRPD, *supra* note 1, art. 9 (accessibility); art. 10 (right to life); art. 14 (liberty and security of the person); art. 17 (protecting the integrity of the person); art. 22 (respect to the right of privacy); art. 23 (respect for home and the family); art. 25 (right to health).

(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(c) Provide these health services as close as possible to people's own communities, including in rural areas;

(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, *inter alia*, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner; [and]

(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.⁷⁹

In addition to specifically tailoring the right to health to the needs of persons with disabilities, the CRPD provides a range of other rights which, if ensured, would increase persons with disabilities' capacity to exercise their right to health. These supporting rights include rights to access information technologies and medical facilities,⁸⁰ to receive additional support during periods of risk and humanitarian emergencies,⁸¹ to enjoy recognition before the law as full citizens,⁸² to ensure that the existence of a disability is not a justification for the deprivation of liberty,⁸³ to be free from compulsory medical experimentation,⁸⁴ to live independently and be included in

⁷⁹ *Id.*, art. 25.

⁸⁰ *Id.*, art. 9

⁸¹ *Id.*, arts. 11 & 21.

⁸² *Id.*, art. 12.

⁸³ *Id.*, art. 14.

⁸⁴ *Id.*, art. 15.

the community,⁸⁵ to receive mobility aids,⁸⁶ to privacy,⁸⁷ and to habitation and rehabilitation.⁸⁸

The CRPD posits this comprehensive rights regime in a format that places specific obligations on state parties. To protect persons with disabilities, the CRPD provides that States should have robust domestic legislation to protect the rights of persons with disabilities, and that this legislation must be enforced.⁸⁹ Article 4(1) requires States to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities.”⁹⁰ To achieve this end, Article 4 requires States, among other things:

- (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention [CRPD];⁹¹
- (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;⁹²
- (c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;⁹³ [and]
- (d) To refrain from engaging in any act or practice that is inconsistent with the present [CRPD] and to ensure that public authorities and institutions act in conformity with the present Convention.⁹⁴

⁸⁵ *Id.*, art. 19.

⁸⁶ *Id.*, art. 20.

⁸⁷ *Id.*, art. 22.

⁸⁸ *Id.*, art. 26.

⁸⁹ *Id.*, arts. 31–50.

⁹⁰ *Id.*, art. 4(1).

⁹¹ *Id.*, art. 4(1)(a).

⁹² *Id.*, art. 4(1)(b).

⁹³ *Id.*, art. 4(1)(c).

⁹⁴ *Id.*, art. 4(1)(d).

4.2. Complaints Procedures under the CRPD

Where states have ratified the Optional Protocol to the CRPD, then the Committee on the Rights of Persons with Disabilities can “receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the” CRPD.⁹⁵

5. BEYOND THE CRPD: A NEED FOR A CONVENTION TO PROTECT OLDER PERSONS

Scholars have developed models to explain the inequalities experienced by older and disabled persons.⁹⁶ These models explain inequality based on two broad issues. One issue focuses on how medical impairments are a trigger for disadvantage, while the other focuses on how society turns difference into disadvantage.⁹⁷ While the CRPD will largely protect older persons who are disadvantaged by their medical conditions, the CRPD will do very little to assist older persons who are disadvantaged due to social structures based upon their chronological age. This part will illustrate how the CRPD can assist older persons who are disadvantaged by policies associated with the medical model; however, the CRPD offers little support to older persons who are disadvantaged by structural discrimination based upon age.

⁹⁵ Optional Protocol to the Convention on the Rights of Persons with Disabilities, U.N. Doc. A/61/611 (Dec. 6, 2006).

⁹⁶ For a discussion of how these models were used to develop the CRPD, see Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law And The United Nations Convention on the Rights of Persons With Disabilities*, 83 WASH. L. REV. 449, 460 (2008) (arguing that the Convention categorically affirms the social model of disability in relation to persons with disabilities by describing it as a condition arising from “interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others” instead of a condition arising from inherent limitations”) (citing CRPD, *supra* note 1, art. 1).

