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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

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Summary: *Since the outbreak of the COVID-19 pandemic across the world, it has been reported that older persons have suffered acute hardship and fatalities more than any other age group. According to the World Health Organisation the fatality rate among older persons is five times the global average, and the United Nations has predicted that the mortality rate could climb even higher. The situation is aggravated on the African continent as a result of a shortage of medical personnel and other resources, as well as inadequate palliative measures to address the issues around the pandemic. Despite the provisions in the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights of Older Persons in Africa which seek to provide some safety nets, many of these senior citizens continue to suffer untold socio-economic hardship. Adopting an analytical and doctrinal methodology,*

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this article examines the Protocol, the International Covenant on Economic, Social and Cultural Rights and several United Nations policy documents aimed at realising the socio-economic rights of older persons. The article finds that there is a lack of political commitment to operationalise the provisions of the Protocol, as evinced by the limited number of countries that have ratified it since its adoption in 2016. It comparatively engages with the provisions of the Inter-American Convention on the Rights of Older Persons to argue that, beyond the normative framing of these rights in Africa, there is a need for deliberate and genuine commitment by governments in Africa, if the rights are to be realised. The article advocates international, regional and national cooperation and calls for a more liberal judicial approach, to ensure that the Protocol's 'paperisation' of the rights of older persons does not lead or continue to lead to their pauperisation.

Key words: *Africa; COVID-19; economic and social rights; impact; older persons; pandemic*

1 Introduction

Older persons, just as every other person, are entitled to socio-economic rights or economic and social rights. However, the COVID-19 pandemic has gravely impacted on the realisation of these rights, because 'while COVID-19 primarily is a public health challenge, the crisis also has economic and social dimensions'.¹ The pandemic has revealed a pathetic situation among older persons, as it has spotlighted the failure of present laws and policies to address the economic and social rights needs of this category of persons. Since the outbreak of the pandemic, it has been reported that older persons have suffered acute hardship and fatalities more than any other age group. According to the World Health Organisation (WHO) the fatality rate among older persons is five times the global average,² and the United Nations (UN) has predicted that the mortality rate could climb even higher.³

1 MJ Nkhata & AW Mwenifumbo 'Livelihoods and legal struggles amidst a pandemic: The human rights implications of the measures adopted to prevent, contain and manage COVID-19 in Malawi' (2020) 20 *African Human Rights Law Journal* 517.

2 WHO 'COVID-19 strategy update – 14 April 2020', <https://www.who.int/publications-detail/covid-19-strategy-update---14-april-2020> (accessed 4 June 2021).

3 UN 'Policy Brief: The impact of COVID-19 on older persons', [un_policy_brief_on_covid-19_and_older_persons_1_may_2020.pdf](https://www.un.org/development/desa/policy/policy_briefs/pb1901.pdf) (accessed 4 June 2021).

Although older persons have over the years been subjected to abuse and deprivation of human rights,⁴ the pandemic has exacerbated the deplorable state in which they have found themselves. The WHO has stated that 'COVID-19 is changing older people's daily routines' with adverse job, health and family implications.⁵

Whereas it was once stated that 'Africa is a youthful continent, as more than half of the population is 19 years of age or younger',⁶ the African continent has now been projected to have the fastest increase in the population of older persons, with a projection that it would 'reach 215 million persons aged 60 or older by 2050, an almost fourfold increase from current figures, doubling its proportion from 5 per cent of the total population in 2010 to 11 per cent in 2050'.⁷

Although a long life ordinarily should be everybody's desire, 'for older people in developing countries today, longevity can be a double-edged sword ... For those who are poor, ageing often means new burdens and worries about making ends meet.'⁸ To echo the famous statement by a former Secretary-General of the UN, Kofi Annan:⁹

We are in the midst of a silent revolution. It is a revolution that extends well beyond demographics, with major economic, social, cultural, psychological and spiritual implications. And it is a revolution that hits developing nations harder than others and not just because the majority of older persons live in developing countries, but because the tempo of ageing there is already – and will continue to be – far more rapid.

Traditionally in Africa, it is taken for granted that one's children would take care of one's material needs at old age. Thus, in one of its reports to the African Commission Kenya stated that it perceived no central issue around the rights of older persons, because 'under traditional African systems children are to take care of their aged parents'.¹⁰ For this reason, perhaps, the debate around the rights of

4 HelpAge International 'State of the world's older people' (2002) SoTWoPeng. PDF (iugm.qc.ca) (accessed 4 June 2021).

5 WHO (n 2).

6 UN Department of Economic and Social Affairs 'Regional dimensions of the ageing situation' (2008) 24, <http://globalag.igc.org/agingwatch/desa/aging/mipaa/regionaldimensions.pdf> (accessed 4 June 2021).

7 C Mahler 'The Independent Expert on the Enjoyment of all Human Rights by Older Persons' Office of the High Commissioner, The United Nations Human Rights, <https://www.ohchr.org/en/issues/olderpersons/ie/pages/ieolderpersons.aspx> (accessed 3 June 2021).

8 HelpAge International (n 4).

9 UN "'Silent revolution' of world ageing has economic, spiritual implications, says secretary-general in message on international day of older persons", <https://www.un.org/press/en/1998/19980930.sgsm6727.html> (accessed 4 June 2021).

10 Report on the African Charter on Human and Peoples' Rights, June 2006 para 164.

older persons has not attracted the deserved traction or, as Kollapan puts it, it does not have the 'sufficient currency in the context of the African human rights system'.¹¹

However, it is arguable that the traditional African context of care has been eroded partly by urbanisation and globalisation and partly by the overwhelming personal needs of the children of the older persons.¹² The UN has noted that 'the well-being of older persons in Africa is affected by a range of regional trends and factors, characterised by changing family dynamics, a growing inadequacy of traditional family support, poverty and material deprivation, ill health and marginalisation'.¹³ Similarly, Aboderin et al argue that there is a growing debate on ageing in sub-Saharan Africa as a result of 'long-standing concerns about impacts of rapid sociocultural and economic change on customary family care systems, which – in the absence of comprehensive formal services – provide the bulk of long-term care across most of SSA'.¹⁴

In the current pandemic situation, for example, several children who hitherto were responsible for the material needs of their older parents may have lost their means of income, making it difficult for them to cater for themselves, and their dependent parents. It has thus become pertinent for governments in Africa to operationalise relevant legal and policy frameworks that are protective of older persons, to ensure a real-world realisation of their economic and social rights.

African governments adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Older Persons Protocol) on 30 January 2016.¹⁵ The Protocol 'represents the highest political commitment from African leaders

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- 11 J Kollapan 'The rights of older people – African Perspectives' (2008) 3, <http://globalag.igc.org/elderrights/world/2008/africa.pdf> (accessed 4 June 2021); African Commission 'Guidelines for National Periodic Report' reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 199.
- 12 TBE Omorogiuwa 'COVID-19 and older adults in Africa: Social workers' utilisation of mass media in enforcing policy change' (2020) 63 *International Social Work* 647.
- 13 UN Department of Economic and Social Affairs (n 6) 25.
- 14 I Aboderin et al 'Human rights and residential care for older adults in sub-Saharan Africa: Case study of Kenya' in H Meenan, N Rees & I Doron (eds) *Towards human rights in residential care for older persons: International perspectives* (2016) 14. Also see I Aboderin & JR Beard 'Older people's health in sub-Saharan Africa' (2014) *Lancet online* 6.
- 15 AU 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons', <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons> (accessed 13 November 2021).

in promoting and protecting the rights of older people'.¹⁶ Despite the Protocol and the African Charter on Human and Peoples' Rights (African Charter) which seek to provide some safety nets, many of these senior citizens continue to suffer untold socio-economic hardship.

