The principle of equality and non-discrimination for the protection of the rights of older persons

Contribution to the discussion of an International Convention

IPPDH
552 Sarmiento Av. - Floor 16 • C1041AAL
Autonomous City of Buenos Aires
Argentine Republic
ippdh@mercosur.org.uy
PREFACE

Document written by the Human Rights Public Policy Institute (Instituto de Políticas Públicas en Derechos Humanos, hereinafter IPPDH) of the Southern Common Market (Mercado Común del Sur, hereinafter MERCOSUR) to support the presentation by the Executive Secretary, Dr. Víctor Abramovich, Second Session of the Open-ended Working Group on Strengthening the Protection of the Human Rights of Older Persons, New York, 1 to 4 August, 2011. Constanza Argentieri and Laura Saldivia, IPPDH researchers, participated in the preparation of this document.
EXECUTIVE SUMMARY

The Human Rights Public Policy Institute (Instituto de Políticas Públicas en Derechos Humanos, hereinafter IPPDH) is a body within MERCOSUR that has been created as an instance of technical cooperation, research and coordination of the human rights public policies of the countries included in the regional bloc. The national counterparts of the IPPDH are the High Authorities in Human Rights and Chancelleries of Full and Associate Members of MERCOSUR. They meet every semester in a specialized gathering known as the RAADDHH (acronym of the meeting of such high authorities), with a Permanent Commission working specifically for the promotion of the rights of older persons.

The topic of the rights of older persons and the promotion of the development of an international convention is significantly relevant for the MERCOSUR States.

Along these lines, this document intends to contribute to the discussion of an international instrument, focusing on three fundamental core areas related to an explicit acknowledgement of the principle of non-discrimination on the grounds of age. Firstly, the notion of formal equality before the law and the inclusion of age as a suspected category with the purpose of avoiding pejorative differences in treatment; secondly, the concept of structural or material equality and its consequence in the positive obligations of the State, especially in the contexts of social services and policies; thirdly, the State’s obligation of protection from different forms of violence affecting older persons, which is based on the due diligence principle.

The first core area develops the concept of formal equality of a suspect category, taking into account that the explicit acknowledgement of the non-discrimination principle is a key issue in the discussion of this topic in relation to human rights.

Thus, it is noted that even though certain cases of reasonable and objective differences in treatment on the grounds of age, such as establishing a minimum or maximum age to perform specific jobs or to be appointed to public offices, or taking special protection measures on the grounds of age may be allowed, there are circumstances in which age is a ground of discriminatory treatment. It is necessary to adequately identify these
circumstances in an international instrument because the use of age as a differentiating factor for negative treatment occurs specifically in circumstances in which the age factor is used in state policies and regulations as a maximum limit to have access to certain benefits, perform activities or exercise rights. In these situations, it is important to conceptualize the age category as discrimination suspect in order to enforce a strict scrutiny of the reasonability of the measure. For these reasons, the use of age as a differentiating factor for negative treatment must be included in the debates of the Convention development process.

The second core area of this document focuses on one of the most complex situations regarding equality: the analysis of discriminations that require a study of historical, social, political, and economic conditions, i.e., the structural conditions that define the life of a community or social group. The discussion of this core area includes the different State obligations emerging from the notion of substantive equality.

One of the main implications of this concept is the duty of the State to produce information to identify sectors that are disadvantaged or neglected in the exercise of rights and require prior and special attention.

One further duty of the State is to take affirmative action measures with the purpose of providing special protection of the rights of certain groups that are in a disadvantaged situation.

A topic that is directly related with this duty of the States to take affirmative action measures regarding the group of older persons and, particularly, those with characteristics that aggravate their exposition to discriminatory actions and practices, is the development of social security systems in a broad sense, i.e., contributory as well as non-contributory social security systems.

Another topic discussed in this point is the right to receive care, which becomes particularly important in the case of older persons because it generates in the State the obligation to design and enforce public policies aimed at eradicating any type of discrimination or violence and based on an approach to human rights that seeks to eradicate any healthcare bias.
In addition, besides the obligation of States to take measures aimed at protecting the rights of a group that has been identified as a victim of a violent or discriminatory situation, the analysis of State obligations regarding structural inequality must also consider the inclusion of a differentiated approach taking into account the characteristics of the group in the social services in general.

Likewise, the principle of equality and non-discrimination in its most robust sense, understood as a legal tool to demand the State to take affirmative measures, indicates that the social meaning and the lawfulness of an apparently neutral norm or practice ought to be considered in relation to their impact on the group.

Lastly, within the concept of structural equality, there must be a distinction regarding the warrantee of the right to participation, understood as the real possibility of people to participate in political processes, in the orientation and supervision of governmental decisions. The exercise of this right has a substantial impact on non-discrimination issues regarding groups in vulnerable situations because it generates autonomy and equality conditions in relation to citizen participation, which should be provided for in the regulation of the rights of older persons in an international convention.

The third core area of the document refers to another consequence of this robust notion of equality in relation to the role of the States as regards their duty to protect rights and, in particular, the right to life and physical integrity and to be protected against violent situations even when these violent actions or situations are not caused by non-State actors.

The obligation of the State to protect, which includes the duty to prevent predictable violence risks, must be guided or based on the principle of due diligence that demands a particular behavior from the public authorities.

The due diligence principle presupposes the following obligations on the part of the State: generating risk diagnoses of possible violent situations with the purpose of developing prevention policies, regulating private acts (State’s duty to protect compliance with the rights), warranty the existence of accessible and suitable legal resources and enforce measures to fully compensate the victims of human rights violations.
International bodies for the protection of human rights have identified the group of older persons as a victim of structural violence patterns and, particularly, have distinguished older women as vulnerable in multiple discriminatory situations. In this context, the institutionalization of older persons is a topic of great concern.

For that reason, in the process of discussing an international instrument for older persons, it is relevant to approach adequately the issue of the protection duty based on the due diligence principle in cases of usual forms of violence and abuse that affect the right to life and personal integrity of older persons, contributing to the delimitation of its scope and clarifying its relationship with other State obligations, and particularly with the principle of equality and non-discrimination.

As a conclusion, an international convention protecting the rights of older persons must acknowledge this principle of equality and non-discrimination so that the States assume all the obligations aimed at eradicating and preventing structural discrimination situations suffered by the group of older adults,

This is not about abstract legal principles. Their adequate normative definition contributes to orienting public policies -especially social protection systems designed and implemented by the States to protect older persons-. It also provides clear guidelines for adapting and adjusting far-reaching social policies and services to the needs of this group, and a framework for the regulation and supervision of services offered by private entities.
I. INTRODUCTION

The Human Rights Public Policy Institute (IPPDH) is a body of the MERCOSUR created by the Common Market Counsel of the MERCOSUR by means of Provision No. 14/09, dated July 23, 2009, as an instance of technical cooperation, research and coordination of the human rights public policies of the countries in the regional bloc. The national counterparts of the IPPDH are the High Authorities in Human Rights and Chancelleries of Full and Associate Members of MERCOSUR. They meet every semester in a specialized gathering known as the RAADDHH (acronym of the meeting of such high authorities), where regional activities and initiatives are coordinated.

In the specific context of the RAADDHH, there is a Permanent Commission on Older Persons\(^1\). This Commission entrusted the IPPDH the conduction of a study about the general situation of protection of the rights of older persons in the region, with a view to promoting an international convention of the UN\(^2\).

