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Strengthening the Rights of Older People Worldwide: Building Greater European Support

This paper provides background to the conference organised by HelpAge Deutschland and HelpAge International, in Osnabrück, Germany, on 5-7 December 2012. The conference seeks to generate greater political support in Europe for new international human rights instruments specifically for older people.

The year 2012 is a critical one for the rights of older people. It is the European Year of Active Ageing and Solidarity between Generations; the Madrid International Plan of Action on Ageing (MIPAA) is undergoing a 10-year review; and regional instruments on older people's rights are being drafted at the Inter-American, African and European levels. At the international level, the Open-ended Working Group on Ageing (OEWG), has now met three times. This is the first and only UN Member State forum dedicated to identifying gaps in the protection of older people's rights under existing human rights law and discussing the need for new instruments to fill these gaps.

A consensus has emerged that older people's rights have been neglected and that action needs to be taken to address this. Even so, there is still no consensus among UN Member States about the best course of action to take. Strong support for an international convention and a UN special rapporteur on the rights of older people has emerged primarily from Latin American Member States, and support is growing among African and Asian Member States.

The general position of European Union Member States, however, is that there is no need for new human rights instruments and that existing mechanisms need to be better implemented. It is critical that the position taken by European Union Member States is informed by, reflects, and responds to the reality of the lives of older women and men around the world. However,

there has been little engagement of older people, civil society and other actors in this debate within Europe.

The conference, *Strengthening the Rights of Older People Worldwide: Building Greater European Support*, will contribute to that debate.

Today, 760 million people are over 60; by 2050, that number will have risen to 2 billion.¹ As the global population of older people rapidly increases, so will the number of rights violations against older people unless there is a concerted effort by States to redress the current situation.

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.

This paper explains the international discussion around "gaps", explores existing international human rights law, and outlines possible solutions.

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 OEWG² has identified four types of gaps:

- 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.
- An **implementation gap** exists where the rights and obligations are contained within law, but are not wholly translated into national law and practice.
- 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.

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 social welfare, health and income security.
- **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, and later endorsed by UN General Assembly resolution 57/167. It contains three priority themes: development, health and wellbeing, and enabling environments.

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 while they have moral weight, they have no legally-binding power. Even if States were to implement each recommendation to the letter, these existing documents 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. 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 within 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 these 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]. While 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 nine core international human rights treaties,³ 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 recognised that States “are ‘age-blind’ in their human rights reporting”, citing the fact that just four of 124 State reports to the Human Rights Committee between 2000 and 2008 had made even a passing reference to older people.⁴

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.⁵

Lack of redress: Where older people’s specific situations are not expressly referenced and their specific rights not articulated, older people face rights violations 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, argued that since sexual orientation was not codified in the UDHR and subsequent treaties, it has no legal foundation and any attempt to create new standards would be a misinterpretation of human rights law.⁶ 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.

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, ie, 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.

For example, Article 4.1 of the CEDAW confirms that “temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination”.

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.⁷

Does the Convention on the Rights of Persons 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 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 on 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. 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.

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.⁸ In 2011, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health presented a thematic study on the realisation of the right to

health of older persons to the 18th Session of the Human Rights Council.⁹

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.¹⁰ As advisory documents, their capacity to have a broadening impact is limited.

Lack of a systematic and comprehensive approach: As the UN Secretary-General has noted, “existing human rights mechanisms have lacked a systematic and comprehensive approach to the specific circumstances of older men and women”.¹¹ 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 articulates the right to social security in old age.

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

- The Working Group on Older Persons and People with Disabilities in Africa, of the African Commission on Human and People's Rights has drafted a protocol to the African Charter that is currently under discussion.¹²
- The Organization of American States has prepared a draft convention on the human rights of older persons. Formal negotiations on the text started in September 2012.¹³
- 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 older persons”.¹⁴

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.¹⁵ 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.