Using a literature-based method, this article assesses the impact of COVID-19 on older persons' economic and social rights and examines the provisions of the Older Persons' Protocol and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as it relates to older persons in Africa. The article finds that there is a lack of political commitment to operationalise the provisions of the Protocol, as evinced by the limited number of countries that have ratified it since its adoption in 2016. Only two countries, Lesotho and Benin, have ratified the Older Persons Protocol.¹⁷ The Protocol requires ratifications by 15 countries to enter into force.¹⁸ Owing to the non-operationalisation of the Protocol in many African countries, there is a near absence of state reporting on the Protocol during national periodic reports of the African Commission on Human and Peoples' Rights (African Commission) as well as scarce domestic legislation on the subject matter across the African continent.

The article is organised in five parts. While this part introduces the work, part 2 examines the international and regional legal and policy frameworks on the economic and social rights of older persons in Africa while drawing comparative inspirations from the Inter-American Convention on Protecting the Human Rights of Older Persons (Inter-American Convention). In part 3 the article examines the impact of COVID-19 on older persons' economic and social rights. By way of conclusion and recommendations, the article argues in part 4 that, beyond the normative framing of economic and social rights and, indeed, any right of older persons in Africa, there is a need for deliberate and genuine political commitments by governments in Africa, if the rights are to be realised. The article thus advocates a coordinated national, regional and international cooperation and calls for a liberal judicial approach, to ensure that the Older Persons Protocol's 'paperisation' of the rights of older persons does not lead or continue to lead to their pauperisation.

16 J Mwanjisi 'Revising perceptions of the rights of older people in Africa' (2016) *Open Democracy*.

17 AU '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', <https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%E2%80%99%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20OLDER%20PERSONS.pdf> (accessed 13 November 2021).

18 Art 26 Older Persons Protocol.

2 Legal frameworks on the economic and social rights of older persons

This part presents frameworks that underpin the economic and social rights of older persons in Africa. The part reveals evidence of normative support for economic and social rights, drawing on the UN and African human rights instruments. It asserts that, while there currently is no one-stop shop or single treaty or convention that is specifically devoted to addressing the rights of older persons, these rights can be found and justified in the general human rights instruments within the UN and African human rights systems.

2.1 International legal framework

At the UN level, there is currently no human rights treaty that specifically addresses the concerns of older persons.¹⁹ Hence, there is a growing call for an international convention in this regard.²⁰ However, the absence of a specific international treaty does not mean that older persons 'are entirely without legal protections under international law'.²¹ Certain UN human rights instruments and declarations, such as ICESCR, the UN Vienna International Plan of Action on Ageing of 1982, the UN Principles for Older Persons of 1991, the UN Proclamation on ageing of 1992, and the Madrid International Plan of Action on Ageing of 2002 are analysed below, as providing a good foundation to push for the rights of older persons.

It bears mentioning that 'human rights do not expire as one ages'.²² Thus, just as every other human being, older persons should be beneficiaries of the existing general economic and social rights instruments. The flagship hard law that valorises the economic and social rights of everyone is ICESCR. As of November 2021, 171 countries, including all African states – except Botswana, Mozambique and South Sudan – have either acceded to or ratified ICESCR.²³

19 D Rodríguez-Pinzón 'The international human rights status of elderly persons' (2003) 18 *American University International Law Review* 915-917.

20 I Doron & I Apter 'The debate around the need for an international convention on the rights of older persons' (2010) 50 *The Gerontologist* 586-593; I Doron & I Apter 'International rights of older persons: What difference would a new convention make to the lives of older people' (2010) 11 *Marq Elder's Advisor* 367.

21 AS Kanter 'The United Nations Convention on the Rights of Persons with Disabilities and its implications for the rights of elderly people under international law' (2009) 25 *Georgia State University Law Review* 530.

22 N Todorović 'Wakeup call: Prevention and response to the violence, abuse and neglect' 3, https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2021/02/Natasa-Todorovic_paper-.pdf (accessed 13 November 2021).

23 UN International Covenant on Economic, Social and Cultural Rights, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3>.

While ICESCR is not specifically tailored to address the rights of older persons, the treaty contains several economic and social rights that are pro-older persons. It has been rightly observed that 'in view of the fact that the Covenant's provisions apply fully to all members of society, it is clear that older persons are entitled to enjoy the full range of rights recognised in the Covenant [ICESCR]'.²⁴ A non-exhaustive list of older persons' economic and social rights protected under ICESCR and other human rights instruments is discussed below.

2.1.1 *Right to equality and non-discrimination*

According to article 3 of ICESCR state parties undertake to 'ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights'. The Committee on Economic, Social and Cultural Rights (ESCR Committee) in its General Comment 6 states that 'states parties should pay particular attention to older women who, because they have spent ... their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow's pension, are often in critical situations'.²⁵ Although these provisions may not accommodate older men, it at least opens up some talking points around the economic and social rights of older persons. Even at that, article 2(2) of ICESCR sufficiently addresses the concerns of both older men and women when it obligates state parties to guarantee that economic and social rights will be 'exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Again, it is clear that there is no specific mention of older persons as a protected group in the foregoing provisions. However, it has been revealed that the omission of 'older persons' in the categorisation was not intentional but due to the fact that when ICESCR was adopted in 1966, 'the problem of demographic ageing was not as evident or as pressing as it is now'.²⁶ Be that as it may, the closing phrase, 'other status' in article 2(2) above has been interpreted to include older persons. According to the ESCR Committee, 'the prohibition of discrimination on the grounds of "other status" could be interpreted

en.pdf (accessed 8 June 2021).

24 I Doron & K Mewhinney *The rights of older persons: Collection of international documents* (2007) 69.

25 ESCR Committee General Comment 6: The economic, social and cultural rights of older persons' (1995) para 5.

26 General Comment 6, para 3(11).

as applying to age'.²⁷ In addition, in General Comment 20 the ESCR Committee states that '[t]he inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category',²⁸ and that '[a]ge is a prohibited ground of discrimination in several contexts'.²⁹ Thus, the ESCR Committee calls on states to eliminate both formal and substantive discrimination.³⁰

Other human rights instruments make provision for the protection of the rights of older persons against discrimination. Perhaps the most essential of these instruments is the Convention on the Rights of Persons with Disabilities (CRPD). Article 3 of CRPD clearly states that its principles include non-discrimination, full and effective participation and inclusion in society, and equality of opportunity. In fact, article 5 of CRPD protects rights to equality and non-discrimination. One interesting aspect of CRPD is that it does not define 'disability'.

The absence of a definition therefore provides an opportunity to stretch the meaning of 'disability' beyond the orthodox medical approach to a rights-based approach, capable of accommodating older persons.³¹ After all, the UN has conceded that

[t]he term 'disability' summarises a great number of different functional limitations occurring in any population ... People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.³²

It therefore is arguable that old age introduces a peculiar disability in and of itself.

By way of soft laws, the Vienna International Plan of Action on Ageing (Vienna Plan) states that '[a]n important objective of socio-economic development is an age-integrated society, in which age discrimination and involuntary segregation are eliminated and in which solidarity and mutual support among generations are encouraged'.³³ In addition, the UN Principles for Older Persons (UN

27 General Comment 6 para 3(12).

28 ESCR Committee General Comment 20: Non-discrimination in economic, social and cultural rights (art 2, para 2 of the International Covenant on Economic, Social and Cultural Rights) 2 July 2009, E/C 12/GC/20 para 15, <https://www.refworld.org/docid/4a60961f2.html> (accessed 8 June 2021).

29 General Comment 20 (n 28) para 29.

30 General Comment 20 para 8.

31 Kanter (n 21).

32 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, annexed to General Assembly Resolution 48/96 of 20 December 1993 (Introduction para 17).

33 Vienna Plan para 25(h).

Principles) require states to treat older persons fairly regardless of age.³⁴ The Madrid International Plan of Action on Ageing 2002 (Madrid Plan) also mandates states to 'ensure the full enjoyment of all human rights and fundamental freedoms by ... combating all forms of discrimination'.³⁵ As discussed below, in several countries this right has been violated in the context of the pandemic.