For that reason, in the 19\(^{th}\) RAADDHH that took place in April 2011 in Asunción, Paraguay the IPPDH presented a preliminary study based on the available information about normative commitments regarding the protection of the rights of older persons in the member countries of the MERCOSUR, the public institutions created to deal with the topic and a systematization of the situational diagnoses presented by the States in the reports presented before the international bodies that protect human rights\(^3\).

---

\(^1\) It was established in the RAADDHHs18\(^{th}\) Meeting, held in Brasilia in 2010. Before acquiring the status as a permanent commission, it existed in the RAADDHH the Working Group on Older Persons which was created in 2009 in Asunción, Paraguay.

\(^2\) MERCOSUR/RAADDH/ACTA Nº 02/10.

\(^3\) In the 19th RAADDHH, the Permanent Commission on Older Persons manifested the importance of this Second Session of the United Nations Working Group on Older Persons that took place from August 1\(^{st}\) to 5\(^{th}\), 2011 and requested the RAADDHH to promote the active participation of members of this commission in it. Thus, the RAADDHH also considered of high importance the celebration of this Second Session of the United Nations Working Group and requested the States to participate actively in this instance. Cf. MERCOSUR/RAADDHH/ACTA Nº 01/11.
The rights of older persons and the promotion of an international convention are significant topics for the States of the MERCOSUR.

The enforcement of an international instrument is important in a context of great demographic transformation in the Americas and other parts of the world. The ageing of the population has repercussions in the human rights field and in the public policies aiming at its protection.

Even though there has been a significant development in the acknowledgement of certain rights on the part of treaty enforcement bodies, the multiplicity of the normative sources related to this issue, with different legal categories and scopes, demands specifying the content of the rights of older persons and the corresponding obligations of the States to respect, protect and warranty those rights. A particular instrument would undoubtedly be able to contribute to that work.

Additionally and taking into account the importance of the Human Rights Universal System of Protection, it is essential to endorse a supervision mechanism to promote, in a specific and specialized way, the effective protection of the rights of older persons inside each State.

As pointed out in the Economic Commission for Latin America (Comisión Económica para América Latina, hereinafter ECLAC) a convention on the rights of older persons would reassure the fundamental principle of equality and non-discrimination on the grounds of age, as explicitly acknowledged by international rules and human rights bodies (ECLAC, 2010: 57).

---

4 The world population is ageing at a constant and significant pace. The total number of 60-year-old persons or older used to be 700 million in 2009 and is estimated to become 2,000 million in 2050 (United Nations 2009). In Latin America and the Caribbean, as a result of the demographic transition, the population is ageing gradually but inexorably. In the next few decades, there will be a constant increase of the proportion as well as the absolute number of 60-year-old persons or older. In absolute terms, the amount of persons in this age group will grow by 57 million between 2000 and 2025 (43 and 100 million, respectively) and 83 million between 2025 and 2050. This population group is increasing faster than younger groups. Its annual average growth rate will be 3.4% between 2000 and 2025. In fact, the percentage of change in this age group will be between three and five times higher than in the total population in the periods 2000-2025 and 2025-2050. As a result, the percentage of 60-year-old persons and older in the total population will treble between 2000 and 2050 (8.2% and 24%, respectively). ECLAC (2009).
In this regard, the document will focus on three core areas related to the explicit acknowledgement of the principle of non-discrimination on the grounds of age. These core areas should be included in the discussions about the elaboration of an international instrument. Firstly, the notion of formal equality before the law and the inclusion of age as a suspected category with the purpose of avoiding pejorative differences in treatment; secondly, the concept of structural or material equality and its consequence in the positive obligations of the State, especially in the contexts of social services and policies; thirdly, the State’s obligation of protection from different forms of violence affecting older persons, based on the due diligence principle.

II. AGE DISCRIMINATION. EQUALITY BEFORE THE LAW

The explicit acknowledgement of the principle of non-discrimination on the grounds of age is a key issue in the discussion of this topic in relation to human rights. Including the prohibition of discrimination on the grounds of age within the regulations is a highly significant requirement for the protection of the right to equality before the law of older persons.

In this regard, it would be appropriate to indicate that only two international treaties mention specifically age as a forbidden ground of discrimination: section 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which enumerates “sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status” and the International Convention on the Rights of Persons with Disabilities, which also mentions age in many sections as a possible ground for aggravated or multiple discrimination when it is combined with a disability.

Even though other international human rights treaties fail to enumerate age as a forbidden category, the lists they include are not restrictive but merely illustrative. Within the enumerated categories, the one that refers to “any other social condition” is an open and
flexible entity that has allowed Committees to consider it in certain cases of age discrimination (Committee on Economic, Social and Cultural Rights, 200; paragraph 15).

Such is the case of the Committee on Economic, Social and Cultural Rights (CESCR), which has considered that “age is a prohibited ground of discrimination in several contexts”\(^5\).

The Human Rights Committee has sustained that as long as age is not enumerated as one of the prohibited grounds of discrimination in the second part of section 26 of the Covenant, the Committee's opinion is that any distinction related to age that is not based on reasonable and objective criteria can be included in the concept of discrimination for “other social conditions” or be considered non-compliant with the principle of equality before the law stated in the first part of article 26 (Human Rights Committee, 2001, 2003, 2006).

When establishing the general prohibition of discrimination, these international treaties enumerate a series of categories that demand a prohibition on a differentiated pejorative treatment. These categories have the following characteristics: 1) they refer to permanent features of the persons, which they cannot do without at will without losing their identity; 2) they identify social groups that are subject to historical processes or structural factors of discrimination, i.e., a community or social group that has been historically subjected to cultural valuing patterns that tend to revile it; and 3) do not constitute per se criteria to be based on for a possible rational and equal distribution or sharing of goods, rights or social security contributions\(^6\).

Therefore, it is presupposed that a difference in treatment expressed in an act of law (in a far-reaching sense) or in a policy based on any of these categories has negative quality in the exercise of the rights of persons and, for that reason, it is acknowledged as a possible discrimination situation by different international bodies that protect human rights.

---

\(^5\) Cf. CESCR (2009: paragraph 29). In the same paragraph, “The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence”.

\(^6\) Basis of Sentence C-371/00 of the Constitutional Court of Colombia.
Consequently, the analysis of equality under this formalist approach evaluates State measures in the following terms: when the State makes distinctions based in prohibited grounds of discrimination that imply the restriction of a right or benefit, such treatment will become suspect and will be considered for strict scrutiny, i.e., a more intense scrutiny than the one devoted to differentiating practices or regulations which are directed to persons who do not belong to any of the enumerated categories. This stricter examination demands, inverting the burden of proof, the State to justify that the purpose of the regulation or act is substantial to the public interests and that the distinction is absolutely indispensable for such a purpose, there being no other alternatives that are less restrictive for the relevant rights than the ones imposed by that regulation.

The Inter-American Court of Human Rights was categorical when it stated that “to determine the validity of a rule based on a suspected category, there must be a funded degree of reasonability or proportionality in the inclusion of the distinction criterion to justify the restriction of the fundamental right [...] and these distinctions may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind” (Inter-American Court of Human Rights, 2003: paragraph 91).

In addition, the Inter-American Commission on Human Rights (IACHR) was clear regarding this topic when it declared that “The restriction must be shown to be necessitated by some overriding or urgent stated objective, adequate or proportional to the end sought, and the least restrictive of the protected right. When the restriction cannot be credibly shown to satisfy these requirements, it will be invalid as it will be motivated solely by prejudice” (IACHR, 2007: paragraph 83).