⁹⁷ See Paul Harpur, *Time to be Heard: How Advocates can use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. U. L. REV. 1271, 1273–85 (2011) (discussing different models that have changed law and policy related to disability).

5.1. Emergence of Structural Explanations of Disadvantage

During the 1980s models emerged which challenged the problematizing of individual difference. As analysed in this section, theories emerged that regarded divergence from medically constructed ability standards as simply a form of social diversity. Both old age and disability scholars argued that a significant cause of inequalities was not their levels of ability, but how society was structured, interacted with, and how they perceived those abilities.⁹⁸ While age and disability scholars focused upon different structural factors, both schools criticised how ability standards were used as a tool of disempowerment.

While both age and disability scholars critique the structural causes of inequalities, arguably disability scholars took a more radical and emancipatory position.⁹⁹ Disability social model scholars argued that physical and mental differences were simply a manifestation of diversity.¹⁰⁰ This ability diversity is turned into a disability when society adopts practices and beliefs which are disabling.¹⁰¹ For

⁹⁸ See SAMUEL BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 7-13 (2009) (describing “the endorsement of a social rather than a medical model of disability” as “the one position that approaches consensus within the movement”).

⁹⁹ See Colin Barnes, *An Ethical Agenda in Disability Research: Rhetoric or Reality?*, in THE HANDBOOK OF SOCIAL RESEARCH ETHICS 458, 458-73 (M.D. Mertens & P.E. Ginsberg eds., 2008) (promoting the benefits of emancipatory research for persons with disabilities and the wider community). Unlike methods which treat persons with disabilities as passive medical subjects, emancipatory disability research requires researchers to fully involve disabled people and their representative organisations in all aspects of the research process. *Id.* See also Ardha Danieli & Carol Woodhams, *Emancipatory Research Methodology and Disability: A Critique*, 8 INT. J. OF SOC. RES. METHODOLOGY 281, 281-96 (2005) (arguing that the advocacy of participatory and emancipatory research can be criticised on several grounds including problems of internal inconsistency and contradiction, an overly selective use of the works of feminist researchers, and that research using such an approach could constitute an exercise of power that potentially marginalises some voices and potentially oppresses some disabled people and researchers).

¹⁰⁰ For a discussion of the social model, see BAGENSTOS, *supra* note 98 (describing “the endorsement of a social rather than a medical model of disability” as “the one position that approaches consensus within the movement”).

¹⁰¹ See Michael Stein & Janet E. Lord, Jacobus tenBroek, *Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167, 178-84 (2008) (explaining the impact of social inclusion of people with disabilities in activities such as sports).

example, using a wheelchair is simply a different form of mobility. Using a wheelchair becomes disabling when buildings have steps instead of ramps,¹⁰² and when technology is only usable by people with certain physical abilities.¹⁰³ Through focusing on how society disables people with different abilities, social model scholars turned the focus from curing individuals to removing the “barriers in the way of persons with disabilities who seek to carry out the usual activities of everyday life.”¹⁰⁴

Strong social model scholars employed radical doctrines and focused exclusively upon the role of society in causing disablement. Researchers, such as Tom Shakespeare, have argued for a more “balanced approach to cure and therapy within disability studies.”¹⁰⁵ While society is a major factor that disables people with impairments, medical factors can have a significant impact on how some people experience their impairments. For example, a person with a wheelchair might be more disabled by the built environment than

¹⁰² See Adam Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1258–59 (2007) (noting the architectural barriers to people in wheelchairs).

¹⁰³ See Paul Harpur, *From Universal Exclusion to Universal Equality: Regulating Ableism in a Digital Age*, 40 N. KY. L. REV. 529, 531–33 (2013) (describing how technology can increase people’s ability to interact in communities).

¹⁰⁴ NEIL REES ET AL., AUSTRALIAN ANTI-DISCRIMINATION LAW 6.3.2.1 (2014).