2.1.2 *Right to work*

The right to work accrues to everyone, young or old. Article 6 of ICESCR provides that state parties recognise 'the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'.³⁶ Similarly, article 7 provides for 'the right of everyone to the enjoyment of just and favourable conditions of work', which include fair wages, equal remuneration for equal work as well as safe and health working conditions, equal promotion opportunities subject to seniority and competence as well as rest or leisure or holiday with pay.³⁷ It is arguable that even in times without crisis, older persons who are not of retirement age usually become targets of retrenchment or job losses. This has caused the International Labour Organisation (ILO) to emphasise the need to protect older persons against job or occupational discrimination based on age.³⁸

The UN soft law contains several provisions that recognise this right. For example, the Madrid Plan mandates states to ensure laws and policies that 'enable older persons to continue working as long as they want to work and are able to do so', as well as 'promote equal access for older persons to employment and income-generation opportunities, credit, markets and assets'.³⁹ Principles 2 and 3 of the UN Principles state that older persons should have the opportunity to work or to have access to other income-generating opportunities and that they should be able to participate in determining when and at what pace withdrawal from the labour force takes place.⁴⁰ Also, the Vienna Plan provides that 'governments should facilitate the

34 United Nations Principles for Older Persons Adopted by General Assembly Resolution 46/91 of 16 December 1991 Principle 18, <https://www.ohchr.org/Documents/ProfessionalInterest/olderpersons.pdf> (accessed 10 June 2021).

35 See paras 21, 28-32 of Madrid International Plan of Action on Ageing 2002, <https://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf> (accessed 26 June 2021).

36 Also see art 27 of CRPD.

37 Art 7 ICESCR.

38 See ILO Recommendation 163 (1980) concerning Older Workers paras 3-10.

39 Madrid Plan paras 23, 28(b) & 48(c).

40 UN Principles, Principles 2 & 3.

participation of older persons in the economic life of the society’;⁴¹ that measures should be taken to ‘assist older persons to find or return to employment by creating new employment possibilities and facilitating training or retraining’; and that the ‘right of older workers to employment should be based on ability to perform the work rather than chronological age’.⁴² By Recommendation 38 of the Vienna Plan older persons, just as their younger counterparts, should have satisfactory working conditions and environment. As would be discussed below, the current pandemic has threatened older persons’ right to work.

2.1.3 *Right to social security*

This right seems to be one of the most radical rights of older persons, because of elaborate normative underpinning around it. According to article 9 of ICESCR, state parties recognise ‘the right of everyone to social security, including social insurance’.⁴³ Although the article fails to specify the type or level of social safety protection that could be seen as social security or insurance, the ESCR Committee has clarified that ‘the term “social security” implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person’s control’.⁴⁴

Further, the ILO Social Security (Minimum Standards) Convention provides global standards for nine branches of social security which are medical care; sickness benefits; unemployment benefits; old-age benefits; employment injury benefits; family benefits; maternity benefits; invalidity benefits; and survivors’ benefits.⁴⁵ With specific reference to older persons, article 26 of the above Convention and article 15 of the ILO Invalidity, Old-Age and Survivors’ Benefits Convention⁴⁶ urge member states to put national laws and policies in place aimed at older persons’ ‘survival beyond a prescribed age’.

The right to social security applies to both retirement benefits and other benefits for those older persons who do not work in the formal or pensionable sectors. After all, the Madrid Plan recognises that, in developing countries, most older persons who work are engaged in the informal economy, which often deprives them of the benefits of adequate working conditions and social protection provided by

41 Vienna Plan, Recommendation 37.

42 As above.

43 Also see art 28 CRPD.

44 General Comment 6 para 26.

45 ILO Social Security (Minimum Standards) Convention 1952 (102).

46 Invalidity, Old-Age and Survivors’ Benefits Convention 1967 (128).

the formal sector economy.⁴⁷ Indeed, as the ESCR Committee states, article 9 of ICESCR requires states to 'provide non-contributory old-age benefits and other assistance for all older persons, who ... are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income'.⁴⁸ It is argued that the survival of older persons, rather than their employment entitlement, should be the major factor in determining how states' older persons' intervention should be formulated and implemented.

Specific pro-older persons soft laws have also provided for this right. For example, the Vienna Plan requires states 'to propose and stimulate action-oriented policies and programmes aimed at guaranteeing social and economic security for the elderly'.⁴⁹ Further, the Madrid Plan urges states to develop and implement policies that ensure that older persons have adequate economic and social protection.⁵⁰

However, this right has not found the deserved expression in most developing countries. Older persons are not spared of the endemic poverty and systemic failures in these countries.⁵¹ For example, a UN report suggests that the incidence of poverty in Zambia affects up to 80 per cent of older persons.⁵² What most developing countries call social security systems have produced no social security for their citizens.⁵³ This has led to a situation where the majority of older persons in Africa have little or no social safety net in their favour.⁵⁴ Apart from few African countries, such as Botswana and Lesotho which provide automatic social pension for all older persons,⁵⁵ and South Africa which has a near universal pension scheme,⁵⁶ the majority of older persons in African countries such as Nigeria (most of whom work in the informal sector) still rely on family support to survive.⁵⁷ The pandemic has also adversely impacted this family support.

47 Madrid Plan para 24.

48 General Comment 6 para 30.

49 Vienna Plan para 5(c).

50 Madrid Plan para 51(a).

51 J.J. Dhemba 'Dynamics of poverty in old age: The case of older persons in Zimbabwe' (2014) 57 *International Social Work* 717.

52 UN 'Income poverty in old age: An emerging development priority', <https://www.un.org/esa/socdev/ageing/documents/PovertyIssuePaperAgeing.pdf> (accessed 12 November 2021).

53 M Cichon & P Karuma 'Financing social protection' in ILO *Reflections on reform strategies for social protection in English-speaking African countries* (2000).

54 M Ferreira 'Advancing income security in old age in developing countries: Focus on Africa' (2005) 2 *Global Ageing* 22-29.

55 C Bailey 'Extending social security coverage in Africa' Working Paper ESS 20 Geneva: International Labour Office, 2004.

56 Ferreira (n 54).

57 As above.

3 Right to an adequate standard of living

According to article 11 of ICESCR⁵⁸ everyone has a right to an adequate standard of living, 'including adequate food, clothing and housing, and to the continuous improvement of living conditions'.⁵⁹ The article further provides that this right includes freedom from hunger and thus mandates state parties to ensure that the methods of production, conservation and distribution of food are improved upon.⁶⁰ This is one of the broadly-defined rights of older persons as it cuts across quality food, shelter and clothing.

This right has also adequately been provided for under soft law. For example, Principle 1 of the UN Principles clearly provides that '[o]lder persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help'.⁶¹ Principle 6 provides that '[o]lder persons should be able to reside at home for as long as possible'. Similarly, Recommendations 19 of the Vienna Plan provides that housing for the elderly must be viewed as more than mere shelter, because '[i]n addition to the physical, it has psychological and social significance, which should be taken into account'.⁶² The UN thus urges national governments to ensure that '[w]henver possible, the aging should be involved in housing policies and programmes for the elderly population'.⁶³

4 Right to health

Article 12 of ICESCR confers on everyone the right to enjoy 'the highest attainable standard of physical and mental health' and provides that state parties should take all steps necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.⁶⁴ The ESCR Committee recommends that states should take into account recommendations 1 to 17 of the Vienna Plan, 'which focus entirely on providing guidelines on health policy to preserve the health of the elderly and take a comprehensive view, ranging from prevention and rehabilitation to the care of the terminally ill'.⁶⁵ The ESCR Committee further urges states to 'bear in mind that maintaining health into old age requires investments

58 Also see art 28 of CRPD and art 25 of the Universal Declaration.

59 Also see art 28(1) of CRPD.

60 Art 11(2) ICESCR.

61 UN Principles.

62 Vienna Plan Recommendation 19.

63 Vienna Plan Recommendation 24. Also see Recommendations 20-23.

64 Also see art 25 of CRPD and art 25 of the Universal Declaration.

65 General Comment 6 para 34.

during the entire life span, basically through the adoption of healthy lifestyles (food, exercise, elimination of tobacco and alcohol, etc)' and that 'prevention, through regular checks suited to the needs of the elderly, plays a decisive role'.⁶⁶

The UN soft law also recognises this right. The Madrid Plan states that 'older persons are fully entitled to have access to preventive and curative care, including rehabilitation and sexual health care'.⁶⁷ Principle 11 of the UN Principles also provides that older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.⁶⁸ Further, the Vienna Plan provides that '[t]he care of elderly persons should go beyond disease orientation and should involve their total well-being, taking into account the inter-dependence of the physical, mental, social, spiritual and environmental factors'.⁶⁹ It goes further to state that '[h]ealth efforts, in particular primary health care as a strategy, should be directed at enabling the elderly to lead independent lives in their own family and community for as long as possible instead of being excluded and cut off from all activities of society'.⁷⁰ Arguably, in the COVID-19 context, this is one of the most impacted rights in African countries such as Nigeria and Kenya, as discussed below.

