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# In Course of Change? Soft Law, Elder Rights, and the European Court of Human Rights

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## Introduction

The growing interest in older persons' rights is part of a global phenomenon, and broad international engagement has emerged against the backdrop of the "Old Age Revolution."<sup>1</sup> On February 19, 2014, the Committee of Ministers of the Council of Europe<sup>2</sup> ("Committee of Ministers" or "Committee") passed a

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1. See Dep't of Econ. & Soc. Affairs, Current Status of the Social Situation, Well-Being, Participation in Development and Rights of Older Persons Worldwide, U.N. Doc. ST/ESA/339, at 2 (2011) [hereinafter Dep't of Econ. & Soc. Affairs, Current Status of Older Persons], <http://www.un.org/esa/socdev/ageing/documents/publications/current-status-older-persons.pdf>; see also *The Demographic Future of Europe—From Challenge to Opportunity*, at 2, COM (2006) 571 final (Oct. 12, 2006); U.N. POPULATION FUND & HELPAGE INT'L, OVERVIEW OF AVAILABLE POLICIES AND LEGISLATION, DATA AND RESEARCH, AND INSTITUTIONAL ARRANGEMENTS RELATING TO OLDER PERSONS—PROGRESS SINCE MADRID 1 (2011), [http://www.unfpa.org/webdav/site/global/shared/documents/publications/2011/Older\\_Persons\\_Report.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/publications/2011/Older_Persons_Report.pdf); Israel Doron, *Demographic, Social Change and Equality, in EQUALITY LAW IN AN ENLARGED EUROPEAN UNION: UNDERSTANDING THE ARTICLE 13 DIRECTIVES 117, 119* (Helen Meenan ed., 2007) ("Coupled with the projected increase in global population, ageing is a demographic revolution: the older population aged sixty and over, will quadruple by the year 2015."); Christine Victor, *The Demography of Ageing, in THE SAGE HANDBOOK OF SOCIAL GERONTOLOGY* 61, 61–66 (Dale Dannefer & Chris Phillipson eds., 2010).

2. The Committee of Ministers of the Council of Europe includes forty-seven member states of the Council of Europe. See *About the Committee of Ministers*, COUNCIL EUR., [http://www.coe.int/T/CM/aboutCM\\_en.asp](http://www.coe.int/T/CM/aboutCM_en.asp) (last visited Nov. 2, 2015) [hereinafter *About the Committee of Ministers*]. It is comprised of the Foreign Affairs Ministers, or their permanent diplomatic representatives, of all member states and meets in Strasbourg, France. *Id.*; see also *Ministers for Foreign Affairs of the Member States of the Council of Europe*, COUNCIL EUR. (Nov. 10, 2015), [http://www.coe.int/T/CM/MFA\\_en.asp](http://www.coe.int/T/CM/MFA_en.asp) [hereinafter *Ministers for Foreign Affairs*]. The Committee represents the governments of its member states and is the Council of Europe's decision-making body. See *About the Committee of Ministers*. The Committee acts as a governmental body where each nation can discuss problems

recommendation<sup>3</sup> “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all older persons.”<sup>4</sup> This recommendation was a new and unique expression of soft law,<sup>5</sup> in the sphere of the rights of older persons in Europe.<sup>6</sup> It is impossible to understand this new recommendation without understanding the broader historical context of elder law and how the field developed.

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facing European society on an equal footing. *Id.* It also serves as a collective forum to formulate a Europe-wide response to such challenges. *Id.* In collaboration with the Parliamentary Assembly of the Council of Europe (PACE), it acts as the guardian of the Council’s fundamental values and monitors member states’ compliance with their undertakings. *Id.* Twenty-eight of the states are members of the European Union. See *The Council of Europe and the European Union: Different Roles, Shared Values*, COUNCIL EUR., <http://www.coe.int/en/web/portal/european-union> (last visited Nov. 11, 2015).

3. COMM. OF MINISTERS, COUNCIL OF EUR., RECOMMENDATION CM/REC(2014)2 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE PROMOTION OF THE HUMAN RIGHTS OF OLDER PERSONS 1–3 (2014) [hereinafter COMM. OF MINISTERS, RECOMMENDATION ON OLD AGE], [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/cddh-age/Document\\_CDDH\\_AGE/CMRec\(2014\)2\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/cddh-age/Document_CDDH_AGE/CMRec(2014)2_en.pdf). For general information on the authority of the Committee to make recommendations, see Statute of the Council of Europe art. 15(b), May 5, 1949, 87 U.N.T.S. 103 (“In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations.”). For an example of how soft law has dealt with the regulation of coastal areas, see Alan Boyle, *Soft Law in International Law-Making*, in INTERNATIONAL LAW 122, 131 (Malcolm D. Evans ed., 3d ed. 2010) [hereinafter Boyle, *Soft Law*] (discussing the non-binding Rio Declaration on Environment and Development); José-Roberto Pérez-Salom, *Sustainable Tourism: Emerging Global and Regional Regulation*, 13 GEO. INT’L ENVTL. L. REV. 801, 819–820 (2001) (discussing the Committee’s adoption of three recommendations promoting sustainable tourism).

4. COMM. OF MINISTERS, RECOMMENDATION ON OLD AGE, *supra* note 3, at 1 (“The purpose of the present recommendation is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all older persons, and to promote respect for their inherent dignity.”).

5. For an explanation of the term “soft law,” see *infra* Part I.A.

6. See COMM. OF MINISTERS, RECOMMENDATION ON OLD AGE, *supra* note 3, at 2–3 (explaining how the European Council made this recommendation). The Council of Europe drafting group was set up to create a non-binding instrument to promote the human rights of older persons. See *Human Rights of Older Persons*, COUNCIL EUR., [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/cddh-age/default\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/cddh-age/default_EN.asp) (last visited Nov. 11, 2015). The group held four meetings from 2012 to 2013 with experts from member states and representatives of international organizations, civil society, national human rights institutions, and others. *Id.*

Some have argued that existing international soft-law norms<sup>7</sup> sufficiently and effectively protect the rights of the elderly and thus obviate the need for hard-law international conventions.<sup>8</sup> This Article directly addresses this argument by focusing on how the European Court of Human Rights (the “ECHR” or the “Court”) applies soft-law protections for older persons. Despite the broad scope of soft law in the sphere of elder rights, scholarship has said little about the use of soft law by international courts and its effectiveness.<sup>9</sup> In light of the relative multiplicity of soft-law norms of the human rights of older persons, the purpose of this Article is to examine whether, and to what extent, the Court—a body established by the European Convention on Human Rights (“European Convention” or “Convention”) to interpret that instrument<sup>10</sup>—can and does use international or European soft law when hearing claims by older persons.

Against the backdrop of the growing body of soft law on the subject of older persons’ rights, and, especially in light of the Council of Europe’s new recommendation, the Court’s expansive judicial policy can significantly promote the rights of older persons in Europe. Moreover, in the absence of hard law in the field of older persons’ rights, older persons could use soft law as an effective tool of action for social change when attempting to enforce their rights before the ECHR.

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7. See Israel Doron, *From National to International Elder Law*, 1 J. INT’L AGING L. & POL’Y 43, 58–59 (2005); Diego Rodríguez-Pinzón & Claudia Martín, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT’L L. REV. 915, 916–22 (2003).

8. See Israel Doron & Itai Apter, *The Debate Around the Need for an International Convention on the Rights of Older Persons*, 50 GERONTOLOGIST 586, 590–91 (2010) (describing existing soft law and the arguments against implementing hard law in this field); Kwong-Leung Tang & Jik-Joen Lee, *Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People*, 36 BRIT. J. SOC. WORK 1135, 1143 (2006) (discussing government resistance to a proposal for a U.N. convention on the rights of the elderly).

9. See Research Div. of the European Court of Human Rights, *The Use of Council of Europe Treaties in the Case-Law of the European Court of Human Rights* (June 2011), [http://www.echr.coe.int/Documents/Research\\_report\\_treaties\\_CoE\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf).

10. Convention for the Protection of Human Rights and Fundamental Freedoms § II, June 1, 2010, C.E.T.S. No. 194 [hereinafter *European Convention*]; see D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 811 (2d ed. 2009); Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT’L L. 783, 793 (2006); Luzius Wildhaber, *The European Court of Human Rights: The Past, the Present, the Future*, 22 AM. U. INT’L L. REV. 521, 528 (2007).

## I. Literature Review

### A. *Soft Law*

Whether an international agreement or convention is binding, or whether it is only soft law, is not clear cut, but rather depends on a multitude of factors.<sup>11</sup> The term “soft law” may refer to a range of international legal arrangements that are perceived as legal norms and are unique because they are non-binding and unaccompanied by sanctions.<sup>12</sup> Unlike treaties, which clearly create discernable rights and obligations in international law, soft law is more difficult to identify.

The Universal Declaration of Human Rights, passed by the United Nations General Assembly on December 10, 1948, was part of a global effort to enhance human rights following World War II.<sup>13</sup> However, the Universal Declaration was not made binding until 1966,<sup>14</sup> and scholars therefore regard the Declaration as the first practical expression of soft law in the field of public international law.<sup>15</sup> In addition, while it is possible to point to non-binding international law norms that have existed since the

11. See Boyle, *Soft Law*, *supra* note 3, at 124.

12. For a general overview of soft law, see R.R. Baxter, *International Law in “Her Infinite Variety,”* 29 INT’L & COMP. L.Q. 549, 550 (1980); László Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 INT’L & COMP. L.Q. 605, 607–11 (2010); Boyle, *Soft Law*, *supra* note 3, at 124; Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EJIL 499, 499–503 (1999); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 319–22 (2006) [hereinafter Shelton, *Normative Hierarchy*]; Dinah Shelton, *Introduction: Law, Non-Law and the Problem of “Soft Law,”* in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 1, 10–18 (Dinah Shelton ed., 2000) [hereinafter Shelton, *The Problem of “Soft Law”*]; K.C. Wellens & G.M. Borchard, *Soft Law in European Community Law*, 14 EUR. L. REV. 267, 267–85 (1989); Michelle Cini, *From Soft Law to Hard Law?: Discretion and Rule-Making in the Commission’s State Aid Regime* 3–5 (Eur. Univ. Inst. Eur. Forum Series, Working Paper No. 2000/35, 2000).

13. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948). For more on the progress of human rights after World War II and the passage of the Universal Declaration of Human Rights, see WIKTOR OSIATYŃSKI, HUMAN RIGHTS AND THEIR LIMITS 4–8 (2009); SHABTAI ROSENNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW 215 (2004); Ed Bates, *History*, in INTERNATIONAL HUMAN RIGHTS LAW 17, 34–37 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakuaran eds., 2010); Boyle, *Soft Law*, *supra* note 3, at 124.

14. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976).

15. Dinah Shelton, *Commentary and Conclusions*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449, 449 (Dinah Shelton ed., 2000) [hereinafter Shelton, *Commentary and Conclusions*].

beginning of the twentieth century,<sup>16</sup> the Universal Declaration was the first comprehensive norm to include, in effect, all U.N. member states.<sup>17</sup>

Legal literature only identified the concept, as opposed to the actual norm, of soft law in the early 1970s.<sup>18</sup> Soft law evolved during the economic crisis caused by the 1973 War in the Middle East and the ensuing energy shortage, and it further developed in the context of environmental regulation.<sup>19</sup> As soft law grew, it became an influential element of public international law.<sup>20</sup>

This development can be partly attributed to the absence of a clear definition of the term “soft law.”<sup>21</sup> For example, the term can allude to a range of legal norms that are not included within the well-known, formal frameworks of norms and binding case law.<sup>22</sup> In addition, “soft law” can refer to treaties that take a non-binding

16. See Int'l Labor Org. [ILO], *Recommendation Concerning Unemployment*, Recommendation No. 001 (Nov. 28, 1919), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R001](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R001) (establishing the International Labor Organization and creating non-binding international law standards on unemployment); see also G.A. JOHNSTON, *THE INTERNATIONAL LABOUR ORGANIZATION: ITS WORK FOR SOCIAL AND ECONOMIC PROGRESS* 88–106 (1970) (discussing standards set by the ILO in the decades following its establishment); N. VAIDYANATHAN, *ILO STANDARDS: FOR SOCIAL JUSTICE AND DEVELOPMENT OF LABOUR* 3–5 (1992) (noting the ILO's role in setting international standards since 1919).

17. ROSENNE, *supra* note 13, at 212–17.

18. Blutman, *supra* note 12, at 606; Hillgenberg, *supra* note 12, at 502; Jan Klabbers, *The Redundancy of Soft Law*, 65 *NORDIC J. INT'L L.* 167, 167 (1996); Wellens & Borchard, *supra* note 12, at 267; Cini, *supra* note 12, at 4.

19. See Hillgenberg, *supra* note 12, at 500; Klabbers, *supra* note 18, at 173; Wellens & Borchard, *supra* note 12, at 268.

20. See Boyle, *Soft Law*, *supra* note 3, at 138; Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 *STAN. L. REV.* 573, 574–75 (2008); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 *J. LEGAL ANALYSIS* 171, 171 (2010); Shelton, *Normative Hierarchy*, *supra* note 12, at 319; see also A.E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 *INT'L & COMP. L.Q.* 901, 901–13 (1999) [hereinafter Boyle, *Some Reflections*].

21. Guzman & Meyer, *supra* note 20, at 183–84, 202 (explaining that one reason for soft law's prevalence is the flexibility it provides to states).

22. See Boyle, *Some Reflections*, *supra* note 20, at 901–02; C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *INT'L & COMP. L.Q.* 850, 852 (1989) [hereinafter Chinkin, *The Challenge of Soft Law*]; Doron & Apter, *supra* note 8, at 590–91; see also Baxter, *supra* note 12, at 550–51 (demonstrating other ways in which soft law has become an influential field of public international law); Josef Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 *AM. J. INT'L L.* 443, 443 (1983) (“Law can be contained in treaties or in other instruments, whether or not adopted under the authority of treaties, that show the softness of their content by such titles as ‘guidelines’ or ‘declaration of principles.’”).

form or use vague expressions.<sup>23</sup> The term is also used to describe norms drafted by global bodies that lack formal international legal authority, such as the World Bank.<sup>24</sup> Soft law can be directed at the non-state actors against whom international contract law is unenforceable, such as the International Court of Justice (ICJ) in the Hague.<sup>25</sup> Mainly, however, soft law relies on the participating bodies' free consent to the obligations set forth in an agreement or declaration.<sup>26</sup>

Soft law may be expressed in a number of ways.<sup>27</sup> It appears along a continuum between fully binding agreements and the types of political treaties that are mere declarations.<sup>28</sup> Some agreements appear binding, but their language and intent, as defined in the Vienna Convention regarding treaties, make it clear that they are only soft law.<sup>29</sup> For example, the inclusion of the term "agreement" in a document's title is not conclusive proof of whether the agreement is hard or soft.<sup>30</sup> With that in mind, this Article defines the term "soft law" as follows: Soft law is any non-binding international norm (meaning it does not carry a sanction for non-compliance) that, nonetheless, shapes parties' expectations of how to achieve the agreement's declared objectives.<sup>31</sup>

It is important to understand what motivates states and other international actors to prefer non-binding soft law over binding hard law.<sup>32</sup> Several theories behind this preference

23. Chinkin, *The Challenge of Soft Law*, *supra* note 22, at 851.

24. Laurence Boisson de Chazournes, *Policy Guidance and Compliance: The World Bank Operational Standards*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 281, 281–85 (Dinah Shelton ed., 2000).

25. Christien Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 35 (Dinah Shelton ed., 2000) [hereinafter Chinkin, *Normative Development*].

26. *See id.* at 30–31.

27. Chinkin, *The Challenge of Soft Law*, *supra* note 22, at 859–62; *see* Boyle, *Soft Law*, *supra* note 3, at 122–24; Guzman & Meyer, *supra* note 20, at 172.

28. Guzman & Meyer, *supra* note 20, at 173; *see* Baxter, *supra* note 12, at 550–53.

29. Guzman & Meyer, *supra* note 20, at 173; *see* Baxter, *supra* note 12, at 550–53.

30. Vienna Convention on the Law of Treaties art. 31, subd. 2, May 23, 1969, 1155 U.N.T.S. 331 (requiring that only the text, preamble, and annexes be considered in interpreting treaties).

31. Baxter, *supra* note 12, at 550–51; Guzman & Meyer, *supra* note 20, at 172–75.

32. *See* Shelton, *The Problem of "Soft Law," supra* note 12, at 1.

exist.<sup>33</sup> Some argue that it is rooted in a desire to implement a uniform policy on a complicated subject, while still accommodating states' varying interests.<sup>34</sup> Notably, soft law permits states to take an intermediate position, such as partial or gradual participation in an agreement,<sup>35</sup> examples of which include agreements on climate change,<sup>36</sup> the environment,<sup>37</sup> hazardous materials,<sup>38</sup> and fishing.<sup>39</sup>

A second theory views soft law as a gradual legal mechanism that guides behavior and looks to long-term results.<sup>40</sup> Under this model, states adopt soft laws with the belief that they will develop into hard law.<sup>41</sup> This is desirable because states can use the interim, when the treaty is non-binding, to prepare for that shift.<sup>42</sup> For example, states could have used the period following the

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33. See Boyle, *Soft Law*, *supra* note 3, at 125; Michael O'Boyle & John Darcy, *The European Court of Human Rights: Accomplishments, Predicaments and Challenges*, 52 GERMAN Y.B. INT'L L. 139, 152 (2009).

34. Guzman & Meyer, *supra* note 20, at 188–90.

35. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000).

36. See, e.g., U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (treaty governing climate change); see also Boyle, *Soft Law*, *supra* note 3, at 130–32 (describing the Framework Convention as soft law).

37. See, e.g., U.N. Env't Programme [UNEP], *Environmental Impact Assessment*, UNEP/GC14/25 (June 17, 1987), <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=100&ArticleID=1658> (adopting the Goals and Principles of Environmental Impact Assessment as developed by the Working Group of Experts on Environmental Law).

38. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57.

39. Food & Agric. Org. of the U.N. [FAO], International Plan of Action for the Management of Fishing Capacity (Feb. 1999), <ftp://ftp.fao.org/docrep/fao/006/x3170e/X3170E00.pdf>; see Boyle, *Soft Law*, *supra* note 3, at 125; Gerson & Posner, *supra* note 20, at 624–25 (contending that when an issue is addressed by many participants, soft law enables them to reach an agreement); Wolfgang H. Reinicke & Jan Martin Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-Binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 95 (Dinah Shelton ed., 2000). But see Klabbbers, *supra* note 18, at 182 (arguing that soft law is redundant and does not serve a useful function in public international law).

40. Gerson & Posner, *supra* note 20, at 624–25; Guzman & Meyer, *supra* note 20, at 176–77; see also Boyle, *Soft Law*, *supra* note 3, at 127 (providing examples of non-binding soft-law Instruments that have led to multilateral treaties); Chinkin, *The Challenge of Soft Law*, *supra* note 22, at 856–59 (describing the transformation of soft law into hard law).

41. See Abbott & Snidal, *supra* note 35, at 423; Blutman, *supra* note 12, at 617–19.

42. Chinkin, *Normative Development*, *supra* note 25, at 26–27; Gerson & Posner, *supra* note 20, at 587.



passage of the non-binding Universal Declaration to prepare for the passage of the binding International Covenant on Civil and Political Rights.<sup>43</sup>

A third, political explanation posits that international soft law reduces the risk of state non-compliance and, instead, enables states to enjoy the benefits from a treaty with little risk. A state can suffer significant damage—ranging from condemnation to sanctions—for breaching a contractual treaty agreement.<sup>44</sup> States thus often avoid joining binding treaties because they believe that any potential gains are outweighed by the risks damage caused by breach.<sup>45</sup> Thus, under this theory, states prefer to create soft law.