¹⁰⁵ The original social model argued that the growth of capitalism was a major cause of the oppression of persons with impairments. As part of this anti-capitalist agenda, the traditional social model employed Marxist concepts of radical economic reforms. For a discussion of this approach, see VICTOR FINKELSTEIN, ATTITUDES AND DISABLED PEOPLE: ISSUES FOR DISCUSSION (1980) (arguing that current interpretations of ‘disability’ perpetuate an oppressive relationship among society and the disabled); Vic Finkelstein, *The Social Model of Disability Repossessed*, Paper (2001), <http://pf7d7vi404s1dxh27mla5569.wpengengine.netdna-cdn.com/files/library/finkelstein-soc-mod-repossessed.pdf> [perma.cc/ZAN6-8FXG] (arguing that: (1) “professions, such as OT, Physiotherapy or Social Work,” do not adequately perform the function of supporting the disabled community “because they were created by people with capabilities from the perspective of people with capabilities,” and (2) professionals should be developed within the community to “creat[e] a more appropriate nationalised service which allies itself with the community and responds to what people want.”); Michael Oliver, *THE POLITICS OF DISABLEMENT* (1990) (discussing the development of views of disability in capitalist society); Michael Oliver, *Capitalism, Disability and Ideology: A Materialist Critique of the Normalization Principle* (1994) (identifying what normalization does not say about disabled people in capitalist societies), <http://pf7d7vi404s1dxh27mla5569.wpengengine.netdna-cdn.com/files/library/Oliver-cap-dis-ideol.pdf> [perma.cc/ PKR7-7UV4].

their medical condition;¹⁰⁶ however, arguably, a person who has advanced Huntington's disease would be more disabled by his or her brain deterioration and loss of control over their voluntary movements. Recognising the multifaceted causes of disablement, Shakespeare has proposed an interactional model that explains how "disability is always an interaction between individual and structural factors."¹⁰⁷ Shakespeare's interactional approach explains that disability is caused by medical, psychological, environmental, economic, and political factors.¹⁰⁸ The CRPD embraces this wider understanding of disability and recognises that disablement is caused by both social and medical factors.¹⁰⁹ Accordingly, where the disablement of people is triggered due to an ability difference, then the CRPD will likely regulate this situation.

Although there are similarities between how age and disability scholars explain the structural causes of disadvantage, there are key differences which significantly reduced the capacity of the CRPD to protect older persons with disabilities. Similar to moderate disability scholars and the CRPD, age scholars employed structural approaches to explain the socially excluded condition and relative income poverty of older people.¹¹⁰ These scholars argued that

¹⁰⁶ See Phillipa Clarke et al., *Mobility Disability and the Urban Built Environment*, 168 AM. J. OF EPIDEMIOLOGY 506 (2008) (examining "the effect of built environment characteristics on mobility disability among adults aged 45 or more").

¹⁰⁷ See TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS REVISITED* 74-75 (2d ed. 2014) (challenging the orthodoxy of disability studies).

¹⁰⁸ *Id.* at 83.

¹⁰⁹ See Paul Harpur, *Embracing the New Disability Rights Paradigm: The importance of the Convention on the Rights of Persons with Disabilities*, 27 *DISABILITY AND SOC'Y* 1, 1-14 (2012) (providing analyses of the impact of the United Nations Convention on the Rights of Persons with Disabilities and practical guidance as to how this convention can be used to drive change); Paul Harpur, *Ensuring Equality in Education: How Australian Laws are Leaving Students with Print Disabilities Behind*, 15 *MEDIA AND ARTS L. REV.* 70 (2010) (reporting on primary research and analyzing recent reforms to the Disability Discrimination Act of 1992); Michael Perlin & Alison Lynch, *The Four Factors: Sanism, Pretextuality, Heuristics, and "Ordinary Common Sense" in SEXUALITY, DISABILITY, AND THE LAW: BEYOND THE LAST FRONTIER?* 13 (Palgrave Macmillan 2016) (discussing four critical factors that dominate the relationship between mental disability and the law: sanism, pretextuality, heuristics, and ordinary common sense).