In conclusion, this part has unpacked the normative underpinning, within the UN human rights system, on the economic and social rights of older persons. It shows that, despite the absence of a specific UN treaty or convention on older persons' rights, these rights can safely be accommodated and enjoyed under the general economic and social rights instruments, such as ICESCR. The next part briefly considers the African human rights system legal framework on the economic and social rights of older persons.

4.1 Regional framework on the rights of older persons

Although very few African countries, such as Mauritius,⁷¹ South Africa⁷² and Uganda,⁷³ have some modicum of either constitutional or legislative provisions on ageing, in this part we focus only on the provisions of the African Charter and the Older Persons Protocol.

66 General Comment 6 para 35.

67 Madrid Plan para 58.

68 UN Principles Principle 11. Also see Principles 10 & 12-14.

69 Vienna Plan Recommendation 2.

70 As above. Also see Recommendations 1 & 3-17.

71 The Protection of Elderly Persons Act 2005.

72 The Older Persons' Act 2006.

73 Constitution of the Republic of Uganda, VII.

Against the background that the article focuses on the impact of COVID-19 on the economic and social rights of older persons in Africa, it is pertinent to unveil how the African human rights system has attempted to address and redress the economic and social rights of this category of persons. The understanding of the framework within the African system would help to project the argument that there is an existing normative grounding for the rights of older persons in Africa, but that what is more essential is the full operationalisation of the relevant framework that would lead to a practical realisation of the rights.

4.1.1 African Charter

It has been noted that '[t]he position of older persons under the African Charter ... was relatively stronger, compared to its counterparts in Europe and the Americas'.⁷⁴ This is because 'it bolstered the superior position of older persons ... by recognising ... the duty to preserve ... the cohesion of the family, to respect one's parents at all times and to maintain parents in case of need'.⁷⁵ It was also 'the first human rights instrument in the world to expressly recognise and protect older persons' rights as a distinct category'.⁷⁶ One of the groundbreaking features of the African Charter is that it guarantees both economic and social rights and civil and political rights equally.⁷⁷ That the Charter recognises economic and social rights as justiciable rights was a reaction to the 'dire poverty' on the African continent as well as 'an acknowledgment that accountability through the law was part of the solution'.⁷⁸

Thus, apart from generally providing for the rights to work,⁷⁹ health⁸⁰ and education,⁸¹ the African Charter heralds provisions specifically directed at older persons. For example, article 18(4) states that the 'aged and the disabled shall ... have the right to special measures of protection in keeping with their physical or moral needs'. It is arguable that the economic and social rights needs of older persons come within the meaning of 'physical or moral needs' as stated in these provisions. Moreover, article 2 of the African

74 DM Chirwa & CI Rushwaya 'Guarding the guardians: A critical appraisal of the Protocol to the African Charter on the Rights of Older Persons in Africa' (2019) 19 *Human Rights Law Review* 59.

75 As above. See art 27 African Charter.

76 As above.

77 L Chenwi 'The African system' in J Dugard et al (eds) *Research handbook on economic, social and cultural rights as human rights* (2020) 27-29.

78 F Viljoen *International human rights law in Africa* (2012) 215.

79 Art 15 African Charter.

80 Art 16 African Charter.

81 Art 17 African Charter.

Charter provides that the rights recognised in the Charter should be enjoyed by all without distinction based on protected characteristics, including 'other status' which, it is argued, includes old age.

However, the provisions in the African Charter have been the subject of criticism on several grounds. These criticisms include the fact that it is too patriarchal in nature;⁸² that it does not clearly compartmentalise the rights of women, persons with disabilities and older persons as distinct vulnerable persons or groups;⁸³ and that article 18 specifically takes a narrow outlook on the rights of older persons by restricting it to familial attachment.⁸⁴ Notwithstanding these criticisms, it is arguable that the Charter provisions have opened up an interesting and novel talking point in the human rights protection of older persons across Africa, and it indeed was the normative foundation for the Older Persons Protocol.

4.1.2 Older Persons Protocol

The Protocol has been described as being 'surprisingly short, consisting of about 20 articles articulating normative principles'.⁸⁵ It has also been observed that the Protocol, unlike the Inter-American Convention, gives no express definition of the rights of older persons, but that it creates an obligation on state parties to enforce those undefined rights.⁸⁶ This is a major flaw which should have been spotted and addressed at the drafting stage. However, from the Protocol's framing of the obligations of states, one can easily deduce the corresponding older persons' economic and social rights envisaged under the Protocol. It is in this perspective of duty-right correlation that we have focused on the Protocol.

Article 3 of the Older Persons Protocol mandates states to prohibit any discrimination against older persons, by eliminating cultural stereotypes, marginalisation and stigmatisation through appropriate laws. Similarly, article 4(1) requires states to ensure that older persons have equal treatment and protection. This resonates with our earlier discussion on equality and discrimination. As regards the right to work and just working conditions, the Older Persons Protocol provides that states shall take measures to eliminate 'work place discrimination against older persons with regard to access to

82 M Mutua 'The African human rights system in a comparative perspective: The need for urgent reformulation' (1992) 44 *Nairobi Law Monthly* 27.

83 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Dickinson Law Review* 679 687.

84 Chirwa & Rushwaya (n 74) 60-61.

85 As above.

86 As above.

employment' and shall ensure 'appropriate work opportunities for older persons'.⁸⁷

As far as social security is concerned, states are mandated to 'develop policies and legislation that ensure that older persons who retire from their employment are provided with adequate pensions and other forms of social security'.⁸⁸ They are to ensure that 'universal social protection mechanisms exist to provide income security for those older persons who did not have the opportunity to contribute to any social security provisions'.⁸⁹ Commendably, this provision, at least normatively, has addressed Ferreira's concern about older persons who do not work in the formal sector of the economy and thus are disentitled from pension.⁹⁰ It would ensure that even those who cannot 'contribute to any social security provisions' by way of contributory pensions are taken care of. This provision is an innovation that the African system has introduced, compared to the Inter-American system.⁹¹

The Older Persons Protocol has not expressly provided for the right to an adequate standard of living (food, shelter, clothing and water). Although articles 10 and 11 of the Protocol give a semblance of states' duties regarding the right to an adequate standard of living, by requiring them to incentivise older persons' family members who provide home care for them, give older persons priority treatment in service delivery, and ensure that residential care for older persons are affordable and of a high standard,⁹² an explicit provision for the right would have been a better way. It has been suggested that the Protocol should have been fashioned after the Inter-American Convention which clearly provides for the right to housing.⁹³

The Older Persons Protocol provides for the right to health whereby states guarantee 'the rights of older persons to access health services that meet their specific needs', as well as 'the inclusion of geriatrics and gerontology in the training of health care personnel'.⁹⁴ To ensure that older persons are not denied medical care owing to poverty, the Protocol mandates states to 'take reasonable measures to facilitate access to health services and medical insurance cover for older persons within available resources'.⁹⁵ Although the rights to

87 Art 6 Older Persons Protocol.

88 Art 7(1) Older Persons Protocol.

89 Art 7(2) Older Persons Protocol.

90 Ferrera (n 54).

91 Chirwa & Rushwaya (n 74) 73.

92 Arts 10-11.

93 Chirwa & Rushwaya (n 74) 71.

94 Art 15 Older Persons Protocol.

95 Art 15(2) Older Persons Protocol.

food and water are not specifically provided for apart from reference to these in the Preamble, the failure to provide for these rights does not exempt state parties from their duty to promote and realise these rights, based on the principle of interdependence of rights.⁹⁶ After all, food and water are social determinants of health.

