

## **Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons**

**Working paper prepared by the Office of the High Commissioner for Human Rights**

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### *Summary*

This working paper, prepared by the Office of the High Commissioner for Human Rights (OHCHR), provides an update to the [2012 Analytical Outcome Paper](#) on the normative standards in international law in relation to older persons submitted by OHCHR to the third working session of the Open-Ended Working Group on Ageing in August 2012.

This analytical update further examines the question of the adequacy of the normative framework of the international human rights system and its implementation mechanisms for the promotion and protection of the human rights of older persons. It does so against the background of the COVID-19 pandemic which has had a major impact on the older persons' enjoyment of their human rights.

In particular, the report takes into account the insights that have been gained during the sessions of the Open-ended Working Group on Ageing held since 2012 (especially at its eighth, ninth and tenth sessions held from 2017 to 2019), from the work of the Independent Expert on the human rights of older persons and other UN and regional human rights mechanisms, and from the voices of older persons and their representative organizations, national human rights institutions and other stakeholders reflected in the documents submitted to the Open-ended Working Group.

The findings of this update accord with the conclusions of the 2012 Analytical Outcome Paper. Since the preparation of that study, there have been significant normative developments relating to the human rights of older persons at the regional level. However, at the international level, the existing human rights framework continues to provide fragmented and inconsistent coverage of the human rights of older persons in law and practice, and the engagement of international human rights mechanisms with the human rights of older persons has not been systematic, coherent or sustained. The lack of a dedicated normative instrument on the subject and the conceptual limitations of existing instruments appear to be a significant factor contributing to these shortcomings. The adoption of such an instrument would be an effective way to bring about major changes in how the human rights of older persons are understood and protected, and thus contribute to changes in law and practice at the national level required to ensure older persons fully enjoy their human rights.

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## SUMMARY OF CONCLUSIONS

1. There is no clear articulation in any of the United Nations human rights treaties of the nature and significance of ageing, its social construction and the phenomenon of ageism. Without such a coherent conceptual framework to inform the interpretation and application of existing human rights norms and to frame the development of new norms and interpretations that address the realities of older persons' lives, the international human rights system will continue to fall short in delivering on its promises to ensure that all persons, including all older persons, fully enjoy their human rights and fundamental freedoms, by stimulating changes at the national level.
2. Since the preparation of the 2012 Analytical Study for the third working session of the Open-ended Working Group on Ageing, there have been a number of significant normative developments relating to the human rights of older persons, mainly at the regional level. However, at the international level the existing human rights framework continues to provide fragmented and inconsistent coverage of the human rights of older persons in law and practice. This reflects the conceptual limitations of the existing treaties for addressing the violations of human rights that older persons experience, and the lack of a coherent, comprehensive and integrated normative framework on the rights of older persons.
3. The engagement by the UN human rights treaty bodies ranges from extremely limited to substantial engagement with some aspects of the human rights of older persons by certain treaty bodies. However, overall it cannot be said that there is a coherent approach to the human rights of older persons that is systematically applied across the human rights treaty bodies; the absence of a specialized instrument is part of the reason for that.
4. The record of the thematic special procedures is also mixed. The mandate of the Independent Expert on the human rights of older persons has brought focus and depth to the issue since 2014. Otherwise, while there have been some significant considerations of the human rights of older persons, these have tended to be ad hoc and one-off interventions which, while helpful, have not necessarily been based on a coherent and holistic approach to the human rights of older persons that is more broadly sustained.
5. The discussions at the Open-ended Working Group have shown the interrelatedness of the various human rights considered and the need for a coherent, integrated and detailed set of normative standards to address them. Existing conceptual frameworks are not adequate to fully address the violations suffered by older persons. The protection afforded under the current frameworks and standards is in some cases seriously deficient and in other cases too general to give adequate guidance to governments, policymakers and advocacy groups about what actions are appropriate to ensure the realization of specific human rights for older persons.
6. The appropriate inquiry to consider at this stage is whether a new normative instrument would add a significant impetus to efforts to better ensure the protection of the human rights of older persons. Experience with other specialized treaties at the United Nations and the regional level shows that such treaties add substantially and in unique ways to the realization of the rights that they guarantee and that this would equally be the case with a new normative instrument on the human rights of older persons.
7. The assumption that existing United Nations human rights mechanisms, in particular the human rights treaty bodies, can give significantly greater time and attention to the human rights of older persons is unrealistic and impractical, given the many competing priorities they are mandated to consider under their constituent treaties, the pressure on the time and resources available to them and the limits on the length of treaty body and State party documents. While there are some measures that the human rights treaty bodies, States parties and other stakeholders could take to improve consideration of ageing issues by existing bodies, these are likely to bring about only incremental change.

**8. The silences, neglect and relative invisibility of human rights issues of central concern to older persons are so widespread and systemic in the international human rights system that it is clear that fundamental change is required. Simply exhorting existing mechanisms to do more and to include the perspectives of older persons in the execution of their mandates is not enough; a new dedicated normative instrument is needed to comprehensively remedy those deficiencies.**

## I. INTRODUCTION

1. In August 2012 the Office of the High Commissioner for Human Rights (OHCHR) prepared an Analytical Outcome Paper (the 2012 Study or the 2012 Analytical Study) for the third working session of the Open-ended Working Group on Ageing which the General Assembly had established by its resolution 65/182.<sup>1</sup> The 2012 Study was prepared in order to assist the Open-ended Working Group in carrying out its mandate,<sup>2</sup> and analysed the existing international human rights normative framework as it related to the protection of the human rights of older persons. At its tenth session the OHCHR was requested to provide an update to the 2012 Study.<sup>3</sup>

### A. The scope and findings of the 2012 Analytical Study

2. The 2012 Analytical Study explored the extent to which the rights of older persons and guarantees of equality and non-discrimination on the ground of older age are explicitly recognized in international human rights treaties. It found that there were few specific references to discrimination on the ground of older age, although it was in theory covered by general guarantees of equality and of non-discrimination on the ground of ‘other status’.<sup>4</sup> The 2012 Study noted that the absence of such explicit guarantees in the United Nations human rights treaties appeared to contribute to the low level of attention given to age discrimination when compared to discrimination on grounds that were explicitly mentioned in the treaties.<sup>5</sup>

3. The 2012 Study also explored the utility of general human rights guarantees for older persons, noting that these guarantees applied in principle for the benefit of older persons as they did for all other individuals. It also noted that in some cases it was possible to interpret general guarantees to apply to particular violations experienced by older persons and that human rights bodies had done so on occasion. The right to social security in older age and aspects of the right to health, as well as the rights of older women, were examples.<sup>6</sup>

4. At the same time the 2012 Analytical Study noted that relatively little attention had been given to the situations of older persons under other general guarantees and that some experiences of older persons ‘were all but completely overlooked by the human rights system.’<sup>7</sup>

5. The 2012 Study also noted that there were ‘emerging claims that there are specific human rights features particular to [the] situation [of older persons], which are not adequately addressed by relevant

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<sup>1</sup> Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper* [2012 Analytical Study], August 2012, submitted to the third working session of the Open-ended Working Group on Ageing, 21-24 August 2012, <https://social.un.org/ageing-working-group/documents/OHCHRAnalyticalOutcomePaperonOldePersonsAugust2012.doc>. The first draft of this paper was prepared in March 2020 and has been updated as of late December 2020.

<sup>2</sup> Set out in GA resolution 65/182, para 28 (21 December 2010), resolution 67/139, para 1 (20 December 2012) and resolution 74/125, para 52 (18 December 2019).

<sup>3</sup> The preparation of this report also benefited from the deliberations of an expert group meeting convened by the Office of the High Commissioner for Human Rights on 10 and 11 February 2021.

<sup>4</sup> The 2012 Study also made some reference to the normative frameworks in the regional human rights systems.

<sup>5</sup> 2012 Analytical Study, pp 3-4.

<sup>6</sup> 2012 Analytical Study, p 4.

<sup>7</sup> 2012 Analytical Study, p 4.

human rights instruments.<sup>8</sup> Of particular importance were rights such as the right to long-term care and support and the right to palliative care, among others.

6. The 2012 Analytical Study concluded that overall at the universal level, notwithstanding the fact that in some areas there was engagement with the relevant experiences and issues, there was a ‘demonstrable inadequacy of protection arising from normative gaps, as well as fragmentation and a lack of coherence and specificity of standards as they relate to older persons’.<sup>9</sup>

## **B. Overview of the conclusions of this Update**

7. The findings of this Analytical Update accord with the conclusions of the 2012 Study. As the discussion below shows, there has been a limited number of progressive developments in relation to the recognition of the specific types of human rights violations that older persons suffer, but these have been ad hoc, fragmented and not sustained across individual mechanisms or across the human rights system as a whole.<sup>10</sup> There is an awareness in some parts of the human rights system of the importance of ageing and associated human rights issues, and this has been reflected in specific references to age discrimination or the human rights of older persons. However, a closer qualitative examination of these references reveals that these issues are not receiving adequate sustained attention in a manner that is informed by a sound underlying comprehensive conceptual framework relating to the human rights of older persons. There does not appear to have been any significant, sustained increase in engagement by the system as a whole with the human rights of older persons since the Open-ended Working Group commenced its work nearly a decade ago. The COVID-19 pandemic and response to it have highlighted the existing failures to adequately protect the human rights of older persons and underlined the urgency of moving with expedition to improve the international human rights framework.

## **C. Structure of this Analytical Update**

8. In the following sections this Update:

- (a) describes the impact of the COVID-19 pandemic and responses to it on the human rights of older persons and the implications of this for the work of the Open-ended Working Group;
- (b) provides an overview of the theoretical approach and methodology of the Update, noting the importance of a background conceptual analysis of the situation of the human rights of older persons that is based on ageism and an understanding of the nature of the ageing process and older age;
- (c) discusses new issues that have emerged from the discussions at the Open-ended Working Group on Ageing and suggest an adjusted focus for future discussions;
- (d) briefly describes normative and other significant developments at the regional level since 2012;
- (e) provides an overview of the developments in the UN human rights system since 2012 with a particular focus on the human rights treaty bodies;

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<sup>8</sup> 2012 Analytical Study, p 4.

<sup>9</sup> 2012 Analytical Study, p 3. See generally C Martin, D Rodríguez Pinzón and B Brown, *Human Rights of Older Persons: Universal and Regional Legal Perspectives* (Springer, 2014).

<sup>10</sup> The empirical material presented in this Update relating to the consideration by the United Nations human rights bodies of issues relating to the human rights of older persons has largely been based on the material available in the Universal Human Rights Index database (<https://uhri.ohchr.org/en>). That database is a compilation of documents produced by the treaty bodies relating to specific countries which permit searches by full text, themes, categories of affected persons, type of document and specific mechanism. However, it does not include general comments, decisions under individual complaints procedures or reports under inquiry procedures, or the thematic reports of the special procedures. The specific searches undertaken have been described below at the relevant places and involve winnowing of raw results to identify substantive references. The database searches have been supplemented by manual searches of other material. While the searches and analysis are not exhaustive, they provide a reasonable indication of the level of engagement by the bodies concerned with issues relevant to the human rights of older persons. The different dates for specific searches reflect changes to the UHRI database that took place during 2020 after some of the searches were completed; these changes did not allow some of the searches conducted to be updated, so the results from the earlier searches have been retained.

- (f) examines in detail the thematic areas of focus that have been considered by the Open-ended Working Group at its eighth to tenth sessions and analyses the limitations of the existing normative framework and practice in those areas;
- (g) identifies a number of important issues, including issues not covered in existing human rights treaties, that are relevant to older persons and that require attention from the international human rights system;
- (h) considers whether a specialised normative instrument dedicated to the human rights of older persons or human rights in older age could make a unique and significant contribution to remedying the relative invisibility and neglect of violations of older persons' rights within the existing international human rights framework and thereby help bring about real changes in the lives of older persons; and
- (i) sets out its overall conclusions, including that a new dedicated normative instrument is a necessary step for significantly improving older persons' enjoyment of their human rights.

## II. THE COVID-19 PANDEMIC AND THE HUMAN RIGHTS OF OLDER PERSONS

9. Since the tenth session of the Working Group held in 2019, the world has been and continues to be profoundly affected by the COVID-19 pandemic. The pandemic has had a major impact on the enjoyment of human rights and fundamental freedoms around the world.<sup>11</sup> While the pandemic has seriously affected the lives of many groups and its consequences have been amplified by existing structures of inequality and disadvantage,<sup>12</sup> the impact on older persons has been particularly devastating. Older persons have shown a greater susceptibility to severe cases of infection and have represented the overwhelming proportion of lives lost. However, the impact has gone well beyond this and has highlighted the existence of ageist structures, attitudes and practices and their very real consequences for the enjoyment of human rights by older persons. In a United Nations policy brief on COVID-19 and the human rights of older persons launched on 1 May 2020<sup>13</sup> the Secretary-General described the particular risks that COVID-19 presented to older persons. These included:

- significantly higher risk of mortality and severe disease following infection<sup>14</sup>
- potential age discrimination in decisions on access to medical care, triage and lifesaving therapies, as well as increased risks to life and health from the scaling back of other critical services to address COVID-19<sup>15</sup>
- the 'horrifying picture' of thousands of residents of aged care homes or long-term care facilities in a number of countries who lost their lives as a result of contracting coronavirus<sup>16</sup>
- additional exposure to neglect, mistreatment or abuse: lockdowns in care homes and institutions have taken a toll on the lives and physical and mental health of older residents,<sup>17</sup> while those locked down with family members and caregivers, particularly women, have faced increased risks of violence, neglect and abuse<sup>18</sup>
- reduction in access to health services, including home-based visits and community care<sup>19</sup>

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<sup>11</sup> United Nations, *COVID-19 and Human Rights: we are all in this together*, April 2020.

<sup>12</sup> United Nations, *Social Policy to promote a more inclusive, resilient and sustainable recovery: building back better post-COVID-19 for the achievement of the 2030 Agenda in the context of the decade for action and delivery for sustainable development*, Note by the Secretariat, E/CN.5/2021/4 (2020).

<sup>13</sup> United Nations, *Policy Brief: The Impact of COVID-19 on older persons*, May 2020.

<sup>14</sup> Id at 5.

<sup>15</sup> Id at 5.

<sup>16</sup> Id at 6.

<sup>17</sup> Id at 9.

<sup>18</sup> Id at 7.

<sup>19</sup> Id at 6.

- threats to social networks, an increased risk of social isolation and risks to mental health especially for older women living alone during lockdowns and as a result of social distancing measures<sup>20</sup>
- an escalation of ‘entrenched ageism’ including discrimination against and stigmatization of older persons and the emergence in public discourse and on social media of ‘remarks and hate speech targeting older persons . . . as expressions of intergenerational resentment’,<sup>21</sup> though the *Policy Brief* also notes examples of initiatives, often community-based, that have shown support for and solidarity with older persons<sup>22</sup>
- the impact of the digital divide which means that some older persons may not have access to information about the pandemic and related health and socio-economic measures or other matters and have difficulty in accessing services such as banking, online shopping, government services or other online services that they need<sup>23</sup>
- ‘the invisibility of older persons in public data analysis’ and the need for ‘[i]nnovative approaches, backed by evidence and data disaggregated by age, but also sex and relevant socio-economic characteristics . . . essential to effective public policy making that is inclusive of older persons.’<sup>24</sup>

10. The *Policy Brief* called for ‘the building of stronger legal frameworks at both the national and international levels to protect the human rights of older persons, including by accelerating the efforts of the Open-ended Working Group on Ageing to develop proposals for an international legal instrument to promote and protect the rights and dignity of older persons.’<sup>25</sup>

11. The gravity and urgency of the situation in relation to older persons created by the pandemic and responses to it were highlighted by more than 140 member States in a joint statement in support of the Secretary-General’s *Policy Brief*, in which they expressed their ‘deep concern regarding the devastating impact the COVID-19 pandemic is having on the lives of older persons’.<sup>26</sup> The joint statement also expressed the signatories’ ‘deep concern over the escalation of ageism, including age discrimination and stigmatization of older persons, which aggravate their vulnerabilities’<sup>27</sup> and stated their commitment ‘to fully promoting and respecting the dignity and rights of older people . . .’ and to ‘working to strengthen global and national target responses to address the needs and rights of older persons and foster more inclusive, equitable, resilient and age-friendly societies.’<sup>28</sup>

12. Various bodies in the United Nations system have responded to the pandemic,<sup>29</sup> including the human rights mechanisms.<sup>30</sup> In her initial report to the General Assembly in July 2020, the Independent

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<sup>20</sup> Id at 3, 9-10.

<sup>21</sup> Id at 9.

<sup>22</sup> Id at 10.

<sup>23</sup> Id at 11.

<sup>24</sup> Id at 4.