### B. *The Bodies Operating in the Field of Soft Law*

Many scholars divide the field of soft law into three main categories based on which body produces the law.<sup>46</sup> The first category includes soft law produced by international organizations, and other similar bodies, that make non-binding decisions for their member states.<sup>47</sup> These decisions may include guidelines, programs, declarations, and plans of action.<sup>48</sup> U.N. General Assembly Resolutions are clear examples of this kind of soft law.<sup>49</sup> Council of Europe recommendations also fit in this category.<sup>50</sup>

The second category includes non-binding bilateral or multilateral agreements and declarations among states. Examples include norms produced by the Organization for Economic Cooperation and Development (OECD) and by the forum of industrialized countries (G7/8).<sup>51</sup> This type of soft law takes many forms, including declarations of intent, final acts of

43. Gerson & Posner, *supra* note 20, at 625.

44. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 48 (1968); Oona A. Hathaway, *The Cost of Commitment*, 55 *STAN. L. REV.* 1821, 1832–34 (2003).

45. George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 *J. LEGAL STUD.* S95, S109–S112 (2002); see Guzman & Meyer, *supra* note 20, at 177–78, 192–97; Reinicke & Witte, *supra* note 39, at 94.

46. Blutman, *supra* note 12, at 607–08.

47. *Id.* at 607.

48. *Id.*

49. *Id.*

50. See, e.g., COMM. OF MINISTERS, *RECOMMENDATION ON OLD AGE*, *supra* note 3, at 2–3.

51. Nicholas Bayne, *Hard and Soft Law in International Institutions: Complements, Not Alternatives*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 347, 347 (John J. Kirton & Michael J. Trebilcock eds., 2004).

summits, political and technical understandings that are non-binding, and recommendations adopted at international conferences.<sup>52</sup> A paradigmatic example is the Helsinki Accords, signed on August 1, 1975, among thirty-five countries as part of the process of ending the Cold War.<sup>53</sup> This category of agreements illustrates how soft law can emerge from political negotiations among states and how such agreements can evolve over time.

The third category comprises agreements produced by non-governmental organizations (NGOs). These agreements have become influential over the years, despite their non-binding nature. For example, the Red Cross and, in the context of elder law, the Venice Commission have produced agreements that contribute to soft law.<sup>54</sup> This type of soft law is especially challenging because it is produced by groups that are interested in promoting a particular agenda and seek to shape cross-border behavior.<sup>55</sup> This sphere of soft law is important and widespread in the realm of human rights in general, and in elder law in particular.<sup>56</sup>

## II. Soft Law and the Legal Rights of Older Persons

Elder rights law began to develop in public international law in the early 1980s.<sup>57</sup> In 1982, the U.N. General Assembly adopted a Resolution<sup>58</sup> affirming the Vienna International Plan of Action on Aging, a plan containing sixty-two recommendations to guarantee the rights of older persons.<sup>59</sup> The central issues addressed by the

52. Blutman, *supra* note 12, at 607–08.

53. Baxter, *supra* note 12, at 557–59. *But see* Klabbers, *supra* note 18, at 171–72 (arguing that the Helsinki Accords were binding).

54. Blutman, *supra* note 12, at 607–08.

55. JÜRGEN FRIEDRICH, INTERNATIONAL ENVIRONMENTAL “SOFT LAW”: THE FUNCTIONS AND LIMITS OF NONBINDING INSTRUMENTS IN INTERNATIONAL ENVIRONMENTAL GOVERNANCE AND LAW 138 (2013) (“By pushing for the adoption of nonbinding instruments, NGOs often successfully place issues on the international agenda.”).

56. Blutman, *supra* note 12, at 608.

57. Doron & Apter, *supra* note 8, at 590; Rodríguez-Pinzón & Martin, *supra* note 7, at 917; *see, e.g.*, U.N. Comm. on Econ., Soc. and Cultural Rights [CESCR], General Comment No. 6: The Economic, Social, and Cultural Rights of Older Persons, para. 4, U.N. Doc. E/1996/22 (Dec. 8, 1995) [hereinafter CESCR, General Comment No. 6] (discussing the 1982 World Assembly); *see also* THE RIGHTS OF OLDER PERSONS: COLLECTION OF INTERNATIONAL DOCUMENTS 31 (Israel Doron & Kate Mewhinney eds., 2007).

58. G.A. Res. 37/51 (Dec. 3, 1982)

59. WORLD ASSEMBLY ON AGING, VIENNA INTERNATIONAL PLAN OF ACTION ON AGING, U.N. Sales No. E.82.1.16 (1982) [hereinafter WORLD ASSEMBLY ON AGING, VIENNA INTERNATIONAL PLAN OF ACTION ON AGING], <http://www.un.org/es/>

plan included health and nutrition,<sup>60</sup> housing,<sup>61</sup> social services,<sup>62</sup> unemployment prevention,<sup>63</sup> and education.<sup>64</sup> Although this plan is considered milestone in the development of elder rights in the international arena, it has no binding legal force and serves as a mere guideline for member states.<sup>65</sup>

In 1991, the U.N. published the United Nations Principles for Older Persons.<sup>66</sup> This document included five key principles.<sup>67</sup> The first principle, “independence,” includes the right to food, shelter, clothing, health, work, and education.<sup>68</sup> The second principle, “participation,” seeks to enable older persons to take part in the public sphere so that they can participate in decisions relating to both their own rights, as well as to the rights of others.<sup>69</sup> The third principle, “care,” encompasses the right of older persons to receive appropriate support and treatment, whether they live at home, in an institution, or elsewhere.<sup>70</sup> The fourth principle, “self-fulfillment,” addresses personal development and provides older persons with full access to education and cultural resources.<sup>71</sup> The last principle ensures “dignity” for older persons<sup>72</sup> and aims to enable them to live independent lives without being exploited or suffering discrimination or abuse.<sup>73</sup> Despite this document’s importance, it is merely declarative, and thus not legally binding.<sup>74</sup>

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globalissues/ageing/docs/vipaa.pdf; see Doron & Apter, *supra* note 8, at 590; Rodríguez-Pinzón & Martin, *supra* note 7, at 947; Tang & Lee, *supra* note 8, at 1139.

60. WORLD ASSEMBLY ON AGING, VIENNA INTERNATIONAL PLAN OF ACTION ON AGING, *supra* note 59, at pt. III.A.3.a (Recommendations 1–17).

61. *Id.* at pt. III.A.3.c (Recommendations 19–24).

62. *Id.* at pt. III.A.3.e (Recommendations 30–35).

63. *Id.* at pt. III.A.3.f (Recommendations 36–43).

64. *Id.* at pt. III.A.3.g (Recommendations 44–51).

65. *Id.* at pmbl.

66. G.A. Res. 46/91, annex, Principles for Older Persons (Dec. 16, 1999), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>; see CESCR, General Comment No. 6, *supra* note 57, at para. 5; Doron & Apter, *supra* note 8, at 590; Rodríguez-Pinzón & Martin, *supra* note 7, at 948; Tang & Lee, *supra* note 8, at 1140.

67. G.A. Res. 46/91, annex, *supra* note 66.

68. *Id.* at paras. 1–6.

69. *Id.* at paras. 7–9.

70. *Id.* at paras. 10–14.

71. *Id.* at paras. 15–16.

72. *Id.* at paras. 17–18.

73. *Id.*; see Rodríguez-Pinzón & Martin, *supra* note 7, at 948.

74. G.A. Res. 46/91, annex, *supra* note 66 (encouraging “Governments to incorporate the . . . principles into their national program[s] whenever possible”).

In 1992, two additional central documents promoting the rights of older persons were published: an outline for integrating older persons in development<sup>75</sup> and the Proclamation on Aging.<sup>76</sup> The first document identified eight goals set by the U.N. General Assembly for older persons' rights.<sup>77</sup> The latter document, published on the tenth anniversary of the Vienna International Plan of Action on Aging,<sup>78</sup> urged countries to support older women whose work taking care of home and family had gone unrecognized.<sup>79</sup> The document also encouraged older persons to continue living creative lives after retirement.<sup>80</sup> The Proclamation acknowledged the importance of encouraging, supporting, and strengthening families by noting that families constitute the foundation for supporting the elderly population.<sup>81</sup> Finally, the Proclamation called on countries to bolster cooperation in research in order to expand knowledge on the subject of aging and older persons.<sup>82</sup>

The Second World Assembly on Ageing ("Madrid Conference"), held in Madrid in April 2002,<sup>83</sup> was the pinnacle of elder rights on the international level. The Madrid Conference examined the implementation of the Vienna Conference's resolutions on aging, and it accepted the Madrid Plan with the support of all 159 U.N. member states.<sup>84</sup> The Madrid Plan's intergenerational policy values a society that emphasizes all age groups equally,<sup>85</sup> and it urges all countries to recognize and promote the rights of the aging.<sup>86</sup>

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75. G.A. Res. 47/86, Implementation of the International Plan of Action on Aging: Integration of Older Persons in Development (Dec. 16, 1992), <http://www1.umn.edu/humanrts/resolutions/47/86GA1992.html>.

76. G.A. Res. 47/5, annex, Proclamation on Aging (Oct. 16, 1992), <http://www1.umn.edu/humanrts/resolutions/47/5GA1992.html>.

77. G.A. Res. 47/86, *supra* note 75; see Tang & Lee, *supra* note 8, at 1140.

78. G.A. Res. 47/5, annex, *supra* note 76.

79. *Id.* at para. 2(g)–(h).

80. *Id.* at para. 2(i).

81. *Id.* at para. 2(k)–(l).

82. *Id.* at para. 2(o); see CESCR, General Comment No. 6, *supra* note 57, at para. 7; Rodríguez-Pinzón & Martín, *supra* note 7, at 948–49.

