

International human rights law and older people: Gaps, fragments and loopholes

Introduction

This paper provides an overview of the scope and rigour of the current international human rights framework with relation to respecting, promoting and protecting the rights of older people.

Today, 760 million people are over 60; by 2050, that number will have risen to 2 billion. Older people already outnumber young children (0-4) and will outnumber children under 15 by 2050.¹ This trend is global. Today, 65 per cent of people over 60 live in less developed countries; by 2050, 80 per cent will.² As the global population of older people rapidly expands, so will the number of rights violations against older people unless there is a concerted effort by States to redress the current situation through enforceable obligations.

The impact of advances in health and longevity were not foreseen when the first international human rights instruments were drafted. As a result, older people's rights and State obligations were not explicitly codified. Today, when older people challenge violations of their rights, they must search a fragmented system of generic human rights law and then seek clarification that they are included in the group protected by a particular law.

This is challenging when there are almost no explicit references to older people in international law and the elaboration of soft law over time has failed to meet the most urgent needs of this growing demographic.

Section 1 of this paper explains the international discussion around "gaps", surveys the existing international human rights law landscape and provides an overview of regional documents. Section 2 explores five issues older people face in international law: age discrimination; violence and abuse; the rights to earn income, to social security and to resources; access to justice; and autonomy and independence.

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Section 1: Existing international human rights law

Types of gaps within the current framework

There are different gaps in international human rights law, each of which infringes on the rights of the individuals concerned. The Open-ended Working Group on Ageing³ has identified four types of gaps, which are explained below.

A **normative gap** exists where persistent acts and circumstances depriving a person or people of their dignity are not provided for in existing human rights law. Human rights are intended to formally define the thresholds that identify situations in which human dignity is threatened or violated.⁴ A normative gap exists when there is no such definition or where the definition is inadequate.

An **implementation gap** exists where the rights and obligations are contained within law, but are not wholly translated into national law and practice. This failure may be attributed to, inter alia, a lack of political will to start or maintain the necessary procedures; a conscious or unconscious de-prioritisation of the issue, sometimes through diversion of funds or alleged lack of resources; a lack of visibility of the issue in international or national discourse to provide the impetus for action; or a lack of technical understanding in how to implement procedures to fulfil obligations.

A **monitoring gap** exists where no independent body or mechanism is mandated to ensure States comply with their obligations, thus depriving citizens of their State's accountability and protection for commitments made.

An **information gap** exists where substantive discussions on the rights of older people are inhibited by a lack of disaggregated data and statistics. This prevents an accurate picture of the current situation from being drawn and impacts on the duties of experts and monitoring bodies to draw conclusions and make targeted, specific recommendations.

Existing documents devoted to ageing and older people

The 1982 Vienna International Plan of Action on Ageing is the first international document on ageing, created by the first World Assembly on Ageing, and later endorsed by UN General Assembly resolution 37/51. It is developmental in focus, outlining principles and recommendations on areas such as the family, social welfare, health and income security. General references are made to human rights via reaffirmation of the applicability of the principles and objectives of the Universal Declaration of Human Rights to older people.

The UN Principles for Older Persons were adopted by UN General Assembly resolution A46/91 of 1991. These Principles are preceded by a reaffirmation of faith in fundamental and equal human rights, however, this text is not binding.

The 2002 Madrid International Plan of Action on Ageing (MIPAA) was adopted by the Second World Assembly on Ageing, along with a political declaration. It contains three priority themes: development; health and well-being; and enabling environments. Eliminating age-based discrimination and promoting the human rights of older people are issues that do emerge in this non-binding document. However, as the report of the United Nations High Commissioner for Human Rights to the Economic and Social Council noted in July 2012,⁵ implementation of the Plan of Action "does not systematically consider linkages to the obligations of the State parties under international human rights instruments." Regional action plans have been created, however, monitoring of implementation has been weak. The limited and sometimes non-existent awareness of MIPAA and its limited implementation was recognised by the UN General Assembly in 2011 in resolution 65/182.⁶ Its lack of impact is further evidenced by the fact that only 42 States out of the then 192 responded to the request

for information on its implementation within that same resolution.⁷

Whilst some commitments in the political declaration may reinforce human rights, MIPAA is not a human rights treaty. Governments have no legal obligation to implement any of the recommendations within MIPAA, and there is no independent monitoring mechanism. Moreover, it does not constitute a comprehensive human rights framework and important human rights issues for older people, such as equality before the law, non-discrimination, access to effective remedies, and freedom from torture or other cruel, inhuman or degrading treatment or punishment, are not included.⁸

Why not just improve implementation of existing documents devoted to older people?