<sup>25</sup> United Nations, *Follow-up to the International Year of Older Persons: Second World Assembly on Ageing*, A/75/218, para 58 (2020), citing United Nations, *Policy Brief: The Impact of COVID-19 on older persons*, May 2020, 14.

<sup>26</sup> Statement of Support to the UN Secretary General’s Policy Brief on The Impact of COVID-19 on Older Persons, 11 May 2020, para 2, [http://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/ENG\\_final\\_-with-countries.pdf](http://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/ENG_final_-with-countries.pdf).

<sup>27</sup> Id at para 4.

<sup>28</sup> Id at para 13.

<sup>29</sup> See ‘UN Response to COVID-19’, <https://www.un.org/en/coronavirus/UN-response>; and UN Programme on Ageing (DESA), ‘COVID-19 Outbreak and Older Persons: Relevant UN System Resources on COVID-19 and Older Persons’, <https://www.un.org/development/desa/ageing/covid19.html>.

<sup>30</sup> United Nations Office of the High Commissioner for Human Rights, ‘COVID-19 and Human Rights Treaty Bodies’, <https://www.ohchr.org/EN/HRBodies/Pages/COVID-19-and-TreatyBodies.aspx>; *Compilation of statements by human rights treaty bodies in the context of the COVID-19 pandemic*, September 2020, [https://www.ohchr.org/Documents/HRBodies/TB/COVID19/External\\_TB\\_statements\\_COVID19.pdf](https://www.ohchr.org/Documents/HRBodies/TB/COVID19/External_TB_statements_COVID19.pdf).

Expert on the human rights of older persons, Ms Claudia Mahler addressed in detail the impact of the COVID-19 pandemic on the human rights of older persons.<sup>31</sup> She considered the evidence that was available to show that the rights of older persons had been violated or were under threat as a result of the pandemic and responses to it that had been identified in the Secretary-General's *Policy Brief*. She also drew attention to the importance of access to justice by older persons and the need for an independent body or procedure for the protection of the human rights of older persons.<sup>32</sup>

13. All of the impacts described above reflect deficiencies in the protection provided to older persons in the enjoyment of their human rights that already existed before the pandemic. The health emergency and responses to it have exacerbated and highlighted those human rights failures. As the High Commissioner for Human Rights put it in May 2020:

This crisis has laid bare, and often amplified, many challenges that older people have been facing for years, such as discrimination based on older age, lack of social protection and access to health services, lack of autonomy and participation in decision-making, and risk of violence, neglect and abuse.<sup>33</sup>

14. The consequences of the pandemic and responses to it have shown that existing normative frameworks at the international and national level have serious flaws and that the effective protection of the human rights of older persons is still a long way off. As the Independent Expert put it, the pandemic 'has made visible protection gaps that will need to be addressed beyond the response and recovery stages.'<sup>34</sup> She noted that 'the lack of a comprehensive and integrated international legal instrument to promote and protect the rights and dignity of older persons continue to have significant practical implications, including for older persons in emergency situations.'<sup>35</sup>

15. The pandemic has thus made it a matter of even greater urgency to focus on the question of what more can be done to ensure that the types of violations of human rights that we have seen during the pandemic do not occur again. Avoiding recurrence of these abuses requires addressing the underlying structures, attitudes and practices that have left older persons open to these violations of their rights. A new international legal and policy framework in the form of a binding instrument is needed to provide guidance and to stimulate action at the national level where existing protections have been shown to be inadequate in many respects before and during the pandemic.

16. This paper reviews the existing international human rights framework and its contribution to the protection of the human rights of older persons and finds it wanting. The analysis of this paper supports the position that one important contribution to the process of better protection of the rights of older persons would be the adoption of a new binding international instrument on the subject.<sup>36</sup>

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<sup>31</sup> *Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons, Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, A/75/205 (2020).*

<sup>32</sup> A/75/205. The Independent Expert discusses ageism and age discrimination; the right to health; autonomy; care and support in residential situations; palliative care; the impact of isolation; the right to live without violence, abuse or neglect; the right to information; gaps in data on older persons; access to justice; the need for an independent national mechanism to address violations of older persons; rights; and social protection and the right to work.

<sup>33</sup> Statement by the United Nations High Commissioner for Human Rights, Michelle Bachelet, presented at the Virtual debate 'Human Rights of older persons in the age of COVID-19 and beyond' with the High Commissioner for Human Rights and the new Independent Expert on the enjoyment of all human rights by older persons, 12 May 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25879&LangID=E>.

<sup>34</sup> A/75/205, para 29.

<sup>35</sup> A/75/205, para 78.

<sup>36</sup> One of the recommendations that emerged from the UN75 Consultation process held in 2020 and participants' dialogue on inequality was that governments should take steps to . . . promote the creation of a new UN Convention to protect the rights of older people.' United Nations, *Listening to People's Priorities for the Future and Their* 4.

### III. CONCEPTUAL APPROACH AND METHODOLOGY

17. As noted in the 2012 Analytical Study, older persons, however defined, compose a large and growing number and percentage of the world's overall population and the populations of most individual countries and, despite their diversity, face many common experiences in all parts of the world. Ageism, relative invisibility and devaluation of older persons, their exclusion from economic and other social opportunities, economic insecurity, discrimination in health care, material poverty and social exclusion, and violence, abuse and neglect, are just some of the violations of human rights faced by many older persons around the world. While the actual situation of specific groups of older persons may be exacerbated as a result of intersectional or multiple discrimination, ageist attitudes and practices are frequently a major contributing factor to the disadvantage they face.

18. These violations of basic rights reflect not just individual violations in a particular area of life, but are the manifestation of interlocking and entrenched social constructions of older age, attitudes to older persons and ageing and discriminatory structures that support and reinforce each other. To address individual and systemic violations means understanding and engaging in a systematic and coherent manner with intertwined society-wide attitudes, practices and structures.

19. It is critical for everyone who is engaged in these discussions to listen to and understand the lives and deaths of older persons and the violations they suffer. Those experiences and views have been eloquently and comprehensively presented to the Open-Ended Working Group in detailed submissions and by the presentation of testimony by older persons themselves, and have also been summarized in the compilations provided to the Open-ended Working Group. They highlight the failures of the international human rights system to heed the calls of older persons and to promote and protect their rights.

20. Older persons and their organizations have given voice loudly and clearly to the non-recognition and violations of their rights and the need for a new instrument to remedy that. Looking solely at how existing rights can be applied to the violations older persons experience risks missing types of violations that may be unique, new or intersecting, and therefore not addressing the full range of violations faced by older persons.

#### A. The need for a proper diagnosis of the problem

21. In assessing whether the current international human rights framework has shown itself fit for purpose in addressing the human rights of older persons or advancing the elimination of discrimination on the basis of older age, it is necessary to be clear about the nature and causes of the problems that the system is expected to address in this area.

22. For an international instrument to be an effective response to an identified human rights problem, the problem and its causes must be clearly identified and conceptualised. As noted above, that requires the experiences and voices of those who have suffered the violations to be heard and for these to shape how the violation is understood and defined. This enables an appropriate definition of the violations to be formulated and the steps States and others must take to eliminate those violations tailored to the specific circumstances of the violations in question. This process may involve the formulation of a 'new' type of violation, as was the case for example with forced disappearances, a specific innovative type of human rights violation generally considered to be more than the sum of the violations of other rights often present when someone is disappeared.<sup>37</sup> An appropriate and effective response may also require adding detailed specifications to existing generally formulated rights, an approach seen in the development of the obligations to end discrimination against women, ensure the rights of the child, and ensure the rights of persons with disabilities in the United Nations and regional treaties on those subjects. A further approach is for those expert bodies charged with the interpretation

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*Ideas for Action, Concluding Report of the UN75 Office*, January 2021, 30, <https://www.un.org/en/un75/finalreport>.

<sup>37</sup> See C Grossman, 'Disappearances' in *Max Planck Encyclopedia of International Law* (online), last updated February 2008.

and application of existing general rights to do so in a manner that adapts these guarantees to new circumstances within the accepted rules of treaty interpretation. Examples of this are the interpretations by both the Committee on the Elimination of Discrimination against Women and the Committee against Torture to include violence against women within the scope of their respective treaties, a subject not explicitly mentioned in either treaty.

23. Without an adequate diagnosis of the problem and its causes, it is difficult to develop an adequate response to violations of the human rights of older persons. Existing treaties were not formulated on the basis of an adequate diagnosis or in-depth understanding of the nature of the ageing process and its social meanings or of how ageism structures so many aspects of social relations and leads to discriminatory laws, policies and practices. A principal finding of this Update is that the absence of such a diagnosis goes a long way towards explaining the inadequate response of the existing international human rights framework to human rights violations against older persons or on the basis of older age. Examples of these inadequacies of the existing framework are provided later in this Update.

### **B. Defining older persons and older age: necessity, complexity and flexibility**

24. The discussions within the Open-ended Working Group on Ageing about how to improve the existing human rights framework have been formulated in terms of better ensuring the ‘human rights of older persons’, or protecting human rights in or against discrimination on the basis of ‘older age’. While these approaches overlap, they are not identical. The former (‘older persons’) identifies a group defined by reference to being ‘old’ or ‘older’, while the latter focuses on action which is undertaken by reference to the ‘older age’ of the affected person. Whether a new binding instrument should be formulated to protect the rights of ‘older persons’ or to prohibit discrimination on the basis of ‘older age’ (or both) is an important question, the answer to which will affect the scope and coverage of any instrument.<sup>38</sup> The former approach is seen by some as potentially marginalizing and devaluing a specific group of persons; and many ‘older persons’ do not necessarily identify as ‘old’.<sup>39</sup> Focusing on the ground of discrimination concentrates attention on the disadvantageous treatment itself and the motivation for it and may be more flexible in terms of coverage of a wider chronological age range. These are issues that are yet to be explored in detail in the discussions of the Open-ended Working Group on Ageing.

25. In either case it is necessary to have a working definition of ‘older persons’ or ‘older age’. The alternative is to adopt an approach which would address all forms of age discrimination – against younger as well as against older persons whatever their age. This approach has been adopted in some international instruments and some national legislation. However, thus far the discussions at the Open-ended Working Group of Ageing have focused on the older end of the ageing spectrum, an approach justified by the specific experiences of persons in the middle and later stages of their lives. Those experiences and the social meanings of having reached later stages of life mean that the nature of the discrimination experienced by older persons is different in important respects from age discrimination against younger people, although the practice of stereotyping people on the basis of their age may be common to both groups. The stereotypes are different in each case: for example, discrimination against a younger person on the basis of age is not based on assumptions that because of their chronological age they have lost the capacity or willingness to learn or the capability to carry out particular tasks, but these attitudes are frequently seen in relation to older persons.

26. The challenges of defining ‘older persons’ and ‘older age’ are well-known. The ageing process is a continuous one and the significance of the stage of life which a person has reached and their designation as ‘old’ varies according to social context, so choosing a specific chronological age is a problematic way to define the start of older age. The realities of peoples’ lives at any given age can vary enormously depending not only on how they are ageing biologically but also on factors such as their

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<sup>38</sup> See A E Georgantzi, ‘Developing a new framework for human rights in older age: Exploration, interpretation and application’, PhD dissertation, National University of Ireland Galway, April 2020, 267-275.

<sup>39</sup> Id at 149-153.

race, sex, gender, indigeneity, disability, socio-economic status and other status and their experiences earlier in life.

27. In 2018 the European Union Agency for Fundamental Rights (FRA) noted the various components of ‘ageing’:

Age and ageing are usually discussed and addressed from four distinct but intersecting perspectives:

- chronological age based on date of birth;
- biological age, linked to physical changes;
- psychological age, referring to mental and personality changes during the life cycle;
- social age, which defines the change of an individual’s roles and relationships as they age.<sup>40</sup>

28. This means that the use of chronological age alone may be inappropriate or misleading in many cases, as whether a person has reached older age is an assessment made in a social context against a matrix of different factors which may include but are by no means limited to chronological age. Further, where an assessment is being made of person’s needs, capabilities or interests for a particular purpose (for example whether they should benefit from subsidised travel support or be eligible to enrol in continuing education to improve their employability or for other purposes), chronological age is generally a poor proxy for whether a person satisfies those criteria.<sup>41</sup> Nonetheless, in many cases governments and others find it administratively convenient to use chronological age to determine eligibility for access to specific entitlements or assistance schemes, though these schemes are often based on generalizations or stereotypes about what reaching the specific chronological age means for individuals.

29. Even where chronological ages are used by governments and international bodies, they vary considerably. The United Nations uses 60 as the threshold for certain purposes but accepts that this may be too high in certain circumstances; it may also be too low in others. Pension and retirement ages vary among countries and sometimes between women and men within countries. During the COVID-19 pandemic the age thresholds for ‘older persons’ who were required or urged to self-isolate or restrict their movements ranged from 58 to 80 and many other ages in between.

30. Whether a particular person is ‘old’ may well depend on the purpose for which one is asking that question: a 40-year old refused employment because they are assumed not to be able to fit in with a group of younger employees or to have limited IT skills, is the victim of discrimination based on older age and is covered by legislation in some countries, but would not be governed by provisions that set the lower threshold for older age as 60. On the other hand, the use of a chronological age for determining eligibility for certain forms of social protection is convenient for governments in the administration of social programs, although these programs themselves also sometimes are based on ageist assumptions. Thus, defining ‘older persons’ or ‘older age’ in any new normative instrument is likely to require a flexible definition that takes into account these factors, as well as allowing governments to have workable criteria for the administration of policies and programs.<sup>42</sup> But if a definition of older person is indeed necessary in any context, then it is likely to vary from one situation to another.

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<sup>40</sup> European Union Agency for Fundamental Rights, ‘*Shifting perceptions: Towards a rights-based approach to ageing*’, Chapter 1 in *Fundamental Rights Report 2018* (2018) 9, 10 (citation omitted).

<sup>41</sup> ‘The common interpretation of chronological age as a standard marker of a person’s expected decline through the life course -- where individuals of similar age are expected to have similar declining levels of health and productive capacity – is inaccurate.’ D J Lowsky et al, ‘Heterogeneity in Healthy Aging’ (2014) 69(6) *Journals of Gerontology A: Biol Sci Med Sci* 640, 646.

<sup>42</sup> For a discussion of some of these issues, see the workshops organized in 2018 and 2020 by the Deutsches Institut für Menschenrechte [German Institute for Human Rights]: <https://www.institut-fuer-menschenrechte.de/themen/rechte-aelterer>.

31. As is shown by the discussion in later sections of this Update, the international human rights framework, including the jurisprudence of the treaty bodies, has few explicit guarantees of discrimination on the basis of age and there is little to show that a sophisticated approach to ageing and discrimination has been elaborated. In contrast, the Inter-American Convention on Protecting the Human Rights of Older Persons provides an example of how such a framework might be developed. That Convention recognizes ‘older age’ is a malleable concept, defining an ‘older person’ as a ‘person aged 60 or older, except where legislation has determined a minimum age that is lesser or greater, provided that it is not over 65 years.’<sup>43</sup> While this definition is still based on chronological age, the Convention also recognises the socially constructed nature of ‘older age’, defining old age as the ‘social construct of the last stage of the life course’ and ‘ageing’ in the following terms:

‘Ageing’: A gradual process that develops over the course of life and entails biological, physiological, psychosocial, and functional changes with varying consequences, which are associated with permanent and dynamic interactions between the individual and their environment.

32. While recognizing the complexity of defining ‘older persons’ or ‘older age’, this paper proceeds on the basis of the discussions thus far that have generally used age thresholds such as 60 or ‘standard retirement’ or pension eligibility ages. Nonetheless, it is important to recognise the limitations of chronological age and particular chronological ages as accurate indicators of who is considered ‘old’ for certain purposes in a given society and whether they have been discriminated against on that basis, and whether the qualities ascribed to ‘older persons’ are in fact possessed by persons of that age generally.

### **C. Ageism and age discrimination – fundamental underpinning concepts**

33. Understanding the nature of the ageing process and the extent and impact of ageism is critical to any attempt to address violations against individuals on the ground of their older age. Ageism and actions based on ageist attitudes are a critical component and frequently a principal cause of human rights violations based on older age.<sup>44</sup> Other factors may also combine with ageist attitudes and practices that constitute the disadvantage suffered by particular groups of older persons -- such as race, ethnicity, gender and so on (the concept of intersectionality).<sup>45</sup> Factors such as the structure of labour markets may also shape the environment in which ageism leads to discrimination against older persons.