¹¹⁰ See SCOTT DAVIDSON, *GOING GREY: THE MEDIATION OF POLITICS IN AN AGEING SOCIETY* 15-20 (2012) (showing how the aging population has necessitated policy reform related to providing income in retirement and made the politics of aging a

oppression was not caused naturally by old age, but how society imposed conditions on older people.¹¹¹ Townsend explains the consequence of using age to structurally divide society:

[Older persons are subjected to] fixed ages for pensions; the minimal subsistence afforded on the state pension; the substitution of retirement status for unemployment; the near-compulsory admission to residential care of many thousands of people whose faculties were relatively intact; the enforced dependence of many residents in homes and of patients in hospitals and nursing homes, and the conversion of domiciliary services into commodity services.¹¹²

While accepting that advancing age can result in impairment, age structural theorists emphasised how ageism reduced the capacity of older persons to contribute economically and socially. Pressuring – or requiring older people to resign at a set age – it was argued, caused older persons to be dependent on welfare and reduced their capacity to maintain an independent social identity.¹¹³ To counter this exclusion, scholars argued that older persons should be integrated in society and not forced to disengage from the community.¹¹⁴

The problem with using the CRPD to combat the structural impact of ageism is that ageism is not strictly disablism. While ageism can be based upon generalized assumptions made about ability based upon age, ageism does not discriminate based upon different abilities but upon age. The capacity of older persons to connect age

key issue for young and old voters alike).

¹¹¹ See G. FERRELL ET AL., *THE SOCIOLOGY OF OLD AGE* (1993) (describing the process of society using welfare payments and support to oppress older persons as 'welfarisation').

¹¹² See P. Townsend, *Policies for the Aged in the 21st Century: More 'Structured Dependency' or the Realisation of Human Rights?*, 26 *AGEING & SOC'Y* 161, 165 (2006) (arguing that the plight of millions of older people in many developed countries is rooted in the evolution of social policy, not old age itself).

¹¹³ See generally LAURA KATZ OLSON, *THE POLITICAL ECONOMY OF AGING* (1982); P. Townsend, *The Structural Dependency of the Elderly: The Creation of Social Policy in the Twentieth Century*, 1 *AGEING & SOC'Y* 5 (1981).

¹¹⁴ See C. GILLEARD & P. HIGGS, *CULTURES OF AGEING* (2000) (focusing on a shift in the nature of post-retirement life experienced by people at the end of the twentieth century).

and disability is further weakened when other causes of ageism are considered. Some manifestations of ageism are not based upon abilities but how society is structured more broadly. The next section will analyse the intersection between age and disability to illustrate how ageist attitudes can be based on a range of factors which have very little or nothing to do with disability. To illustrate this point, this part will now analyse the four over-arching attitudes that contribute to disability and old age inequalities: "attitudes of discomfort," "existential anxiety," "costliness and triviality."¹¹⁵

5.2. Attitudes of Discomfort and Existential Anxiety

Majority culture equates attractiveness with fully functional, healthy young bodies. People who fall outside the standard of normal abilities can be viewed as unattractive or even disgusting.¹¹⁶ The disabled body is rarely portrayed as sexual or desirable.¹¹⁷ The missing limb, uncontrollable movement or difficulty in communication has been regarded by society as something ugly and worth exterminating,¹¹⁸ or at best, something to pity, economically isolating, and worthy of charitable support.¹¹⁹ Discrimination which flows from the manifestation of disability would constitute discrimination based upon disability.

¹¹⁵ Elizabeth Emens, *Framing Disability*, 5 U. ILL. L. REV. 1383, 1389 (2012).

¹¹⁶ See generally Martin S. Pernick, *Defining the Defective: Eugenics, Aesthetics, and Mass Culture in Early-Twentieth-Century America*, in *THE BODY AND PHYSICAL DIFFERENCE: DISCOURSES OF DISABILITY* 89 (Sharon L. Snyder & David T. Mitchell eds., 1997). See also SUSAN SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* (2009) (illustrating how the law reflected this prejudice and prohibited people with disabilities from public spaces).