Scope and depth: These three plans or principles are the only international documents devoted to ageing and whilst they have moral weight, they have no legally-binding power. Even if States were to implement each recommendation to the letter in good faith, they would not address the full range of specific rights older people require. They do not provide for independent monitoring or accountability mechanisms to assess progress, or an investigatory body for violations and non-compliance. Implementation without stringent monitoring also provides no feedback to further improve programmes. The target population and other stakeholders have no basis to call upon their government to enforce equal treatment and protection with the offerings of these documents.

Legal certainty: Some who oppose the development of new international standards specific to older people's rights have argued that since all human rights are universal, provisions within existing human rights law are applicable to older people, and therefore attempts to further clarify States' obligations are unnecessary. However, for international human rights law to be effectively incorporated and upheld in national law, there must be legal certainty of how human rights obligations apply to different people and in different circumstances. Human rights law has never been comprehensively applied to older

people or the context of ageing. As a result, there is a lack of legal certainty and clarity which threatens the equal protection of older people's rights. Improved implementation of existing policy documents alone will not address this protection gap.

Multiple "gaps": Implementation gaps represent only one type of legal gap facing the world's older people. Addressing one gap and not others could result in any number of problems, including weak legal standards, high theoretical standards that are not put into practice, low levels of accountability, and the inability for dialogue around lessons learned for continuous improvement in levels of progress.

Binding international human rights law and older people

None of the foundational human rights instruments, namely the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), or the International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly prohibits discrimination on the basis of age.

To explore the exact language of those foundational documents in greater detail, UDHR Article 2 states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*" [emphasis added]. Whilst not binding, the UDHR provides the basis, language and moral force for subsequent human rights instruments.

Both the ICCPR and the ICESCR ensure that the rights contained within are applicable to all people "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*" [emphasis added].

Within the subsequent nine core international human rights treaties⁹, only one prohibits discrimination on the basis of age and two mention older people:

- **Articles 1.1 and 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of**

Their Families (ICRMW, 1990) prohibit discrimination on the basis of age.

- **Article 11.1.e of the Convention on the Elimination of All Forms of Discrimination Against Women** (CEDAW, 1979) provides for the equal right of women to social security including in old age.
- **Article 25.b and 28.2.b of the Convention on the Rights of Persons With Disabilities** (CRPD, 2008) require States to provide services to prevent and minimise further disabilities among older people, and to ensure older people with disabilities have access to retirement benefits and programmes. Four other provisions in the CRPD require “age-appropriate” or “age-sensitive” measures for people with disabilities that could be interpreted to include old age, related to access to justice, prevention of abuse, and information on reproductive rights.

Obviously, the rights protected in these treaties are contingent on the older person in question being a migrant or part of a migrant's family, a woman or a person with a disability.

Does the term “other status” provide adequate protection in international law?

Failure to report: A consequence of excluding age from explicit prohibited grounds for discrimination is that States are not prompted to report on the situation of older people. They are therefore less likely to ensure older people are included within national law, programmes or initiatives, or to ensure equality across groups. The UN Secretary General made an analysis of the treatment of older people by Treaty Bodies, concluding that despite the existence of various documents on ageing, such as MIPAA, States “are ‘age-blind’ in their human rights reporting”. He gave as an example the fact that just four of 124 State reports to the Human Rights Committee had made even a passing reference to older people between 2000 and 2008.¹⁰

Lack of redress: Where older people's specific situations are not expressly referenced and their specific rights, needs and challenges are not articulated, older

people face rights violations that deprive them of dignity, integrity of person, security of person and even life, without any recourse to justice or redress.

Selective interpretation and lack of legal certainty: States can selectively interpret “other status,” and therefore their obligations. For example, Pakistan, on behalf of the Organisation of Islamic States, objected to the holding of the first UN panel on sexual orientation and gender identity during the 19th Session of the Human Rights Council in March 2012. Since sexual orientation was not codified in the UDHR and subsequent treaties, they argue it has no legal foundation and any attempt to create new standards would be a misinterpretation of human rights law. A letter sent to the President of the Human Rights Council makes clear that the Organisation of Islamic States was:

“seriously concerned at the attempt to introduce in the United Nations concepts that have no legal foundation in any international human rights instrument. The international community only recognizes those right [sic] enumerated in the Universal Declaration of Human Rights which were codified in subsequent international legal instruments. We note with concern the attempts to create controversial “new notions” or “new standards” by misinterpreting the Universal Declaration of Human Rights and international treaties to include such notions that were never articulated or agreed to by the UN membership.”¹¹ This line of argument could be applied to the rights of older people. Codification into international law would ensure legal clarity and limit the possibility of selective interpretation.