83. Second World Assembly on Ageing, *Madrid International Plan of Action on Ageing*, at foreword (Apr. 2002) [hereinafter *Madrid International Plan*], <http://www.undesadspd.org/Portals/0/ageing/documents/Fulltext-E.pdf>; see Doron & Apter, *supra* note 8, at 590; Tang & Lee, *supra* note 8, at 1140–41.

84. *Madrid International Plan*, *supra* note 83, at annex.

85. *Id.* at paras. 10–11.

86. *Id.* at para. 15.

The Madrid Plan sets forth three priorities. The first (and highest) priority addresses older persons and their development.<sup>87</sup> The Plan recommends implementing programs to ensure economic and social protections for older persons.<sup>88</sup> It calls for men and women, including those who devoted their lives to being homemakers, to have equal access to social insurance.<sup>89</sup> In addition, it urges countries to create protections for people who lack social security insurance.<sup>90</sup> The Plan specifically calls on countries to protect older persons during natural disasters and other humanitarian emergencies.<sup>91</sup> According to the Plan, it is imperative that older persons, who are the most vulnerable, receive food, housing, and medical care during those times.<sup>92</sup> The Plan's second priority addresses the need to improve the health of the aging population<sup>93</sup> and calls for equal access for older persons to necessary medical care, including mental health care.<sup>94</sup> The Plan's third priority calls on countries to ensure that older persons are provided with suitable living environments and proper housing.<sup>95</sup>

The Madrid Plan is a detailed program that sets forth goals for U.N. member countries' responsibilities towards older people.<sup>96</sup> The U.N. and its institutions were determined to oversee the Plan's implementation and translated it into a variety of languages, resulting in follow-up reports to the conference's decisions.<sup>97</sup> However, the Madrid Plan is not legally binding, nor does it contain a call for creating a binding universal declaration on the rights of older persons.<sup>98</sup>

87. *Id.* at paras. 16–56; see Rodríguez-Pinzón & Martin, *supra* note 7, at 949.

88. *Madrid International Plan*, *supra* note 83, at paras. 16–18.

89. *Id.* at paras. 49–53.

90. *Id.*

91. *Id.* at paras. 54–56.

92. *Id.*

93. *Id.* at paras. 57–89; see Rodríguez-Pinzón & Martin, *supra* note 7, at 949–50.

94. *Madrid International Plan*, *supra* note 83, at paras. 69, 84.

95. *Id.* at paras. 91–113; see Tang & Lee, *supra* note 8, at 1140–41.

96. See Tang & Lee, *supra* note 8, at 1140–41.

97. See, e.g., U.N. Expert Group Meeting on Social and Economic Implications of Changing Population Age Structures, *Implementing the Madrid Plan of Action on Ageing*, at 71–79, ESA/P/WP.201 (Aug. 31, 2005), [http://www.un.org/en/development/desa/population/events/pdf/expert/9/full\\_report.pdf](http://www.un.org/en/development/desa/population/events/pdf/expert/9/full_report.pdf) (describing the Madrid International Plan and a “road map” for its implementation).

98. Rodríguez-Pinzón & Martin, *supra* note 7, at 950; Tang & Lee, *supra* note 8, at 1141; see also Israel Doron & Benny Spanier, *International Convention on Rights of Older Persons: Where We Were, Where We Are, and Where Are We Going?*, 8 GLOBAL AGEING 7, 8 (2012) (using the Madrid International Plan as an example of

As of today—more than a decade after the Madrid Conference—efforts to implement the Plan are still prevalent.<sup>99</sup> In April 2009, in Bonn, Germany, an international conference of experts in the field of aging was held for the first time since the U.N.’s initiative began.<sup>100</sup> This meeting (the “Bonn Meeting”) focused on the conditions of older persons around the world.<sup>101</sup> The Bonn Meeting sought to examine the measures needed in order to ensure the basic rights of older persons around the world.<sup>102</sup> On the international level, the Bonn Meeting looked to strengthen and institutionalize the rights of older persons, since attending scholars believed that the wealth of soft law was not sufficient to protect the rights of the elderly.<sup>103</sup> The Bonn Meeting’s recommendations were comprehensive and addressed a variety of topics;<sup>104</sup> however, it fell short of turning care for older persons into binding international law.<sup>105</sup>

In the wake of these recommendations, further discussions were held under U.N. auspices, and at the end of the process, the U.N. Secretary-General presented a follow-up document to guide future action.<sup>106</sup> This document led to the U.N. General Assembly’s adoption of a resolution that established an open-ended working group (OEWG).<sup>107</sup> This group was assigned to map the gaps in the protection of elder rights and to formulate guidelines for closing those gaps.<sup>108</sup>

non-binding soft law).

99. See, e.g., U.N. POPULATION FUND & HELPAGE INT’L, *supra* note 1, at 7–9, 13–15, 18 (highlighting the policies, legislation, and data on aging that emerged after 2002).

100. U.N. Dep’t Econ. & Soc. Affairs, Rep. of the Expert Group Meeting “Rights of Older Persons,” at 3–4 (May 5–7, 2009) [hereinafter Bonn Meeting Report], <http://www.un.org/esa/socdev/ageing/documents/egm/bonn09/report.pdf>.

101. *Id.* at 1.

102. *Id.* at 3 (stating that the purpose of the meeting was to “explore how fundamental human rights of older persons could be assured and deepened and how the Madrid Plan of Action on Ageing could be better implemented concerning the rights of older persons”).

103. *Id.* at 3, 4.

104. *Id.* at 8, 10–11, 13, 20.

105. *Id.* at 14–16.

106. U.N. Secretary-General, *Follow-up to the International Year of Older Persons: Second World Assembly on Ageing*, U.N. Doc. A/68/167 (July 19, 2013), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/402/51/PDF/N1340251.pdf?OpenElement>.

107. G.A. Res. 65/182, Follow-up to the Second World Assembly on Ageing (Dec. 21, 2010), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/65/182](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/182).

108. *Id.* at para. 28 (“[The General Assembly] decides to establish an open-ended working group, open to all States Members of the United Nations, for the purpose of strengthening the protection of the human rights of older persons by considering

International organizations that promote elder rights add to soft law in that realm.<sup>109</sup> For example, over the years, the International Labor Organization (ILO) has published a series of standards to protect older persons in the workplace.<sup>110</sup> The organization enacted recommendations to prevent discrimination against older workers during their employment and to expand social insurance and retirement rights.<sup>111</sup> The ILO's standards extend beyond mere soft (contractual) law—rather, they are binding on the countries that ratified them.<sup>112</sup> The conventions forbid discrimination against older workers, including in professional vocational training, as well as against women who began working at a more advanced age because of family obligations.<sup>113</sup> Importantly, however, while the ILO has developed conventions to protect older persons, it has not produced a declaration or convention that specifically addresses older persons at work.<sup>114</sup>

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the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures, and requests the Secretary-General to provide all necessary support within existing resources for the duration of its mandate.”); see Doron & Spanier, *supra* note 98, at 10–11 (discussing the OEWG).

109. Paul De Hert & Eugenio Mantovani, *Specific Human Rights for Older Persons?*, 4 EUR. HUM. RTS. L. REV. 398, 400–01 (2011).

110. *Id.* at 400.

111. Int'l Labor Org. [ILO], *Recommendation Concerning Older Workers*, Recommendation No. 162 (June 23, 1980), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:R162](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R162); Int'l Labor Org. [ILO], *Convention Concerning Employment Policy*, Convention No. 122 (July 9, 1964), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312267](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312267).

112. See *ILO Supervisory System/Mechanism*, INT'L LAB. ORG., <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang-en/index.htm> (last visited Feb. 8, 2016) (explaining the two kinds of supervisory mechanisms the ILO developed to oversee ratifying states' application of ILO Conventions and Recommendations in law and in practice).

113. Int'l Labor Org. [ILO], *Recommendation Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, Recommendation No. 165 (June 23, 1981), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312503](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312503); Int'l Labor Org. [ILO], *Convention Concerning Vocational Guidance and Vocational Training in the Development of Human Resources*, Convention No. 142 (June 23, 1975), [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312287](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312287); see Rodríguez-Pinzón & Martin, *supra* note 7, at 951.

114. Rodríguez-Pinzón & Martin, *supra* note 7, at 951. In Article 1(a) of ILO Convention 111, “older persons” is not mentioned as one of the categories of forbidden discrimination. Int'l Labor Org. [ILO], *Convention Concerning Discrimination in Respect of Employment and Occupation*, Convention No. 111 (June 25, 1958), <http://www.ilo.org/dyn/normlex/en/f?p=noRMLExPUB:12100:0::no>

International law addressing older persons is continually expanding and developing, but the practical results to date have been disappointing.<sup>115</sup> As experts at the Bonn Meeting described:

This is clearly distinct from a normative gap where the current provisions fail to capture adequately ongoing practice which denies rights. Instead, an implementation gap suggests a failure to incorporate international standards into domestic legislation and procedures, or a lack of institutions or other actors competent to implement measures that would result in the fulfillment of the relevant rights. So the bigger question is—is it possible to detect such a gap with respect to the rights of older people?<sup>116</sup>

### III. Elder Rights and the European Court of Human Rights

The European Convention does not explicitly address the rights of older persons. So, to the extent that older people are to enjoy human rights, they need to find “auspices” within the context of the Convention’s general articles. Thus, it is not surprising that elder rights have not been studied within the context of the ECHR. Until recently, the Court did not even expressly address the issue of elder rights as a unique legal subject; it was not until 2014 that the Court published a report, *Elderly People and the European Convention on Human Rights*, in which it unsystematically discussed central judgments dealing with older people.<sup>117</sup> However, as this Article shows, this document does not apply to older persons’ rights.<sup>118</sup>

This Article addresses the impact that the lack of hard international law has had on the scarcity of the ECHR’s judgments addressing elder rights. Some scholars claim that only using soft-law tools to address rights has resulted in weak law that inadequately protects older persons.<sup>119</sup> But others claim that international elder-rights soft law provides important groundwork

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12100:P12100\_Ilo\_Code:C111 (limiting forbidden discrimination to “any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin”).