¹¹⁷ See generally Jennifer Mays, *Feminist Disability Theory: Domestic Violence against Women with a Disability*, 21 *DISABILITY AND SOC'Y* 147 (2006).

¹¹⁸ See generally WILLIE V. BRYAN, *THE SOCIAL PERSPECTIVES AND POLITICAL HISTORY OF DISABILITIES AND REHABILITATION IN THE UNITED STATES* (2010); THOMAS LEMKE, *PERSPECTIVES ON GENETIC DISCRIMINATION* 71-72 (2013); MARIUS TURDA, *MODERNISM AND EUGENICS* 84-85 (2010); James C. Wilson, *Rewriting the Genetic Body-Text: Disability, Textuality, and the Human Genome Project*, in *The Disability Studies Reader* 67 (Lennard J. Davis ed., 2d ed. 2006).

¹¹⁹ See generally Arlene Mayerson & Matthew Diller, *The Supreme Court's Near-sighted View of the ADA in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 124 (Leslie Pickering Francis et al. eds., 2000).

While popular culture may regard the disabled body as unattractive, does the same criteria apply to a person who has grown old? Western society encourages people to fear the consequences of growing old.¹²⁰ As a result of this existential anxiety people are encouraged by society to do all in their power to keep their body as youthful as long as possible. Under this young-is-beautiful model, people are encouraged to regard the signs of aging as inherently undesirable.¹²¹ Older people are encouraged to eschew thinking or acting elderly, after all, the elderly are often disempowered and subjected to humiliating treatment.¹²²

Arguably people are not regarded by society as unattractive when they reach a particular age, but when the individual's appearance alters beyond a certain range. Signs of old age, such as wrinkled skin and loss of body function, are regarded by popular culture as unattractive.¹²³ Discriminating against a person as they appear old is not discrimination based upon a disability. The CRPD would not provide any protection for an older person who is discriminated against based upon their older appearance, unless the manifestation of old age is connected with a disability.

5.3. Attitudes of Costliness and Triviality

There is a trend in society to equate full abilities as economically positive and irreversibly different abilities as problematic. These attitudes negatively impact persons who are aged and with disabilities.¹²⁴ While policy debates surround both identities, arguably the

¹²⁰ See Bryan Appleyard, *A life Worth Living? Quality of Life in Older Age*, in *UNEQUAL AGEING: THE UNTOLD STORY OF EXCLUSION IN OLD AGE* (Paul Cann & Malcolm Dean eds., 2009) (presenting underlying reasons why the ageing population is faced with discrimination, condescension and fear by society).

¹²¹ See B. BYTHEWAY, *AGEISM* (1995) (reviewing age prejudice and ageism in an historical context).

¹²² See generally JOHN BRAITHWAITE ET AL., *REGULATING AGED CARE: RITUALISM AND THE NEW PYRAMID* 3 (2007).

¹²³ See Dominic Abrams et al., *Age Discrimination as a Source of Exclusion in Europe: The Need for a Human Rights Plan for Older Persons*, in *FROM EXCLUSION TO INCLUSION IN OLD AGE: A GLOBAL CHALLENGE* (Thomas Scharf & Norah C. Keating eds., 2007) (examining steps being taken in Europe and through the United Nations to create a society for all ages); MAURICE CHARNEY, *WRINKLED DEEP IN TIME: AGING IN SHAKESPEARE* (2009) (illustrating Shakespeare's use of dramatic characters to explore the ravaging effects of time).

¹²⁴ See generally DONALD L. VENNEBERG & BARBARA WELSS EVERSOLE, *THE*

aging population has created a climate of urgency on how to fund the changing demographic.¹²⁵ This problem, the increased longevity of life and a decline in birth rates is said to be creating a demographic time-bomb.¹²⁶ The United Nations projects that by the middle of the 21st century older persons (ages 60 years and over) are projected to exceed the number of children for the first time in history.¹²⁷ This demographic time-bomb is said to exist as productive members of society now confront an increasing cost burden as older members of the population leave the workforce.¹²⁸ This argument is built on the beliefs that older persons have reduced abilities, are no longer productive and that it is unfair for older people to expect society to pay for their retirement and decline to death.¹²⁹

BOOMER RETIREMENT TIME BOMB: HOW COMPANIES CAN AVOID THE FALLOUT FROM THE COMING SKILLS SHORTAGE (2010).