34. The term ‘ageism’ originated in relation to discrimination against older persons, but it is also used to refer to discrimination against people of any age on the ground of their age. In this Update the term is used in relation to ageism against older persons -- stereotypes, prejudice and/or discriminatory actions or practices against older persons based on their actual chronological age or based on a perception that the person is ‘old’ or ‘elderly’.<sup>46</sup>

35. Robert N Butler, the American sociologist who originally coined the term in the 1960s,<sup>47</sup> described in a joint publication with sociologist Myrna I Lewis in the following terms:

the systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin colour and gender. Old people are categorized as senile, rigid in thought and manner, old fashioned in morality and skills/.../ageism allows the

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<sup>43</sup> Article 2: [www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp)

<sup>44</sup> See United Nations, *Global Report on Ageism* (World Health Organization, 2021).

<sup>45</sup> See A Numhauser-Henning, ‘Elder law and its subject: the contextualised ageing individual’ (2021) 41(1) *Ageing and Society* 516-535.

<sup>46</sup> See generally F Snellman, ‘Whose ageism? The reinvigoration and definitions of an elusive concept’ (2016) 68 *Nordic Psychology* 148-159; T N Iversen, L Larsen and P E Solem, ‘A conceptual analysis of Ageism’ (2009) 61(3) *Nordic Psychology* 4-22.

<sup>47</sup> R N Butler, ‘Age-Is: Another Form of Bigotry’ (1969) 9(4) *The Gerontologist* 243.

younger generation to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.<sup>48</sup>

36. There has been considerable development in understanding of ageism and its impact since that time, with extensive literature showing its nature and widespread extent,<sup>49</sup> that ageism is often invisible or taken for granted as the appropriate way to think and act, and that it can lead to significant physical and mental harm to individuals and harm to society more generally.<sup>50</sup>

37. Ageism can be implicit or explicit, and may be negative or positive (apparently benevolent) and can take many different forms.<sup>51</sup> It can be expressed on different levels, such as micro-, meso-, or macro-levels: <sup>52</sup> ageist attitudes may exist in one's own mind, in the attitudes and behaviour of one person in relation to another; or on an institutional and policy level. Ageist attitudes are widely held, including among older persons themselves, and this internalization leads to a range of harmful effects.<sup>53</sup>

38. Many submissions to the Open-ended Working Group on Ageing have documented widespread and systematic ageism as one of the major barriers to the full enjoyment by older persons of their human rights. The World Health Organization noted in 2015 that ageism is pervasive across societies and everywhere, and may now be 'more pervasive than sexism or racism'.<sup>54</sup> There have been many examples of the expression of ageist attitudes and the adoption of ageist policies during the pandemic: the Secretary-General's *Policy Brief on COVID-19 and older persons* and the initial report of the current Independent Expert on the human rights of older persons to the Human Rights Council in 2020, as well as recent academic writings, have documented these extensively<sup>55</sup> and both the former and current and Independent Experts on the human rights of older persons have underlined the importance of taking action to eliminate ageism and stereotypes about older person on a number of occasions.<sup>56</sup>

39. Ageism is a form of age discrimination. Older persons are no less diverse than other groups of people - indeed some commentators argue older persons are more diverse -- and accordingly prejudices and stereotypes applied to individuals are discriminatory. Ageism is similar in many respects to other

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<sup>48</sup> R N Butler and M I Lewis, *Ageism and Mental Health* (1973), quoted in R Butler, *Why Survive? Being Old in America* (1975), 12.

<sup>49</sup> See, eg, e.g., T D Nelson, 'Ageism: Prejudice Against Our Feared Future Self' (2005) 61 *Journal of Social Issues* 201-221; L Ayalon and C Tesch-Römer (eds), *Contemporary Perspectives on Ageism* (Springer, 2018)

<sup>50</sup> K Sargent-Cox, 'Ageism: we are our own worst enemy' (2017) 29(1) *International Psychogeriatrics* 1, 1-2.

<sup>51</sup> L A Cary et al, 'The Ambivalent Ageism Scale: Developing and Validating a Scale to Measure Benevolent and Hostile Ageism' (2017) 57(2) *The Gerontologist* 27-36.

<sup>52</sup> Israel Doron and Nena Georgantzi (eds), *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons* (2018), 4.

<sup>53</sup> E-S Chang et al, 'Global reach of ageism on older persons' health: A systematic review' (2020) 15 *PLoS One*, doi: 10.1371/journal.pone.0220857.

<sup>54</sup> World Health Organization, *World Report on ageing and health* (2015), 11. The World Health Organization, recognizing both the human rights and health implications of ageism in society, launched its Global Anti-Ageism Campaign: see Alana Officer and V de la Fuente-Núñez, 'A global campaign to combat ageism', (2018) 96 *Bulletin of the World Health Organization* 299-300; Alana Officer et al, 'Editorial: Valuing older people: time for a global campaign to combat ageism' (2016) 94 *Bulletin of the World Health Organization* 710-710A.

<sup>55</sup> See, eg, S Fraser et al, 'Ageism and COVID-19: what does our society's response say about us?' (2020) 49(5) *Age and Ageing* 692-695; L Ayalon, 'There is nothing new under the sun: ageism and intergenerational tension in the age of the COVID-19 outbreak' (2020) 32(10) *International Psychogeriatrics* 1221-1224; M Diehl et al, 'Aging in Times of the COVID-19 Pandemic: Avoiding Ageism and Fostering Intergenerational Solidarity' (2020) 76(2) *Journals of Gerontology: B Psychol Sci Soc Sci* 1-4.

<sup>56</sup> *Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, Mission to Slovenia*, A/HRC/30/43/Add.1, para 72 (2015); *Report of the Independent Expert on the enjoyment of all human rights by older persons on her mission to Costa Rica*, A/HRC/33/44/Add.1, para 70 (2016); *Report of the Independent Expert on the enjoyment of all human rights by older persons on her mission to Montenegro*, A/HRC/39/50/Add.2, para 84 (2018).

forms of stereotyping that classify individuals or groups of individuals according to their personal or group characteristics such as race, ethnicity, sex and gender, and disability.

40. International human rights law recognizes the damage that applying group-based stereotypes and prejudices causes and that this amounts to a denial of the right to equality and non-discrimination as well as of other rights. For this reason, UN human rights treaties impose explicit obligations on States parties to take effective steps to eliminate stereotypes and prejudices on these grounds. Some of the more extreme ageist statements made during the pandemic have similarities to some types of ‘hate speech’ that are often directed against other groups.

41. Thus, understanding how ageism structures and leads to disadvantage is central to responding to human rights violations against older persons.

#### **D. Obligations to eliminate ageism: a major gap in the international human rights framework**

42. A striking feature of the international human rights framework is that there is no explicit guarantee against being subjected to treatment based on ageism, and no explicit obligation on States to take active measures to eliminate ageism and its discriminatory consequences.<sup>57</sup> This contrasts starkly with the existence of treaties that oblige States parties to take steps to eliminate racism, sexism and ableism. The term ‘ageism’ itself has been rarely used by UN human rights bodies, with the exception of the Independent Expert on the human rights of older persons and the Special Rapporteur on the rights of persons with disabilities, though there have been references to stereotypes based on age or age in combination with characteristics such as sex.<sup>58</sup>

43. It might be possible to derive an obligation to address and eliminate ageism under existing treaties by analogy to sexism, ableism and racism. The concept of discriminatory treatment includes dealing with persons on the basis of group-based stereotypes and ideas of superiority or a particular group. Accordingly, States’ obligations to prevent discrimination on the basis of ‘other status’ or ‘age’ specifically could be interpreted to extend to obligations to eliminate ageism. However, little progress has been made on this front under general human rights treaties. This may be contrasted with the specific provisions of the Convention on the Elimination of All Forms of Discrimination against Women (Article 5(a)) and the Convention on the Rights of Persons with Disabilities (Article 8(1)) that address sexism and ableism and the measures taken under those treaties.

44. For example, Article 8(1) of the Convention on the Rights of Persons with Disabilities requires States parties ‘to adopt immediate, effective and appropriate measures:

- (a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
- (c) To promote awareness of the capabilities and contributions of persons with disabilities.<sup>59</sup>

Article 8(2) provides specific examples of what this might involve.

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<sup>57</sup> See generally B Mikołajczyk, ‘International law and ageism’ (2015) 35 *Polish Yearbook of International Law* 83-108.

<sup>58</sup> Committee on Economic Social and Cultural Rights, *General comment No 6: the economic, social and cultural rights of older persons* (1995), E/1996/22, para 41; Committee on the Elimination of Discrimination against Women, *General recommendation No 27 on older women and protection of their human rights*, CEDAW/C/GC/27, para 36 (2010).

<sup>59</sup> Articles 7 and 8. See F Bariffi, ‘Article 8: Awareness-Raising’ in I Bantekas, M A Stein and D Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2019), 229-257.

45. Similar provisions appear in the International Convention on the Elimination of All Forms of Racial Discrimination<sup>60</sup> and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>61</sup>

46. There is little international case law that addresses the issue of ageist stereotypes and assumptions under general human rights guarantees.<sup>62</sup> It may be possible to derive an obligation to address ageism from existing general guarantees on the ground of ‘other status’, but this is by no means a straightforward or incontestable process of interpretation. A provision such as those included in other international human rights treaties would provide a clear and indisputable guarantee and a precise indication to States of the steps that they need to take to eliminate ageism.<sup>63</sup>

47. The submissions to the Open-ended Working Group from older persons and their organizations have made it clear how corrosive an influence ageism is in their everyday lives. Thus far the international human rights system has failed to provide an explicit binding prohibition of this form of conduct or to provide an effective remedy for it. The elaboration of explicit obligations in this regard is needed to redress this situation.<sup>64</sup>

### **E. Other conceptual limitations of the existing framework**

48. This Update finds that analyses based on an understanding of ageism and its impact have generally not underpinned the engagement of the international human rights system with the rights of older persons. There are also other conceptual limitations of the existing human rights treaties framework that help one to understand why the current international human rights system has failed to accord the rights of older persons adequate attention and what needs to be done to improve that situation. The 2012 Analytical Study touched on this theme, referring to the specificity of older persons’ experiences that were not captured by existing norms, but did not explore it in depth. An example of this is the construction of the right to work around a model of life that involves childhood, education, working life and retirement (with the latter a relatively short period historically)<sup>65</sup> – while with increased longevity we now arguably have a four-stage life (and there are other models). This longer period of

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<sup>60</sup> See Committee on the Elimination of Racial Discrimination, *General recommendation XV on article 4 of the Convention* (1993).

<sup>61</sup> See R Holtmaat, ‘Article 5’ in M Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012), 141-167.

<sup>62</sup> In *International Federation of Associations of the Elderly (FIAPA) v. France*, Complaint No 145/2017, decision on the merits of 22 May 2019, the European Committee of Social Rights rejected a complaint against a French criminal law as implemented by the courts that did not accept older age of itself as an indicator of vulnerability in the context of a law that criminalised fraudulent exploitation of a person ‘whose particular vulnerability due to age . . . is apparent or known to the offender’ but rather considered the specific context. See also *Carvalho Pinto de Sousa Morais v Portugal*, Application No 17484/15, European Court of Human Rights, Fourth section, Judgment of 25 July 2017 and commentary in I Doron, B Spanier and E Mantovani, ‘Ageism, Human Rights, and the European Court of Human Rights: A Critical Analysis of the *Carvalho v. Portugal* Case (2017)’ (2018) 11(2) *DePaul Journal for Social Justice* Article 3; and *Khamtokhu and Aksenchik v Russia*, Applications Nos 60367/08 and 961/11, European Court of Human Rights, Judgment of the Grand Chamber, 24 January 2017. See Corina Heri, ‘Between a Rock and a Hard Place: The Court’s Difficult Choice in *Khamtokhu and Aksenchik v Russia*’ *Strasbourg Observers* <https://strasbourgobservers.com/2017/03/17/between-a-rock-and-a-hard-place-the-courts-difficult-choice-in-khamtokhu-and-aksenchik-v-russia/>.

See also Inter-American Court of Human Rights, *Case of Poblete Vilches and others v Chile (Merits, Reparations and Costs)*, Series C, No 349, Judgment of 8 March 2018, paras 125-143 (discrimination on the basis of age in the delivery of emergency health services).

<sup>63</sup> Mikołajczyk, above n 57.

<sup>64</sup> In relation to legal strategies to address ageism at both the international and national levels, see ‘Chapter 6: Strategy 1 – Policy and Law’ in *Global Report on Ageism*, above n 44, 93-111.

<sup>65</sup> World Health Organization, *World Report on ageing and health* (2015) 10.

life after the traditional retirement age has major implications for the content of the right to work, the right to social security, and the right to education, (re)training and life-long learning.

49. There have been similar examples in other areas. For example, to the extent that the right to social security is implemented only through contributory pension schemes linked to employment in the formal labour force, it disadvantages women because it does not correspond to the realities of women's lives and the pattern of participation by many women in the paid labour force or the extent of their work in the informal economy.<sup>66</sup> Similarly, the changing patterns of longevity require a fundamental rethink of how current understandings of the right to work for those who must or wish to continue in some form of paid work after they reach 'standard retirement age'.

50. The limitations of existing frameworks have been identified in discussions at the Open-ended Working Group on Ageing and further analysis appears in section V below. Similar analyses of the conceptual limitations of existing frameworks were undertaken prior to the elaboration of the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) and the Convention on the Rights of Persons with Disabilities (CRPD): advocates for a specialized convention argued in each case that the conceptual frameworks of the mainstream treaties were, respectively, androcentric or ableist. As a result, it was argued, it was no accident that women's experiences of human rights violations and those of persons with disabilities were neglected within the general human rights treaties, because those treaties were formulated without fully taking into account the types of violations that women and persons with disabilities commonly faced. To the extent that the content and underlying assumptions of the rights included in existing treaties fail adequately to reflect older persons' experiences, calls for enhanced interpretation and more effective implementation of existing instruments are missing the critical issue – that the conceptual limitations of the existing framework are themselves major barriers; it is more than just a lack of interest, expertise, time, resources, or will.

51. This Update discusses in section VIII the question of whether the adoption of a new binding instrument based on a comprehensive and integrated framework to protect the human rights of older persons is likely to bring with it the type of significant changes that have been seen in the case of other specialised UN human rights treaties.

## **F. Assessing the significance of developments – the need for a qualitative approach**

52. It is against this conceptual background that this Update examines the adequacy of the international human rights framework in some detail. In documenting developments since the 2012 Study it is important to note that simply listing individual developments may not give a complete picture of whether the UN human rights system has significantly advanced its understanding of and engagement with the human rights of older persons. The fact that some issues relating to older persons have been taken up in different fora on a number of occasions may indeed indicate that there is an increased awareness of the relevance of human rights to the situation of older persons. However, the critical issue is whether these examples are more than sporadic instances of engagement or whether they are evidence of a sustained and coherent approach that reflects a soundly-based and comprehensive understanding of the human rights issues relating to older persons in individual mechanisms and across the system and the reasons for the documented violations including the impact of ageism.

53. There has been a modest increase in interest in ageing issues and the human rights of older persons in some international human rights fora over the last decade. However, the overall position of older persons is still one of relative invisibility – their rights are often not recognized or referred to in contexts when their testimonies and submissions demonstrate that their rights are being violated. It is important to be alert to the silences in the international human rights system – those instances where one would reasonably expect that the existing human rights system would have engaged to a greater extent, but where it has not – and to try to understand why that is so. Without a systematic approach

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<sup>66</sup> Beth Goldblatt, *Developing the Right to Social Security - A Gender Perspective* (Routledge, 2016).

underpinned by an explicit and coherent framework there is likely to be limited or no sustained engagement with these issues, and this has indeed proved to be the case.

*The critical question: would a new normative instrument make a unique and significant difference?*

54. In the discussions at the Open-ended Working Group on Ageing and elsewhere of the adequacy of the international framework for the protection of the human rights of older persons, the question of whether adoption of a new normative instrument should be one of the measures adopted to improve the situation has been a central topic. There has been much debate over whether the acknowledged violations and deficiencies are the result of ‘gaps’ in the international framework, in particular whether any such gaps are ‘normative’, ‘protection’, or ‘implementation’ gaps or some other form of gap. For some, the adoption of a new normative instrument would be justifiable only if any such gaps were ‘normative’ gaps, while for others the existence of the deficiencies and shortfalls in the existing system are sufficient justification to move toward a new normative instrument, whether existing limitations are to be described as ‘normative gaps’ or in some other way.

55. It is clear that significant gaps or limitations in effective coverage do exist in the current system. They include but are not limited to areas such as: ‘legal capacity, quality of care, long-term care, palliative care, assistance to victims of violence and abuse, available remedies, independence and autonomy, and the right to an adequate standard of living, in particular with regard to housing’,<sup>67</sup> as well as ageism, the right to lifelong learning for older persons, the impact of technological developments, older persons in emergency situations, digital deficits and access by older persons to information technology, the potential role and drawbacks of robots in relation to provision of care and support, and the data gaps relating to older persons, in particular those belonging to particular subgroups of older persons.