Taking into account this notion of formal equality and the concept of suspect category, it is important to discuss the use of age as a factor for negative treatment differences in the convention elaboration process. Thus, certain cases of reasonable and objective differences in treatment on the grounds of age, such as establishing a minimum age to perform specific jobs or to be appointed to public offices, might be permitted. However, there are circumstances in which age is a ground for discriminatory treatment. It is necessary to identify adequately these circumstances in an international instrument because the use of age as a differentiating factor for negative treatment occurs specifically
in circumstances in which the age factor is used in state policies and regulations as a maximum limit to access to benefits, to perform activities, or to exercise rights\textsuperscript{7}. In these situations, it is important to conceptualize the age category as suspect of discrimination in order to enforce a strict scrutiny of the reasonability of the measure.

As a conclusion, the explicit acknowledgement of age as a prohibited ground of discrimination in these circumstances and its inclusion as a suspect category has significant consequences in the recognition of the right of equality before the law of older persons. Requiring a strict scrutiny to evaluate the lawfulness of rules and acts that restrict the exercise of rights on the grounds of age is an essential step towards the protection of the rights of older persons.

The following section will take into account the evolution of the concept of formal equality to the concept of material equality and its consequences in State obligations before the groups who suffer structural inequality situations.

III. STRUCTURAL DISCRIMINATION AND POSITIVE OBLIGATIONS

One of the most complex situations in the discussion of equality consist in analyzing discriminations that require a study of historical, social, political, and economic conditions, i.e., the structural conditions that define the life of a community or respective social group. As described by the CESCR, “(…) individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.” (CESCR, 2009: paragraph 1).

\textsuperscript{7} Declaring itself in relation to a norm setting the minimum age to adopt a child in 25 years old, the Constitutional Court of Colombia sentenced that the age category is not always suspected of discrimination. It differentiated the acts of law establishing minimum ages to perform a job or receive a benefit from the ones that establish maximum limits for the exclusion of a person from an activity or benefit. In the first case, it held an analysis of low reasonability. In the second case, due to being problematic or half-suspected regulations, the revision scrutiny must be strict. The reason for the difference in treatment for the same “age” category was justified by the fact that sociological evidence shows that contemporary discriminatory practices tend to affect primarily older persons. Sentence C-093/01, (2001).
This kind of discrimination has been called structural by some authors or systemic by the CESCR. The latter defines it in the following manner: “The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.” (CESCR, 2009: paragraph 12).

Firstly, it is important to highlight that, from a social perspective a group is more than a series of individuals who are in the same place at the same time. In general terms, these groups are characterized by forming an autonomous entity with an existence that exceeds its individual members so that it is possible to refer to the group without specifically mentioning any of its members. The group has its own identity developed on the base of its member’s identification with the group, which at the same time generates a relation of interdependence.

The disadvantaged situation of the individuals who belong to these groups, victims of structural discrimination patterns, is translated fundamentally into a lack of access to universally acknowledge rights and warranties. This has led to a revision of the concept of equality and non-discrimination, rethinking the role of the States as warrantors of fundamental rights. From this perspective, equality is protected when legislation and public policies take into account the specific circumstances and characteristic of the individuals who are in a position of social, political, economic or legal disadvantage.

Thus, the State is required a more active role to generate social balances by means of a special protection of these groups that suffer structural discrimination processes. The development evolve from a formal notion of equality, which presupposes an equal starting point for everyone, just limited to demand objective and reasonable distinction criteria and, therefore, to prohibit unreasonable, capricious or arbitrary differences in treatment, towards a concept of material or structural equality. The latter originates in the acknowledgement that certain sectors of the population require special balancing measures aimed at modifying the social structure and, for that reason, seeks to neutralize
and overcome obstacles and natural or social restriction in order to build or reach an inclusive social structure.

This is how inequality and exclusion were translated into their own juridical language, which has managed, from international human rights law, to call the attention of the States regarding the situation suffered by certain groups and demand them special protection, which is expressed within different duties of the State aimed at balancing effective opportunities to access fundamental rights.

In relation to the disadvantaged situation of older persons, an acknowledgement can be found in the Follow-Up Report of the Second World Assembly on Ageing, issued in July 2010 before the United Nations General Assembly: “Human rights mechanisms have also identified older men and women as being a vulnerable group requiring special measures of protection” (UN, 2010: paragraph 102).

In that regard, the CESCR has expressed that age is a prohibited ground of discrimination in many contexts: “Side by side with older persons who are in good health and whose financial situation is acceptable, there are many who do not have adequate means of support, even in developed countries, and who feature prominently among the most vulnerable, marginal and unprotected groups”, thus including older persons in the list of groups that may suffer disadvantages, vulnerability or marginalization, and especially those who are also affected by other discrimination factors (CESCR, 1995: paragraph 17; 2003: paragraph 16.h).

On the other hand, it is important to highlight that human beings do not belong to one social group only. Their lives are affected by a wide variety of identity factors that may merge in multiple discrimination processes, and this makes the analysis of each particular case more complex. The idea of multiplicity is based on the notion that subjectivity is made of vectors such as race, gender, social class and sexuality, which reaffirm and constitute reciprocally.

---

8 This term was coined by Kimberlé Crenshaw in her article “Demarginalizing the intersection of race and sex: black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics” (1989), where she highlights the multidimensionality of the identity and oppression experience of marginalized subjects.
This topic has become prevalent in the international system of human rights and particularly in General Recommendation No. 27 of the Committee on the Elimination of Discrimination against Women (CEDAW). This Recommendation explicitly states that “The discrimination older women experience is often multidimensional, with age discrimination, compounding other forms of discrimination based on sex, gender, ethnic origin, disability, levels of poverty, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds. Older women who are members of minority, ethnic or indigenous groups, or who are internally displaced or stateless often experience a disproportionate degree of discrimination” (CEDAW, 2010: paragraph 13).

Likewise, the CEDAW, in its General Recommendation No. 28, related to Section 2 of the Committee on the Elimination of Discrimination against Women, expressed that “Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measure” (CEDAW, 2010: paragraph 18).

In the same way, the preamble of Resolution 7/24 on the Elimination of violence against women of the Human Rights Council of the United Nations expressed a deep concern for “multiple or aggravated forms of discrimination and disadvantage can lead to the particular targeting or vulnerability to violence of girls and some groups of women, such as women belonging to minority groups, (...) women with disabilities, elderly women, widows...”.

9 Cf. CEDAW (2010, paragraph 31). In this Recommendation, it was stated that “States parties’ obligations should take into account the multidimensional nature of discrimination against women and ensure that the principle of gender equality applies throughout women’s life cycle, in legislation and in the practical implementation thereof. In this regard, States parties are urged to repeal or amend existing laws, regulations and customs that discriminate against older women, and ensure that legislation proscribes discrimination on the grounds of age and sex.”
In addition, in its General Recommendation No.24 about women and health, the CEDAW stated, in relation to multiple discrimination situations, that older women are a potentially vulnerable and disfavored group (CEDAW, 1999: paragraph 24).

The evolution of the concept of equality, from that formalist perspective to the material or structural equality one, is a key tool for the enforceability of a positive intervention of the State taking into account multiple and structural discrimination situations and trying to balance existing inequalities. This redefinition of the role of the State as an active warrantor of rights has different consequences that translate into concrete duties that will be analyzed in the next section.