115. See Bonn Meeting Report, *supra* note 100, at 14–16.

116. *Id.* at 16.

117. EUROPEAN COURT OF HUMAN RIGHTS, *ELDERLY PEOPLE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2014), [http://www.echr.coe.int/Documents/FS\\_Elderly\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Elderly_ENG.pdf).

118. See *infra* Part V.

119. See Baxter, *supra* note 12, at 550; Boyle, *Some Reflections*, *supra* note 20, at 911–12.



for the future implementation of hard law.<sup>120</sup> They insist that, because states find it easier to take on non-binding norms, soft law promotes elder rights on the international level.<sup>121</sup>

To what extent is the ECHR aware of the soft law that addresses rights of older persons? Does the abundance of soft law on the matter of older persons' rights influence the Court? These questions become more pointed in light of the fact that the ECHR is capable of promoting only such rights as are included in the Convention.<sup>122</sup> Older persons—or the Court itself—could assert these norms. If the Court uses soft law when determining the rights of older persons, that would bolster the argument that, on its own, soft law can effectively protect those persons' rights. Such a finding would validate the notion that it is more useful to continue on the soft-law path than to attempt to produce a binding international charter.

#### IV. The Study's Methodology

We examined the manifestations of ageism, soft law, and the rights of older persons in ECHR decisions.<sup>123</sup> More specifically, our research evaluated the social status and legal rights of older persons as reflected by the Court's rulings.<sup>124</sup> The findings presented below, which are only one part of our comprehensive study,<sup>125</sup> focus on soft law.

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120. Doron & Apter, *supra* note 8, at 590–91.

121. *Id.*

122. See HARRIS ET AL., *supra* note 10, at 4–5 (noting that the ECHR takes applications from states and individuals “alleging breach by another party that has ratified the Convention”); Patricia Egli, *Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?*, 17 J. TRANSNAT'L L. & POL'Y 1, 2 (2007) (“In addition to articulating a catalogue of civil and political rights and freedoms, the Convention established a mechanism for the enforcement of the obligations agreed upon by contracting states.”); see also Buergethal, *supra* note 10, at 793 (describing the 1998 implementation of Protocol No. 11 to the Convention, which allowed individuals to make applications alleging a state party's breach of the Convention directly to the ECHR, and abolished the European Commission on Human Rights, which had, up until that time, performed a screening function for individual applications to the ECHR).

123. Benny Spanier, Israel Doron & Faina Milman-Sivan, *Older Persons' Use of the European Court of Human Rights*, 28 J. CROSS CULTURAL GERONTOLOGY 407, 408 (2013) (citing Benny Spanier, *Ageism, Soft Law and the Rights of Older Persons in the European Court of Human Rights* (2013) (unpublished Ph.D thesis, Haifa University) (on file with author)).

124. *Id.*

125. Some of the quantitative findings from our study have already been published. See *id.* at 410–15.

We used quantitative and descriptive methods to perform an empirical analysis of public texts from the ECHR that are available on the Court's website (HUDOC).<sup>126</sup> The Court uploads complete official versions of all judgments going back to 1960,<sup>127</sup> and these judgments can be searched using the site's web-based open-access text search engine.<sup>128</sup>

To create the sample for our study, it was necessary to decide on two preliminary questions. First, who is an "older person"? In other words, from what age will a person be considered "old"? Since this study dealt with a public international court, we chose a standard taken from the field of international law and old age. The U.N. Commissioner for Human Rights' General Comment No. 6, which implemented the rights of older persons in the context of the International Covenant on Economic, Social and Cultural Rights,<sup>129</sup> defines an older person as any person over the age of sixty.<sup>130</sup>

Second, what date range of the Court's judgments should we consider? In light of the history of the Court's development, our study focused on the years following the November 1, 1998, adoption of Protocol No. 11 into the European Convention on Human Rights.<sup>131</sup> By starting with that date, we were able to

126. HUDOC, EUR. CT. HUM. RTS., <http://www.echr.coe.int/pages/home.aspx?p=home&c=> (follow "search HUDOC case-law" link).

127. EUROPEAN COURT OF HUMAN RIGHTS, HUDOC USER MANUAL 5 (2012), [http://www.echr.coe.int/Documents/HUDOC\\_Manual\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/HUDOC_Manual_2012_ENG.pdf).

128. See HUDOC, *supra* note 126.

129. CESCR, General Comment No. 6, *supra* note 57, at para. 9 ("The terminology used to describe older persons varies considerably, even in international documents. It includes: 'older persons,' 'the aged,' 'the elderly,' 'the third age,' 'the ageing,' and, to denote persons more than [eighty] years of age, 'the fourth age.' The Committee opted for 'older persons' . . . the term employed in General Assembly resolutions 47/5 and 48/98.")

130. *Id.*; see also Rodríguez-Pinzón & Martín, *supra* note 7, at 952–53 (discussing the implicit authority for General Comment 6 found in Article 9 of the International Covenant on Economic, Social and Cultural Rights). For further evidence that the age of sixty is generally recognized as the beginning of old age, see U.N. Secretary-General, *Follow-up to the Second World Assembly on Ageing: Comprehensive Overview*, U.N. Doc. A/65/157 (July 21, 2010) [hereinafter U.N. Secretary-General, *Follow-up*] (analyzing the status of older people globally); U.N. POPULATION FUND & HELPAGE INT'L, *supra* note 1, at 1 (discussing the rapid "rate of growth of the population aged [sixty] years or over"); Frederic Megert, *The Human Rights of Older Persons: A Growing Challenge*, 11 HUM. RTS. L. REV. 37, 42–43 (2011) (describing the challenges of defining "old age" and "older persons").

131. This Protocol established the Court as we know it today: a permanent body that sits year-round and allows individual applications. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, *opened for signature*

compile data pertaining to a complete decade—namely, the period between January 1, 2000, and January 1, 2011, eleven years in total.

These two points in time—the applicant’s date of birth and his or her application date—served as the basic terms used for searching HUDOC to create the sample. We entered birth years of older persons (e.g., 1920, 1921, etc.) into the search system one at a time and, on the same search page, entered the relevant years for the delivery of judgments (from the beginning of 2000 to the end of 2010). The search produced a list of all applicants who were born in the relevant years and about whom the ECHR delivered judgments between 2000 and 2010. Of the 12,680 overall judgments rendered during that period, 1,503 judgments related to older persons. These 1,503 judgments constituted the study population. From this population, we used stratified random sampling to select fifteen percent of the judgments, a total of 226 judgments, which we fully analyzed for this study.<sup>132</sup> We performed basic descriptive analysis was performed on the entire study population.

## V. Findings

### A. *Do Court Judgments Address or Mention Elder-Rights Soft Law?*

In the study’s first phase we researched whether ECHR judgments used elder-rights soft-law standards. The study took into account all of the standards (“Instruments”) that comprise soft law regarding older persons.<sup>133</sup> These Instruments contain practical plans of action that the Court could have used in its

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May 11, 1994, E.T.S. No. 155 (entered into force Nov. 1, 1998), <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cda9>.

132. For information on the methodology of sampling, see generally 1 MORRIS H. HANSEN, WILLIAM N. HURWITZ & WILLIAM G. MADOW, *SAMPLE SURVEY METHODS AND THEORY: VOLUME I METHODS AND APPLICATIONS* 4–10 (1956) (summarizing the “fundamental principles of sampling” which make it “possible, with a relatively small sample, to secure results that approximate very closely some of the characteristics of a large population”); LESLIE KISH, *SURVEY SAMPLING* 9–10 (1965) (describing the use of “sample values,” which are calculations based on subsets of a data set, to estimate the “population values,” which are calculations that use the entire data set); LARRY L. ORR, *SOCIAL EXPERIMENTS: EVALUATING PUBLIC PROGRAMS WITH EXPERIMENTAL METHODS* 103–05 (1999) (discussing “the issues involved in designing the experimental sample to achieve the most valid and precise estimates of the experimental impact”).

133. See *supra* Part II.

rulings, or that older persons could have used in their applications to the Court.<sup>134</sup> We cross-referenced these Instruments with the help of the Court's sophisticated search engine.<sup>135</sup>

We discovered that *none* of the ECHR's judgments within our sample mentioned legal Instruments of soft law. We therefore broadened the search beyond the study's sample to encompass *all* judgments of older persons made by the Court. In other words, the study abandoned the fifteen percent sample and instead searched every judgment—all 1,503 of them<sup>136</sup>—relating to older persons. The goal was to determine whether the ECHR mentioned or used soft law in any of its judgments when considering the rights of older persons during the study period. The search again included the use of the Instruments made by the Court and/or by older persons in their arguments before the Court. Here too, the search showed that not a single ECHR judgment mentioned legal Instruments of soft law.

As a result, we expanded the search to encompass all of the ECHR's judgments during the study period, not just those that affected older persons. This time, we examined all 12,683 judgments produced by the Court during the study period.<sup>137</sup> We conducted long and thorough searches with the assistance of the ECHR's information professionals. And once again we found that the ECHR used no Instruments of soft law whatsoever in considering the matters of older persons' rights.

We therefore concluded that, since 2000, neither the Court nor any applicants have used legal Instruments of soft law to address matters of elder rights in proceedings before the ECHR.

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134. We looked at five main Instruments: the U.N. Principles for Older Persons, G.A. Res. 46/91, annex, *supra* note 66; the Vienna International Plan of Action on Aging, G.A. Res. 37/51, *supra* note 58; CESCR, General Comment No. 6, *supra* note 57; the U.N. Commission on the Elimination of Discrimination Against Women's General Recommendation No. 27, U.N. Comm'n on the Elimination of Discrimination Against Women, General Recommendation No. 27, U.N. Doc. CEDAW/C/2010/47/GC.1 (Oct. 19, 2010) [hereinafter General Recommendation No. 27], <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC1.pdf> (focusing on older women within the context of the Convention on the Elimination of All Forms of Discrimination against Women); and the Madrid International Plan of Action on Ageing, *supra* note 83.