Examination of Special Measures to ensure older people's full enjoyment of human rights

Where laws treat individuals and groups equally, there may still be problems with implementation of those laws, i.e., a de facto situation of inequality. When groups face particular obstacles to enjoying their rights on an equal basis with others, temporary special measures may be provided in international human rights law for the specific purpose of bringing about equality between groups. Without explicit

protection of older people's human rights, any attempt for a State to remedy historical and structural violations faced by older people would leave it vulnerable to claims of discrimination by competing groups.

As an example, Article 3 of the CEDAW states that State parties "shall take...appropriate measures" to ensure the development and advancement of women, and Article 4.1 confirms that "temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination". Special measures are also provided for in several articles in the CRPD, and within Articles 1.4 and 2.2 of the Convention on the Elimination of Racial Discrimination (CERD).

Treaties that only implicitly include older people do not provide solid footing for State parties to address older people's rights through special measures. The UN Secretary General has remarked that the lack of special measures to ensure equality for older people is a major area of concern with regard to ageing.¹²

In General Comment 6 of the Committee on Economic, Social and Cultural Rights¹³, the Committee notes that "respect for the rights of older persons requires special measures to be taken." Withstanding the somewhat weak language of calling for the "respect" rather than promotion, protection or advancement of human rights in instruments of human rights law, this provision is further hollowed of its weight and potential impact because it is non-binding. This is especially so when compared to ICESCR Article 10.3 which provides for special measures of protection and assistance for children and young people with respect to working conditions, and even invokes an age limit below which young people should be prohibited from working.

Does the Convention on the Rights of Person with Disabilities sufficiently protect older people's rights?

The CRPD is insufficient to protect older people without disabilities who may seek to vindicate their right to be free from discrimination.

Many older people do undergo some deterioration of physical or mental

capacities leading to disability. In this context, the CRPD Article 1 will apply to them since it applies to "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

However, long-standing social conceptions of age impact how older people are treated regardless of capacity. Examples include: upper-age limits on jobs that discriminate against individuals without reference to abilities; age is often a key factor in the distribution of information, for example, that related to HIV and AIDS; age can influence whether ambulances are dispatched, whether medical treatment is provided, or whether crimes will be prosecuted or even investigated. The CRPD does not protect older people in these situations, nor was it designed to.

Soft law provisions on the rights of older people

Soft law refers to law that is non-binding or enforceable, but expresses the views of the issuing Treaty Bodies or Special Procedures.

General Comments and Recommendations

Treaty Bodies that monitor the implementation of Treaties have affirmed some rights of older people in General Comments or General Recommendations. These are seen as guides to the reading of the binding provisions contained within the Treaties and enunciate each Treaty Body's interpretation of particular issues as they affect certain older people.

In 1995, the Committee on Economic, Social and Cultural Rights (CESCR) devoted its General Comment No. 6 to the economic, social and cultural rights of older people. From that point, the CESCR issued a further nine General Comments making at least passing reference explaining state obligations to ensuring different rights relevant to older people. General Comment No. 6 was described in the April 2012 report of the High Commissioner for Human Rights to the Economic and Social Council as offering "the most comprehensive guidance on older persons on rights such as the right to health, an adequate standard of living

including food and housing, to work and to social security".¹⁴ In addition, in 2007, its General Comment No. 19 addressed social security in old age.

Within a list of places where people live under custody or control, the Committee against Torture noted in its General Comment No. 2 (2008) that institutions that care for older people fall within the definition of places of detention in which State parties have obligations to prohibit and redress torture and other cruel, inhuman and degrading treatment and punishment.

In 2010, the Committee on the Elimination of Discrimination against Women drafted General Recommendation No. 27 on the gendered nature of ageing and disproportionate impact of discrimination against older women. Three other CEDAW Committee General Recommendations include paragraphs on particular needs and vulnerabilities of older women. These provide valuable insight into the CEDAW Committee's interpretation of the Convention.

Special Procedures

In addition, two Special Procedures mandate holders have in recent years drafted reports which explicitly address older people within the context of their mandate. In 2010, the Independent Expert on the question of human rights and extreme poverty presented a report to the 14th Session of the Human Rights Council on older people and social security.¹⁵ In 2011, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health drafted a thematic study on the realisation of the right to health of older persons. This report was presented to the 18th Session of the Human Rights Council.¹⁶

What are the limitations of soft law?