56. The debate over whether the deficiencies in the existing international framework are ‘normative gaps’ has not been resolved, in part because participants in that discussion have different understandings of what constitutes a ‘normative gap’. The focus on the issue has impeded progress in recommending concrete measures to improve older persons’ enjoyment of their human rights, a pressing concern before COVID-19 and now urgently so, especially given the broad agreement about the nature and extent of the failures in the international system and the violations of the human rights of older persons worldwide.<sup>68</sup>

57. This Analytical Update notes that the existence of limitations and deficiencies in the current international framework has been identified clearly and repeatedly over at least the last decade. The critical question should therefore now be what unique additional value a new binding instrument would add to the struggle to ensure that older persons fully enjoy their rights. Answering that question would respond directly to the request by the General Assembly for advice as to how the human rights of older persons ‘could be better protected’. This is discussed further in Section VIII below.

58. Similar inquiries were undertaken when member States considered whether to elaborate other specialized United Nations human rights treaties, including those relating to racial discrimination, discrimination against women, the rights of the child, persons with disabilities, migrant workers, torture and disappearances. All of these addressed topics that were already ‘covered’, though inadequately, by existing human rights instruments: the focus of States was whether a new focused treaty would add momentum to the struggle to eliminate these violations while at the same time still recognizing that existing standards and procedures can also contribute to that struggle within their own areas of responsibility and limited resources.<sup>69</sup> Focusing on the question of whether a new instrument would

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<sup>67</sup> *Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons, Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, A/75/205, para 78 (2020).*

<sup>68</sup> See the discussion in section VI below.

<sup>69</sup> See, for example, in relation to the human rights of persons with disabilities, G Quinn and T Degener, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (United Nations, 2002).

make a significant and tangible difference to the lives of older persons would provide the Open-ended Working Group with a means of moving forward positively with the performance of its mandate. Doing so does not stand in the way of making whatever improvements might also be made under existing frameworks; however, the analysis in the Update suggests that these improvements are likely to be incremental and will not bring about the major shift in orientation that is required to address the problems that have been identified.

#### IV. NORMATIVE AND OTHER DEVELOPMENTS AT THE INTERNATIONAL AND REGIONAL LEVELS

##### A. Adoption or entry into force of new normative instruments

*Inter-American Convention on Protecting the Human Rights of Older Persons and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa*

59. The Inter-American Convention on Protecting the Human Rights of Older Persons<sup>70</sup> was adopted by the Organization of American States on 15 June 2015 and entered into force on 11 January 2017, thirty days after the deposit of the second instrument of ratification.<sup>71</sup> As of 22 February 2021 2020 seven of the thirty-five member States of the OAS were party to the treaty and one other member State had signed but not ratified it.<sup>72</sup>

60. On 31 January 2016 the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.<sup>73</sup> The Protocol will enter into force thirty days after the deposit of the fifteenth ratification by a member State of the Union.<sup>74</sup> As of 18 June 2020 two member States had signed and ratified the Protocol; a further fifteen of the Union's 55 member States had signed but not yet ratified the treaty.<sup>75</sup>

61. These two treaties join Article 23 of the Revised European Social Charter<sup>76</sup> and the Charter of Fundamental Rights of the European Union<sup>77</sup> as the only regional binding instruments that explicitly require States parties to take measures to ensure the enjoyment of human rights by older persons across a range of areas of social life.<sup>78</sup> The two treaties apply of course only to those States in the two regions

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<sup>70</sup> [www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp). See M I Dabove, 'Derechos humanos de las personas mayores en la nueva Convención Americana y sus implicancias bioéticas' (2016) 16(1) *Revista Latinoamericana de Bioética* 38-59; M I Dabove, 'Derecho de la Vejez en tiempos de pandemia' (2020) 49 *Revista de la Facultad de Derecho* 1-20, doi : 10.22187/rfd2020n49a10.

<sup>71</sup> [www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons_signatories.asp) (visited 21 February 2021).

<sup>72</sup> In addition, in February 2019 the Inter-American Commission on Human Rights established a Thematic Rapporteurship on the Rights of Older persons, [www.oas.org/en/IACHR/jsForm/?File=/en/iachr/r/pm/default.asp](http://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/r/pm/default.asp).

<sup>73</sup> <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-older-persons>. The African Commission had established a Working Group on Rights of Older Persons and People with Disabilities in 2007: <https://www.achpr.org/specialmechanisms/detail?id=12>.

<sup>74</sup> Article 26.

<sup>75</sup> OAU/AU Treaties, Conventions, Protocols & Charters, <https://au.int/treaties> (status as of 30 June 2020) (visited 22 February 2021). According to press reports one other member State signed the Protocol in December 2019 and ratified it on 9 July 2020, but these actions are not yet reflected in the official status list.

<sup>76</sup> *Council of Europe Treaty Series*, No 163. As of 22 February 2021, 34 of the 47 member States of the Council of Europe were parties to the Revised Charter. Of those, 16 or roughly one-third of the members of the Council of Europe had accepted and were therefore bound by Article 23.

<sup>77</sup> In particular Articles, 21, 25 and 34.

<sup>78</sup> Mention should also be made of the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa by the African Union on 29 January 2018. As of 18 June 2020 that treaty had received 9 signatures, but no ratifications. 'Status list', <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (visited 22 February 2021). It will

that have adhered to the relevant treaty. While the two treaties are significant achievements and important articulations of the rights of older persons that are of both regional and universal relevance, it has also been pointed out that each is in some respects conceptually problematic, limited in coverage, and possibly inconsistent in certain respects with existing international standards.<sup>79</sup> For example, the UN Special Rapporteur on the rights of persons with disabilities has stated that the African Protocol ‘contains standards that offer less protection than and contradict the Convention on the Rights of Persons with Disabilities’.<sup>80</sup>

*Council of Europe Convention on preventing and combating violence against women and domestic violence*

62. Mention should also be made of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention)<sup>81</sup> which entered into force on 1 August 2014. While this treaty does not explicitly refer to older women, it provides protection in relation to violence against older women<sup>82</sup> and in relation to domestic violence against all older persons. It covers ‘Inter-generational domestic violence’ including ‘physical, sexual, psychological and economic violence by a person against her or his child or parent (elderly abuse) or such violence between any other two or more family members of different generations’.<sup>83</sup>

## **B. Other regional developments**

63. Within the European Union, proposals to broaden the scope of protection provided by the Employment Equality Directive (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), which covers age discrimination in work, were proposed as early as 2008.<sup>84</sup> A proposed new Directive, which would have been legally binding, would have extended protection against discrimination on the basis of age as well as on other grounds beyond the area of employment. The initiative did not find sufficient support to be adopted and the proposal is not currently being pursued. However, the European Council has recently endorsed on the level of policy the taking of additional measures informed by a human rights approach to better ensure the human rights of older persons.<sup>85</sup>

## **C. Other developments**

*Non-binding instruments*

64. Another regional development, albeit involving a non-binding instrument, was the adoption within the framework of the Council of Europe of the Recommendation of the Committee of Ministers

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come into force thirty days after the receipt of the fifteenth instrument of ratification by a Member State of the Union.

<sup>79</sup> See D M Chirwa and C I Rushwaya, ‘Guarding the Guardians: A Critical Appraisal of the Protocol to the African Charter on the Rights of Older Persons in Africa’ (2019) 19(1) *Human Rights Law Review* 53.

<sup>80</sup> A/74/186, para 15 (2019).

<sup>81</sup> *Council of Europe Treaty Series*, No 210, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>. As of 22 February 2021 34 States were parties to the Convention, while another 11 States and the European Union had signed but not ratified it.

<sup>82</sup> The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the monitoring body under the Convention, has interpreted it in this way.

<sup>83</sup> Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, Istanbul, 11 May 2011, para 42.

<sup>84</sup> European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2 July 2008, COM(2008) 425 final, 2008/0140 (CNS), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52008PC0426>.

<sup>85</sup> Council of the European Union, *Council Conclusions on Human Rights, Participation and Well-Being of Older Persons in the Era of Digitalisation*, 9 October 2020, <https://data.consilium.europa.eu/doc/document/ST-11717-2020-REV-2/en/pdf>.

to Member States on the promotion of the human rights of older persons (2014).<sup>86</sup> This contains a number of significant rights-based recommendations; however, the Special Rapporteur on the rights of persons with disabilities has commented that the Recommendation ‘despite recalling the provisions relevant to older persons in the Convention on the Rights of Persons with Disabilities, falls short in upholding all the standards of the Convention.’<sup>87</sup>

65. On 18 November 2012 the member States of ASEAN adopted the non-binding ASEAN Declaration on Human Rights. The Declaration provides that every person ‘is entitled to the rights and freedoms set forth [in the Declaration], without distinction of any kind such as . . . age . . .’ (Article 2), states that ‘the rights of . . . the elderly . . . are an inalienable, integral and indivisible part of human rights and fundamental freedoms’ (Article 4), and guarantees a range of other civil, political, economic, social and cultural rights.

## **V. DEVELOPMENTS IN THE PRACTICE OF THE UN HUMAN RIGHTS MECHANISMS, ESPECIALLY THE HUMAN RIGHTS TREATY BODIES**

### **A. Nature, extent and quality of the references to age and older persons**

66. The record of engagement by United Nations human rights treaty bodies with the human rights of older persons has been a mixed one. There have been important statements that address in detail the rights of older persons and some committees address issues of concern to older persons on a regular basis, though not always highlighting the age-specific aspects of the rights involved. The Independent Expert on the human rights of older persons has stated that ‘procedures for monitoring human rights treaties generally ignore older persons’,<sup>88</sup> while the Special Rapporteur on the rights of persons with disabilities noted in her 2019 report that, while the CEDAW Committee and the Committee on Economic, Social and Cultural Rights (CESCR) had issued general comments on the rights of older persons, ‘references to older people, including older persons with disabilities, in the concluding observations of human rights bodies and universal periodic review recommendations are particularly scarce.’<sup>89</sup> Further, dispersed and individual references do not of themselves show a sustained engagement or a broader coherent or systemic approach, and there is a lack of sustained follow-up based on a coherent and integrated framework of older persons’ rights.

67. The figures provided in this Update give some indication of the extent to which older persons’ rights have been explicitly included in the work of the treaty bodies. Not every treaty covers a wide range of rights that are potentially relevant to the situations of older persons. Nonetheless, all of the principal United Nations human rights treaties have relevance: even where the scope of a treaty is relatively narrow (for example, the Convention against Torture), it is appropriate to consider whether the treaty has been applied to those areas relevant to older persons..

68. The record of the thematic special procedures is also mixed. The establishment of the mandate of the Independent Expert on the human rights of older persons has brought focus to the issue since

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<sup>86</sup> CM/R(2014)2. In 2017 the Parliamentary Assembly of the Council of Europe urged the Committee of Ministers of the Council of Europe to ‘consider the necessity and feasibility of drawing up a legally binding instrument’ on the human rights of older persons: ‘Human rights of older persons and their comprehensive care’, Recommendation 2104 (2017).

<sup>87</sup> A/74/186, para 15 (2019). A review of the implementation of the Recommendation was undertaken in 2018: Council of Europe Steering Committee on Human Rights (CDDH), *CDDH Report on the implementation of the Committee of Ministers’ Recommendation CM/Rec(2014)2 on the promotion of human rights of older persons*, adopted by the CDDH at its 90th meeting (27-30 November 2018). The comments and analysis of the Committee make clear that the record of implementation is extremely variable and there is a long way to go to implement its standards.

<sup>88</sup> *Report of the Independent Expert on the human rights of older persons*, A/HRC/27/46, para 31(d) (2014); *Report of the Independent Expert on the human rights of older persons*, A/HRC/39/50, para 88 (2018).

<sup>89</sup> *Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar, submitted in accordance with Human Rights Council resolution 35/6, Older persons with disabilities*, A/74/186, para 10 (2019).

2014. While there has been some explicit substantive consideration of the human rights of older persons within other mandates, these have tended to be ad hoc and one-off engagements which, while helpful, are often not sustained or sufficiently based on a coherent and holistic approach to the human rights of older persons. Nor do special procedures generally include consultation with older persons and their organizations in their country visits. Further, there is no established framework for regular follow-up with States equivalent to the reporting procedure under the human rights treaty system which allows regular self-assessment and external monitoring of progress. Such repeated interactions between international supervisory bodies and States parties in the form of periodic reports and reviews, have been shown to be critical elements in helping to bring about change at the domestic level.<sup>90</sup>

69. The following section provides a general analysis of the work of the human rights treaty bodies, in particular since 2012; a more detailed analysis of the treaty bodies' engagement with the specific and thematic issues considered by the Open-ended Working Group at its last three sessions appears in section VI.

## **B. The practice of the human rights treaty bodies**

70. As noted above, when assessing the nature and extent of the engagement of the human rights treaty bodies with the human rights of older persons or in older age, one must adopt both a qualitative and a quantitative approach. This section makes some general comments about a number of the treaty bodies<sup>91</sup> and there is more detailed discussion, in particular of the work of the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women, which are treated briefly in this introductory discussion, in Section VI as part of the analysis of the specific rights explored at the Open-ended Working Group on Ageing.

71. The human rights treaty bodies have engaged with certain aspects of the human rights of older persons or discrimination on the basis of older age; the extent of that engagement has varied from between committees and within committees over time. Some important general statements have been made but overall the nature, level and intensity of this engagement falls short of providing a comprehensive, coherent and sustained engagement with the human rights of older persons.

72. A general indication of the trend in the level of engagement with these issues can be obtained from the results of a search of the OHCHR Universal Human Rights Index (UHRI) database of all treaty body concluding observations from 2010 to 2019 using the category of affected persons 'older persons' (conducted 6 March 2020). From 2010-2014 the number of hits was 270, while from 2015-2019 the number was 249. While there was a slight increase in the period 2013-2016, overall there has been no significant upward trend: the rolling five-year average for 2010-2014 was 50, while for 2015-2019 it was 49.8, and the overall yearly average for the 10-year period was 51.9. As most of these references include both an expression of concern by a committee and a related recommendation, the actual number of distinct references is roughly half these raw numbers.

### *Committee on Economic, Social and Cultural Rights*

73. A number of rights central to the well-being of older persons are guaranteed by the ICESCR: the rights to health, an adequate standard of living, to work, and to social security stand out, though they are by no means the only relevant rights. The Committee on Economic, Social and Cultural Rights (CESCR) does engage with the situation of older persons in the context of these rights. However, the challenge of sustaining attention to and ensuring coherent consideration of the rights of older persons or rights as they apply to older persons can be seen from its practice. For example, in 1996 the CESCR adopted a detailed general comment on older persons and the enjoyment of economic, social and

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<sup>90</sup> For a detailed review of the literature and a rigorous empirical assessment of the evidence, see C Creamer and B Simmons, 'The Proof is in the Process: Self-Reporting Under International Human Rights Treaties' (2020) 114 *American Journal of International Law* 1–50.

<sup>91</sup> It does not discuss the work of the Committee on the Rights of the Child or the Committee on Forced Disappearances. A search of the UHRI database for affected group 'older persons' produced no hits for the CED and only three hits for the CRC (search conducted 28 February 2021).

cultural rights. The full impact of this statement outside the treaty reporting process is difficult to gauge accurately, but the general comment provides an important frame of reference for government and others working to give effect to the ICECSR. The content of this general comment, however, reflects the thinking of its time and contains a number of references that would now be seen as out of date in terms of how one should address human rights in older age.<sup>92</sup>

74. While general comments are important statements that can be influential, a major part of the impact of a treaty body's work comes with its regular engagement with individual States parties in the reporting process: for a committee to have a continuing and sustained impact in relation to the human rights of older persons, these issues need to be reflected in an explicit and sustained engagement by the Committee in its dialogue with States parties to the ICESCR under the reporting procedure and in its concluding observations.<sup>93</sup>

75. The record in this regard is mixed. Even the high-profile general comment on this issue has failed to translate into these matters becoming regular and priority issues in dialogues with States. For example, a search of the UHRI database for CESCR concluding observations over the last 20 years relating to 'older persons' returned about 85 separate results, though a number of the references to issues such as social security may apply substantively to older persons even if they are not mentioned explicitly.

#### *Committee on the Elimination of Discrimination against Women*

76. The Committee on the Elimination of Discrimination against Women (the CEDAW Committee) is the treaty body that most consistently addresses issues relating to the human rights of older persons in its concluding observations and general recommendations. That coverage of course focuses on older women rather than the older population as a whole. The Committee also regularly engages in a life course analysis, underlining the impact of discrimination against girls and women in earlier stages of their lives on their well-being in older age. As well as its general recommendation dealing with the situation of older women adopted in 2010,<sup>94</sup> the Committee has touched on the position of older women in a number of other general recommendations, as well as adopting a general recommendation on the economic consequences of marriage, its termination or dissolution that is of particular relevance to older women.<sup>95</sup>

77. Despite this good work in general, there are a number of areas in which older women seem to be largely invisible in the CEDAW Committee's consideration. The example of access to education, training, life-long learning and capacity-building by older women is discussed below.