¹²⁵ See LEAH ROGNE ET AL., SOCIAL INSURANCE AND SOCIAL JUSTICE: SOCIAL SECURITY, MEDICARE, AND THE CAMPAIGN AGAINST ENTITLEMENTS (2009) (examining aspects of social insurance programs including Social Security and its possible privatization); c.f. J. Kennedy, *Disability and Aging – Beyond the Crisis Rhetoric*, 12 J. OF DISABILITY POL'Y STUD. 226, 226 (2002) (explaining that while viewing the aging population as a crisis may create urgency and get people to respond, it may not give way to the best solution to the problem).

¹²⁶ See Daniel Callahan, Symposium, *The Graying of America: Challenges and Controversies: Must We Ration Health Care for the Elderly?*, 40 J. MED. & ETHICS 10 (2012) (arguing that the US cannot avoid the need to ration health care for the elderly). The Congressional Budget Office predicted “projected increases in [Medicare] spending . . . would require tax increases of an unprecedented magnitude . . . under current policy, future generations will be worse off by higher taxation or lower benefits.” G. K. Kollman and D. Noschler, *The Financial Outlook for Social Security and Medicare*, CRS Report for Congress, Congressional Research Service, Washington, D.C., 2004, at CRS 1-6.

¹²⁷ U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD POPULATION AGEING 2013, at xii, U.N. Doc. ST/ESA/SER.A/348 (2013), <http://www.un.org/en/development/desa/population/publications/pdf/ageing/WorldPopulationAgeing2013.pdf> [perma.cc/D5MY-VBLW].

¹²⁸ See DANIEL CALLAHAN, SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY (1987) (arguing that the combination of a sharply growing number of the elderly combined with more and more expensive technology would be financially overwhelming).

¹²⁹ See generally SCOTT DAVIDSON, GOING GREY: THE MEDIATION OF POLITICS IN AN AGEING SOCIETY 15–20 (2012); Leslie Pickering Francis & Anita Silvers, *Bringing Age Discrimination and Disability Discrimination Together: Too Few Intersections, Too Many Interstices*, 11 MARQUETTE ELDER'S ADVISOR 139 (2009) (arguing that one discrimination based on age has been tolerated to some extent based on the theory that the aged have already had their fair shot at life); Phoebe W. Williams, *Age Discrimination in the Delivery of Health Care Services to Our Elders*, 11 MARQUETTE ELDER'S

If older people continue economically contributing to society by remaining in the workforce, then older people confront criticism for taking opportunities away from the next generation.¹³⁰ Even if older people try to stay in the workforce, ageism, and the law's response to it, reduces their opportunities.¹³¹ Older people are often typecast as being inflexible to change, having, or about to have, a reduction in their mental and physical abilities and focused on retirement.¹³² These attitudes have a detrimental impact on older persons. A substantial percentage of older workers report enduring hardship due to age attitudes.¹³³

The difficulty with combatting ageist stereotypes is that these harmful attitudes are not always simply negative. In many situations, negative and positive attitudes towards old age coexist to create a situation where ageists erroneously believe they are protecting the human rights of the old rather than denying rights.¹³⁴ These positive feelings manifest where ageists believe they are showing respect by protecting older people and not requiring them to contribute to the economic life of the community.¹³⁵ Rather than recognising the inequalities they are creating, ageists can believe

ADVISOR 1 (2009) (arguing that older persons are often denied health treatment that can cure conditions as they are perceived as not being able to live sufficiently long to justify the expense).

¹³⁰ See SANDRA FREDMAN, *DISCRIMINATION LAW 101-08* (2d ed., 2011) (surveying discrimination law and exploring concepts of inequality).

¹³¹ See Judith J. Johnson, *Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes*, 33 SEATTLE U. L. REV. 49 (2009) (arguing that courts are increasingly permitting employers to employ policies which discriminate on the basis of greater seniority, higher health care costs and retirement status).