III.a. Duty to produce information

As stated by the IACHR, “Not all societies discriminate against the same groups. Some societies discriminate against certain ethnic, religious or political groups that other societies assimilate and absorb. Then, too, over the course of history, new targets of discrimination have emerged that did not exist before (for example, carriers of HIV-AIDS). Groups that are in a vulnerable situation will vary from one society to the next and from one point in history to another. Therefore, every State has a duty to determine who those groups are and to devise inclusive policies suited to each group and capable of ensuring to them the free and full exercise of their rights” (IACHR, 2007: paragraph 118).

One of the main derivations of the concept of substantive equality is the duty of the State to produce information that manages to identify sectors that are disadvantaged or neglected in the exercise of rights and that may require special and prior attention.

That is to say, the development of a concept of formal equality towards a concept of material or substantive equality implies a State that abandons neutrality and has tools to diagnose the social situation and the production of duly disaggregated information to find out which groups or sectors need to receive urgent and special protection measures in a
specific historical moment, taking into account their specific characteristics when taking actions that affect them\textsuperscript{10}.

This has also been mentioned by the CESCR. The Committee specifically referred to the protection of the rights of older persons when it stated that the methods that the States must use to comply with the obligations acquired in relation to older persons will be the same as the ones established for other obligations. Among them, the Committee includes the need to determine, by means of regular vigilance, the character and scope of the problems of a State and the need to adopt and pursue policies and programs designed to respond to the requirements (CESCR, 1995: paragraph 18).

In General Recommendation No. 25, the CEDAW recognized that age is one of the reasons why women may suffer multiple forms of discrimination and, for that reason, the Committee indicated the need to have statistical data classified by age and sex in order to evaluate older women’s situations better. In addition, the Committee stated in its General Recommendation No. 28 that “States parties have an international responsibility to create and continuously improve statistical databases and the analysis of all forms of discrimination against women in general and against women belonging to specific vulnerable groups in particular” (CEDAW, 2010: paragraph 10).

As regards violent situations reflecting structural discrimination patterns, the IACHR stated that the States have a correlative duty to watch over the social situation producing statistical information appropriate for the design and evaluation of public policies as well as the control of enforced public policies on the part of the civil society. In addition, the Commission declared that “Statistical data on the problem of violence against women is an important public interest issue. Hence, States must have appropriate legal and administrative mechanisms to ensure ample access to that information, establish vehicles for circulating it, and encourage public debate and scrutiny of the policies being implemented in that realm” (IACHR, 2007: paragraph 43).

\textsuperscript{10} This new approach on the part of the State to modify structural inequality situations becomes relevant in the particular case of the group of older persons, taking into account that, as mentioned in the introduction of this document; “the world population is ageing at a constant and quite spectacular pace. The total number of persons who are 60 years old or older used to be 700 million in 2000 and is estimated to be 2,000 in 2050” ECLAC (2010).
The production of information on the part of the State is a key tool for designing, enforcing and evaluating public policies aimed at eradicating structural discrimination situations and promoting material equality conditions among the different social groups that form a certain community.

Identifying groups who suffer right violation situations must be attended to with priority, as well as surveying obstacles for the effective access and exercise of fundamental rights must be the base for States to design their equality and non-discrimination policies. Delimiting the area for the enforcement of right protection measures will only be possible if the State develops information development and analysis policies.

An international convention acknowledging and protecting the rights of older persons should specifically establish the State’s obligation to produce information, as it is one of the key tools to adopt efficient measures to warrant the exercise of fundamental rights.

III.b. Duty to adopt special protection measures

The notion of structural equality brings forward one of the most relevant consequences related to States obligation to warrantee the non-discrimination principle. This is the right to adopt affirmative action measures aimed at the special protection of the rights of certain groups who are in a disadvantaged situation.

In this regard, the Human Rights Committee has claimed that “the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to
correct discrimination in fact, it is a case of legitimate differentiation under the Covenant” (Human Rights Committee, 1989: paragraph 10).

Additionally, the CESCR expresses that “In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities” (CESCR, 2009: paragraph 9).

The implementation of this type of measures works in most cases as the necessary tool to warranty the effective exercise of the rights of a certain group that, without this special treatment, would not be able to access equally to the exercise of rights.

Regarding groups who may be vulnerable or susceptible to discrimination in relation to their rights, the CESCR stated that the State has the obligation to sanction norms protecting them against discrimination and to adopt special measures including active protection policies (CESCR, 1990: paragraphs 9, 12, 13; 1995: paragraph 17).

For instance, besides the general duty not to discriminate, the States assumes the obligation to adopt affirmative or positive balance actions to ensure the exercise of the

---

11 This Committee has also established that, regarding groups that are vulnerable or prone to be discriminated against in their economic, social and cultural rights, the State has the obligation to sanction norms protecting them against that discrimination and to adopt special measures that include active protection policies. The adoption of special measures -even legislative ones-, and active policies that protect groups in a vulnerable situation in relation to economic, social and cultural rights has been originated in different instruments. The Committee also establishes that a certain degree of priority should be guaranteed as regards access to housing for unprivileged groups such as older persons, children, physically disabled persons, the terminally ill, HIV positive patients, persons with persistent medical problems, mentally ill persons, victims of natural disasters or persons who live in dangerous areas, as well as access to land in the case of poor and impoverished groups. In this regard, the Committee states that women, children, older persons, indigenous peoples and ethnic minorities are disproportionately affected by forced displacements in such a way that appropriate protection measures are required. OG No. 7, item 10. In OG No. 5, item 18 it is stated that the measures adopted to eradicate discrimination against person with disabilities will not be considered discriminatory in the sense of Section 2.2 of the Covenant as long as they are justified in the principle of equality and they are only used in the necessary manner in order to achieve the objective. Cf. CESCR (1990: paragraph 9 and 12; 1991: paragraph 8; 1994: paragraph 9; 1995: paragraph 17).
rights of these subordinated groups. Additionally, these measures include, in many cases, a different treatment on the part of the State and the acknowledgement of certain prerogatives founded specifically in the need of the members of a group that has been identified as disadvantaged and as a victim of a structural inequality situation.

Specifically regarding the protection of the rights of older persons, an international convention should analyze this perspective on equality and establish the concrete obligation that, as explained below, affects directly the exercise of the rights of older people, such as: the right to social security in its contributory as well as in its non-contributory phases and the right to receive care.

III.b.1 The right to contributory social security

The development of social security systems is one of the great issues that are directly linked with the obligation of the States to adopt measures of affirmative action in relation to the group of older persons.

Social security seeks to protect the individual from certain contingencies associated to the material insecurities and risks that may be associated to diseases, incapacities to stay in a job or to find one due to the loss of abilities, lack of income to face maternity or child upbringing, a need to guarantee an income during retirement or with the loss of the person who supports the family.

As stated by the CESCR, the systems designed to provide social security services may consist in contributory plans or plans based on insurance. These plans generally include the payment of compulsory contributions by the beneficiaries, the employers and sometimes the State, together with the payment of services and administrative charges to be sent to a joint fund, or non-contributory plans, such as universal or social assistance plans, address to certain beneficiaries (CESCR, 2008: paragraph 4), which will be analyzed in the following item.
Old age is generally acknowledged in international human rights law as one of the main conditions originating the right to receive social security services (UN, 2010: paragraph 108). The reason is that older persons are exposed to many situations that are meant to be covered by social security, especially older women, who in many cases suffer the consequences of a lack of protection in relation of social security due to a disadvantaged insertion in the labor force during their youth.