The options? Potential human rights instruments on the rights of older people

A new UN convention on the rights of older people

A UN convention would:

- Be legally binding upon States on ratification.
- Provide governments with a legal framework, guidance and support to help them protect and promote older people's rights in our increasingly ageing societies.
- Oblige governments to adopt non-discriminatory laws to protect against age discrimination.
- Require governments to collect data on all age groups and disaggregate all data by age and sex.
- Encourage governments to roll out national campaigns to eradicate discrimination against older people. Taking proactive steps to ensure older people are treated in a dignified and respected manner can change negative stereotypes and attitudes that lead to discrimination.
- Have the power to call for the creation of national monitoring mechanisms which could further support and monitor government policies to improve realisation of older people's rights.
- Require governments to maintain focus on this group through the periodic submission on the situation of older people to the Treaty Body that monitors compliance.
- Mainstream and ensure visibility of older people across human rights bodies.
- Have the capacity to address emerging concerns around older people's rights that arise in the future through the drafting of General Comments or General Recommendations by the Treaty Body.
- Generate recommendations and guidance, which civil society can work alongside governments to implement.
- Guide human rights organisations and civil society to understand and work toward better implementation of older people's human rights in their programmes.

A UN convention would not:

- Impact on the lives of all older people without the goodwill and support of each government. A convention would only be as good as the intentions of the States and other actors making it real in the lives of older people. Though legally binding, there are limitations to how far it could be effectively enforced. Firstly, it would require the ratification and subsequent goodwill of the State to comply with its obligations. Secondly, the language of human rights conventions usually offers States some margin of discretion to choose measures to implement them. Thirdly, there are no effective sanctions for non-compliance with those obligations. Finally, many States fail to submit their reports on time and the only recourse normally available to Treaty Bodies is to provide information regarding non-submission to the General Assembly.

A new Special Procedure on the rights of older people

A Special Procedure would:

- **Be a thematic special rapporteur or working group** appointed by the Human Rights Council.
- **Be able to make country-specific visits** to discuss the situation of older people.
- **Be able to make country-specific recommendations** as a result of both country visits and investigated complaints which, in collaboration with governments, could create significant positive national legislative or policy change.
- **Elaborate on and consolidate knowledge of current understanding** around older people's rights, presenting information to the General Assembly and Human Rights Council.
- **Draft thematic reports** with non-country specific recommendations and observations that would help to build norms and consolidate international customary law on the rights of older people.
- **Receive and respond to urgent concerns** from civil society organisations.

A Special Procedure would not:

- **Generate legally binding recommendations** and so implementation depends on State goodwill.
- **Be able to make more than one to three visits** to different States each year.
- **Be granted access to a country** unless the State agrees to the visit.

A UN Declaration on the rights of older people

A UN Declaration would:

- **Be an international gesture of solidarity** with older people and validate their concerns that their particular challenges to full enjoyment of their rights are neither well-articulated nor understood.
- **Have the potential to outline in general terms the norms and standards governments should adopt** in relation to the rights of older people beyond the current appreciation of them being part of "other vulnerable groups".
- **Have the potential to be cross-referenced by Treaty Bodies.**⁴

A UN Declaration would not:

- **Be legally binding** and therefore provide no additional obligation or incentive for implementation beyond the current documents devoted to ageing and older people, such as the UN Principles for Older Persons and the Madrid International Plan of Action on Ageing.
- **Further articulate State obligations.**
- **Provide governments with specific guidance or outline obligations in detail.** Declarations are often very general in scope. The impact on older people will be negligible without significant efforts by civil society groups and very pro-active governments.