#### *Committee against Torture and the Subcommittee on the Prevention of Torture*

78. The Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention (OPCAT) have established two procedures for the monitoring and implementation of the Convention. The Convention established the Committee against Torture (CAT), which administers a number of procedures (including a reporting procedure) and also adopts general comments on the interpretation of the Convention. Under the Optional Protocol the Subcommittee for the Prevention of Torture (SPT) performs a number of functions including visiting States parties and liaising with National Preventive Mechanisms.

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<sup>92</sup> Georgantzi, above n 38, 206-208.

<sup>93</sup> The concluding observations of committees in the reporting procedure present what these bodies consider to be the priority issues in the implementation of the relevant treaty generally and for the particular State party. As tailored recommendations to each State party resulting from consideration of the State's report and its dialogue with the committee, they are a potentially important way of stimulating change at the national level. Accordingly, what appears in the concluding observations is important as an indicator of priorities and a contributor to change.

<sup>94</sup> *General recommendation 27*, CEDAW/C/GC/27, paras 16, 37-38 (2010).

<sup>95</sup> *General recommendation 29 on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, CEDAW/C/GC/29 (2013).

79. For both committees the Convention against Torture provides the relevant normative framework. The scope of that Convention covers conditions of imprisonment, a topic that engages much of the CAT's attention in the reporting procedure; visiting places of detention is a core function of the SPT. Both the CAT and the SPT have taken the view that social care institutions fall within the scope of the Convention against Torture, in particular if they involve involuntary confinement.<sup>96</sup> The SPT has also expressed the view that the phrase 'places of detention' in Article 4 of OPCAT has a broad meaning which extends beyond 'traditional places of detention' and includes 'social care institutions'.<sup>97</sup>

80. The 2012 Analytical Study referred to the challenges presented by older populations in prisons and the particular issues that may arise in relation to older prisoners, including issues relating to conditions of detention that may constitute cruel, inhuman or degrading treatment or punishment, or torture. In many countries of the world prison populations are ageing<sup>98</sup> and this presents challenges for the administration of prisons and ensuring that the rights of older prisoners are respected.

81. From 2012 to 2019 the Committee against Torture adopted 140 sets of concluding observations on State party reports. A search of CAT Concluding observations for that period in the UHRI database (search term 'older' or 'elderly' or affected group 'older persons') identified about a dozen occasions on which the Committee expressed concerns about older persons, including:

- (a) about the abuse of older persons and persons with disabilities in residential care and the absence or inadequacy of independent monitoring mechanism for those institutions;<sup>99</sup>
- (b) about the 'large number of persons with mental and psychosocial disabilities, including older people, [who] are confined involuntarily in psychiatric institutions';<sup>100</sup> and
- (c) about older women being accused of witchcraft and subjected to violence or social exclusion or being killed.<sup>101</sup>

82. There was also an expression of concern about violence against older persons (among other groups);<sup>102</sup> and a reference to the killing of 'the elderly, women and children' who were trying to flee attacks by security forces on towns and villages.<sup>103</sup> Older prisoners and the denial of rights they face have been invisible; older persons in care institutions have had very limited visibility, and other forms of torture or cruel, inhuman or degrading treatment that older persons may experience receive little attention.<sup>104</sup>

83. Despite the views of CAT and the SPT that aged care homes fall within the scope of the Optional Protocol's regime of visits by the SPT itself and National Preventive Mechanisms (NPMs), the SPT appears to have done little in this regard, or indeed in relation to older prisoners more

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<sup>96</sup> Committee against Torture, *General comment No 2: Implementation of article 2 of the Convention*, CAT/C/GC/2, para 15 (2008).

<sup>97</sup> CAT/C/50/2, para 67 (2013).

<sup>98</sup> M Turner et al, 'Ageing and dying in the contemporary neoliberal prison system: Exploring the 'double burden' for older prisoners' (2018) 212 *Social Science & Medicine* 161-167; L Barry et al, 'Health-care needs of older women prisoners: Perspectives of the health-care workers who care for them' (2020) 32(2) *Journal of Women & Aging* 183-202.

<sup>99</sup> CAT/C/IRL/CO/2, paras 7, 35-36 (2017); CAT/C/PAN/CO/4, paras 42-43 (2017); CAT/C/CHL/CO/6, paras 38-39, 56 (2018); CAT/C/LVA/CO/6, paras 22-23 (2019); CAT/C/CYP/CO/5, paras 38-39 (2019); CAT/C/DEU/CO/6, paras 13-16 (2019).

<sup>100</sup> CAT/C/SRB/CO/2, para 18 (2015).

<sup>101</sup> CAT/C/KEN/CO/2, para 17 (2013); CAT/C/BFA/CO/1, para 21 (2014); CAT/SLE/CO/1, para 16 (2014).

<sup>102</sup> CAT/C/NOR/CO/8, para 22(c) (2018).

<sup>103</sup> CAT/C/SYR/CO/1/Add.2, paras 20, 23 (2012).

<sup>104</sup> However, CAT included in all nine lists of issues it adopted in late December 2020 and early January 2021 a standard question about the impact of the COVID-19 pandemic and asked States parties to indicate what measures they had taken in relation to persons deprived of their liberty and in other situations of confinement such as homes for older persons, though it asked about older prisoners explicitly only once.

generally.<sup>105</sup> From the 50 reports by the SPT to States parties or to the National Preventive Mechanisms (NPMs) publicly available on the OHCHR website as of 4 December 2019, it appeared that the SPT had not paid any visits to aged care residences, whether dementia wards or more generally; the SPT has on a small number of occasions stressed the need for NPMs to have the competence and resources to visit such institutions and for them to do so in practice.<sup>106</sup> However, overall older persons are relatively invisible in the practice of the SPT.

#### *Committee on the Elimination of Racial Discrimination*

84. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) does not include specific reference to older persons or discrimination on the basis of age. Although race, ethnic origin and indigeneity are factors that interact with age to produce violations of older persons' rights, the Committee on the Elimination of Racial Discrimination (CERD) appears to have given little priority to the specific human rights of older persons. Searches of CERD concluding observations in the UHRI database up to the end of 2020 using the 'affected persons' category of 'older persons' or text searches for 'elder', 'older', 'old age' or 'pensions' produced about a dozen results. Older indigenous persons worldwide experience chronic poverty, health inequality and other forms of disadvantage (as seen in differential rates of mortality from COVID-19 in some countries among racial or ethnic minorities). This is an important area of intersectional discrimination involving older persons, as studies show that in some countries a person's race or ethnicity significantly affects their experience of ageing and often reflects the cumulative disadvantage suffered at earlier stages of their lives.<sup>107</sup> However, although the Committee regularly asks for general statistical information and information relation to specific areas disaggregated by age, sex/gender, ethnicity, national origin and other statuses, it appears that older persons belonging to the groups protected by the Convention have been largely invisible in its work.

#### *Committee on the Rights of Persons with Disabilities*

85. The Committee on the Rights of Persons with Disabilities has adopted seven *General comments* since 2014, as well as *Guidelines* on Article 14 of the Convention dealing with the right to liberty and security of persons with disabilities.<sup>108</sup> The general comments adopted by the Committee dealing with legal recognition before the law, equality and non-discrimination (in particular the concept of inclusive equality) and the right to live independently in the community address issues that have been discussed at recent sessions of the Open-ended Working Group on Ageing. The CRPD Committee's work in relation to legal capacity and supported decision-making is directly relevant to the situation of those older persons who benefit from the protections of the CRPD.

86. In addition to the statements it has made in its General comments the CPRD has given some attention to older persons in its concluding observations. For example, a search of the UHRI database

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<sup>105</sup> This same collection of reports also appears to say little about the position of older prisoners, with the only exception being *Elderly prisoners: Visit to New Zealand undertaken from 29 April to 8 May 2013: observations and recommendations addressed to the State party, Report of the Subcommittee*, CAT/OP/NZL/1, para 65 (2017).

<sup>106</sup> *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, Report to the National Preventive Mechanism*, CAT/OP/DEU/2, para 12, 21 and 22 (2013).

<sup>107</sup> See, eg, J E Pace and A Grenier, 'Expanding the Circle of Knowledge: Reconceptualizing Successful Aging Among North American Older Indigenous Peoples' (2017) 72(2) *Journals of Gerontology: B Psychol Sci Soc Sci* 248-258; J B Temple et al, 'Prevalence and context of racism experienced by older Aboriginal and Torres Strait Islanders' (2019) 38(1) *Australasian Journal of Ageing* 39-46; .

<sup>108</sup> *General Comment No 1: Article 12: Equal recognition before the law* (2014) and *Corrigendum: General Comment No 2: Article 9: Accessibility* (2014); *General Comment No 3: Article 6 - Women and girls with disabilities* (2016); *General Comment No 4: Article 24: Right to inclusive education* (2016); *General Comment No 5: Article 19: Right to independent living* (2017); *General Comment No 6: Article 5: Equality and non-discrimination* (2018); *General Comment No 7: Article 4.3 and 33.3: Participation with persons with disabilities in the implementation and monitoring of the Convention* (2018); *Guidelines on Article 14*.

for references to ‘older persons’ or the affected persons group ‘older persons’ identified 29 results in the 85 sets of Concluding observations that the Committee had adopted by the end of 2020, roughly a third. In the majority of cases there was only one explicit reference to older persons with disabilities addressing one area covered by the Convention.<sup>109</sup> While it might be thought that many of the comments about persons with disabilities generally may be applicable and therefore be applied to older persons with disabilities, the pattern across the human rights system shows that this is not an assumption that can necessarily be made.<sup>110</sup>

#### *Committee on the Rights of Migrant Workers*

87. Established by the International Convention for the Protection of All Migrant Workers and Members of Their Families (ICMW), the Committee on Migrant Workers (CMW) held its first session in 2004. The ICMW is the only one of the principal UN human rights treaties to expressly refer to age as a ground of non-discrimination (Article 1(1)). However, the CMW has devoted little explicit attention in its concluding observations to issues faced by older migrant workers,<sup>111</sup> though some of the general concerns expressed by the Committee (for example in relation to social security) would also apply to older workers. In the four general comments adopted by the CMW since 2011 there are virtually no explicit references to older migrant workers and they do not engage substantially with issues that may particularly affect older migrant workers.<sup>112</sup>

#### *Decisions in individual communications under the United Nations human rights treaties*

88. Since the 2012 Analytical Paper there have been almost no individual complaints decided by the treaty bodies dealing explicitly with the human rights of older persons.<sup>113</sup> This suggests that older persons do not see the treaty bodies and their constituent treaties as offering a means of redressing violations of their rights. There appear to have been only two cases dealing with the rights of older persons,<sup>114</sup> both involving discrimination against older women in pension entitlements because of failures to recognise their interrupted participation in the labour force. In these cases the CESCR and the CEDAW Committee addressed the issue of the impact on women’s social insurance and pension payments of the exclusion of periods spent caring for family members from calculations of their pension entitlements or other adverse impacts of pension scheme regulations on women because of their unpaid care responsibilities.

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<sup>109</sup> There were about 40 independent explicit references in relation to these States parties.

<sup>110</sup> The 13th session of the Conference of the States parties to the CPRD had as one of its substantive roundtable discussion topics the human rights of older persons with disabilities, which may stimulate further attention on this group in the work of the Committee. CRPD/CSP/1 (2020) and *Addressing the rights and needs of older persons with disabilities: ageing and demographic trends*, Note by the Secretariat, CRPD/CSP/2020/3 (2020).

<sup>111</sup> A search conducted on 20 January 2021 of CMW concluding observations in the UHRI database up to 31 December 2020 for ‘affected persons’ category ‘older persons’ and a search using terms ‘elder’, ‘older’ or ‘old age’ and ‘pension’ produced 11 substantive results out of 69 sets of Concluding observations.

<sup>112</sup> Indeed, the only explicit reference appears to be the comment by the CMW referring to the particularly damaging nature of detention for migrant workers and their families who ‘may include victims of torture, unaccompanied older persons, persons with disabilities and persons living with HIV/AIDS’. *General comment No 2 on the rights of migrant workers in an irregular situation and members of their families*, CMW/C/GC/2, para 46 (2013).

<sup>113</sup> See also *Moylan v Australia*, Committee on the Elimination of Racial Discrimination, Communication No. 47/2010, Decision on admissibility adopted by the Committee at its eighty-third session (12–30 August 2013), CERD/C/83/D/47/2010.

<sup>114</sup> Committee on Economic, Social and Cultural Rights, *Trujillo Calero v Ecuador*, Communication No 10/2015, views of 26 March 2018; Committee on the Elimination of Discrimination against Women, *Ciobanu v Moldova*, Communication No 104/2016, views of 4 November 2019.

89. Both cases are significant recognitions of the impact of discrimination during earlier stages of women's lives on their standard of living in the post-paid work stages of life, discussed in more detail below under the right to social protection, as well as recognizing intersectional discrimination.

### **C. Developments in the work of other UN human rights mechanisms<sup>115</sup>**

#### *Engagement generally by the special procedures with the human rights of older persons*

90. *Prior to 2012:* In the period before the preparation of the 2012 Analytical Study there had been a number of reports by thematic special rapporteurs that engaged with the human rights of older person within the context of specific mandates.<sup>116</sup> While these were welcome contributions to the debates, they were generally one-off interventions by the special procedure in question and were not followed up within the framework of those mandates, as the special procedures do not include regular reporting procedures as do the principal human rights treaties. In the case of some thematic mandates dealing with issues that are salient in relation to the rights of older persons, there appears to have been little or no explicit engagement with the human rights of older persons.<sup>117</sup>

91. *Since 2012:* While there have been some interventions by thematic special procedures on issues relating to the human rights of older persons, these have addressed a small number of relevant issues and have not been followed up in the context of the specific mandate.<sup>118</sup> Nonetheless, many of the issues addressed by thematic special rapporteurs do have relevance for older persons.<sup>119</sup>

#### *Independent Expert on the human rights of older persons*

92. The major development in relation to the Human Rights Council thematic special procedures was the establishment by the Council in 2013 of the mandate of the Independent Expert on the enjoyment of all human rights by older persons, a position to which Ms Rosa Kornfeld-Matte was appointed in 2014; she was succeeded in that role in 2020 by Ms Claudia Mahler. The former Independent Expert submitted a number of thematic reports and has also carried out a number of country

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<sup>115</sup> In relation to the profile of older persons in the Universal Periodic Review, it was found that 'among more than 13,000 recommendations related to discrimination classified under the Universal Human Rights Index, less than 1 per cent concern age discrimination against older persons': *Activities of the Office of the United Nations High Commissioner for Human Rights, the United Nations system and regional organizations to support States' efforts to promote and protect the human rights of older persons, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/41/32, para 42 (21 June 2019).*

<sup>116</sup> *Pre-2012:* These include: *Report of the Special Rapporteur on extreme poverty and human rights: Report on non-contributory pensions and human rights, A/ HRC/14/31 (2010) [2012 Study, p 12 n 64]; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, A/HRC/10/44, para 72 (2009); Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report to the General Assembly submitted by Mr Anand Grover, Special rapporteur on the right of everyone to the highest attainable standard of physical and mental health, A/64/272, paras 51-53 (2009) ('Elderly persons'); Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest standard of physical and mental health, A/HRC/18/37 (2011).*

<sup>117</sup> For example, the reports of the Special Rapporteur on the right to adequate housing have devoted little more than the occasional passing reference to the specific issues that older persons face, with consideration limited to some references to age as one of a number of relevant statuses or to older persons as one group in a list of marginalized groups. However, over the course of the mandate, established in 2000, there has been no detailed examination of the human rights of older persons to housing. Equally the reports of the Special Rapporteur on the right to education have not addressed in any detail the implications of this right for older persons, in particular in the context of lifelong learning (see below).

<sup>118</sup> *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez, A/HRC/22/53, paras 51-56 (2013).*

<sup>119</sup> See the discussion of the 2019 report of the Special Rapporteur on the rights of persons with disabilities dealing with the human rights of older persons with disabilities at p 28 below.

visits. The discussion below of particular themes before the Open-ended Working Group also refers to the consideration by the Independent Experts of those themes in their reports.

93. The former Independent Expert noted the major shift from biomedical to a human rights approach in thinking about ageing and older persons and identified a number of new issues that have arisen in the field of ageing and human rights. In addition, on a number of occasions she drew attention to the fragmented and dispersed nature of the current international normative framework on the human rights of older persons and expressed the view that a new international treaty on the human rights of older persons is desirable, in addition to other measures taken to improve implementation under existing frameworks and procedures.