The CESCR has categorically stated that “Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, homeworkers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees” (CESCR 2008: paragraph 31).

The State has the obligation to establish a system that works efficiently, that guarantees in an effective and efficient way the services it intends to provide, that is supervised by the efficiently by the competent authorities and that is sustainable as time passes.

The CESCR has clearly stated which are the social risks and contingencies that this system must encompass. They include health, sickness, old age, unemployment, industrial accidents, family allowance, maternity, disability, survivors and orphans (CESCR, 2008: paragraph 12). It has also indicated the concrete obligations that the State assumes in relation to the protection of the right to social security, including: the adaptation of regulatory frameworks to the human rights standards established in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the adoption of a national social security strategy and plan of action to realize this right, the promotion of the rights of individuals and organizations to gather, receive and distribute information about all the rights offered by social security in a clear and transparent manner, particularly in rural areas and in underprivileged urban areas or among linguistic or any other minority, as well as a special protection of the groups in vulnerable situations, such as the group of older persons (CESCR, 2008: paragraph 48).
The CESCR also establishes that the State must warrantee all victims of violations of the right to social security the access to efficient judicial or any other kind of resource, as well as to adequate reparation, including restitution, compensation, satisfaction or guarantees of no repetition (CESCR, 2008: paragraph 77).

In addition, before any action is carried out by the State party, or by any other third party, that interferes with the right to social security, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the ICESCR, and include: “(a) an opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies” (CESCR, 2008: paragraph 78).

Compliance with the right of social security is crucial because it is a right that seeks to guarantee all individuals their human dignity in circumstances in which they are deprived of their capacity to fully exercise any of their rights, promoting the reduction of poverty and strengthening social inclusion mechanisms. In the case of older persons, this right becomes especially relevant because the group is one of the most exposed to some of the situations that social security aims to solve. In this sense, the right to social security must be one of the core areas of an international convention on the protection of the rights of older persons, translating into the obligation of the State to appropriately adopt positive action measures to guarantee their effective exercise.

III.b.2. The Right to Non-Contributory Social Security

The role of the State as responsible for adopting positive measures aimed at balancing inequality situations among different social groups has direct consequences in the right to social security. From this perspective, the right to social security must be understood as a right for all citizens, independently for their working conditions and their contributions. Therefore, this right has a scope that goes beyond coverage against risks and
contingencies because its exercise contributes to generating basic conditions for the development of an autonomous existence.

That is to say, the second modality of social security analyzed in the previous item, e.g., non-contributory social security, must be recognized as a fundamental right of individuals and not as an imperfect mechanism of assistance for groups in vulnerable situations. Substantive or structural equality demands from the State the adoption of special protection policies for certain groups, which in terms of concrete policies could be translated into the acknowledgement of the right of non-contributory social security.

This issue has been approached by different international bodies for the protection of human rights. On that regard, the CESCR has declared that the right to social security encompasses contributory allowances as well as insurance plans and non-contributory allowances financed with tax revenue. The CESCR specifically highlighted that the States must take into account within the available resources non-contributory old age allowances or other allowances for all senior citizens who, due to not having worked or having covered the minimum contribution period, do not have the right to enjoy an old age pension or any other help or social security allowance and lack another source of income (CESCR, 2008: paragraphs 4 and 15).

The Independent Expert on the question of Human Rights and Extreme Poverty has stressed that “non-contributory pensions or social pensions play in reducing extreme poverty and contributing to the realization of human rights of older persons” (UN, 2010: paragraph 4).

As previously stated, the group of older persons deserves special attention in relation to compliance with the right to social security and, within this group, the State must identify the individuals who suffer multiple discrimination situations, such as the group of women. For them, the acknowledgement and effective access to the right to non-contributory social security are highly relevant issues. The disadvantaged employment situation that women suffer throughout their lives has a very negative impact on the access to social security in old age. The purpose is merely to present this concern in terms of positive obligations of
the State and acknowledgement of rights. However, it must be clarified that this issue requires a depth of analysis that exceeds the purpose of this work.

As a conclusion, the obligations assumed by the States in relation to this group of older persons imply adopting a set of measures that include social policies aiming at changing a structural inequality situation that has put this community in a vulnerable position. Within the set of social policies that the State should enforce, the ones that become more significant are those aimed at designing, implementing and evaluating a social security system in the broad sense, including contributory as well as non-contributory services (ECLAC, 2011), with the purpose of modifying structural discrimination patterns that have determined the marginalization of this group and contemplating other multiple discrimination situations that older persons may suffer, such as indigenous or afro-descendant women or older persons in situations of irregular migration, refuge or forced displacement (IACHR, 2008: 44). This right and its corresponding obligation on the part of the State should also be one of the main topics in the elaboration of an international convention.

III.b.3. Duty of care

As stated in a report published by the ECLAC, the Latin American Center of Development (Centro Latinoamericano de Desarrollo, hereinafter CELADE) and the United Nations Population Fund (UNFPA), individuals with moderate to severe dependence, who need periodic care, are expected to duplicate in Latin America between 2000 and 2050, increasing from 23 million to 50 million. It is forecasted that, by the year 2050, half the population that depends on care will be over 60 years old. This article indicates that the demographic opportunity to have caregiver will be limited in the period 2000-2050 in the region due to the fact that one person will not be enough to take care of each individual who needs help, and that the general as well as the local regulatory frameworks of the countries in the region and the existent social programs related to the protection of childhood, old age and dependency reveal an increasing concentration of the risks
associated to care in the family. The burden falls especially on women, independently of their age (ECLAC, CELADE, 2001: 45).

Care, in the broad sense, has not been a specific issue in legislation or in social policies. On the contrary, it has been understood as a responsibility of households almost exclusively and alien to public policies, with exceptions in cases of families that cannot solve the issue on their own.

The issue of care is directly linked to the principle of equality in the exercise of rights because its lack of regulation exposes individuals who require care as well as the ones who provide it to situations of more vulnerability. For that reason, the State has a key role in the regulation of a supply and care model that warranties equality conditions in the access to rights to the individuals who provide care as well as those who receive it. Accordingly, the State must take into account the dynamics of time, money and kinds of services regulated.

In that regard, the above mentioned report states three principles to guide reforms aimed at incorporating care as a new pillar of social protection: “Firstly, it is crucial to favor equality among the citizens who require care, so that their family or social origins are not the ones that determine their possibility to receive support services in moments of dependence. Likewise, with the purpose of achieving equal opportunities for women, assistance responsibilities should be distributed among the members of the family and it would be necessary to develop policies and programs aiming at strengthening gender equality, including men as well as women in support tasks and allowing everyone to merge their professional with their family lives. Secondly, it is necessary to include universality as a basic principle of the services, the allowances and the benefits directed to individuals who need and provide assistance [...] universality does not exclude the need to enforce certain degrees of selectivity and cannot be extended to levels of care that are not financeable [...] Therefore, it is the responsibility of the State to ensure the quality and accessibility of the existent services to all citizens and to perform an active role in their provision. Finally, providing care is a practical exercise of solidarity; even though it is mainly directed to the individuals who urgently need it in everyday life, indirectly, it provides security to everyone” (ECLAC, CELADE, 2011: 59).
The duty to care must be one of the core areas of the positive measures adopted by the States for the protection of the rights of older persons because it is a group that is generally in a particular vulnerability situation, victims of discrimination, mistreatment and violence in institutions, community homes, long-term care services, psychiatric institutions, health centers, correctional facilities and within the family, among other places (ECLAC, CELADE, 2011: 31).