In summary, this part has revealed that the African human rights system is not bereft of provisions that recognise and protect the economic and social rights of older persons. In fact, it has demonstrated that the African human rights system is one of the most innovative systems in the world, as regards older persons' human rights instruments. However, what is lacking is the political will to put the instruments into practice. Having examined the economic and social rights of older persons in the foregoing parts, it is apposite to examine how the COVID-19 pandemic has impacted these rights, which is the aim of the next part.

5 Impact of COVID-19 on the economic and social rights of older persons

In this part we examine the impact of COVID-19 on select economic and social rights, namely, the rights to work, social security, health and non-discrimination. It has rightly been observed that 'many of the measures taken in response to the pandemic give rise to particular consequences for older persons'.⁹⁷ To these consequences we now turn.

5.1 Impact on the right to work and social security

This right is one of the casualties of COVID-19 as many older persons who are (self)employed people have either not been able to earn a living or have had their working conditions changed to their detriment.⁹⁸ It has been observed that the 'lockdown measures ...

96 Chenwi (n 77) 37.

97 A Byrnes & T Mattsson 'Human rights of older persons' 22-24 February 2021 Virtual Conference) 13-14, <https://asef.org/wp-content/uploads/2021/02/ASEMHRS20-Background-paper.pdf> (accessed 18 July 2021).

98 AgeUK 'COVID-19: The impact on the human rights of older people', <https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/equality-and-human-rights/older-people-and-human-rights-during-the-covid-19-pandemic.pdf> (accessed 13 November 2021).

drastically reduced economic activity making it difficult for people to pursue livelihoods'.⁹⁹ In the peak of the pandemic the UN reported:¹⁰⁰

Where social protection systems were weak or absent, millions of people have been left without an income. Unemployment is already skyrocketing in many countries and hours worked in all countries and regions are estimated by the ILO to have fallen dramatically by 10,7 per cent.

Older persons perform crucial roles in their communities and families, including contributing to household incomes and supporting younger generations, for example, providing child care.¹⁰¹

According to the ILO in 2018,¹⁰² that is, before the COVID-19 pandemic, 56 per cent of older men and 33 per cent of older women formed part of the labour force in African and other low-income countries. However, COVID-19 has directly and indirectly impacted these older workers. Directly, some of these persons in the formal sector have lost their means of livelihood. For example, a survey has revealed that in Nigeria 89 per cent of older persons became concerned over a loss in household finances and another 26 per cent stated that they stopped work because of COVID-19, while 86 per cent of Ugandan older persons were concerned about their household income.¹⁰³ The systemic impact of ageism contributes to loss of livelihood for older persons, who are easily compulsorily retired in favour of younger and allegedly more active workers during economic crises.¹⁰⁴

The problem of those in the formal sector becomes more complicated against the backdrop that social protection schemes in

99 Nkhata & Mwenifumbo (n 1) 532-533; N Holcroft-Emmess 'The impact of Covid-19 on workers' rights (with Michael Ford)', <https://ohrh.law.ox.ac.uk/the-impact-of-covid-19-on-workers-rights-with-michael-ford/> (accessed 13 November 2021).

100 UN 'Policy Brief: World of work and COVID-19', https://www.un.org/sites/un2.un.org/files/the_world_of_work_and_covid-19.pdf (accessed 13 November 2021).

101 UNECE 'Older persons in emergency situations' UNECE Policy Brief on Ageing 25 (November 2020), https://unece.org/fileadmin/DAM/pau/age/Policy_briefs/ECE_WG1_36_PB25.pdf (accessed 13 November 2021).

102 ILO 'Women and men in the informal economy: A statistical picture', https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf (accessed 26 June 2021).

103 F Juergens 'Older people's livelihood, income security and access to social protection during COVID-19 and beyond' Paper presented at 'Building forward better for older persons post COVID-19' UN DESA Expert Group Virtual Meeting, 2-5 March 2021.

104 J Raja 'The global economic crisis: Long-term unemployment in the OECD' Institute for the Study of Labour (IZA), <http://ftp.iza.org/dp6057.pdf>; OECD (2020). OECD 'Employment outlook 2020: Worker security and the COVID-19 crisis', <https://doi.org/10.1787/1686c758-en> (accessed 26 June 2021).

Africa are inadequate. It has been reported that only 22 per cent of older persons receive pensions in sub-Saharan Africa.¹⁰⁵ This percentage not only is pathetic but also is 'a clear violation of the human right to income security in older age, condemning many to live their last years in destitution'.¹⁰⁶

The above 2018 ILO report indicates that 78 per cent of the world's older persons work in the informal sector,¹⁰⁷ and the situation of those in this sector is bleak. According to the UN, in the context of the pandemic, '[i]nformal economy workers are particularly vulnerable to lockdown measures. Their earnings in the first month of the crisis are estimated to have declined by 60 per cent globally (around 80 per cent in Africa and Latin America).'¹⁰⁸ As Juergens argues, the 'informal economy tends to provide lower and more volatile incomes and few social protection benefits ... they are also more likely to work in sectors heavily affected by the pandemic ... and are likely to be excluded from crisis-related assistance'.¹⁰⁹ Thus, the lockdowns or closure of non-essential services meant that the livelihoods of cross-border traders, local and migrant daily labourers, domestic workers, self-employed workers, street vendors and waitrons had been disrupted.¹¹⁰

According to a recent survey carried out in Kenya by Advisory Network, the COVID-19 lockdowns adversely impacted the means of livelihood of older persons. One of the older Kenyan respondents in the informal sector stated during the survey that 'as a shoemaker, before COVID-19, I could receive as high as 500 shillings [\$4,5] a day. But now I hardly take home any money. On a good day, I can get 40 shillings [\$0,36] at most.'¹¹¹ In another report conducted by HelpAge International, 41 per cent of older Kenyan males stated that the pandemic increased their risk of being denied opportunities and services.¹¹² Similarly, in a report by World Vision a South Sudanese older woman was reported to have stated that 'COVID-19 is like a death sentence to us vulnerable women who depend on farming to

105 ILO 'Social protection for older persons: Policy trends and statistics 2017-19', https://www.ilo.org/secsoc/information-resources/publications-and-tools/policy-papers/WCMS_645692/lang--en/index.htm (accessed 28 June 2021).

106 Juergens (n 103).

107 ILO (n 102).

108 UN (n 100).

109 Juergens (n 103).

110 G Dafuleya 'Social and emergency assistance ex-ante and during COVID-19 in the SADC region' (2020) 2 *International Journal of Community and Social Development* 254.

111 Chronic Poverty Advisory Network 'Kenya COVID-19 poverty monitor October 2020', <http://www.chronicpovertynetwork.org/covid19-poverty-monitor/kenya-october> (accessed 28 June 2021).

112 <https://www.helpage.org/what-we-do/coronavirus-covid19/covid19-rapid-needs-assessment-rnas/> (accessed 12 November 2021).

feed our children'.¹¹³ This obviously presents a disturbing situation which needs urgent attention, because with 'lockdown and the restrictions on movement of goods and services, families living on a daily income face[d] the threat of starvation, risking a further fall into abject poverty'.¹¹⁴

Indirectly, COVID-19 has impacted the older persons' means of survival by disempowering and impoverishing younger family members on whom they sometimes depend for survival. In a 2021 research survey in Kenya one of the older respondents stated in the COVID-19 context that '[o]ur income went down since some of my sons who support the household financially lost their employment'.¹¹⁵ Thus, although the African culture expects the youth to take care of older persons, the former would perform this traditional obligation only to the extent of their wherewithal. Unemployed or underemployed children obviously may not be able to meet their personal needs, let alone those of their older parents, uncles or aunts.