94. In her 2018 thematic report the Independent Expert commented:<sup>120</sup>

The Independent Expert stresses that the lack of a comprehensive and integrated international legal instrument to promote and protect the rights and dignity of older persons has significant practical implications, given that: (a) existing regulations do not cohere, let alone conceptualize regulatory principles to guide public action and the policies of Governments; (b) general human rights standards do not consider the recognition of third-generation specific rights in favour of older persons; (c) it is difficult to clarify the obligations of States with respect to older persons; (d) procedures for monitoring human rights treaties generally ignore older persons; (e) current instruments do not make the issues of ageing visible enough, which precludes the education of the population and with it, the effective integration of older persons.

95. The Independent Expert reiterated that view in her 2019 thematic report dealing with older persons in emergency situations, noting the ‘significant practical implications’ for older persons of such situations. She also stressed that ‘current instruments do not make the issues of ageing specific or sufficiently visible, and therefore preclude older persons from the full enjoyment of their human rights, particularly in emergency situations.’<sup>121</sup> The current Independent Expert expressed a similar view in her first thematic report to the General Assembly.<sup>122</sup>

### *Special Rapporteur on the rights of persons with disabilities*

96. Another development of importance has been the thematic report prepared in 2019 by the then Special Rapporteur on the rights of persons with disabilities.<sup>123</sup> In her report, the Special Rapporteur analyzed the relevance of the CRPD for older persons with disabilities generally and in a number of specific areas. She emphasized that while disability and ageing perspectives were not the same, the overlap between persons with disabilities and older persons with disabilities meant that the CRPD could provide a solid basis for older persons with disability being able to claim certain of their rights.

97. At the same time the Special Rapporteur noted that discrimination in older age is not ‘the mere result of ableist biases’; she noted the role of ageism which she considers to be ‘a distinct form of oppression that affects older persons, including older persons with disabilities.’<sup>124</sup> She also noted that ‘intersection between older age and disability results in both aggravated forms of discrimination and specific human rights violations against older persons with disability.’

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<sup>120</sup> *Report of the Independent Expert on the human rights of older persons*, A/HRC/39/50, para 88 (2018).

<sup>121</sup> *Report of the Independent Expert on the enjoyment of all human rights by older persons*, A/HRC/42/43, para 101 (2019).

<sup>122</sup> *Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons*, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, Claudia Mahler, A/75/205, para 78 (2020).

<sup>123</sup> *Report of the Special Rapporteur on the rights of persons with disabilities*, Catalina Devandas-Aguilar, submitted in accordance with Human rights Council resolution 35/6, *Older persons with disabilities*, A/74/186 (2019).

<sup>124</sup> A/74/186, para 7 (2019). See M van der Horst and S Vickerstaff, ‘Is part of ageism actually ableism?’ (2021) *Ageing and Society* 1-12, doi:10.1017/S0144686X20001890.

98. The Special Rapporteur emphasized that ‘the combined effect of ageism and ableism leads to ‘unique entry point for dealing with gaps in human rights protection and age-biased interpretations of human rights standards’<sup>125</sup> and for ‘dealing with the intersection between ageing and disability from a human rights perspective.’<sup>126</sup>

99. Not only will the guarantees of the CRPD apply directly to older persons with disabilities who wish to invoke them, but they also provide a basis on which to formulate further guarantees that apply to older persons with disabilities and older person who do not have disabilities, using the CRPD standards as an irreducible baseline.<sup>127</sup> However, despite the higher incidence of impairment among older persons than in the general population ,a significant proportion of older persons would not fall within the definition of ‘person with disability’ in the CRPD, so would not be able to rely directly on that treaty. Further as the Special Rapporteur on the rights of persons with disabilities has pointed out, ‘the age at which people experience disability influences their sense of identity as well as societal perceptions of them’ and those ‘who acquire impairments when older seldom self-identify as persons with disabilities and are more likely to perceive the decline of their physical and cognitive functioning as a “normal” part of ageing.’<sup>128</sup> This interaction between self-identification and social construction is likely to lead to a less extensive application of the CRPD in practice to older persons. The current Special Rapporteur on rights of persons with disabilities has emphasized the importance of ‘continuing the conversation’ between disability and age advocacy groups in order to ‘to work towards common understanding, to clarify commonalities and to work towards sustainable life-course solutions.’<sup>129</sup>

## VI. SPECIFIC THEMATIC ISSUES CONSIDERED BY THE OPEN-ENDED WORKING GROUP ON AGEING

100. The following areas and rights were examined by the Open-ended Working Group on Ageing at its eighth, ninth and tenth sessions or will be considered at its eleventh session:

<b>OEWG Sessions</b>	<b>Thematic focus</b>	<b>Discussion on normative elements</b>
Eighth session (2017)	Equality and non-discrimination Violence and abuse	
Ninth session (2018)	Long-term and palliative care Autonomy and independence	Equality and non-discrimination Violence and abuse
Tenth session (2019)	Social protection and social security, including social protection floors Education, training, life-long learning and capacity-building	Long-term and palliative care Autonomy and independence
Eleventh session (2020)	Right to work and access to the labour market Access to justice	Social protection and social security, including social protection floors Education, training, life-long learning and capacity-building

101. This section examines each of these thematic areas (other than access to justice). In relation to each thematic area, it provides an overview of the key issues and analyses the adequacy and limitations of existing international human rights norms and their application and implementation.

<sup>125</sup> A/74/186, para 8 (2019).

<sup>126</sup> A/74/186, para 13 (2019).

<sup>127</sup> A/74/186, para 16 (2019).

<sup>128</sup> A/74/186, para 6 (2019).

<sup>129</sup> *Report of the Special Rapporteur on the rights of persons with disabilities, Gerard Quinn, A/HRC/46/27, para 83 (2021).*

## A. Equality and non-discrimination

### *Existing treaties and the practice of the human rights treaty bodies*

102. Equality and non-discrimination are fundamental principles of human rights law, affirming that individuals should not be subject to invidious differential treatment on the basis of an individual or group characteristic. This is reflected in the Universal Declaration of Human Rights and in many subsequent treaties that contain general guarantees of equality (Article 26 of the ICCPR), guarantees of the enjoyment of rights protected by a specific treaty without discrimination on specific grounds (Article 2 of the ICESCR, Article 2 of the ICCPR), and specific thematic treaties designed to address discrimination against particular groups (the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women). Other thematic treaties such as the International Convention on the Protection of All Migrant Workers and Members of Their Families (MWC) and the CRPD are also designed to achieve equality and non-discrimination for particular groups through the elaboration of a detailed series of guarantees addressing human rights violations often experienced by members of those groups.

103. As has been noted in many submissions to the Open-ended Working Group on Ageing, the standard list of prohibited grounds of discrimination in United Nations human rights treaties does not explicitly include age.<sup>130</sup> Article 2 of the UDHR guarantees everyone to the right set out in the 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’. Similar language appears in the two International Covenants, as well as in corresponding provisions of regional human rights treaties. Age has been included in some regional instruments over the years,<sup>131</sup> though not all,<sup>132</sup> and the recent regional treaties on the human rights of older persons include such protections.

### *Limitations, deficiencies and gaps*

104. When it considered whether age was a prohibited ground of discrimination under the ICESCR, the CESCR noted the omission of an explicit reference to age in the UDHR and the ICESCR and commented:

Rather than being seen as an intentional exclusion, this omission is probably best explained by the fact that, when these instruments were adopted, the problem of demographic ageing was not as evident or as pressing as it is now.<sup>133</sup>

105. While demographic ageing may indeed not have been a pressing issue when the ICESCR was adopted, the more important point is not the fact of the ‘problem’ of ageing populations, but rather social responses to the process of ageing and older persons. Ageism is not a new phenomenon – the term was coined around the time the International Covenants were adopted but the phenomenon existed long before it was explicitly named. However, the pervasiveness of ageism and the failure of the international human rights system and national systems to respond to ageism and discrimination on the basis of older age compared with how they have responded to other forms of discrimination (racism, sexism, ableism, rights of the child) is seen by those advocating on behalf of older persons as evidence that the violations of human rights suffered by this large and increasing number and proportion of the human population are viewed as less important than these other forms of discrimination.

106. The fact that the drafters of a treaty do not have particular circumstances in mind when drafting treaty protections can both influence the nature and content of the guarantees included in the instrument

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<sup>130</sup> With the exception of the Migrant Workers Convention, Article 1(1).

<sup>131</sup> For example, the Charter of Fundamental Rights of the European Union, Article 25.

<sup>132</sup> For example, Protocol 12 to the European Convention on Human Rights adopted in 2000 added a freestanding equality right to the Convention’s guarantees that did not explicitly include prohibition of age discrimination but guaranteed non-discrimination ‘on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

<sup>133</sup> CESCR, *General comment 6*, para 11 (1995).

and also send the message that an omitted ground is of lesser importance than the listed grounds and may be subjected to less rigorous scrutiny than other explicitly listed grounds. In the case of age, where age discrimination and stereotyped attitudes are a widespread and ingrained part of most societies, it is often easy to assume that existing practices are objective and reasonable, even though they embody ageist assumptions. This reflects a more widespread failure to recognize ageism and the fact that it is not taken as seriously as other forms of discrimination such as racism, sexism, and ableism.

107. From the perspective of implementation, when a specific ground of discrimination is included in a treaty which obliges a State party to implement protections against discrimination on that ground in national law, that ground is more likely to be explicitly included in national laws and the possibility of its being implemented in practice enhanced; an unlisted ground may be overlooked and given lesser priority. The experience of some States in Latin America and in Africa following the adoption of their regional instruments on the human rights of older persons indicates that specific legislation has been enacted in response to the adoption of the regional instruments.

108. Over time it has become accepted that age falls within the category of ‘other status’ included in most international catalogues of prohibited grounds of discrimination. However, there has been little case law or other practice that details the definition of equality and non-discrimination on the ground of (older) age or analyzes in depth the ageing process and its social and legal construction. Equally, there has been limited consideration of whether there are special features of age discrimination that require a tailored definition of discrimination. In contrast, the definition of discrimination on the basis of disability in the CRPD added to existing definitions of discrimination by defining denial of reasonable accommodation as a form of discrimination. The inclusion of a requirement of reasonable accommodation or adjustment is something that many advocates consider is appropriate also in relation to the situation of older persons, for example in relation to the employment conditions of older workers.

109. Further, age discrimination as a general concept covers discrimination on the ground of both younger and older age and as a general concept may not capture important dimensions of the nature of the ageing process for older persons and the discrimination they face on that basis (for example, assumptions about a person of a particular age not wanting to participate in paid work or assumptions about their preferred living arrangements).

110. The issue of intersectional, multiple or cumulative discrimination involving age has also been identified as an important issue. While United Nations human rights treaty bodies have referred to many grounds of possible intersectional discrimination, issues of intersectionality have not always been particularly well dealt with in the few cases that have come before them,<sup>134</sup> although there have been positive developments, in particular under the CEDAW Optional Protocol (though older age has generally not been involved).<sup>135</sup> The jurisprudence before regional tribunals in Europe in relation to intersectional discrimination in general and older age as a component of intersectionality has been limited and flawed.<sup>136</sup> Nor has there been any articulation in the human rights treaty body case law of a coherent and experience-based conceptual framework on the rights of older persons.

111. International standards and national laws on older persons in many cases fail to directly and comprehensively address older age discrimination and in some cases embody standards that are either

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<sup>134</sup> The 2012 Analytical Study noted: ‘The international system has a limited ability under the current framework of protection to reflect such a necessarily nuanced recognition of inter-sectional or multiple discrimination issues as they relate to older persons, not only for women, but in relation to other grounds of identity which may result in discrimination and marginalization. The development of norms particular to the situation of older persons would facilitate such approaches to be further elaborated.’ 2012 Analytical Study, p 12.

<sup>135</sup> For a discussion including intersectionality in the practice and case law of the UN human rights treaty bodies, see S Atrey, *Intersectional Discrimination* (Oxford University Press, 2019) 16-19.

<sup>136</sup> See in the regional context *Parris v Trinity College Dublin and Others*, Court of Justice of the European Union, Request for a preliminary ruling from the Labour Court, Ireland, Judgment of the Court (First Chamber) of 24 November 2016 and the commentary by D Schiek, ‘On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)’ (2018) 18(2-3) *International Journal of Discrimination and the Law* 82, 90-93 and Numhauser-Henning, above n 45, 525-529.

outmoded or are in need of a fundamental reexamination in the light of the developments in thinking about ageing and the human rights of older persons over the last few decades. National age discrimination laws frequently contain many exceptions or exemptions that are discriminatory (for example in relation to insurance, employment, access to employment services). One example of this is the general acceptance under international and regional human rights law and many national laws of mandatory retirement ages, albeit with some restrictions. Mandatory retirement ages are on their face a form of age-based differential treatment that is only acceptable if clearly demonstrated to be reasonable. The justifications permitted under current international law give rise to questions whether they are consistent with contemporary notions of the equal enjoyment of human rights by older persons.<sup>137</sup>

### ***Conclusion on equality and non-discrimination***

112. The failure to include age as an explicit ground of prohibited discrimination in most of the principal United Nations human rights treaties continues to send the message that protection against older age discrimination is not a priority in the human rights framework. It also appears to set a lower bar for the justification of differential treatment based on older age. Some regional standards appear to accept justifications for discriminatory treatment that are arguably at odds with modern ideas of equality and non-discrimination and sometimes this jurisprudence has been taken up at the international level.

113. The experience of the CRPD has shown the importance of recognizing that what equality requires for a particular section of the community may be distinct from more general definitions of discrimination and must be spelt out explicitly. The inclusion of a denial of reasonable accommodation as a form of disability discrimination is the clearest example and this has parallels in relation to the situation of older persons as noted above in the employment context. Similarly, ageism and the application of ageist stereotypes is a major dimension of age discrimination that is inadequately covered by existing international norms. A clear, tailored definition of what equality and non-discrimination on the basis of older age means according to contemporary standards is needed as part of a binding legal instrument.

### **B. Autonomy and independence**

114. Together with equality and non-discrimination, ensuring that older persons enjoy autonomy and independence is critical to their well-being and enjoyment of all human rights. The scope of the concepts of autonomy and independence, the violations of the autonomy and independence of older persons' rights and the extent and limitations of existing international human rights protections have been explored both in submissions and other material provided to the Open-ended Working Group on Ageing<sup>138</sup> and in the work of the Independent Expert on the human rights of older persons.<sup>139</sup>

115. The material presented to the Open-ended Working Group on Ageing has noted that there is a broad consensus on the content of autonomy and independence, though 'the relevant international documents do not provide clear and consistent definitions of each term.'<sup>140</sup> Autonomy has been

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<sup>137</sup> A Byrnes, I Doron, N Georgantzi, W Mitchell and B Sleaf, 'The Right of Older Persons to Work and to Access the Labour Market' [2019] UNSW Law Research Series 101, available at <https://ssrn.com/abstract=3504975>.

<sup>138</sup> See *Analysis and overview of guiding questions on autonomy and independence received from Member States, 'A' Status National Human Rights Institutions and accredited non-governmental organizations*, presented to the ninth session of the Open-ended Working Group on Ageing, 2018 [https://social.un.org/ageing-working-group/documents/ninth/Open-ended Working Group on Ageing9\\_Substantive\\_Report\\_Autonomy\\_Independence\\_OHCHR.pdf](https://social.un.org/ageing-working-group/documents/ninth/Open-ended%20Working%20Group%20on%20Ageing9_Substantive_Report_Autonomy_Independence_OHCHR.pdf); *Substantive Inputs in the form of Normative Content for the Development of a Possible International Standard on the Focus Areas 'Autonomy and Independence' and 'Long-term and Palliative Care'* [Substantive inputs – Autonomy and Long-term care], Working document submitted by the Department of Economic and Social Affairs (DESA) in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), to the tenth session of the Open-ended Working Group on Ageing, A/AC.278/2019/CRP.4, paras 3-28 (2019), [https://social.un.org/ageing-working-group/documents/tenth/A\\_AC.278\\_2019\\_CRP.4.pdf](https://social.un.org/ageing-working-group/documents/tenth/A_AC.278_2019_CRP.4.pdf).

<sup>139</sup> *Report of the Independent expert on the human rights of older persons*, A/HRC/30/43 (2015).

<sup>140</sup> *Substantive inputs – Autonomy and Long-term care*, para 10.

described as ‘the right to have control over one’s life, to make one’s own decisions and to have those decisions respected’,<sup>141</sup> while independence has been described in various ways, including the ability to carry out one’s decisions in practice and to be able to remain fully integrated in society and community life.<sup>142</sup> There is clearly some overlap in the concepts and their practical implications for the lives of older persons. There has also been some debate over whether they are rights or principles, or both.