Non-binding nature restricts impact:

Special Procedure reports provide recommendations to States and General Comments and General Recommendations are guides to interpretation only. Neither form is cited frequently on its own. Their non-binding status is however regularly cited by States parties.¹⁷ As advisory

documents, their capacity to have a broadening impact is limited.

Information gap: Without the power to compel States to collect better information, many of the CEDAW Committee's references to older people during State reviews were actually referring to the existing information gap, noting that the State had provided little or no data on the status of older women or requesting better information on older women.

These findings are not restricted to the Treaty Body mechanisms themselves. The Universal Periodic Review process referred to older people only 31 times out of 21,353 recommendations made during the entire first round of reviews from 2008-2012, and where they are mentioned, it is often within a long list of other vulnerable groups.¹⁸

Lack of a systematic and

comprehensive approach: As the UN General Secretary has noted, "existing human rights mechanisms have lacked a systematic and comprehensive approach to the specific circumstances of older men and women".¹⁹ No amount of soft law on older people's rights, drafted and adopted at different points in time and focusing on different thematic issues, can create the systematic and comprehensive approach necessary to protect the specific circumstances of older men and women.

Regional human rights mechanisms

Some States are bound by provisions relating to older people in regional texts that they may have ratified.

The **American Convention on Human Rights** (1969) prohibits capital punishment for people under 18 or over 70. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador, 1988) provides for the right to social security in old age, and special protections (facilities, food and medical care) in old age.

The **African Charter on Human and Peoples' Rights** (1981) articulates special protection for older people. Its Protocol on the Rights of Women in Africa (2003) articulates special protection for older

women and their right to freedom from violence and abuse.

The **Arab Charter on Human Rights** (1997) articulates State responsibility for “outstanding care and special protection” for older people.

The **Charter of Fundamental Rights of the European Union** (2000) prohibits age-based discrimination, respects the right of older people to live a life of dignity and independence and to participate in social and cultural life and also articulates the right to social security in old age.

Other regional human rights texts, binding and non-binding, on older people are forthcoming:

- The Working Group on Older Persons and People with Disabilities in Africa, of the African Commission on Human and People's Rights is drafting a protocol to the African Charter that is currently under discussion.²⁰
- The Organization of American States has prepared a draft convention on the human rights of older persons with formal negotiations on the text starting September 2012.²¹

The Steering Committee for Human Rights (CDDH) of the Council of Europe has created a new drafting group (CDDH-AGE) to elaborate a non-binding

instrument on the promotion of the human rights of the elderly.²²

Why don't we just strengthen regional bodies?

Lack of protection for all: There are no regional texts devoted to or containing older people specific provisions that cover all of Western Asia and Asia-Pacific, even though 59 per cent of all older people in the world reside in Asia-Pacific alone.²³ Relying on regional human rights instruments means that over half of the world's older people would not be protected.

Increasing the depth and strength of comparative law: By clarifying a class of rights within a piece of international legislation, provisions and decisions can be compared, thus further strengthening jurisprudence across continental boundaries.

Undermining universality: Regional human rights instruments can complement international human rights standards. However, development of regional instruments in the absence of international standards upon which those regional instruments can be based has resulted in different standards and legislation across regions that undermines the concept of universal human rights.

Section 2: Key issues

The aim of this section is to provide some illustrative examples in support of further discussions around older people's rights. This exploration is by no means exhaustive and the five legal issues highlighted are interrelated with each other.

Key Issue 1: Age Discrimination in its multiple forms

Manifestations of discrimination in old age

Discrimination underpins many human rights violations faced by older people.²⁴ Despite this, age discrimination has been ignored by nearly every human rights instrument to date.²⁵ Age is a social construct as much as it is a numerical category. Stereotypes and negative attitudes can manifest themselves through exclusion, marginalisation, isolation, and abuse in many forms. Structural barriers and legal barriers to older people's enjoyment of equal rights are reinforced by these patterns. The discrimination and mistreatment older people face is something that affects every aspect of their lives²⁶ and requires greater clarification in international human rights standards.

For example, the Human Rights Committee has found that age ceilings within the framework of the right to work can be permitted if "objective and reasonable".²⁷ Without clearer international human rights standards, employers can continue to claim that applying upper-age limits to recruitment and employment without regard for abilities is "reasonable".