135. See HUDOC, *supra* note 126.

136. *Id.*

137. For an analysis of trends associated with the increase in applications to the ECHR and the number of judgments issued by the ECHR, see EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2010, at 13–16, [http://www.echr.coe.int/Documents/Annual\\_report\\_2010\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf).

*B. Are General Soft Law Instruments Mentioned in Relevant Judgments?*

In light of our findings, the question arose as to whether the Court uses soft law at all, i.e., in cases not limited to older persons. While researching soft law in the matter of older persons' rights, we also examined a sample of judgments to see how the Court uses legal Instruments of soft law in general. We examined 226 judgments, including those judgments which relate to the subject of older persons' rights only because the plaintiffs were over sixty-years-old. With that broadened scope, we found three judgments in which Instruments of soft law—though not those referring to older persons' rights—were used.<sup>138</sup>

The Court, therefore, occasionally applies general soft-law standards. In what follows, this Article will delineate the manner in which the Court uses soft law in one of the three judgments that we found in the 226-case sample, with the goal of understanding and providing insight into the Court's willingness to use soft law in general, and in the specific context of older persons' rights.

One of these cases, *Depalle v. France*, involved a claim by an older person, who was born in 1919,<sup>139</sup> against the French government for breaching his property rights under Protocol 1, Article 1 of the Convention, as well as for breaching his right to housing under Article 8.<sup>140</sup> The plaintiff legally purchased a seaport home built on an area that was defined as public land.<sup>141</sup> Construction on that land required a special license, and the special license needed to be renewed periodically.<sup>142</sup> When the plaintiff applied for renewal in March of 1993, he was told that, in

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138. *Depalle v. France*, 2010-III Eur. Ct. H.R. 235; *Petkov v. Bulgaria*, App. No. 77568/01 (Eur. Ct. H.R. June 11, 2009), [Staroszyk v. Poland, App. No. 59519/00 \(Eur. Ct. H.R. 2007\),](http://hudoc.echr.coe.int/eng#{)

139. *Depalle*, 2010-III Eur. Ct. H.R. at 235, 241.

140. *Id.* at 239–40; see also European Convention, *supra* note 10, at Protocol 1, art. 1 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”); *id.* at art. 8(1) (“Everyone has the right to respect for his private and family life, his home and his correspondence.”).

141. *Depalle*, 2010-III Eur. Ct. H.R. at 241.

142. *Id.* at 242–43.

the future, the license would be conditional on new land-use restrictions.<sup>143</sup> The plaintiff opposed these conditions, thus giving rise to the dispute before the ECHR.<sup>144</sup>

The ECHR examined the laws and regulations that addressed the subject of preserving maritime public property in France, and it considered the various policies of the other Council of Europe member states.<sup>145</sup> In addition, the Court examined the relevant policies of the European Council.<sup>146</sup> In its decision, the ECHR cited the Committee of Ministers' recommendation for the sustainable preservation of tourism areas through environmentally-friendly means.<sup>147</sup> The Court noted that the Recommendations enable states to nationalize areas that are significant for developing tourism and public use.<sup>148</sup> In fact, the Court ruled that a state has flexibility to decide on such matters.<sup>149</sup> The Court also relied on these Instruments to conclude that the public interest superseded the plaintiff's right to property and that, therefore, the state did not breach the Convention when it required the plaintiff to vacate and when it demolished the portion of his home built on public land.<sup>150</sup>

The Committee of Ministers' Recommendations are a striking example of how the ECHR can rely on soft law when it wishes to do so. Two points are worth mentioning on this topic. First, the Court relied upon the Committee of Ministers' Recommendations to support its ruling even though the Recommendations were not binding, and the Court cited those Recommendations to support its conclusion.<sup>151</sup> Second, the Court—not one of the parties—brought up the soft-law Instrument as legal support for its argument.<sup>152</sup> The fact that the Court cited to soft law unprompted shows the Court's belief that soft law is important.

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143. *Id.* at 243–44.

144. *Id.* at 242–43.

145. *Id.* at 249–58.

146. *Id.* at 258.

147. *Id.* (citing COMM. OF MINISTERS, RECOMMENDATION NO. R (97) 9 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON A POLICY FOR THE DEVELOPMENT OF SUSTAINABLE ENVIRONMENT-FRIENDLY TOURISM IN COASTAL AREAS (1997), <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=565951&SecMode=1&DocId=569968&Usage=2>).

148. *Id.*

149. *Id.* at 266–67.

150. *Id.* at 265–66, 269–70.

151. *Id.* at 258, 265–66.

152. *Id.* at 258, 262–70.

Although *Depalle* is a single case, it offers insight into, if not encouragement for, a broader issue. The judgment suggests that, under certain conditions, the ECHR will use soft law. And if the Court is willing to apply soft law to matters relating to property rights, it could apply the norms of soft law for the benefit and protection of older persons' rights in matters before the Court.

## VI. Discussion

Because the Court has applied soft law before, and the Council of Europe recently created elder-rights soft law, older persons should be more comfortable advancing claims rooted in relevant soft law before the Court. Regardless of whether hard law on this topic exists, individuals could assert rights based on the Council of Europe's Recommendations, or other Instruments. This section will demonstrate several practical implementations of this approach, and it will show that it is possible to find an overlap among the rights enumerated in the Convention, the legal Instruments available to older persons, and the Council of Europe's Recommendations regarding elder rights.

### A. *Article 2 of the European Convention: The Right to Health as Part of the Right to Life*

#### 1. The Court's Judgment and Interpretation of the Right to Health as Part of the Right to Life

In the case of *Cyprus v. Turkey*,<sup>153</sup> the Court broadened its interpretation of the right to life to include the right to health.<sup>154</sup> In the wake of the Turkish invasion of northern Cyprus in July 1974, the government of Cyprus brought a claim against the government of Turkey.<sup>155</sup> Through its claim, Cyprus sought to improve the living conditions of Cypriot Greek citizens who lived in northern Cyprus.<sup>156</sup> The Cyprus government asserted that these citizens' inability to receive adequate medical services breached Article 2 of the Convention, which protects the right to life.<sup>157</sup>

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153. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1.

154. See HARRIS ET AL., *supra* note 10, at 46–47; IDA ELISABETH KOCH, HUMAN RIGHTS AS INDIVISIBLE RIGHTS: THE PROTECTION OF SOCIO-ECONOMIC DEMANDS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 63–64 (2009).

155. *Cyprus*, 2001-IV Eur. Ct. H.R. at 5–6, 8–9.

156. *Id.* at 55–56.

157. *Id.* at 58 (“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” (citing European Convention, *supra* note 10, at art. 2(1)).

Cyprus's allegations stemmed from the fact that northern Cyprus had no emergency medical services and, specifically, no geriatric medical services.<sup>158</sup> This meant that older persons in northern Cyprus had to travel south to Greek Cyprus to receive medical treatment.<sup>159</sup>

In its decision, the Court accepted the principle that the right to health may be included under the right to life set forth in Article 2 of the Convention.<sup>160</sup> However, the Court did not determine the extent of the medical care covered by Article 2.<sup>161</sup> This point is essential. Some scholars believe that the right to health recognized by the Court only encompasses a right to life-saving health.<sup>162</sup> Therefore, issues left to the discretion of member states are not protected by the right to life.<sup>163</sup> According to these scholars, the Court understands that the definition of health is a complex one, especially because the fact that the definition of health differs between Western and Eastern European countries.<sup>164</sup> Furthermore, they argue that funding expensive medications or treatments that are not in the category of life-saving health care cannot be considered a right because of the significant costs.<sup>165</sup> These scholars maintain that even rights such as the right to

158. *Id.*

159. *Id.*

160. *Id.* at 58–59 (“The Court observes that an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally. It notes in this connection that Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”); see also HARRIS ET AL., *supra* note 10, at 46 (“The Court [in *Cyprus v. Turkey*] appeared to accept that in principle Article 2 could extend to the provision of health care.”).

161. *Cyprus*, 2001-IV Eur. Ct. H.R. at 58–59 (“However, the Court does not consider it necessary to examine in this case the extent to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care.”).

162. See HARRIS ET AL., *supra* note 10, at 47–48; KOCH, *supra* note 154, at 63–64.

163. See HARRIS ET AL., *supra* note 10, at 47–48; KOCH, *supra* note 154, at 63–64.

164. See HARRIS ET AL., *supra* note 10, at 47.

165. *Id.*; see, e.g., *Nitecki v. Poland*, App. No. 65653/01 (Eur. Ct. H.R. Mar. 21, 2002), <http://hudoc.echr.coe.int/eng?i=001-22339>. In *Nitecki v. Poland*, the applicant, an individual from Poland who suffered from amyotrophic lateral sclerosis (ALS, or Lou Gehrig’s disease) claimed that the public health service in Poland violated his rights under Article 2 of the European Convention by refusing to refund him the full cost of his prescribed medications. *Id.* Because the health service refused to refund him, he was unable to continue paying for the drug, and his health deteriorated significantly. *Id.* Even though the Court recognized that these circumstances would result in the petitioner’s “untimely death,” it noted that the applicant was treated “under the standard of care available to all patients.” *Id.* Therefore, Poland had not “failed to discharge its obligations under Article 2.” *Id.*



housing and the need for running water, both of which are essential to suitable health, cannot be considered a right falling under the right to life as set forth in the Convention.<sup>166</sup>

Health, then, is not listed among the rights enumerated in the Convention.<sup>167</sup> This is particularly interesting because the right to health is traditionally considered part of socioeconomic rights.<sup>168</sup> “The enjoyment of health is one of the fundamental preconditions for the enjoyment of other rights belonging in the category of economic, social and cultural rights . . . . He who cannot provide for himself and his family because of untreated sickness is dependent on social security . . . .”<sup>169</sup> Although it is impossible to clearly delineate where the right to life ends and the right to health begins, this ambiguity enables the use of soft law to argue that the Convention encompasses the right to health.<sup>170</sup>

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166. HARRIS ET AL., *supra* note 10, at 47–48; *see also* ROBIN C.A. WHITE & CLARE OVEY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 165–66 (5th ed. 2010) (discussing the Court’s holding in *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, that Article 2 does not grant individuals the “right to die” or require member states to permit assisted suicide).