116. Limitations on the right of older persons to enjoy and exercise autonomy and independence have frequently been the result of stereotyped assumptions about the capacities, desires and needs of older persons, leading to the neglect of their wishes, assumptions about their preferences, disregard for their values and views and taking decisions for them – all the result of ageist assumptions that older persons may not be capable of or interested in making those decisions or that they may not know what is ‘in their best interests’. Equally important have been laws that take away the legal capacity of older persons and allow others to make decisions for them, thus permitting the will and preferences of older persons to be overridden on the basis that they lack practical and legal capacity because of their age or other circumstances, and the conflation of age and other circumstances that may have an impact on their capacity.

#### *Existing treaties and practice of the human rights treaty bodies*

117. No international human rights treaty explicitly guarantees a right to autonomy and independence, either generally or in relation to older persons.<sup>143</sup> However, such rights are implicit in many of the rights contained in the principal human rights treaties, for example, the right to liberty and security of the person and right to respect for one’s private life have been interpreted to support aspects of a person’s right to make their own choices and live their life as they wish.

118. So far as issues of legal capacity and the right to live independently and in the community are concerned, the CRPD is of particular relevance and the practice under that treaty since the 2012 Analytical Study has contributed significantly to the understanding of the guarantees ensuring that all persons have and can exercise legal capacity. Older persons with disabilities benefit directly from the provisions of the CRPD on recognition as a person and the possession of legal capacity and ability to make one’s own decisions. The principles of the CRPD and their elucidation by the CRPD Committee in its general comments also provide important guidance for developing age-specific standards that build on but may go beyond the CRPD standards to address explicitly a number of situations of particular relevance to older persons. However, older persons who do not have any impairment of decision-making capacity (or one imputed to them) are still subject to discriminatory treatment and assumptions about their capacity because of their age and may not be able to invoke the protection of the CRPD.

#### *Limitations, deficiencies and gaps*

119. The range of possible normative elements relating to autonomy and independence submitted to the Open-ended Working Group on Ageing at its tenth session show that there are many aspects of the right to autonomy and independence in relation to the specific circumstances of older persons that are not adequately addressed in specific detail in existing human rights instruments.<sup>144</sup> Most of the elements proposed do not appear in other United Nations human rights treaties in this detail (with the exception of some provisions in the CRPD) and have for the most part not emerged in the practice of the treaty bodies as part of a process of dynamic and progressive interpretation.

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<sup>141</sup> *Substantive inputs – Autonomy and Long-term care*, para 10.

<sup>142</sup> *Substantive inputs – Autonomy and Long-term care*, para 10.

<sup>143</sup> The Inter-American Convention on Protecting the Rights of Older Persons identifies independence and autonomy as both general principles and freestanding rights.

<sup>144</sup> *Substantive inputs – Autonomy and Long-term care*, paras 23-28.

### ***Conclusion in relation to autonomy and independence***

120. The material presented to the Open-ended Working Group indicates that there is a range of issues relating to autonomy and independence of older persons that are not adequately articulated in existing normative instruments. These would benefit from inclusion as clear and explicit guarantees in a new normative instrument.

### **C. Violence, neglect, exploitation and abuse<sup>145</sup>**

121. The 2012 Analytical Study focused on violence and abuse in the particular context of residential or institutionalised care, noting the heightened vulnerability and exposure to these violations in those contexts, the absence of detailed and tailored normative standards at the international level applicable to these situations. It also noted the potential applicability of existing rights such as the right not to be subjected to torture, inhuman or degrading treatment or to deprivation of liberty. States have an obligation not only to prevent and punish such violations in State-run institutions, but also an obligation to take all necessary measures to protect older persons against violations of such rights by non-State actors. The challenge has been to translate these general obligations into specific normative regimes and to implement them effectively.

122. These types of violations do not cover all the forms of violence, neglect, exploitation and abuse to which older persons are subject: violence, neglect, exploitation and abuse cover a wide variety of different actions or omissions carried out by State actors and non-State actors in different places.<sup>146</sup> For example, most older persons live in the community rather than in aged care homes, and they face a range of problems of neglect, for example, social isolation, loneliness, barriers to their participation in the community such as limited mobility and dependence on others, and the lack of sufficient material support from the State to enjoy an adequate standard of living. Some older persons are also vulnerable to elder abuse,<sup>147</sup> or may experience abuse at an increased incidence, only some of which is clearly captured by the obligations in relation to torture and cruel, inhuman or degrading treatment or punishment.

#### *Existing treaties and the practice of the human rights treaty bodies*

123. Although the general provisions of the principal UN human rights treaties apply to some of the forms of violence, neglect, exploitation and abuse that older persons experience, there is no explicit reference to the specific situation of older persons.

124. Nonetheless, since the 2012 Analytical Study was prepared, a number of the human rights treaty bodies have adopted general comments which address or touch on the specific situation of older persons. For example, in 2017 the CEDAW Committee adopted *General recommendation 35 on gender-based violence against women*<sup>148</sup> which built on its 1992 *General recommendation 19* on the subject. Although *General recommendation 35* does not contain a separate section focusing on violence against

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<sup>145</sup> 2012 Analytical Study, pp 13-14.

<sup>146</sup> See *Background analytical overview paper: Violence, neglect and abuse*, Open-ended Working Group on Ageing, Eighth session, 5-7 July 2017, [https://social.un.org/ageing-working-group/documents/eighth/Background%20analytical%20papers/Analysis\\_Violence.pdf](https://social.un.org/ageing-working-group/documents/eighth/Background%20analytical%20papers/Analysis_Violence.pdf); *Compilation working document: Normative content on the protection of the rights of older persons from violence, neglect and abuse received from Member States, 'A' Status National Human Rights Institutions and accredited non-governmental organizations*, Open-ended Working Group on Ageing, Ninth session, 23-26 July 2018, [https://social.un.org/ageing-working-group/documents/ninth/2018\\_06\\_29\\_Compilation\\_Working\\_Doc\\_Violence-Neglect-Abuse\\_DESA.pdf](https://social.un.org/ageing-working-group/documents/ninth/2018_06_29_Compilation_Working_Doc_Violence-Neglect-Abuse_DESA.pdf).

<sup>147</sup> The WHO definition of elder abuse is a 'single or repeated act, or lack of appropriate action occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person'. Five broad categories are generally referred to, though are not exhaustive: physical, sexual, psychological or emotional, financial, and neglect.

<sup>148</sup> *General recommendation No 35 on gender-based violence against women, updating general recommendation No 19*, CEDAW/C/GC/35 (2017).

older women, it refers to the Committee's *General recommendation 27* on older women, which specifically addresses different forms of violence against women.<sup>149</sup> *General recommendation 35* also notes that age (among many other factors) is one of the factors that may influence the nature and extent of the violence that women face. The general recommendation also provides a detailed discussion of the nature and extent of States parties' obligations in relation to violence inflicted by State actors as well as that inflicted by non-State actors.

125. The CEDAW Committee consistently raises concerns about gender-based violence in its concluding observations, mainly in general terms. It cannot be assumed that general references to eliminating violence against women will necessarily draw States parties' attention to and generate action on the specific circumstances of violence against older women (particularly given the omission of the situation of older women in many prevalence surveys of gender-based violence). However, so far as explicit references to older women and violence are concerned, in the more than 200 sets of concluding observations adopted from 2012 to early 2020 the Committee raised such concerns explicitly in just over twenty instances; many of these were references to older women along with other subgroups of women.<sup>150</sup> Other committees whose mandates extend to violence against older persons have made almost no explicit references to the issue.<sup>151</sup>

126. Article 16 of the CRPD contains some of the most detailed provisions relating to violence, exploitation and abuse in international human rights treaties. The provision covers a wide range of actions, and requires States parties to adopt age-sensitive and gender-sensitive, as well as disability-sensitive measures, and applies to older persons with disabilities (though it makes no reference to race-, ethnicity- or indigeneity-based measures). In its *General comment 3* on women and girls with disabilities adopted in 2016,<sup>152</sup> the CRPD Committee addressed a number of aspects of the guarantee, setting out detailed examples of the types of action that fell within the protection<sup>153</sup> and including a general discussion of exploitation, violence and abuse against women and girls with disabilities.<sup>154</sup> The general comment makes a number of references to issues of particular concern to older women<sup>155</sup> and also notes the relevance of age in other contexts, noting that '[a]ge and impairment, separately or jointly, can increase the risk of institutionalization of older persons with disabilities.'<sup>156</sup> Even though the CRPD Committee raises the general issue of violence, exploitation and abuse regularly,<sup>157</sup> thus far the Committee has raised the issue explicitly in relation to older persons with disabilities in only a modest number of its concluding observations.<sup>158</sup>

#### *Limitations, deficiencies and gaps*

127. The submissions to the Open-ended Working Group on Ageing, as well as many other sources, have shown that none of the forms of elder abuse -- physical, sexual, psychological or emotional,

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<sup>149</sup> CEDAW/C/GC/27, paras 16, 37-38 (2010).

<sup>150</sup> These figures are based on a search in the UHRI database of CEDAW Concluding observations using the term 'violence' and protected group 'older persons' [search conducted 20 January 2021]. The results were then examined and those that did not explicitly address violence against older women were removed.

<sup>151</sup> Similar searches to that described in n 150 for the Human Rights Committee and the Committee against Torture yielded fewer than half a dozen relevant results in Concluding observations in total. A comparable search of the documents of the Subcommittee for the Prevention of Torture produced no results.

<sup>152</sup> *General comment No 3 (2016) on women and girls with disabilities*, CRPD/C/GC/3 (2016).

<sup>153</sup> CRPD/C/GC/3, paras 31 and 32.

<sup>154</sup> CRPD/C/GC/3, paras 29-37.

<sup>155</sup> CRPD/C/GC/3, para 37 ('widowhood-related practices and accusations of witchcraft').

<sup>156</sup> CRPD/C/GC/3, para 55.

<sup>157</sup> A search similar to the one conducted above, but not using the filter of 'affected persons', produced more than 100 results.

<sup>158</sup> A search in the UHRI database using the separate terms 'violence', 'exploitation' and 'abuse', affected persons 'older persons', mechanism 'CRPD' and type of document 'Concluding observations' [search conducted 21 January 2021] produced half a dozen relevant results.

financial, and neglect – are explicitly referred to in existing normative instruments or adequately addressed in the context of older age at the domestic level. For example, one of the major areas where the existing normative framework is deficient is in relation to financial exploitation and abuse of older persons. The submissions to the Open-ended Working Group on Ageing have shown that financial exploitation and abuse, by family members and in the form of elder financial fraud and scams,<sup>159</sup> is common and is often not clearly or effectively addressed under domestic law and practice. But the same applies to other forms of elder abuse as well.

128. The United Nations human rights treaties include no explicit reference to financial abuse and exploitation of older persons, nor do any of the general guarantees appear to be applied easily to it, especially as the principal human rights treaties do not include an explicit guarantee of the right to property or the peaceful enjoyment of one's possessions as is contained, for example, in Protocol 1 to the European Convention on Human Rights. There have been few references in general comments to financial exploitation or abuse,<sup>160</sup> and apparently no explicit references in concluding observations.<sup>161</sup> Financial exploitation or abuse of an older person would arguably engage the obligation of a State to ensure that a person's private life is not arbitrarily interfered with by non-State actors, this would be an extension of the scope of operation of Article 17 of the ICCPR and not one that has yet been adopted by the Human Rights Committee.<sup>162</sup>

### ***Conclusion in relation to violence, neglect, exploitation and abuse***

129. As in a number of other areas discussed in in this Update the existing extent of coverage of violence against and neglect, exploitation and abuse of older persons is limited. Some aspects of these violations fall within the general guarantees of freedom from cruel, inhuman or degrading treatment or punishment in general guarantees, and the CRPD provides some explicit protection in relation to older persons with disabilities. There has been some engagement by a couple of treaty bodies which have raised certain aspects of these violations in their general comments but there has been little follow-up: in the concluding observations of the treaty bodies, however, there has been a relatively low level of engagement with these issues.

130. While it may theoretically be possible to extend the application of some of the existing treaty provisions to cover phenomena such as financial abuse of older persons, neglect, social isolation, ageism and focused standards relating to long-term care and support, existing treaty bodies have for the most part not done so, due to their already congested agendas and limited resources. Where they have addressed some aspects of these issues, there has been relatively modest follow-through in subsequent examinations of State reports, reflected in the low visibility of these issues in concluding observations across the board. A specific new provision that applies to all forms of violence against, and neglect, exploitation and abuse of older persons would address these gaps.

## **D. Right to long-term care and support<sup>163</sup>**

131. The right to long-term care and support is a critical element of ensuring that older persons who for whatever reason experience challenges or difficulties in carrying out the tasks of everyday life and

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<sup>159</sup> See, eg, D Burnes, CR Henderson Jr, C Sheppard et al, 'Prevalence of Financial Fraud and Scams Among Older Adults in the United States: A Systematic Review and Meta-Analysis' (2017) 107(8) *American Journal of Public Health* e13-e21; DOI: 10.2105/ajph.2017.303821.

<sup>160</sup> One exception is the reference by the CRPD in *General comment 3*, para 34 (reference to economic exploitation).

<sup>161</sup> A search in the UHRI of all treaty body concluding observations using search terms such as 'financial AND exploitation', 'financial AND abuse', as text only and in combination with affected persons 'older persons' [search conducted 19 February 2020], produced no relevant results.

<sup>162</sup> William A Schabas, *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3<sup>rd</sup> rev ed 2019) 459-496.

<sup>163</sup> The phrase 'right to long-term care and support' is problematic in a number of respects. There is no existing binding human rights standards that uses the phrase; and there is no reason why care or support should be limited to cases where it is required for the longer-term care.

going about participating in social life can do so.<sup>164</sup> The right includes the provision of care and support at home, in the community, and in institutional settings such as assisted living or residential aged care homes.<sup>165</sup> Submissions to the Open-ended Working Group on Ageing have stressed that the primary goal of the provision of long-term care *and* support ‘should be to ensure the enjoyment by older persons of their right to autonomy and independence by providing them with the support that they needed to carry out their daily lives in accordance with their will and preferences.’<sup>166</sup> In other words, the provision of support that will enable older persons to live their lives as they wish to live them and that does not limit them in the exercise of their other human rights and fundamental freedoms.

132. The submissions to the Open-ended Working Group on Ageing have shown a variety of ways in which long-term care and support services are provided, whether they are legally guaranteed, whether they are underpinned by a human rights framework and whether they are adequately funded and monitored.<sup>167</sup> However, it is clear from that material and other studies that current approaches to long-term care and support are ‘[f]requently unsystematic and inadequate’, a large proportion of the global population lacks the right to [long-term care] and remains without legal coverage in national legislation’; a great deal thus needs to be done in many countries of the world to ensure equitable and universal access to long-term care and support.<sup>168</sup>

### *Existing treaties and the practice of the human rights treaty bodies*

133. None of the United Nations Human rights treaties specifically refers to the right of older persons to long-term care or support. To the extent that the drafters of these instruments contemplated the position of older persons, for example through the guarantee of the right to social protection (including the right to social security) and the right to an adequate standard of living, it is not clear that they foresaw the challenges to which increased longevity has given rise for older persons who may face a range of social and other barriers to living full and independent lives and who need different forms of support to do so.

134. Various elements of the right to long-term care and support might be found in a fragmented form under some other general human rights guarantees. For example, the right to support to enable an older person to continue living independently in their own home might arguably be derived from the right under Article 17 of the ICCPR not to have one’s privacy or home unlawfully or arbitrarily interfered with. This would require the positive obligations derived from Article 17 to be interpreted in a manner which obliged States parties to adopt a range of economic and social support measures that would enable that outcome.<sup>169</sup> However, the practice of the Human Rights Committee does not show a

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<sup>164</sup> *Substantive Inputs in the form of Normative Content for the Development of a Possible International Standard on the Focus Areas ‘Autonomy and Independence’ and ‘Long-term and Palliative Care’* [Substantive inputs – Autonomy and Long-term care], Working document submitted by the Department of Economic and Social Affairs (DESA) in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), A/AC.278/2019/CRP.4, paras 44-66 (2019), [https://social.un.org/ageing-working-group/documents/tenth/A\\_AC.278\\_2019\\_CRP.4.pdf](https://social.un.org/ageing-working-group/documents/tenth/A_AC.278_2019_CRP.4.pdf).

<sup>165</sup> *Substantive inputs – Autonomy and Long-term care*, para 30.

<sup>166</sup> *Substantive inputs – Autonomy and Long-term care*, para 30.

<sup>167</sup> *Substantive inputs – Autonomy and Long-term care*, paras 31-34.

<sup>168</sup> Xenia Scheil-Adlung, *Long-term care protection for older persons: A review of coverage deficits in 46 countries*, Extension of Social Security series Working Paper No 50, International Labour Office (2015), 2, 15.