The discrepancy between anti-discrimination legislation in many countries and the reality of exclusions in the field of housing that affects older people is not clarified in international human rights law. This normative gap has significant impact on the lives of older people.

In addition to evictions there are many situations where older people are forced from their homes by family or guardians. Throughout the world, they are sent to live with family or institutionalised against their will. In cases of financial abuse, extortion

based on undue influence or unnoticed financial deceit can bankrupt and threaten an older person's tenure.

Discrimination is further evident in access to information. Older people in South Africa, for example, have been denied access to information on HIV making it harder for them to protect themselves or children and others in their care.²⁸ In Tanzania, older people have been refused access to HIV testing services.²⁹

Older people's right to adequate health is impacted by age discrimination, for example, through restricted access to health insurance. A 2011 study of Age Platform Europe found inflated prices for health insurance policies for older people.³⁰ Cases included companies operating with age limits as low as 59 years. Without clearer international human rights standards, insurance companies could claim it is reasonable and justifiable to increase premiums for older people who are more liable to injury or accident.

CRPD Article 25.e prohibits discrimination against people with disabilities in the provision of health insurance. This provision however does not protect older people who do not have a disability from age-based discriminatory practices by insurers.

Multiple or aggravated discriminations

Older people face the same discriminations they have experienced for their whole lives: discrimination based on marital status, sex, disability or race. However, in old age, people experience both the accumulated effects of these discriminations and the additional discrimination of old age.

Older women: Older women, for example, have earned disproportionately low income over their lifetime due to discrepancies in education, time out from the formal labour force to care for children, and prevailing gender discrimination. They are thus likely to be the poorest of the poor. In addition, they are also likely to have worked in the informal sector, or have undertaken unpaid work without access to institutional benefits such as pensions or health insurance. On top of this, married older women are likely

to outlive male spouses, and therefore receive less support. Security of tenure is a major concern for older women who have been found to be more likely to be subject to evictions than any other group.³¹

Minorities: People of racial and ethnic minorities undergo disproportionate challenges to enjoying their fundamental rights. Older Roma men and women, for example, face marginalisation, limited access to public information and lower standards of care in hospitals.³²

LGBT: Older people who identify themselves as being lesbian, gay, bisexual, or transgendered can encounter anti-homosexual attitudes that can aggravate the discrimination older people experience. Older LGBT people may face particularly heightened risk of abuse and neglect in institutional settings, or isolation from a partner and supportive communities. Eligibility for benefits or access to pensions or property inheritance are often denied to same-sex survivors.

The CRPD is the first treaty that directly deals with “multiple and aggravated grounds of discrimination” in its preamble. It is the only human rights treaty to provide provisions on age discrimination related to access to justice (Article 13), abuse (Article 16), health (Article 25) and social protection (Article 28), though not all references are directed toward old age discrimination and the above categories of older people who face multiple discrimination are not covered under these provisions unless they also have disabilities.

Key Issue 2: Violence and abuse

Different forms of violence and abuse

The UN Secretary General has cited violence and abuse against older people as a priority concern.³³ However, older people continue to suffer physical, emotional, psychological, financial and sexual abuse without adequate remedy in national or international law. The rights of older people to security of person and to life are provided for in the ICCPR and the Universal Declaration of Human Rights. However, this does not adequately describe all forms of violence and abuse that older people suffer.

Abuse within institutional settings

Vulnerability whilst in detention facilities and psychiatric institutions has been underlined by the Special Rapporteur on torture and other cruel, inhuman and degrading treatment and punishment, although the illustrative cases cited are neither related to older people nor to forms of detention outside of criminal procedures.³⁴ The Committee against Torture has stated however in General Comment No. 2 that States must also prevent torture and other ill-treatment from occurring in a list of places which included care institutions.³⁵

Sedatives are known to have been given to older patients to minimise stress or workload of staff or under the guise of medication in the best interests of the older person. A 2007 study found chemical restraints such as anti-psychotic medications are given to 21 per cent of nursing home residents in the US without diagnosis of a psychotic condition.³⁶

Extortion and other financial abuse can occur when an older person is assisted by carers to make decisions. There is little in international human rights law that identifies this type of abuse.

In other situations in which people are detained against their will, relevant international law has created binding requirements for States to introduce and maintain monitoring mechanisms. The UN Subcommittee on Prevention of Torture which monitors the Optional Protocol to the Convention against Torture requires States, in Article 17, to create and maintain National Preventive Mechanisms to monitor places where people are deprived of their liberty. These places should include care homes, but from its eight published reports, not a single visit has been made yet to a care home for older people – evidence of a severe implementation gap at international level.