167. KOCH, *supra* note 154, at 60.

168. *Id.* at 59; *see also* Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism To Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT’L L. 462 (2004) (discussing attempts to create an optional protocol to the International Covenant on Economic, Social, and Cultural Rights to better enforce party-state compliance with the treaty’s obligations, which include individuals’ rights to health); Gunilla Backman et al., *Health Systems and the Right to Health: An Assessment of 194 Countries*, 372 LANCET 2047, 2048–50 (2008) (advocating the “right to health” concept as a tool for analyzing and improving health-care systems).

169. KOCH, *supra* note 154, at 59–60; *see also* Katarina Tomaševski, *Health Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 125, 126–30 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 1995) (“Because history has shown the status of health as being more determined by factors outside the health sector than by public health and clinical medicine, health law encompasses issues beyond the health sector.”).

170. *See* KOCH, *supra* note 154, at 111–12 (“[T]here is reason to believe that the Court in its future encounters with health-related facts will consider carefully whether it is possible to increase the protection [of the ECHR], and one cannot exclude the possibility that more aspects of the right to health will fall within the ambit of the Convention.”); Tomaševski, *supra* note 169, at 137–40 (discussing the balance struck by soft-law norms in the area of international human rights law between recognizing “individual rights” and “protecting public health”).

## 2. Soft Law of Older Persons' Rights and the Right to Health

Older persons' right to health holds a unique place in soft law,<sup>171</sup> since old age and health are highly interconnected.<sup>172</sup> Several common themes emerged as central subjects in all five of the soft-law Instruments we examined.<sup>173</sup> First, older persons are seen as participants in a multigenerational society—a society that belongs to those of all ages. They are viewed as being part of a family and a community that provide them with help and support.<sup>174</sup> The Instruments note the importance of ensuring that older persons remain in their natural environment over time—to age in place to the greatest possible extent.<sup>175</sup> The Instruments also call for family and community involvement to enable older persons to remain in a supportive and protective environment that preserves their physical and emotional health.<sup>176</sup>

Second, the Instruments call on countries to develop and improve preventative medicine,<sup>177</sup> which would likely reduce and ease the degree of illness of the elderly.<sup>178</sup> The Instruments also prominently highlight nutrition.<sup>179</sup> In recognizing that nutrition is important to health, the Instruments place special emphasis on

171. See Dep't of Econ. & Soc. Affairs, Current Status of Older Persons, *supra* note 1, at 36–48 (discussing the improvement of older persons' health globally in light of the fact that “[a]dvancing health and well-being into old age is among the priority directions of the Madrid International Plan of Action on Ageing”).

172. Dawn Alley & Eileen Crimmins, *Epidemiology of Ageing*, in THE SAGE HANDBOOK OF SOCIAL GERONTOLOGY 75, 75–77, 86–91 (Dale Dannefer & Chris Phillipson eds., 2010) (introducing the relationship between health and aging). For a discussion of the theoretical underpinnings of the interrelation between aging and health, see NANCY R. HOOYMAN & H. ASUMAN KIYAK, SOCIAL GERONTOLOGY: A MULTIDISCIPLINARY PERSPECTIVE 229–43 (5th ed. 1999).

173. See G.A. Res. 46/91, annex, *supra* note 66 (U.N. Principles for Older Persons); G.A. Res. 37/51, *supra* note 58 (Vienna International Plan of Action on Ageing); CESCR, General Comment No. 6, *supra* note 57; General Recommendation No. 27, *supra* note 134; *Madrid International Plan*, *supra* note 83.

174. *Madrid International Plan*, *supra* note 83, at paras. 12(g), 19.

175. G.A. Res. 46/91, annex, *supra* note 66, at Principle 6; G.A. Res. 37/51, *supra* note 58, at Recommendation 22; CESCR, General Comment No. 6, *supra* note 57, at para. 11; General Recommendation No. 27, *supra* note 134, at para. 48.

176. G.A. Res. 46/91, annex, *supra* note 66, at Principles 7, 10, 13; G.A. Res. 37/51, *supra* note 58, at Recommendation 2; General Recommendation No. 27, *supra* note 134, at paras. 23, 46, 47; *Madrid International Plan*, *supra* note 83, at paras. 66(b), 67(e), 75(b).

177. G.A. Res. 37/51, *supra* note 58, at Recommendation 3; CESCR, General Comment No. 6, *supra* note 57, at para. 35; *Madrid International Plan*, *supra* note 83, at paras. 58, 63, 67(a)–(c), 67(h).

178. CESCR, General Comment No. 6, *supra* note 57, at para. 35.

179. See *Madrid International Plan*, *supra* note 83, at para. 68.

assuring that older persons who are poor and who lack means have suitable nutrition.<sup>180</sup> The Instruments also seek to counter the ill effects that result from alcohol consumption and smoking.<sup>181</sup> Some Instruments call for ensuring clean, running water as part of the health requirements,<sup>182</sup> and others require facilitating access to dental care.<sup>183</sup>

A third theme relates to universal and equal access to medical treatments.<sup>184</sup> The soft-law Instruments ascribe importance to providing older persons with medications and access to the medical system.<sup>185</sup> Moreover, they emphasize the weaker populations among older persons: the very old; the ill, especially those with terminal or mental illnesses; and the poor.<sup>186</sup>

### 3. The Council of Europe's Recommendations and the Right to Health

The Committee of Ministers' Recommendations to the states frequently mention the right to health.<sup>187</sup> Section VI of the Recommendations refers to the entire field of older persons' health.<sup>188</sup> It calls upon states to take measures to prevent, sustain, and improve all matters concerning the health of the elderly.<sup>189</sup> It also advises states to enable access to residential and institutional long-term medical treatment,<sup>190</sup> and says that such treatment should ideally "be available within the community to enable older

180. See G.A. Res. 37/51, *supra* note 58, at Recommendation 12; G.A. Res. 46/91, annex, *supra* note 66, at Principle 1; *Madrid International Plan*, *supra* note 83, at paras. 66(e), 68(a)–(i).

181. See *Madrid International Plan*, *supra* note 83, at para. 66(e).

182. See G.A. Res. 46/91, annex, *supra* note 66, at Principle 1; *Madrid International Plan*, *supra* note 83, at para. 68(a).

183. See *Madrid International Plan*, *supra* note 83, at para. 68(g).

184. *Id.* at paras. 69–73.

185. See G.A. Res. 46/91, annex, *supra* note 66, at Principle 13; G.A. Res. 37/51, *supra* note 58, at Recommendation 10; CESCR, General Comment No. 6, *supra* note 57, at para. 35; General Recommendation No. 27, *supra* note 134, at para. 45; *Madrid International Plan*, *supra* note 83, at paras. 68(a)–(f), 74(a)–(g).

186. See G.A. Res. 37/51, *supra* note 58, at Recommendation 4 (discussing old persons suffering from mental disorders, old persons who have failed to adapt to the environment, and the very old); CESCR, General Comment No. 6, *supra* note 57, at paras. 35–36; General Recommendation No. 27, *supra* note 134, at paras. 24, 46; *Madrid International Plan*, *supra* note 83, at paras. 78–81 (discussing expanding access to HIV/AIDS treatment to older persons).

187. See COMM. OF MINISTERS, RECOMMENDATION ON OLD AGE, *supra* note 3, at paras. 18, 29–39.

188. *Id.* at paras. 29–50.

189. *Id.* at para. 29.

190. *Id.* at paras. 40–43.

persons to stay as long as possible in their own homes.”<sup>191</sup> Under the Recommendations, medical treatment should be integrated as much as possible with multidisciplinary therapy that includes both medical and social aspects.<sup>192</sup> All necessary medical care for older persons should be generally accessible.<sup>193</sup> In other words, states should make sure that medical care is not withheld from older persons who cannot afford it.<sup>194</sup>

The Committee of Ministers’ Recommendations also devote a great deal of attention to the general autonomy of older persons—particularly in the context of their medical care.<sup>195</sup> The Recommendations include guidelines to ensure an older person’s right to decide questions about his or her own health care.<sup>196</sup> They also state that older persons will receive medical care only with their consent.<sup>197</sup> If an older person is unable to give his or her consent, that person’s advance directives (if any) should be respected.<sup>198</sup> If, due to a medical condition, an older person is legally defined as incompetent, then treatment will be administered only with the consent of his or her representative.<sup>199</sup> Further, the Recommendations include the right to access residential treatment facilities and palliative care.<sup>200</sup>

In short, soft law Instruments concerning older persons’ rights to health and the Committee of Ministers’ Recommendations are both broader and more comprehensive than the right to health as it is understood by the ECHR. The Instruments seek to apply a comprehensive vision of the right to health. Soft law views the health of older persons as a socioeconomic right that imposes an obligation on the states to invest in, and to create a suitable infrastructure for, its realization.<sup>201</sup> Therefore, older persons should advance these assertions before the Court.

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191. *Id.* at para. 30.

192. *Id.* at para. 31.

193. *Id.* at para. 33.

194. *Id.*

195. *See id.* at paras. 29–50.

196. *Id.* at paras. 36–39.

197. *Id.* at para. 36.

198. *Id.* at para. 37.

199. *Id.* at para. 38.

200. *Id.* at paras. 40–50.

201. *See KOCH, supra* note 154, at 59–60.