With the foregoing, it is argued that the situation that the pandemic has introduced is a clear violation of the right to work. As noted in the discussion on legal framework, everyone, including older persons, have a right to work and a right to work under just and favourable conditions. Pandemic or no pandemic, this right should be given its deserved protection. While it is conceded that the pandemic is an emergency situation which requires emergency measures, it is argued that a balance should be struck between such measures and the need to protect human rights. Although there is little or no comprehensive age-based poverty data on COVID-19 yet,¹¹⁶ and the chronic data invisibility of older persons despite the COVID-19 spotlight on these persons,¹¹⁷ there already is evidence that a loss of income from work, family support and social security would cause many older persons among the 119 to 124 million

113 World Vision 'COVID-19 is like a death sentence to women in South Sudan', <https://www.wvi.org/stories/coronavirus-health-crisis/covid-19-deathsentence-women-south-sudan-after-years-conflict-it> (accessed 26 June 2021).

114 JG Akech 'Exacerbated inequalities: Implications of COVID-19 for the socio-economic rights of women and children in South Sudan' (2020) 20 *African Human Rights Law Journal* 600.

115 Chronic Poverty Advisory Network 'Kenya COVID-19 poverty monitor January 2021', <http://www.chronicpovertynetwork.org/covid19-poverty-monitor/kenya-january> (accessed 25 June 2021).

116 HelpAge International 'Data gaps and ageing in the COVID-19 pandemic', <https://www.helpage.org/silo/files/data-gaps-and-ageing-in-the-covid19-pandemic.pdf> (accessed 25 June 2021).

117 Office of the High Commissioner for Human Rights 'Older persons remain chronically invisible despite pandemic spotlight, says UN Expert' 1 October 2020. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26319&LangID=E> (accessed 24 June 2021).

persons estimated to be in COVID-19-triggered extreme poverty.¹¹⁸ No doubt, poverty among older persons 'naturally has a direct impact on their health and on all their life conditions'.¹¹⁹

Although approximately 215 countries and territories have either established or expanded social protection schemes to meet people's needs during COVID-19,¹²⁰ studies have revealed that the outcomes of these schemes were inadequate to address the situation as most of these were make-shift, rather than institutionalised schemes.¹²¹ Particularly, older persons in Africa and Asia have found it difficult to benefit from COVID-19 social protection packages because of public health restrictions, systemic failure or outright neglect.¹²² This is a clear departure from the rights-based approach that the above UN and African human rights legal framework represent. Older persons' work or means of income needs to be protected by the governments in line with the provisions of the human rights instruments. Therefore, Juergens has argued that 'to protect older people from both idiosyncratic and covariate shocks, government should prioritize the expansion of high-quality social pensions',¹²³ in their favour. There is a need to create or adjust social protection schemes and care services that meet people's, especially older people's individual needs, promote their well-being and maintain their autonomy and independence.¹²⁴

5.2 Impact on the right to health

As regards the right to health, the story does not differ. The UN has observed that the COVID-19-triggered social isolation has limited older persons' access to COVID-19 and non-COVID-19 healthcare services, including regular check-ups and diagnostics, thereby

118 C Lakner et al 'Updated estimates of the impact of COVID-19 on global poverty: Looking back at 2020 and the outlook for 2021' (2021) The World Bank, <https://blogs.worldbank.org/opendata/updated-estimates-impact-covid-19-global-poverty-looking-back-2020-and-outlook-2021> (accessed 28 June 2021).

119 I Doron, B Spanier & O Lazar 'The rights of older persons within the African Union' (2016) 10 *Elder Law Review* 1 18.

120 U Gentilini, M Almenfi & P Dale 'Social protection and jobs responses to COVID-19: A real-time review of country measures' December 2020, <http://documents1.worldbank.org/curated/en/467521607723220511/pdf/Social-Protection-and-Jobs-Responses-to-COVID-19-A-Real-Time-Review-of-Country-Measures-December-11-2020.pdf> (accessed 25 June 2021).

121 Oxfam 'Shelter from the storm: The global need for universal social protection in times of COVID-19', <https://www.oxfam.org/en/research/shelter-storm-global-need-universal-social-protection-times-covid-19> (accessed 24 June 2021).

122 HelpAge International 'SPACE social protection for older people during COVID-19 and beyond', <https://socialprotection.org/discover/publications/space-social-protection-older-people-during-covid-19-and-beyond> (accessed 24 June 2021).

123 Juergens (n 103).

124 Office of the High Commissioner (n 117).

exposing them to risks of chronic conditions and disabilities.¹²⁵ For example, HelpAge International conducted a Rapid Needs Assessments of Older People (RNA-OPs) in eight African countries and the report indicates that over 60 per cent of older person respondents in Kenya, Mozambique, Rwanda and South Sudan did not know where to access a test for COVID-19.¹²⁶ Also, 54 per cent of older South Sudanese confirmed that the pandemic has adversely affected their access to health services, while 97 per cent of older Zimbabweans stated that they reduced the quantity and quality of food they ate owing to the pandemic-triggered hardship.¹²⁷

Further, the lockdown or isolation has led to mental health issues owing to depression and a lack of social and familial interactions.¹²⁸ Thus, studies have revealed that social distancing and isolation, which reduced physical and social activities, led to problems of physical and mental health among older persons.¹²⁹ Todorovic reported that '[i]solation and separation from their loved ones and the fear of being unable to meet their needs-related essential supplies created psychological stress' among older persons.¹³⁰

Across the globe, older peoples' health was aggravated owing to the impact of lockdowns and isolation and the associated social, religious and financial disconnections on mental health and spiritual well-being as well as making their access to healthcare services difficult and deprioritised.¹³¹ For example, according to HelpAge International, in South Africa, while younger people were allowed to come out of the national lockdown, older people were required to stay at home.¹³² A report states that, globally, older persons' 'level of satisfaction regarding the relationship with their families and neighbours was reported as around 60 per cent before COVID-19 dropping to 40 per cent after the COVID-19'.¹³³ Linked to the loss of means of livelihood discussed above, the mental health of older

125 Todorović (n 22).

126 HelpAge International 'COVID-19 rapid needs assessments', <https://www.helpage.org/what-we-do/coronavirus-covid19/covid19-rapid-needs-assessment-rnas/> (accessed 13 November 2021).

127 As above.

128 Todorović (n 22).

129 W Sepúlveda-Loyola et al 'Impact of social isolation due to COVID-19 on health in older people: Mental and physical effects and recommendations' (2020) 24 *Journal of Nutrition, Health and Aging* 1-10.

130 Todorović (n 22).

131 T Girard 'Impact study of COVID-19 on older people and caregivers in the South Caucasus' 1, https://www.un.org/development/desa/ageing/wpcontent/uploads/sites/24/2021/02/Trgachevska_Girard_Paper.pdf (accessed 26 June 2021).

132 HelpAge International 'Older people are bearing the brunt of COVID-19', <https://www.helpage.org/what-we-do/bearing-the-brunt/> (accessed 13 November 2021).