Abuse in the home

Older people who live with family members are particularly vulnerable to abuse and violence because of the challenges they face in lodging complaints in the first place. Complaints and support systems are often not in place in such informal systems. Fear of retaliation or loss of a needed but abusive family member may keep older people from

reporting abuse. An abuser may also withhold information and access to outside information and communications. Informal carers can be supported to refrain from violence and abuse through education, support or counselling, respite and paid or compensated leave, although there are no such provisions in international law.

Lack of information and monitoring

A critical information gap exists because there is a lack of data disaggregated by age beyond a certain level. Data on violence against women is rarely collected after the age of 49. There is also a lack of data on violence and abuse because reporting incidents or lodging complaints is often challenging when the older person is dependent on the person committing the abuse, whether it be in a home or institutional setting. Several non-binding instruments have requested better data on older people (eg the Madrid International Plan of Action on Ageing) but adherence has been low.

Without the obligation to establish and maintain independent monitoring mechanisms, preventing violence and abuse is all but impossible. A provision similar to that of Article 33 of the CRPD would vastly improve the prospects for justice among older people and reduce the monitoring gap.

Palliative care

Denying palliative care with its capacity to prevent pain that could be considered torture, is not a form of abuse limited to older people but one by which they are disproportionately affected. The right to palliative care is largely invisible in international human rights law. Palliative care has only been included in three Concluding Observations, none of which relate to older persons.³⁷ In his report to the 18th Session of the Human Rights Council, the Special Rapporteur on the right to health noted that care-providers who de-prioritise palliative care could be acting in a discriminatory way: "Age-based discrimination that is sanctioned on the basis of risk/benefit profiling cannot under any circumstances be considered appropriate in the context of palliative care, which aims to improve quality of life, rather than its length."³⁸

It is evidence of an implementation gap fuelled by discriminatory practices that older people are routinely denied palliative care as well as an information gap since denial of such medical care is rarely reported. It is a normative gap that international law denies redress for this violation.

Key Issue 3: The rights to earn income, to social security, and to access to resources

Right to earn income

An older person's right to work is not an issue solely restricted to legislative age ceilings. The right to work for older people is impacted by the fulfilment of other rights, such as the right to education. The right to education is recognised internationally and explicit provisions are made and underlined for other sectors of the population including children, women, and people with disabilities who are provided with extra protections and special measures.³⁹ These provisions do not provide lifelong learning opportunities for older people without disabilities and yet, because of new technologies, career pauses, and other factors interrelating with discrimination and stereotypes, older people are a sector of the population whose rights to education and right to work could be better enhanced through dedicated standards.

Right to social security

The right to social security is enshrined in ICESCR Article 9 and UDHR Article 22, with related provisions in ICESCR Article 11. It encompasses the right to access and maintain benefits for loss of work-related income, insufficiency of funds for health care access, and insufficient family support for dependent adults. CESCR's General Comment No.19 provides non-binding guidance and focuses on the right to social security. The Committee underlines that States need to take "appropriate measures" to provide benefits to older people including non-contributory pension schemes where resources are available.

However, whilst the responsibility of the State to ensure everyone has access to social security is clear in international human rights law, some regional human rights law places the burden of social security on the shoulders of offspring.⁴⁰

There are a number of reasons why this fails to guarantee social security to all older people. Older people may not have living children, or children may migrate or children may be unable to fulfil their duty due to their own poverty.

Evidence of an implementation gap is clear; according to the UN High Commission for Human Rights, "80% of the world's population, many of them older persons – lack access to any kind of social security."⁴¹

Access to resources

Access for older people to loans, insurance, land, rent, and grants for academic projects is often denied or provided for with prohibitive conditions. The CRPD provides for greater access for people with disabilities to lifelong learning opportunities, information, multimedia, buildings and other infrastructure, public facilities and other services, as does the CRC provide for greater access to information, health and legal services for children. Similar provisions would significantly impact on older people's lives.

Older people also face particular challenges in accessing resources in emergency situations with devastating impact. Sixty per cent of flood-related deaths from Hurricane Katrina were among people 65 years or older.⁴² Older people are unable to compete for access to aid and assistance on a same level as younger people especially when it is delivered through food-for-work initiatives or long queues. Often, older people are not registered as they are unable to present themselves for different reasons at the earliest moment. The needs assessments of a great number of aid agencies have been found to lack an ageing perspective which could be avoided with better international oversight.⁴³ The safety and protection of people with disabilities in situations of emergency are ensured in CRPD Article 11, but these provisions do not extend to older people without a disability.