B. *Article 8 of the Convention: The Right to Respect for Private and Family Life*

1. The Court's Judgment and Interpretation of the Right to Family Life

The right to family life appears in Article 8, Section 1 of the Convention.<sup>202</sup> The basic obligation, as interpreted by the Court, is that the state must respect and ensure family life, but it does not need to create or administer it.<sup>203</sup> In this sense, no "positive obligation" applies to the state—the state must ensure that the right exists and that its citizens enjoy it, but the Court understands the state's obligations as limited to protecting the right to family life.<sup>204</sup> Thus, for example, the Court rejects the idea that a state must monetarily assist a family to ensure that one of the parents is able to stay at home and raise their children.<sup>205</sup> It held that, instead, a state may meet its obligations to enable family life by providing child care centers.<sup>206</sup>

The Court has also addressed the "normative" family.<sup>207</sup> This Article focuses on the Court's rulings on one aspect relevant to older persons: the intergenerational fabric of the family, namely, grandparents and their family connections. For example, in *Marckx v. Belgium*, the Court cited the role of grandparents,<sup>208</sup> which shows that the Court is aware of grandparents' roles in family life. The ECHR considers grandparents' place in the family fabric and views the state as having an obligation to protect it.<sup>209</sup>

202. European Convention, *supra* note 10, at art. 8, § 1 ("Everyone has the right to respect for his private and family life, his home and his correspondence.")

203. See HARRIS ET AL., *supra* note 10, at 372.

204. *Id.*

205. *Andersson v. Sweden*, App. No. 11776/85, 46 Eur. Comm'n H.R. Dec. & Rep. 251, 252–54 (1986).

206. *Id.* at 253; see HARRIS ET AL., *supra* note 10, at 395.

207. See, e.g., *Boyle v. United Kingdom*, App. No. 16580/90, 19 Eur. H.R. Rep. 179, paras. 8–15 (1993) (allowing an uncle to make an Article 8 claim to contact his nephew after the latter was taken into public care); *Moustaquim v. Belgium*, App. No. 12313/86, 13 Eur. H.R. Rep. 802, para. 45 (1991) (involving an Article 8 challenge based on the effect deportation had on the plaintiff's "family life").

208. *Marckx v. Belgium*, App. No. 6833/74, 2 Eur. H.R. Rep. 330, para. 45 (1979) ("In the Court's opinion, 'family life,' within the meaning of Article 8 . . . , includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life. 'Respect' for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally.")

209. See *Bronda v. Italy*, App. No. 22430/93, 33 Eur. Ct. H.R. 4 (1998) (considering "relations between a child and its grandparents, with whom it had lived for a time"); *Price v. United Kingdom*, App. No. 12402/86, paras. 6–12 (1988), <http://hudoc.echr.coe.int/eng/?i=001-253>.

In a 2011 case, the Court described the Convention's protection of the development of intergenerational family relationships.<sup>210</sup> That case addressed a grandmother's right to a relationship with her granddaughter when that granddaughter was removed from her mother and step-father's custody due to abuse.<sup>211</sup> The Court reiterated that relations between children and their grandparents are "family life" as covered by Article 8 of the Convention and implied that the State has an obligation to allow ties between grandparents and grandchildren to develop normally.<sup>212</sup>

Throughout the years, the Court has held that states are obligated to ensure the maintenance of family life when possible and to defend that right. Because the ECHR has held that the state must ensure the maintenance of "normative" family relations between grandparents and grandchildren, this is another right of older persons enshrined in the Convention.

## 2. Soft Law on Elders' Rights and the Right to Family Life

Research shows that family plays a central role in preserving the place of older persons in society.<sup>213</sup> Moreover, the various international Instruments that address older persons' rights view the family unit as the social context in which the place of older persons should be examined.<sup>214</sup>

For this reason, states and international organizations are called on to enable family life for all older persons; for example, suitable support should be afforded to older persons to enable them to continue living with their families.<sup>215</sup> However, the fabric

210. *M.P. v. Bulgaria*, App. No. 22457/08, paras. 6–15 (Eur. Ct. H.R. Nov. 15, 2011).

211. *Id.*

212. *Id.* at para. 132 ("The Court reiterates that relations between children and their grandparents are covered by Article 8 of the Convention as 'family life' . . . which implies an obligation on the State to allow ties between grandparents and grandchildren to develop normally . . . . The Court considers that just as in the case of relations between parents and children, when facilitating meetings between grandparents and grandchildren the State must take into account the rights and freedoms of all concerned, and more particularly the best interests of the child.").

213. See Dep't of Econ. & Soc. Affairs, *Current Status of Older Persons*, *supra* note 1, at 6–11; U.N. Secretary-General, *Follow-up*, *supra* note 130, at paras. 7–13; Ariela Laowenstein & Ruth Katz, *Family and Age in a Global Perspective*, in *THE SAGE HANDBOOK OF SOCIAL GERONTOLOGY* 190, 195–98 (Dale Dannefer & Chris Phillipson eds., 2010).

214. See G.A. Res. 37/51, *supra* note 58, at Recommendation 25(f); CESCR, General Comment No. 6, *supra* note 57, at para. 7; General Recommendation No. 27, *supra* note 134, at paras. 51–53.

215. General Recommendation No. 27, *supra* note 134, at para. 48.

of the family should be seen as merely one framework for support.<sup>216</sup> Further assistance should be provided to both older persons and families in order to prevent the older person's removal from this fabric.<sup>217</sup>

The Instruments also call for supportive frameworks to be maintained for the population of poor older persons and for those who live alone, whether by choice or due to economic constraints.<sup>218</sup> Further, the Instruments prioritize the rural population due to the disintegration of the family unit,<sup>219</sup> which results when young people depart for cities and older persons are left behind.<sup>220</sup> Older rural women are especially vulnerable.<sup>221</sup> Finally, the Instruments prescribe continuing research on the needs of older persons in the family sphere.<sup>222</sup> Delineating the trends in this area will enable states to properly address the needs of older persons.<sup>223</sup>

### 3. The Council of Europe's Recommendation and the Right to Family Life

The Council of Europe's Recommendations on "Autonomy and Participation" provide a full model of older persons' right to an independent life.<sup>224</sup> According to the Recommendations, older persons have a right to live their lives in an independent manner.<sup>225</sup> Older persons should be given the opportunity to take an active and practical part in social, cultural, and educational

216. CESCR, General Comment No. 6, *supra* note 57, at para. 10.

217. See G.A. Res. 46/91, annex, *supra* note 66, at Principles 1, 10; G.A. Res. 37/51, *supra* note 58, at Recommendation 26; CESCR, General Comment No. 6, *supra* note 57, at para. 31.

218. See G.A. Res. 37/51, *supra* note 58, at Recommendation 29 ("Governments and non-governmental bodies should be encouraged to establish social services to support the whole family when there are elderly people at home and to implement measures especially for low-income families who wish to keep elderly people at home."); CESCR, General Comment No. 6, *supra* note 57, at para. 33.

219. *Madrid International Plan*, *supra* note 83, at para. 29.

220. *Id.*

221. *Id.*

222. *Id.* at para. 44(g).

223. *Id.* ("Initiate research on the advantages and disadvantages of different living arrangements for older persons, including familial co-residence and independent living in different cultures and settings.")

224. See COMM. OF MINISTERS, RECOMMENDATION ON OLD AGE, *supra* note 3, at paras. 9–15.

225. *Id.*

life, which includes having access to professional training.<sup>226</sup> In addition, older persons are entitled to privacy and to a family life; and both of these rights implicate a right to an intimate life.<sup>227</sup>

The Court's interpretation of the rights enumerated under Article 8 of the Convention, and the manner in which these rights are perceived from an older person's point of view, overlaps with the Council of Europe's Recommendations. The Instruments proclaim an interest for the continuous inclusion of older persons in family life.<sup>228</sup> Arguably, when the Court addresses a claim concerning the right to a family life, it will be possible—and even desirable—to bring the Council of Europe's Recommendations before the Court. And, accordingly, older persons could also rely on other soft-law Instruments relating to their rights.

### Conclusion

The ramifications of the availability of soft law concerning older persons' rights are hotly debated. Some believe that soft law obviates the need to produce a special international convention, since soft law already covers a broad variety of the rights of older persons.<sup>229</sup> But others believe that an international declaration, even if non-binding, is necessary to advance rights that are not found in the many documents of soft law.<sup>230</sup>

An examination of soft law in the ECHR reveals an additional facet of this issue: The Court must protect the rights included in the European Convention. However, many of the rights of older persons, such as socioeconomic rights, are protected by the European Social Charter as part of the scope of those universal rights.<sup>231</sup> At the same time, this Article shows a trend whereby the Council of Europe's Parliamentary Assembly, the Committee of Ministers, the ECHR, and plaintiffs before the Court seek to expand the European Convention's impact. As a result, rights are continually expanding.

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226. *Id.* at para. 10.

227. *Id.* at para. 11.

228. G.A. Res. 37/51, *supra* note 58, at Recommendation 26.

229. Doron & Apter, *supra* note 8, at 590–91.

230. *Id.* at 592; see also Barrelli Maru, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous People*, 58 INT'L & COMP. L.Q. 957, 966–72 (2009) (arguing that the non-binding nature of the U.N. Declaration on the Rights of Indigenous People enhanced its universality).

231. European Social Charter art. 23, *opened for signature* Oct. 18, 1961, C.E.T.S. No. 035 (entered into force Feb. 26, 1965) (“The right of elderly persons to social protection.”).



In a reality where international law has not established a hard-law instrument specifically dedicated to the rights of older persons, this Article demonstrates the potential usefulness of the new Recommendations created by the Council of Europe. It is a worthy endeavor to realize the great potential inherent in the soft law of older persons' rights. The existing situation is an optimal starting point towards a more hopeful future for the older population because the soft law on the subject of older persons provides opportunities for constant progress and improvement. Soft law employs a rich variety of means to protect rights, and it therefore holds real potential for change.

It is encouraging that, as shown in this Article, the ECHR is not blind to soft law. Now, effort should be directed at increasing awareness of the practical application of this law to the field of the human rights of older persons. Those struggling for elder rights need to employ the Court. With the Council of Europe's lead, and with the participation of organizations of older persons, awareness of soft-law tools will likely grow among attorneys for older persons. Success before the European Court would realize soft law's potential, whereas neglecting these developments will close the opening that the Court created.

Using soft law in the future will develop elder-law human-rights jurisprudence and will thus ultimately create a binding, hard-law instrument in this developing field of international law.