In this context, the right to receive care, which should be specifically acknowledged and protected internationally in a convention on older persons, becomes particularly important because it generates in the State the obligation to design and enforce public policies aimed at eradicating any type of discrimination or violence and based on an approach to human rights that seeks to eradicate any healthcare bias.\(^\text{12}\)

**III.c. Differential Approach in Far-Reaching Policies**

Besides the obligation of the States to adopt legislative as well as public policy measures aimed at protecting the rights of a specific group that has been identified as victims of a vulnerable situation, the analysis of State obligations in terms of structural equality must also include a differentiated approach that takes into account the particularities of the group in general social services.

This means that the State must include within a far-reaching measure certain perspectives that manage to prevent an apparently neutral measure from affecting a certain group negatively because certain characteristics that require a special approach in a framework of universal provisions have not been considered.

Therefore, general measures that are also directed at older persons, such as health and education measures, must include the age approach required by this group to effectively

---

\(^{12}\) “The traditional ways to ensure care in old age, mainly through arrangements related to heritage and patrimony (Drake, 1994), have been weakened by different processes, such as migrations, poverty or the informality of employment, which make it harder to accumulate a patrimony and put people in a position different to the one they had some decades ago”. CELADE (2011: 53).
exercise the rights in equal conditions with others. In other words, the set of obligations assumed by the States in regard to the effective protection of the rights of older persons include the need to adopt a differential approach that takes into account the age in the design, enforcement and evaluation of all far-reaching policies and social services.

Some examples of this kind of measure for the protection of the rights of older persons are educational programs that allow for the active participation of older persons in educational activities and, specifically, the possibility to share their knowledge, culture and spiritual values; and in the case of the right to health, the design and execution of policies that provide a preferential access to medications in cases to age-related diseases and the promotion of economic and technical support for home assistance, as well as forms of care within the families, including training and regular visits (ECLAC, 2010: 22). This issue should also be approached in discussions about a future international instrument.

III.d. Analysis of the Discriminatory Impact

The principle of equality and non-discrimination in its most robust meaning, understood as a juridical tool to concretely demand the State to adopt affirmative actions, indicates that the social significance and legality of a supposedly neutral law or practice must be evaluated in terms of its impact on the group as whole. Hence, the eminently group or collective nature of this approach (IACHR, 2007: paragraph 77).

The evaluation of the measures adopted in relation to persons who belong to groups that suffer structural inequalities must be performed on the basis of the discriminatory impact that they may have on that community. Therefore, norms and policies with an apparently neutral design may have an absolutely harmful effect or result on these groups.

This analysis, based on the substantive equality principle, aims at identifying the objective factors that prove the possible negative impact of the adoption of measures that do not take into account the structural disadvantages suffered by certain groups.
In this regard, the CESCR has claimed that, the measures adopted and the results obtained in relation to the eradication of discrimination must be evaluated during the supervision. The national plans, strategies and policies must include appropriate comparative element and indicators, classified according to the forbidden grounds for discrimination (CESCR, 1999, 2002, 2005).

As stated in the previous item, the absence of a differential approach that takes into account the characteristics of a group in a vulnerable situation in far-reaching policies – their past and current subjugation must be highlighted among them– may have a highly negative impact on the community that the State promised to protect in a special way.

In addition, it must be noted that the negative impact of the different discriminatory situations based on lifelong structural patterns has devastating consequences in older persons. The cumulative impact of discriminatory situations has deep consequences in the effective exercise and enjoyment of the rights of older persons. For that reason, it is important to approach from the perspective of human rights international law not only the consequences of multiple discrimination but also the consequences of the negative impact that a wide variety of discriminatory situations have on certain groups who have suffered them for a lifetime.

It is important to highlight that the impact of the measures adopted by the State in relation to groups who suffer structural disadvantages requires prior production and analysis of information. This means that the obligation of the State to produce information, which has been mentioned in the first items of this work, is directly related to the duty to evaluate and monitor the impact of State decisions on individuals. The only way to record positive or negative consequences of the adopted measures it to formulate and submit empirical data. Identical treatment produces discrimination in many cases but this situation can only be proved with the production of information.

III.e. Participation Rights
Historically, disadvantaged sectors have not been able to participate actively in any of the processes included in the real and effective exercise of a right. The lack of power shown by these groups is mainly caused by the lack of knowledge about the fact that they are subjects of a right with a set of warranties that may be activated to demand compliance with State obligations.

As stated in the United Nations Development Programme (UNDP), “the causes underpinning the persistence of inequality are not confined solely to within the household. There are other obstacles preventing public policies from bridging the gaps and combating uneven levels of achievement in terms of well-being. This can be put down to the fact that the political process also responds differently to different needs, depending on the group in question. Among the many factors that affect the reproduction of inequality, the following should be highlighted: the poor quality of political representation, the weakness of public institutions, unequal access to influence specific policies, the classic problems associated with collective action, and institutional shortcomings that lead to state corruption and capture” (UNDP, 2010: 21).

This deficit reveals a lack of institutional tools to open the appropriate ways to actually exercise citizenship.

For that reason, the obligation of the State to guarantee the right to participate, in a broad sense, to the groups that have historically been marginalized from political and social decisions that affect them must be a core issue for the adoption of any measure aimed at protecting their fundamental rights.

All measures adopted must, firstly, try to empower the group it seeks to protect. This empowerment can be generated through norms and policies aimed at individuals who have rights they may demand. In turn, this generates a legal relationship that determines concretely the obligated subject and the complaint mechanisms activated when the obligation is not complied with, due to an action or an omission.

The purpose of these tools that the State must provide to guarantee the enjoyment and exercise of the rights to all persons in general but, in particular, to those who belong to
groups that suffer structural discrimination patterns, must be to grant legal and social power to concretely require certain behaviors from the State.

The UNDP states that “a basic agenda aimed at combating human development inequality in LAC and preventing the intergenerational transmission of inequality could aim to reduce inequalities in terms of power and influence with a view to eradicating the aforementioned irregular practices, while strengthening key state institutions and enhancing their credibility, thereby fostering civic engagement. In a similar vein, it would be crucial to ensure that citizens become increasingly active and engaged in political participation; this, in turn, would ensure the visibility of all sectors of society and their needs, and reduce the incidence of asymmetrical power relations and influence when implementing public policies and distributing resources.” (UNDP, 2010: 106).

As a conclusion, the right to participation refers to the real possibility to influence political processes and affect the orientation and supervision of government decisions. This situation has a huge impact in the issue of non-discrimination of groups in vulnerable situations because it generates autonomy and equality condition in terms of civic participation, which should be established in the regulation of the rights of older persons in an international convention.

The purpose of developing the different topics that affect the principle of equality and non-discrimination in structural terms is to elaborate the debate about the establishment of an international convention specifically acknowledging the rights of older persons. For that reason, there are State obligations and rights that acquire a particular dimension in relation to older people and that should be acknowledged in a specific international instrument according to the scope described in each item.

With a further analysis of the principle of non-discrimination in a context of structural inequality such as the one suffered by the group of older persons, the following item examines the duties of the State to protect life and physical integrity in order to prevent violent situations that affect their rights.