¹³² See Sandra, *supra* note 130, at 101-08.

¹³³ Dominic Abrams & Diane M. Houston, *Equality, Diversity and Prejudice in Britain: Results from the 2005 National Survey*, CABINET OFFICE EQUALITIES REVIEW (Oct. 2006), <http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/kentequality.pdf> [perma.cc/KFB4-7RV7].

¹³⁴ See generally S. T. Fiske et al., *A model of (often mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. OF PERSONALITY AND SOC. PSYCHOL. 878 (2002).

¹³⁵ See generally Dominic Abrams et al., *Attitudes to Age in Britain 2004-08*, Research Report No. 599, DEPARTMENT FOR WORK AND PENSIONS (2009), <http://globalag.igc.org/elderrights/world/2009/ageattitude.pdf> [perma.cc/2LD2-7KZ7].

that their paternalistic attitudes are rewarding the elderly. The combination of attitudes of warmth and incompetence renders ageism an extremely difficult stereotype to combat.

The economic debates around the ageing population illustrate the limitations with relying upon the CRPD to protect the rights of older persons. The CRPD arguably provides older persons with certain rights when they develop disabilities and require increased support. Accordingly the CRPD can be used to help influence debates around health care, provision of mobility aids, independent living verses residential aged care and other such debates. The CRPD however provides inadequate support for older persons who are being pressured to stop participating in the economic life of the community or to retire from work due to mandatory retirement ages. Policies that discriminate based upon age alone are not sufficiently connected with a disability to obtain protection from the CRPD. Using the CRPD to influence policy debates around the ageing population will create the situation where some debates are influenced by a robust international human rights law discourse, where other debates lack the benefit of an international statement on older person's rights.

6. CONCLUSION

This paper argues that there are sufficient regulatory gaps in the current human rights regime to justify the adoption of a new United Nations Convention on the Rights of Older Persons. One of the most significant difficulties in establishing the existence of this regulatory gap is the intersection between old age and disability. Most humans go through a life cycle which, subject to early death, results in a reduction in abilities as a person ages. A person who has reduced abilities, whether they be sensory, mobility or cogitative, often satisfies the definition of disability. As there is already a Convention on the Rights of Persons with Disabilities, why do older persons with disabilities require their own convention?

While the CRPD extends protection to older persons who are disadvantaged by the reduction in their abilities, the CRPD provides inadequate protection in combatting institutions and attitudes in society that lead to ageism. Ageism and Ableism are experienced and perpetuated differently. Ableism is driven by a divergence in one's actual or perceived abilities and by a history of medicalisation and

eugenics.¹³⁶ While aspects of ageism are connected with ability difference, many other aspects of ageism are caused by cultural norms that have nothing to do with disability. Where disablement is constructed by society as something requiring cures and medical attention, old age is often constructed as a period where a person has earned and deserves to have economic stresses of life taken away from them. Retirement and pensions are often regarded as entitlements of old age. While the denial of autonomy can have negative implications, the causes of this denial are significantly divorced from impairment. The economic status of older persons differs markedly from persons with disabilities. Older persons often retain the resources and institutional positions that younger generations seek. On the other hand, older age is a time of costly medical interventions that is a drain on younger generations. The combination of power and disempowerment complicates old age and ageism in ways that disableism and ableism do not experience. Essentially old age is not a disability. Ableism and ageism describe different social problems which both require interventions to combat. The CRPD can help some older persons, but a regulatory gap remains in international human rights law which arguably justifies the adoption of a Convention on the Rights of Older Persons.

¹³⁶ See WILLIE V. BRYAN, *THE SOCIAL PERSPECTIVES AND POLITICAL HISTORY OF DISABILITIES AND REHABILITATION IN THE UNITED STATES* 71–72 (2010) (discussing how the construction of different abilities as a problem requiring cure or treatment is associated with eugenics); see generally Marius Turda, *Modernism and Eugenics* 84–85 (2010).