Key Issue 4: Access to justice

Older people have the right to equal treatment before the law and to equal access to institutions and due process, including legal services.⁴⁴

Access to information

Older people need information on their rights, processes to bring complaints, and judicial systems that recognise their equal value and specific needs. However, obstacles to accessing information for older people exist not only for those with disabilities but also for those who have no impairment. A survey in Tanzania found that only 8 per cent of older women and 39 per cent of older men were aware of their rights under the law.⁴⁵

New and rapid advances in technology can result in denial of access to information. Obligations to ensure that information and methods of applying for redress or placing complaints are available in a variety of methods, including in printed copies or by telephone, are lacking for older people.

Access to the judicial system

The complexity, length, language of, and access to proceedings can impact an older person's decision to seek justice. Age-specific provisions for access to justice in international law leave little guidance for improvement, aside from the provision in the CRPD for "procedural and age-appropriate accommodations" which could apply to older people with disabilities.

Currently, States receive no guidance from international law on age levels for jurors. Some States including Italy, England and Wales have upper-age limits on jurors. This discrimination not only denies older people from acting as jurors without regard for capacity but also limits ageing perspectives from court decisions.

Older people in prison

Older people's rights and how they may be provided for whilst in prison remain unaddressed in international human rights law, including in the non-binding UN Standard Minimum Rules on the Treatment of Prisoners.

Gaps include obligations for States to provide particular care to older people that is specific to their personal needs, such as provisions for extra clothing, mobility arrangements, protection from violence and extortion, age appropriate education and vocational opportunities, access to information and access to complaints mechanisms. Mental health care on the

basis of age and not on existing mental disability could be a consideration since the propensity for older people to suffer mental problems later on as a result of being incarcerated at a late age is higher.

A 2012 report by Human Rights Watch, "Old Behind Bars: The Aging Prison Population in the United States",⁴⁶ outlines some of the observed obstacles to safe confinement. From reaching the top bunk bed, to victimisation by younger prisoners, this group faces assaults to their dignity on a daily basis.

In addition, it states, "For prisoners who no longer pose a public safety risk because of age and infirmity, and who have already served some portion of their prison sentence, continued incarceration may constitute a violation of their right to a just and proportionate punishment."⁴⁷ The High Commissioner for Human Rights has reported that "alternative forms of punishment may be preferable based on the financial, practical, and human rights considerations involved" in older people's incarceration.⁴⁸

Re-entry into society for older people in prison is an area requiring greater consideration by independent international bodies, not least in light of the multiple forms of discrimination faced by the older individual, and subsequent limited access to employment, combined with other factors such as limited savings or pensions.

Key Issue 5: Autonomy and Independence

The varying degrees of dependence many older people experience has often only been seen through a lens of provision of benefits and welfare, but their autonomy is also a component of efforts required to ensure the fullest enjoyment of rights across the life course. People do not lose the full panoply of their rights as they grow older. CRPD Article 14.1.b states that the existence of a disability does not justify deprivation of liberty, and nor should old age.

Autonomy and institutional care

Prevailing unchecked discrimination allows for older people to be denied the right to "the opportunity to choose their place of residence ... not obliged to live in a particular living arrangement," as persons

with disabilities are guaranteed in CRPD Article 19. Older people's rights in this area, especially older women's who face higher rates of institutionalisation than men, have not been adequately addressed by human rights instruments.⁴⁹

Older people are often challenged to retain their rights to make decisions, participate in public life, ensure the right to their family life, choose daily activities and create new personal relationships. These challenges are magnified by institutionalisation. As a court in the UK found, an absence of locks in the door does not mean that a person is not being forcibly detained.⁵⁰

Respect and protection of the family and freedom from interference in private or family matters is captured throughout international human rights law, not least within ICESCR Article 10, ICCPR Article 23, as well as throughout the CRPD, CEDAW, the ICRMW and the UDHR.

However older people face challenges to realising these rights and lack of attention to this area is evidence of an implementation gap as well as a failure to appreciate how these rights apply in the context of old age. These challenges include the care provider restricting numbers, lengths and types of visits, or a lack of resources and provisions within a home to ensure, for example, that couples can share a room, that there are double beds to permit privacy for couples, or to allow for conjugal visits. In addition to resources, age-discrimination can impact on whether staff permit private visits or permit older couples to engage in personal and sexual relationships with other residents.