IV. DUTY TO PROTECT BASED ON THE DUE DILIGENCE PRINCIPLE.
As stated in the previous item, the concept of equality clearly affects the obligations of the State to warrantee older persons effective access and exercise of their rights. In addition, this robust notion of equality has other consequences for the role of the States in relation to their duty to protect rights and, particularly, the right to life and physical integrity and the right to be protected in violent situations even when these violent actions or practices are caused by non-State actors.

The duty of the State to protect, which includes the duty to prevent foreseeable risks of violence, must be guided or based in the due diligence principle, which demand a specific behavior from public authorities.

In principle, the violent or discriminatory situations that must be considered in relation to this kind of obligation of the State would be three: 1. situations generated by State actors; 2. situations generated by private actors in the exercise of public functions, for instance, in situations of institutionalization of older persons; 3. domestic violence situations.

The development of this issue by different international bodies that promote and protect of the rights of women is highly enlightening and must be necessarily considered when addressing this issue in relation to the situations of other social groups. The achievements of feminists groups have allowed defining internationally concrete human right standards for protection in violent situations.

In this regard, it has been possible to determine the scope of many obligations assumed by the State in relation to the prevention, investigation and sanction of discrimination and violence against the group of women. This enormous legal achievement of the CEDAW, the IACHR and the Inter-American Court of Human Rights among others, must be considered when trying to set human rights standards for the design, enforcement and evaluation of public policies aiming at eradicating situations that reflect structural discrimination patterns.

For that reason, the guidelines established internationally to address the issue of violence against women, which will be used as a conceptual framework to develop a specific model for older persons, will be presented below.
Firstly, it is important to highlight that the CEDAW has expressed that the prohibition of discrimination against women is not limited to direct or indirect discrimination on the part of member States but that the Convention also imposes on member States the obligation to proceed with due diligence to prevent and thwart discrimination by private actors. The CEDAW states that in some cases, actions or omissions by a private actor can be attributed to the State as per international law. Consequently, the State parties are obliged to ensure that private actors do not commit discriminatory acts against women as defined by the Convention (CEDAW, 2010: paragraph 10).

The Inter-American Human Rights System (IAHRS) has emphasized that the duty of the States to act with due diligence in situations of human rights infringements includes four obligations: to prevent, to investigate, to sanction and to repair human rights violations (IACHR, 2007, paragraph 27). It has also stated that tutelage of the principle of equality in the terms expressed in the previous section broadens the obligations of the State to formulate preventive policies, especially in cases of extended practices or structural situations of discrimination, even if they are caused by private actors (IACHR, 2007: paragraph 107).

Consequently, the due diligence principle implies the following obligations on the part of the State: generating risk diagnoses of possible violent situations with the purpose of developing prevention policies, regulating private acts (State’s duty to protect compliance with the rights), warranty the existence of accessible and suitable legal resources and enforce measures to fully compensate the victims of human rights violations.

IV.a. The obligation to prevent: the duty to produce information and generate risk diagnoses.

In the context of policy design and enforcement, the duty to protect implies the obligation of the State to produce information and perform diagnoses to identify and characterize risk situations and violence patterns that may affect individuals in order to develop institutional capacities to prevent and avoid right infringements forms and the regulation of potentially
risky activities by private actors, such as abuse and violence in contexts of institutionalization of older persons.

This duty requires the State to provide an appropriate legal framework for protection and to apply it effectively with practices and prevention policies that allow the State to respond effectively to complaints. The prevention strategy must be comprehensive in order to prevent risk factors and strengthen institutions in order to provide an effective response to cases of violence.

IV.b. The responsibility of the State for acts of private actors.

As stated by the CEDAW “The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing” (CEDAW, 2010: paragraph 13).

This has also been emphasized in the Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: “the due diligence standard has helped to challenge the liberal doctrine of State responsibility with regard to violation in the “private sphere”. This meant that the State, by failing to respond to intimate/domestic violence, can be held responsible for not fulfilling its obligation to protect and punish in a non-discriminatory way and can be charged as an accomplice to private violations (UN, 2006).

The IAHRS has also addressed this issue and, specifically, the duty to protect from non-State actors in cases of violence against women as per the Inter-American Convention to Prevent, Sanction and Eradicate Violence against Women “Belém do Pará”. Article 7.b of this instrument requires the State parties to prevent, sanction and eradicate such violence. This obligation assumed by the State parties of this Convention has been developed in different litigious cases solved by the Inter-American Court of Human Rights.

In this regard, this Tribunal established that “the obligation of prevention encompasses all
those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights" and highlighted, quoting the CEDAW, that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation” (Inter-American Court of Human Rights, Case of González et al. (“Cotton Field”) v. Mexico, 2009: paragraphs 252, 253).

On the other hand, the responsibility of the State for the acts of private actors has also been addressed by the Inter-American Court of Human Rights in a case related to the right to mental health and treatment provided to a person by a private hospital, case of Ximenes-Lopes v. Brazil. In this case, the Court established that the responsibility of the State for private acts not primarily attributable to the State is based on “The effects of the duties erga omnes of the States to respect and guarantee protection norms and to ensure the effectiveness of rights go beyond the relationship between their agents and the individuals under the jurisdiction thereof, since they are embodied in the positive duty of the State to adopt such measures as may be necessary to ensure the effective protection of human rights in inter-individual relationships” 13.

In another litigious case, the Court established the scope of State responsibility by declaring that “a State cannot be responsible for all the human rights violations committed between individuals within its jurisdiction. Indeed, the nature erga omnes of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger” (Inter-American Court of Human Rights, Case of the Pueblo Bello Massacre v. Colombia, 2006: paragraph 123).

13 Cf. IACHR (2006: párr. 85). The Court has established that from the main obligations to respect and guarantee the rights, special duties are derived, to be determined by the particular needs of protection of the subject of legislation, whether by his/her personal conditions or by the as is basis. Regarding people who receive health care, and since health is a public good whose protection is in charge of States, the latter have the obligation to prevent third parties from improperly interfering with the exercise of the right to life and personal integrity, particularly vulnerable when a person is receiving health care. Paragraphs 88 and 89.
This doctrine has been extracted from the jurisprudence of the European Court of Human Rights, which suggests that the responsibility of the State for violations committed by third parties may be applied if it is proved that the State was aware of a situation of real and immediate risk and failed to adopt reasonable measures to avoid it\textsuperscript{14}.

IV.c. The obligation to guarantee suitable preventive measures and the obligation to adopt effective remedies

One further derivation of the duty to protect assumed by the State, which becomes especially relevant for groups suffering structural inequality situations, is the obligation to warrantee suitable and effective legal resources for the preventive protection of fundamental rights.

This issue has also been addressed by the CESCR: “Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors.” (CESCR, 2009: paragraph 40).

Along the same lines, the IAHRS has also referred to this issue. In this respect, when the IACHR defined the scope of the obligations of the State to adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property (Section 7 of the Convention of Belem do Pará), it also stated that this is a particular dimension of the right to legal protection that consists in the right to access effective

\textsuperscript{14} The European Court has pointed out that: For this positive obligation to arise, it must be established that, by the time the incidents took place, authorities were aware, or should have been aware, of the existence of a real and immediate risk to the life of the identified individual or individuals due to criminal acts of third parties, and that the aforementioned authorities did not take measures within their power that, reasonably assessed, could have been expected to avoid such risk.
preventive guardianship. The IACHR also highlighted that, the set of preventive measures that the State must provide includes “appropriate specialized services, including shelters, counseling services for all family members, care and custody of the affected minors. These specialized services are in addition to court restraining orders or other precautionary measures compelling the assailant to cease and desist and protecting the physical safety, freedom, life and property of the aggrieved women.” (IACHR, 2007: paragraph 56).