133 Mahler (n 7) 2.

persons also deteriorated owing to digital poverty. Their inability to buy digital devices and data to surf the internet, which would have served as a temporary replacement of the COVID-19 social disconnection, further reveals the growing digital divide between these and younger persons. Also, the sexual and reproductive health rights of older women, which have been ignored for so long, were put in a worse situation by the pandemic.¹³⁴

The healthcare facilities in developed nations, let alone developing nations, were overwhelmed by the pandemic to the extent that 'older persons' access to medical treatments and health care was hindered as health systems had to respond to insufficient resources'.¹³⁵ For example, Dr Solanki, a UK-based medical doctor, who visited Kenya and interviewed older persons at the peak of the pandemic, reported that Kenyan older persons did not have access to basic medical care, and that they were also 'isolated, lonely and malnourished'.¹³⁶ Similarly, in Kenya, HelpAge International reported that at the height of the pandemic, '73 per cent of older women and men and older people with disabilities reported not having enough food', while 48 per cent of older Sierra Leoneans reported that they suffered depression as a result of the pandemic.¹³⁷

From a human rights perspective, the above situation that the pandemic has heralded is antithetical to the relevant human rights provisions. Despite the pandemic, older persons remain imbued with inalienable rights to access medical care at subsidised rates, if not totally free, as provided under the UN and African human rights systems. As noted above, the Vienna Plan expressly mandates states to ensure the total well-being of older persons, in such a way that takes into account the inter-dependence of their physical, mental, social, spiritual and environmental well-being. It is disturbing that most developing countries do not have the gerontological and geriatric medical expertise and services that would help to ensure the medical and mental well-being of older persons. African countries should adopt and operationalise the African Older Persons Protocol which has commendably provided in article 15 that 'the inclusion of

134 R Eghtessadi et al 'Safeguarding gains in the sexual and reproductive health and AIDS response amidst COVID-19: The role of African civil society' (2020) 100 *International Journal of Infectious Diseases* 286-291; T Riley et al 'Estimates of the potential impact of the COVID-19 pandemic on sexual and reproductive health in low- and middle-income countries' (2020) 46 *International Perspectives on Sexual and Reproductive Health* 73-76.

135 As above.

136 BGS 'Impact of COVID-19 on older people in rural Kenya', <https://www.bgs.org.uk/blog/impact-of-covid-19-on-older-people-in-rural-kenya> (accessed 13 November 2021).

137 HelpAge International (n 132).

geriatrics and gerontology in the training of health care personnel' should be taken seriously. A political commitment to the Protocol would ensure that older persons live a healthier life post-pandemic.

5.3 Impact on the right to equality and non-discrimination

The pandemic has gravely impacted on this right, where older persons are being viewed as a liability and disposable items. In the peak of the pandemic, there were reports of 'an increase in discriminatory policies based on age, including triage protocols that use arbitrary age criteria as the basis for allocating scarce medical resources, and a rise in the number of reported cases of neglect of older persons living in institutional settings in many countries'.¹³⁸

For example, in Kenya older persons became anxious or fearful owing to the stigma and discrimination to which they were subjected during the COVID-19 outbreak when the government introduced a 58-year and above age-based restriction.¹³⁹ Also, there have been reports of some countries denying older persons access to the COVID-19 vaccine in an alleged bid to save the younger generation.¹⁴⁰ President Duterte of the Philippines recently stated: 'Let's prioritise those who, once they get a vaccine, there's a chance that he would live and live productively. Most of the senior citizens are no longer that productive.'¹⁴¹ Also, in Indonesia, a clinical trial leader reportedly retorted: 'Why do we target people of a productive age? Because these people can work hard, so the country will not have a deficit.'¹⁴² These not only are unfortunate statements, but they also smack of discriminatory practices, blatant ageism, commodification and commercialisation of human lives.

Fortunately, the WHO has warned that '[t]here is a disturbing narrative in some countries that it's okay if older people die. It's not okay. No one is dispensable ... It is important that everywhere older people are prioritised for vaccination.'¹⁴³ Indeed, no life of an older

138 AgeUK(n 98).

139 HelpAge International (n 132).

140 L Kassova 'Bulgaria is sacrificing its older generations – How to stop that?', <https://euobserver.com/coronavirus/151639> ; P Lloyd-Sherlock 'Bulgaria and COVID-19 vaccine ageism', <https://corona-older.com/2021/05/20/bulgaria-and-covid-19-vaccine-ageism/> (accessed 28 June 2021).

141 'Duterte will "waive" COVID vaccine, saying elderly not a priority' *The Jakarta Post* 13 April 2021.

142 P Lloyd-Sherlock, P Muljono & S Ebrahim 'Ageism in Indonesia's national COVID-19 vaccination programme' (2021) *BMJ* 372.

143 WHO 'WHO Director-General's opening remarks at the media briefing on COVID-19 – 5 February 2021', <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-5-february-2021> (accessed 7 June 2021).

person is disposable at this critical time, because an older person may add more value than a younger person in the fight against the pandemic.

Any discriminatory practice against older persons in the pandemic context smacks of a gross violation of their human rights.¹⁴⁴ Apart from the provisions of articles 2 and 3 of ICESCR which prohibit discrimination, the UN Principles require states to treat older persons fairly regardless of age, while the Madrid Plan mandates states to combat ageism in all its manifestations. Therefore, in the context of COVID-19, paying less attention to older persons with the assumption that they are closer to the grave is not only morally wrong, but also runs contrary to human rights norms.

6 Way forward and concluding thoughts

This article has examined the effect of COVID-19 on the economic and social rights of older persons in Africa. It has provided a modest contribution to the legal and policy frameworks that underpin those rights. It has engaged in some analysis on the normative architecture on the economic and social rights of older persons, which reveals that there is no dearth of legal framework for the promotion of the economic and social rights of older persons in Africa. What is needed is a political will to further that promotion.

International and regional cooperation is paramount for meeting the economic and social rights needs of older persons. According to paragraph 122 of the Madrid Plan, 'enhanced international cooperation is essential to support developing countries, least developed countries and countries with economies in transition' in meeting the economic and social rights needs of older persons. Also, as far back as 1982, the UN noted that '[i]nternational co-operation ... is essential ... and can take the form of bilateral and multilateral cooperation between governments'¹⁴⁵ if the goal of protecting the rights of older persons were to be fully achieved. This could come in the form of financial, economic and technical cooperation and assistance as well as information sharing among countries of the world.

The COVID-19 pandemic has revealed the deep-rooted structural imbalances between developing and developed countries in the

144 Vienna Plan para 25(h).

145 Vienna Plan para 94.

area of vaccine development and distribution.¹⁴⁶ It is essential that developed countries assist developing countries to take care of their older persons in these unprecedented times. This call is supported by several provisions of ICESCR. For example, article 2(1) of ICESCR recognises that national efforts cannot adequately address issues around economic and social rights, hence it clearly provides for states' extraterritorial obligations of international cooperation and assistance.

As the UN Independent Expert on the Rights of Older Persons asserts, the pandemic calls for 'solidarity and for stepping up action towards better protection of the rights of older persons among reports of age-based decisions regarding the allocation of scarce medical resources and the deep-rooted ageism that the pandemic has brought to the fore'.¹⁴⁷

International cooperation and assistance from developed countries may be boosted by a consistent financial contribution of the globally agreed 0,7 per cent of their gross national product (GNP) as the Official Development Assistance (ODA) to developing countries,¹⁴⁸ monitoring of the utilisation of ODA in the recipient states, the provision of technical aid in drafting domestic laws that would address the local context of older persons in the recipient states.

African governments should operationalise the Older Persons Protocol, not only by signing and ratifying it, but also by exploring its provisions on the role of informal care givers. The Protocol recognises 'the importance of traditional family support systems'.¹⁴⁹ As noted above, article 10 recognises that family members should take care of older persons but, more essentially, that states should incentivise such informal caregivers in line with the provisions of the Protocol. In the context of COVID-19, a call has been made that '[w]e should support informal caregivers because they are the ones providing majority of services that support autonomy of older persons'.¹⁵⁰ The government should motivate these care givers by some handsome rewards and awards.

146 HO Yusuf & PE Oamen 'Realising economic and social rights beyond COVID-19: The imperative of international cooperation' (forthcoming in the December 2021 Issue of *II&CLR*).

147 Mahler (n 20) 1.

148 OECD 'Official development assistance', <https://www.oecd.org/development/stats/What-is-ODA.pdf> (accessed 13 November 2021).