Autonomy and forced institutionalisation

The ICCPR⁵¹ protects institutionalised individuals such as those in hospitals and nursing homes by recognising the right to government protection from and remedies for the violence of private actors⁵² and requiring judicial remedies for violations.⁵³ With these safeguards, patients and residents of institutions, many of whom are older, have de jure recourse. Without proper oversight and regulation, States turn a blind eye to their responsibilities to these citizens.

Autonomy and home-based care

Older people are more likely to be cared for in their communities and homes than in institutional settings, and as such can maintain a degree of autonomy and independence because of the care provided to them by informal carers, including family members, volunteers and the charity sector. CESCR General Comment No. 6 is cited as providing the most comprehensive guidance for aspects relating to home-based care such as the right to health, adequate standard of living, food and housing.⁵⁴ Even so, it addresses only a limited range of issues of welfare and protection. It is non-binding, and does not look into issues such as access to justice, discrimination, access to information, active participation in political life, and no specific mention is made of psychological well-being.

There is no guarantee that older people's rights are always respected within the home. Abuse is less likely to be visible because of a general absence of independent monitoring mechanism. In addition older people in violent and abusive situations may face particular challenges to making a complaint or seeking help. With existing systems and laws to protect older people, the onus for reporting violations and managing the consequences is therefore placed on the dependent older person facing abuse.

Two key international treaties reference staff training, however neither provides adequate protection for older people. CAT Article 10 applies to education on treatment of anyone in any form of detention; and Article 11 states that methods, practices and arrangements for the detention of individuals should be kept under systematic review. CRPD Article 4.1.i imposes a general obligation to promote the training of professionals and staff working with people with disabilities, which would cover any official carer of an older person with a disability. The CRPD only obliges training for "professionals and staff" which does not cover older people who are themselves carers, nor informal carers, family members or volunteers.

Conclusion: the way forward

This overview is by no means an exhaustive exploration of the unique ways the international human rights system has failed older people around the world.

Nonetheless, it is evident that history has created a porous shield of protection for older people against different types of abuses. Current international human rights law fails to clearly define and provide for persistent acts, circumstances and institutional factors that currently deprive older people of their dignity and this has resulted in the current protection gap.

Whilst a range of options are available for creating new human rights instruments to address this, it is evident that no amount of soft law on older people's rights, drafted and adopted at different points in time, focusing on different thematic issues and across different bodies, can create the comprehensive framework necessary to protect the specific circumstances of all older women and men.

This leads to the conclusion that the most effective way to address this protection gap is through the systematic articulation of how human rights apply in the context of old age and to older people in legally binding standards dedicated to the rights of older people.

Notes

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- ⁴ McInerney-Lankford S and Sano H, *Human Rights Indicators in Development: An Introduction*, Washington, D.C., World Bank, 2010
- ⁵ Report of the United Nations High Commissioner for Human Rights (E/2012/51), April 2012, pursuant to General Assembly resolution 48/141
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- ⁷ Submissions to the Secretary - General report, GA res. 65/182, <http://www.ohchr.org/EN/Issues/OlderPersons/Pages/Submissions.aspx>
- ⁸ Report of the United Nations High Commissioner for Human Rights (E/2012/51), April 2012, pursuant to General Assembly resolution 48/141
- ⁹ The nine core international human rights treaties are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CED) and the Convention on the Rights of Persons with Disabilities (CRPD).
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- ¹¹ The letter dated February 14 2012 can be accessed at <http://www.unwatch.org/atf/cf/%7B6deb65da-be5b-4cae-8056-8bf0bedf4d17%7D/OIC%20TO%20PRESIDENT.PDF>
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- ¹⁵ Sepúlveda M, *Report of the Independent Expert on the Wuestion of Human Rights and Extreme Poverty*, A/HRC/14/31, 2010
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- ¹⁸ Word searches and analysis were undertaken on the database of UPR-info, <http://www.upr-info.org/database/> (Accessed July 2012)
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- ²⁰ See <http://www.achpr.org/mechanisms/older-disabled/>
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- ²⁴ Discrimination is defined as "any distinction, exclusion or restriction which has the purpose or the effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of the human rights and fundamental freedoms in any field", *Report of the United Nations High Commissioner for Human Rights to the UN Economic and Social Council*, E/2012/51, April 2012
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- ⁴¹ *Report of the United Nations High Commissioner for Human Rights*, E/2012/51, April 2012, p13
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HelpAge International helps older people claim their rights, challenge discrimination and overcome poverty, so that they can lead dignified, secure, active and healthy lives.

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