Mainstreaming older people's rights in Treaty Bodies via General Comments

Mainstreaming would:

- **Result in a higher number of requests for better data** from States regarding older people. More request for data may encourage States to be more holistic in their approach to national data gathering and analysis, and create the possibility of showing improvements.
- **Result in the Treaty Body committee members themselves being more sensitive** to violations of the rights of older people, building their understanding and leading to a more nuanced approach.
- **Generate short explanatory texts** on specific issues related to older people.
- **Increase the visibility of older people in human rights texts.**

Mainstreaming would not:

- **Create a text that is considered to be legally binding by States.**
- **Create a consolidated text that articulates clearly and comprehensively States' obligations** and responsibilities.
- **Be guaranteed to be a priority by Treaty Body committees** who may not have the capacity or will to draft the text and have it adopted.
- **Be written by experts** who have a strong understanding on ageing issues.
- **Guarantee that older people's rights would be significantly better mainstreamed across other human rights bodies and mechanisms,** such as the Universal Periodic Review.

An Annual Day of Discussion in the Human Rights Council on the Rights of Older People

An Annual Day of Discussion would:

- **Make a public demonstration of commitment** from the international community to realising the rights of older people and provide appropriate space in the agenda to underscore the importance of ageing issues in the human rights field.
- **Build from the 2010 preliminary working paper on ageing and human rights by the Human Rights Council Advisory Committee (A/HRC/AC/4/CRP.1)** which noted that "there must be a systematic and comprehensive mechanism to protect the rights of older persons at the international level". No further consideration of this report has been made.
- **Provide a regular forum** for independent experts to provide research and advice to Human Rights Council Members and other interested States.
- **Generate thematic studies of interest** on older people's rights.

An Annual Day of Discussion would not:

- **Provide any binding commitments** that would oblige States to better implement policies, legislation and practices that would positively impact on older people.
- **Be attended by all UN Member States,** nor would the recommendations and studies necessarily reach the appropriate ministries and departments in capital cities.

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 deprive older people of their dignity, and this has resulted in the current protection gap.

While 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, and 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

¹ UNDESA, *Current Status of the Social Situation, Wellbeing, Participation in Development and Rights of Older People Worldwide*, 2011, p.3

² Reports of the first and second sessions of the Open-ended Working Group A/AC.278/2011/4 and A/AC.278/2011/5 respectively.

³ 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).

⁴ Secretary-General Report, *Follow-up to the Second World Assembly on Ageing*, (A/64/127), July 2009, paras 19 and 20

⁵ Word searches and analysis were undertaken on the database of UPR-info, www.upr-info.org/database/ (Accessed July 2012)

⁶ The letter dated February 14 2012 can be accessed at www.unwatch.org/atf/cf/%7B6deb65da-be5b-4cae-8056-8bf0bedf4d17%7D/OIC%20TO%20PRESIDENT.PDF

⁷ Secretary-General Report, *Follow-up to the Second World Assembly on Ageing*, A/66/173, July 2011

⁸ Sepúlveda M, *Report of the Independent Expert on the Wuestion of Human Rights and Extreme Poverty*, A/HRC/14/31, 2010

⁹ Grover A, *Thematic Study on the Realization of the Right to Health of Older Persons by the Special Rapporteur on the Right of Rveryone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, A/HRC/18/37, 2011

¹⁰ See for example, the observation made by the UK to General Comment No. 24 of the Human Rights Committee: "The United Kingdom is of course aware that the General Comments adopted by the Committee are not legally binding." See letter of submission July 1995, UN Doc. A/50/40.

¹¹ UN Secretary-General in his report, *Follow-up to the Second World Assembly on Ageing*, A/66/173, 2011

¹² See www.achpr.org/mechanisms/older-disabled/

¹³ See www.oas.org/consejo/cajp/personas%20mayores.asp

¹⁴ Steering Committee for Human Rights (CDDH), Drafting Group on the Human Rights of Older Persons, CDDH-Age Meeting report, 24-26 September 2012, www.coe.int/t/dghl/standardsetting/hrpolicy/other_committee_s/cddh-age/Document_CDDH_AGE/CDDH-AGE%282012%29R2_fin_en%20.pdf

¹⁵ 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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