149 Chirwa & Rushwaya (n 74) 73.

150 Todorović (n 22) 3.

Further, the national governments in Africa should enact new laws or review existing laws to ensure that human rights are enjoyed at old age, pandemic or no pandemic, thereby addressing the issues of ageism. Such domestic laws should provide effective remedies for direct, indirect and intersectional discrimination based on older age, as well as institutionalise public awareness mechanisms on those rights.¹⁵¹ In addition, a special older persons' unit should be created in the African Union (AU) and in each state party's national human rights institution, to collate and address human rights concerns of this category of persons. The AU unit should oversee the work of the national human rights institution to ensure that they are insulated from domestic political influence.

Moreover, national and regional courts in Africa should adopt a liberal approach to the rights of older persons. Reports indicate that some African countries, such as South Africa, that have rights-based and institutionalised social safety nets were quicker to provide social assistance to address COVID-19 effects than other African countries with weak forms of normative framing.¹⁵² It is arguable that courts' sympathetic approach towards older persons' rights in this pandemic period may attract both direct and symbolic impact. The courts should borrow from the Inter-American Court of Human Rights which recently gave an expansive interpretation to older persons' rights to health and informed consent in *Poblete Vilches v Chile*.¹⁵³ In that case the Court reasoned that the failure to provide an older person with adequate and necessary medical care, leading to his or her death, violated their autonomous right to health to which the Chilean government owed an obligation.

Further, African governments should show genuine political commitment to complying with pro-older person laws and judicial decisions as in the case of the Chilean government. It has been reported that the Chilean government has since started compliance with the orders made in *Poblete*.¹⁵⁴ All stakeholders in Africa should as a matter of urgency cash in on the opportunity that the pandemic has provided through the spotlighting of older persons, by not only including these persons in future public data capturing, but by also

151 A Byrnes 'Building forward better with human rights law and procedures and law reform' Paper presented at the UN Expert Group Virtual Meeting 'Building forward better for older persons post-COVID-19 held on 2-5 March 2021 3.

152 Dafuleya (n 110) 263; B Rohwerder 'Social impacts and responses related to COVID-19 in low- and middle-income countries', <https://www.ids.ac.uk/publications/social-impacts-and-responses-related-to-covid-19-in-low-and-middle-income-countries/> (accessed 25 June 2021).

153 Report 1/16 CASE 12,695.

154 ESCR Net '*Poblete Vilches and Others v Chile*', <https://www.escr-net.org/caselaw/2019/poblete-vilches-and-others-v-chile> (accessed 25 June 2021).

promoting 'a human rights based approach to ageing, one that recognises older persons as rights' holders'.¹⁵⁵

In addition, African governments should comply with the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights which has devoted an expansive attention to vulnerable and disadvantaged groups, including older persons.¹⁵⁶ The Guidelines obligates state parties to 'prioritise the realisation of the rights [ESR] for the poorest and most vulnerable in society', while progressively realising 'the rights for all individuals'.¹⁵⁷ Thus, in the context of older persons who also often suffer poverty, where 'extreme poverty intersects with – and exacerbates – other forms of vulnerability and disadvantage, a state's obligation to intervene to secure the realisation of social rights is urgent and undeniable'.¹⁵⁸

At the regional level, African governments should cooperate by prioritising allocation for assistance to the poorer countries in a bid to realise the economic and social rights of older persons. The AU should coordinate more economic responses to the pandemic. As Iwara notes,

the coronavirus pandemic puts more emphasis on the need for a holistic pan-African response that will not just react to the immediate pandemic, but manage its attendant impacts through commitments to jointly shared instruments, robust economic packages and meaningful investments in public healthcare, education.¹⁵⁹

The AU should urge African governments to establish an institutionalised non-contributory pension or social safety net for older persons. This would ensure that older persons are protected against economic shocks that the pandemic has introduced. The governments should borrow from the Bolivian government which received a global applause for the seamless way in which it addressed older persons' needs with pre-COVID-19 pension programmes. The Bolivian Renta Dignidad programme set up in 2008 effectively gave

¹⁵⁵ Mahler (n 7) 3.

¹⁵⁶ African Commission 'Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights', https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC_E.pdf?sequence=1&isAllowed=y (accessed 25 June 2021).

¹⁵⁷ African Commission (n 156) para 17.

¹⁵⁸ F Viljoen 'Social rights in the African system for the protection and promotion of human and peoples' rights' in C Binder et al (eds) *Research handbook on international law and social rights* (2020) 210.

¹⁵⁹ M Iwara 'Leveraging the African Union's role in the time of COVID-19' *African Arguments* 29 April 2020, <https://africanarguments.org/2020/04/29/leveraging-the-african-unions-role-in-the-time-of-covid-19/> (accessed 27 June 2021).

welfare packages to individuals aged 60 and older, regardless of their level of income.¹⁶⁰ In particular, it is proposed that African leaders should put in place a ‘telecare’ scheme whereby older persons are given a monthly telephone or digital allowance with which they can reach families and friends, thereby improving their mental health. Engendering such pension and telecare schemes across the African continent would address the needs of older persons, both in peace and ‘war’ times. Research has shown that this is possible in Africa and should be strived for.¹⁶¹

Further, the AU should encourage its member states to fulfil their commitment to the 2001 Abuja Declaration by allocating not less than 15 per cent of their annual budgets to the healthcare sector.¹⁶² If this is done faithfully, Africa will not need to engage in medical tourism, neither would it be less prepared for future pandemics.¹⁶³

Finally, the UN Principles should be given the necessary attention in the African setting. The Principles require states to carry older persons along in making decisions affecting them. As has been observed, ‘[t]he COVID-19 pandemic should act as a wakeup call to include older persons in emergency response planning, budgeting, staff allocation and response activities, using their capacity and resources and voicing their concerns and recommendations’.¹⁶⁴ It would be difficult to protect older persons’ rights ‘without giving them a seat at the [discussion] table’.¹⁶⁵

The issue being discussed calls for an end to ‘stigma and generalisations of older persons as being vulnerable, unproductive and a burden to society’ as such narratives can trigger or perpetuate abuse, violence and neglect.¹⁶⁶ There needs to be a shift to ‘the value and need of inter-generational interaction and support’,¹⁶⁷ which older persons bring to the table. National policies that affect their

160 Inter-American Development Bank ‘Stepping up during a crisis: The unintended effects of a non-contributory pension programme during the COVID-19 pandemic’ IDB Working Paper Series IDB-WP-1153 1; N Bontan et al ‘How an existing non-contributory pension programme proved critical during the COVID-19 pandemic’ Ideas Matter 19 May 2021, <https://blogs.iadb.org/ideas-matter/en/how-an-existing-non-contributory-pension-program-proved-critical-during-the-covid-19-pandemic/> (accessed 25 June 2021).

161 HelpAge International ‘Why social pensions? Achieving income security for all older people’, <http://www.pension-watch.net/knowledge-centre/?guid=5ecf33112a9b9&order=n> (accessed 26 June 2021).

162 PE Oamen ‘Realisation of the right to health in Nigeria: The prospects of a dialogic approach’ (2020), <http://dx.doi.org/10.2139/ssrn.3673480> (accessed 26 June 2021).

163 As above.

164 Todorović (n 22) 3.

165 As above.

166 Mahler (n 7) 1.

167 As above.

health and social well-being should be designed in consultation with them.¹⁶⁸ Rather than regarding them as a liability, older persons should be embraced, cared for and given a voice, not only by their families and societies but by African national and regional political entities. As the UN recently observed, we 'must raise visibility of and pay closer attention to ageist attitudes and behaviors, adopt strategies to counter them, and create comprehensive policy responses that support every stage of life'.¹⁶⁹

We conclude by echoing Scott that the

pandemic has revealed a number of policy and institutional weaknesses that need to be corrected ... The pandemic represents an opportunity to change the narrative around ageing by reducing ageism, raising awareness of diversity in ageing, redefining 'old'.¹⁷⁰

168 As above.

169 UN 'Global report on ageism' (2021) ix.

170 A Scott 'Older persons and the post-COVID-19 agenda' (2020) Background paper for the United Nations DESA 2, https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2021/02/Andrew-Scott_Paper.pdf (accessed 26 June 2021).