In relation to the latter, the IACHR has also stressed as one of the obligations of the State the design and enforcement of simple, quick and accessible preventive legal resources that may function as an appropriate and effective solution.

The access to justice is a key element in relation to protection duties based on the principle of due diligence in situations of violence and discrimination\textsuperscript{15}.

Moreover, in the Report on the Situation of Human Rights Defenders in the Americas, the IACHR established general principles that must govern preventive tutelage actions in the States\textsuperscript{16}.

\textsuperscript{15} IACHR has pointed out some duties of the States regarding the access of victims of violence to justice, based on the provisions of the Convention of Belém do Pará, which include: “Developing training of programs for all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women; Implementing educational activities aimed at heightening the general public’s awareness of the problems of and remedies for violence against women” and adopting public measures “to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women; Providing “appropriate specialized [support] services for women who have been subjected to violence, through public and private sector agencies, including shelters, counseling services for all family members where appropriate, and care and custody of the affected children”, and ensuring “research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes” Cf. IACHR (2007: paragraph 34).

\textsuperscript{16} IACHR mentioned, as it pointed out the features that make these resources suitable: 2. Given the special nature of these remedies, and the urgency and necessity in which they must operate, some basic characteristics are required if they are to be considered suitable in the sense established by the Commission and the Court. Such characteristics include, for example, that the remedies be simple, urgent, informal, accessible, and processed by independent bodies. It is also necessary that individuals have the opportunity to approach federal or national legal entities when bias is suspected in the conduct of state or local bodies. Likewise, these remedies must enjoy broad, active legitimacy so that they may be pursued by relatives or by public entities such as prosecutors or ombudspersons on behalf of the individuals under threat, without
The set of obligations that conform in the duty of the State to protect based on the due diligence principle also include the duty to adopt reparation measures that, in the terms of the IAHRS, must be “adequate, effective and quick”. Reparation for the victims of right infringements must be comprehensive and include the guarantees of restitution, compensation, rehabilitation, satisfaction and non repetition (IACHR, 2007: paragraph 58).

IV.d. Due diligence duty in the context of institutionalization of older persons.

International bodies have identified the group of older persons as a group that is a victim of structural violence patterns and they have particularly identified older women as a group that is especially vulnerable to multiple discrimination situations.

In this context, the situation of institutionalization of older persons is a matter of special concern. For that reason, the Committee Against Torture recommended that each State party should prohibit, prevent and redress torture and ill-treatment, among other places, in institutions that engage in the care of the aged (Committee Against Torture, 2008: paragraph 15). In the same manner, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, has stressed that “within detention facilities and psychiatric institutions, the elderly suffer double or triple discrimination” (A/HRC/13/39/Add.5, 2010: paragraph 231). Moreover, the Human Rights Committee has referred to “the vulnerable situation of elderly persons placed in long-term care homes, which in some instances has resulted in degrading treatment and violated their right to human dignity” (CCPR/CO/80/DEU, 2004: paragraph 17).

This is how the obligations derived from the duty of the State to protect based on the due diligence principle become particularly significant in the specific case of the requiring the signature of the latter. It is also helpful if such remedies can be processed on an individual basis or as collective precautionary actions, in other words, to protect a particular group or one that is identifiable based on certain parameters as affected or at imminent risk. It is also important to provide for the implementation of protective measures in consultation with the affected parties and with special law enforcement agencies other than those under suspicion, among other provisions. Cf. IACHR (2007: paragraph 57).
institutionalization of older persons who may be exposed to severe situations of right infringement. Identifying older persons as a group that suffers structural patterns of discrimination and violence, especially in institutionalization situations, results in the acknowledgement of a set of obligations that the State assumes in a special manner to warrantee the effective protection of its fundamental rights.

Consequently, the obligations mentioned in the preceding paragraphs become absolutely operational: to elaborate risk diagnoses, to design and implement preventive policies, to regulate the acts of private entities, to guarantee the access to legal resources, and to adopt the corresponding reparation measures.

In this respect, in the process of discussing an international instrument on older persons, it is relevant to address appropriately the issue of the duty to protect based on the due diligence principle in usual abuse and violence situations that affect the right to life and personal integrity of older persons, contributing to delimit its scope and clarifying its link to other State obligations, especially with the principle of equality and non-discrimination.

V. FINAL REFLECTIONS

The concept of equality and non-discrimination presented in this document has a great impact on the duties of the State regarding the enforcement of the rights of elderly people, and it should be one of the main issues to be discussed to develop an international convention.

Firstly, according to the notion of equal protection of the law developed in this document, it is necessary to identify those assumptions where the category ‘age’ is used in state rules and policies as a negative factor for unequal treatment or as a maximum limit to gain access to benefits, to carry out certain activities or to exercise rights. In these assumptions it is very important to conceptualize the category ‘age’ as a suspect classification in order to force a tight scrutiny of the reasonableness of the policy.

Secondly, this has to be carried out from a perspective that casts the formal notion of
equality aside to adopt a stronger notion of equality, called structural or material, which entails the expansion of the duties assumed by the States regarding the group that is the object of study of this document: elderly people. Accordingly, it has been proved that it is necessary to adopt specific positive action policies to protect the group, particularly in issues concerning the right to social security in the broad sense and the right to receive treatment and care; as well as the need to incorporate a differential approach in the design, implementation, and assessment of policies of general scope, where the obligations of information production, impact analysis and the effective exercise of the right to participation of elderly people are key elements.

Thirdly, the explicit acknowledgement of the obligation of the state to provide protection based in the principle of due diligence in situations of extreme violence and discrimination suffered by the elderly people should be taken into account in discussions addressing the drafting of an international instrument.

This is not about abstract legal principles. Their accurate definition of rules may serve as a guide for public policies, particularly the systems of social protection designed and implemented by the States to preserve senior citizens, it may provide clear directions to adapt and adjust social services and politics of general scope to the special needs of elderly people, and provides a framework for the regulation and supervision of services provided by private parties.

In short, an international convention that protects the rights of the elderly should encompass this principle of equality and non-discrimination, and States should assume all obligations aimed at eradicating and preventing acts of structural discrimination that affect this group.
REFERENCES

General Assembly of the United Nations

United Nations Economic Commission for Latin America and the Caribbean
- (2009), Report “*Ageing and socio-demographic indicators for Latin America and the Caribbean*” (LC/L.2987/REV1), Santiago de Chile.
- (2010) “*Strategy proposal from the perspective of Latin America and the Caribbean, for advancing towards an international convention on the human rights of older persons*”. LC/L.3220 (CEP.2010/5).

Inter-American Commission on Human Rights
- (2008) “*Guidelines for preparation of progress indicators in the area of economic, social and cultural rights*”, OAS.

Committee on Economic, Social and Cultural Rights.

Human Rights Committee.
- (1989) General Comment No. 18, “Non Discrimination”.
- (2001) Communication No. 855/1999 Schmitz-de-Jong v. The Netherlands

Committee on the Elimination of Discrimination against Women (CEDAW).

Committee Against Torture.

Inter-American Court of Human Rights.

Independent expert on human rights and extreme poverty.

United Nations Development Programme (UNDP).

http://www.idhalc-actuarssobreelfuturo.org/site/index.php

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, entitled:

Special Rapporteur on violence against women, its causes and consequences