<sup>169</sup> Regional case law has also offered relatively little in this area. There has been the occasional case before the European Court of Human Rights under Article 8 of the European Convention on Human Rights. See, for example, *McDonald v United Kingdom*, Application No 4241/12, Fourth section, judgment of 20 May 2014 (reduction of home care package for woman with mobility impairment with resulting reduction in overnight care an interference with enjoyment of right to respect for her family and private life but, after an initial period, was a reasonable limitation, given the need to balance the applicant’s and other care-users’ needs and the margin of appreciation enjoyed by States in relation to social, economic and health-care policies). The Court treated the case as one involving an interference with the applicant’s right to respect for her private life under Article 8 and explicitly left 4.

development in this direction. The Committee adopted *General comment 16* on Article 17 of the ICCPR in 1994; this is a relatively brief general comment with a traditional negative rights approach and has not been updated since that time. Nor has this issue made an appearance in concluding observations; presumably these issues seen as more appropriately being taken up by those committees with a more explicit economic and social rights mandate.

135. Other dimensions of the right to long term care and support might be derived variously from the right to health,<sup>170</sup> the right to social security, the right to an adequate standard of living (including the right to housing),<sup>171</sup> the right to take part in cultural life,<sup>172</sup> and possibly other rights.<sup>173</sup> Yet while there may be acknowledgement of certain aspects of the right to long-term care and support in the practice relating to some of these rights, they are often passing references and not the subject of sustained follow-up and may reflect perspectives that have been superseded in some respects.

136. Despite a short general reference to the issue in one general comment,<sup>174</sup> the Committee on Economic, Social and Cultural Rights has devoted almost no explicit attention to these issues in its concluding observations, with only a handful of specific references to long-term care and older persons in its concluding observations since 1999.<sup>175</sup>

137. Older persons with disabilities would also be able to rely on the right to live independently and to be included in the community guaranteed by Article 19 of the CRPD, as well as rights to accessibility (Article 9), personal mobility (Article 20), and participation in cultural life, recreation, leisure and sport (Article 30) to claim certain aspects of the right to long-term care and support. However, many older persons who do not live with disability would not be able to rely on these guarantees and would be left to rely on the unclear and fragmented coverage of general human rights provisions.

#### *Limitations, deficiencies and gaps*

138. The attempts to provide normative support for a right to long-term care and support by shoehorning various aspects of that right into a range of existing rights none of which was designed with this right in mind, illustrates once again the conceptual limitations of the existing international human rights framework. In the world in which these rights were formulated, there was no defined right

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open the question whether Article 8 ‘imposes a positive obligation on the Contracting States to put in place a level of entitlement to care equivalent to that claimed by the application.’ para 49.

<sup>170</sup> However, *General comment 14* on the right to health adopted by the Committee on Economic, Social and Cultural Rights in 2000, while touching on the rights of older persons, does not specifically address the issue of long-term care and support: E/C.12/2000/4 (2000).

<sup>171</sup> However, in the CESCR’s *General comment 4* (1991) on the right to housing there is no reference to the issues that arise in the context of the right to long-term care and support for older persons: E/1992/23 (1992).

<sup>172</sup> In *General comment 21 (Right of everyone to take part in cultural life (art 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, the CESCR refers to older persons (along with persons with disabilities) in the context of the accessibility of cultural activities (E/C.12/GC/21, paras 16(b) and 28) and also notes the ‘important role that older persons continue to play in most societies by reason of their creative, artistic and intellectual abilities, and as the transmitters of information, knowledge, traditions and cultural values’: E/C.12/GC/21, para 28 (2009).

<sup>173</sup> Article 23 of the Revised European Social Charter has been interpreted by the European Committee of Social Rights to include elements of the right to long-term care and support: ‘Article 23 The rights of elderly persons to social protection’, *Digest of the case law of the European Committee of Social Rights*, December 2018, 199-202; *Central Association of Carers in Finland v Finland*, Complaint No 70/2011, decision on the merits of 4 December 2012 and *Central Association of Carers in Finland v Finland*, Complaint No 71/2011, decision on the merits of 4 December 2012.

<sup>174</sup> See, for example, in *General comment 6* (1995), para 31 where the CESCR, drawing on the Madrid International Plan of Action on Ageing, does address the issue of living arrangements for older persons and the need for the State to ensure sufficient resources.

<sup>175</sup> For example, a search conducted on 21 January 2021 in the UHRI database of the CESCR concluding observations using the search terms ‘long term’, ‘aged care’ or ‘care’ yielded two relevant references: E/C.12/MUS/CO/5, paras 39-40 (2019); E/C.12/GR/CO/6, paras 42-43 (2019).

to long-term care and support. There was an assumption in many societies that to the extent that older relatives needed care and support as they aged, this would generally be provided by the person's family. Increased urbanization, changing family structures, increased workforce participation by women (who performed much of the unpaid care work and still do) and the significantly larger numbers of people living to an age where they do require such support were not in the minds of those who formulated the canonical rights to privacy and home, to health, and to social security (which focuses largely on economic security and income transfers). Trying to make these rights do the work to support a right to long-term care and support is unlikely to succeed.

### ***Conclusion on the right to long-term care and support***

139. The need to ensure the enjoyment of the right to long-term care and support is based on the perspectives of older persons, who wish to continue to exercise their autonomy to where and with whom they wish with the provision of necessary support to go about their daily lives in the community or to exercise their right to undertake other living arrangements that also respect their autonomy and right to full participation and inclusion. When one considers the right from that perspective, having to ensure the right by piecing together various elements of the right from other general rights that are not especially well-tailored to responding to these needs and that have for the most part not been adequately interpreted or applied in relation to them, is unlikely to produce an optimal result.

140. One may compare this process with what was done in relation to the right to live independently in Article 19 of the CRPD. It would have been possible to cobble together a number of elements of that right from other general rights, provided interpretations not previously adopted were developed from a disability rights perspective, although even then complete coverage of the areas covered by Article 19 may not have resulted. Article 19, on the other hand, was developed from the perspectives of persons with disabilities and provides a clear and comprehensive statement of the right. That may be contrasted with how older persons would have to piece together bits of protection from disparate rights to create an approximation to what would be embodied in a self-contained articulation of this right. Similarly, a new normative statement could better construct the elements of the right from the ground up.<sup>176</sup>

141. It is clear from the neglect of the issue of long-term care and support that it is not seen as a central component of the other rights that might support it. Seeking to construct such a right from other rights which are seen as serving different goals has not worked, thus exposing the conceptual limitations of existing rights. Because those rights have not been formulated from the perspective of older persons' claims and needs, they do not produce a coherent framework for realizing the many-faceted right to long-term care and support. A specifically formulated provision is needed to achieve that goal.

### **E. Right to palliative care**

142. The material presented to the Open-ended Working Group on Ageing dealing with the right to palliative care, especially submissions at its ninth and tenth sessions,<sup>177</sup> evidenced a broad acceptance of the need for a right to palliative care and its effective implementation. The submissions noted that frequently there was no guaranteed right to palliative care in national law and also made clear that the extent to which the right to palliative care is enjoyed in practice falls short of, and in many cases a long way short of, ensuring that those who need it have access to such services. The submissions and compilations based on them showed that, while efforts were being made to ensure access to palliative care services, the barriers were many: the absence of a legally guaranteed right, lack of financial

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<sup>176</sup> It has been argued in an ILO study that the recognition of long-term care as an explicit and independent right is an important step towards ensuring its realization in practice: Xenia Scheil-Adlung, *Long-term care protection for older persons: A review of coverage deficits in 46 countries*, Extension of Social Security series Working Paper No 50, International Labour Office (2015), 41-42.

<sup>177</sup> See in particular *Analysis and overview of guiding questions on long-term care and palliative care received from Member States, 'A' Status National Human Rights Institutions and accredited non-governmental organizations, Substantive report*, ninth session, 2018, [https://social.un.org/ageing-working-group/documents/ninth/Open-ended Working Group on Ageing9\\_Substantive\\_Report\\_LTC\\_Palliative-Care\\_DESA.pdf](https://social.un.org/ageing-working-group/documents/ninth/Open-ended%20Working%20Group%20on%20Ageing9_Substantive_Report_LTC_Palliative-Care_DESA.pdf); and *Substantive inputs – Autonomy and Long-term care*, paras 44-66 (2019).

resources, insufficient numbers of health professionals trained in palliative care, the restriction of palliative care to a limited category of illnesses, the cost of these services, and differential access in urban and rural areas, were among the barriers commonly mentioned.

*Existing treaties and the practice of the treaty bodies*

143. From a normative perspective there is no explicit reference to the right to palliative care in Article 25 of the UDHR or in Article 12 of the ICESCR which guarantee the right to the highest attainable standard of health, or in any other of the principal United Nations human rights treaties. It has been argued that the right to palliative care can be derived from the rights to the highest attainable standard of health that appear in a number of UN human rights treaties and also that a denial of palliative care might also amount to cruel, inhuman or degrading treatment in violation of the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other treaties containing protections against cruel, inhuman or degrading treatment or punishment.<sup>178</sup>

144. The Committee on Economic, Social and Cultural Rights has referred briefly to palliative care in three of its general comments, in each case a general reference in the context of ensuring the availability of ‘preventive, curative and palliative care services’ to all.<sup>179</sup> There has been no detailed discussion of the nature and extent of the right, although the Committee’s general elucidation of the right to health is relevant to palliative care. The right does not appear to have been a priority issue in the Committee’s dialogue with States parties under the reporting procedure: a search of the UHRI database for the use of the term ‘palliative’ in the Concluding observations of the CESCR up to the end of 2020 produced just four references. These were all in concluding observations in which the Committee noted that States parties have an obligation to ensure that ‘all persons in the State party’ including migrants, refugees and asylum-seekers, ‘have equal access to preventive, curative and palliative health services, regardless of their legal status and documentation’.<sup>180</sup>

145. Nor has the issue assumed a higher profile in the work of the other treaty bodies. A similar search in relation to documents of the Committee against Torture produces one, tangential reference related to the difficulties in the provision of palliative services in a situation of armed conflict following the use of a particular type of weapon.<sup>181</sup> There appears to be no more extended discussion of the issue in the practice of that Committee. Similar searches of the Concluding observations of the Human Rights Committee produce no results, while in the case of the Committee on the Rights of Persons with Disabilities just one result was returned.<sup>182</sup>

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<sup>178</sup> See *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53*, paras 51-56 (2013), as well as the earlier *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, A/HRC/10/44*, para 72 (2009).

<sup>179</sup> *General comment No 14 on the right to the highest attainable standard of health* (2000), para 34 (States parties must ‘respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services . . .’); *General comment No 20 on non-discrimination in economic, social and cultural rights* (2009) (call to ensure ‘even distribution in the availability and quality of primary, secondary and palliative health-care facilities’, notwithstanding person’s place of residence); *General comment No 22 on the right to sexual and reproductive health* (2016), para 7 (referring to statement in *General comment No 14* that the right to health includes ‘the right to the provision of preventive, curative and palliative health care’).

<sup>180</sup> E/C.12/DEU/CO/6, para 59 (2018). See also E/C.12/DNK/CO/6, para 63 (2019); E/C.12/ISR/CO/4, para 57(a) (2019); and E/C.12/UKR/CO/7, para 39 (2020). The CESCR adopted 28 sets of Concluding observations from the beginning of 2018 up to March 2020. The search returned no results for earlier than 2018.

<sup>181</sup> CAT/C/ISR/CO/4, para 29 (2009).

<sup>182</sup> CRPD/C/CAN/CO/1, para 24(a) (2017), in which the CRPD recommended that the State party ensure that ‘persons who seek an assisted death have access to alternative courses of action and to a dignified life made possible with appropriate palliative care, disability support, home care and other social measures that support human flourishing . . .’.

### *Limitations, deficiencies and gaps*

146. The position in relation to the right to palliative care is illustrative of the barriers that a person seeking to claim a right that is not explicitly guaranteed in a treaty provision faces, something that occurs in the case of a number of rights older persons wish to claim. In order for a person to claim the right to palliative care by reference to binding international human rights law, the person has to adopt ‘a strategy of building a right to palliative care through the consideration of a diversity of normative tools and opinions to delineate the extent to which they encompass features of a right to palliative care’.<sup>183</sup> This involves arguing that:

- the general right to health includes palliative care, even though the ICESCR provision does not explicitly mention that topic (or refer to age in Article 2(2) as one of the grounds of non-discrimination in the enjoyment of ICESCR rights) because
- the CESCR, an expert body, whose views are not formally legally binding on States parties though they carry considerable weight and are sometimes described as persuasive or even ‘authoritative’ given the expertise of the committee and the role assigned to it by States, has stated that the right to health includes the right to palliative care, and
- denial of palliative care may also violate the Convention against Torture or Article 7 of the ICCPR, though the two monitoring committees have barely referred to the issue.

147. In contrast, Article 6 of the Inter-American Convention on Protecting the Rights of Older Person provides ‘States Parties shall take steps to ensure that public and private institutions offer older persons access without discrimination to comprehensive care, including palliative care’ and supplements that clear guarantee with further detailed provisions.

### ***Conclusion on the right to palliative care***

148. Existing international human rights norms as interpreted and applied by international human rights bodies have failed to deliver a clear guarantee of the right to palliative care that can be invoked in order to ensure that the right is enjoyed at the national level. The sporadic references that have been made to the right have not been the subject of sustained follow-up and the issue has in effect been largely neglected so far as pressing States parties to ensure that they take steps to ensure access to this right goes. The articulation of an explicit binding norm affirming the right to palliative care appears to be the best option for overcoming this neglect and stimulating States to take action to guarantee and ensure the realization of this right at the national level.

## **F. Social protection and social security, including social protection floors**

149. Social security is defined as ‘the set of policies and programmes designed to reduce and prevent poverty and vulnerability across the life cycle’.<sup>184</sup> The right to social security encompasses nine main areas: ‘child and family benefits, maternity protection, unemployment support, employment injury benefits, sickness benefits, health protection, old-age benefits, disability benefits and survivors’ benefits.’<sup>185</sup> Social protection systems ‘address all these policy areas by a mix of contributory schemes (social insurance) and non-contributory tax-financed schemes including social assistance.’<sup>186</sup>

150. Submissions to the Open-ended Working Group on Ageing have shown that the extent to which older persons enjoy the right to social protection varies considerably, but that overall there are

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<sup>183</sup> F Seatzu, ‘Constructing a Right to Palliative Care: The Inter-American Convention on the Rights of Older Persons’, *Ius et Scientia*, 2015, Vol 1, No 1, 25, 38.

<sup>184</sup> International Labour Office, *World Social Protection Report 2017–19: Universal social protection to achieve the Sustainable Development Goals* [World Social Protection Report 2017–19], Geneva, 2017, 2.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

significant gaps in the enjoyment of the right.<sup>187</sup> The major form of social protection for older persons is provided in the form of income security but also access to health care. Approximately a third of persons of working age are, however, still not covered by an old-age pension scheme. Nonetheless, significant progress has been made in extending pension coverage and as of 2017, 67.6 per cent of the working age population were covered under existing laws regulating contributory or non-contributory pension schemes,<sup>188</sup> and 68 per cent of people above retirement age received a pension.<sup>189</sup> However, ‘for many of those who do receive a pension, pension levels are not adequate.’<sup>190</sup>

151. There is also a persistent gender gap in access to income security in older age,<sup>191</sup> that reflects the patterns of women’s formal labour force participation, often in the informal economy and in the rural economy, and discrimination in wage rates thereby affecting the level of pensions available to women through contributory pensions schemes.<sup>192</sup> Non-contributory schemes are thus important for ensuring women’s access to basic income support, but ‘they are often low, insufficient to fully meet their needs . . . and do not fully compensate for the lack of contributory coverage.’<sup>193</sup> Gender-responsive social insurance pension schemes that include redistributive elements, such as minimum pension guarantees and care credits, can play an important role in ensuring adequate coverage for both women and men.

152. Information provided to the Open-ended Working Group on Ageing also noted that older refugees, asylum-seekers and internally displaced persons ‘are particularly vulnerable to poverty and social exclusion’ and ‘[d]espite being particularly vulnerable, older refugees are often not included in national social protection schemes, due to legal and administrative barriers.’<sup>194</sup>

153. The existing international legal framework recognizes that ensuring the rights to social protection and to an adequate standard of living includes a nationally-defined social protection floor to guarantee at least a basic level of income security and access to health care that permits a person to live a decent life, and extends to higher levels of income replacement and the full participation in the community and guarantees of personal dignity.<sup>195</sup>

#### *Existing human rights treaties and the practice of the human rights treaty bodies*

154. The right of older persons to social security and to an adequate standard of living are set out in existing international human rights law.<sup>196</sup> Article 25 of the Universal Declaration of Human Rights guarantees the right to an adequate standard of living and the right to security in older age, while Articles 9 and 11 of the ICESCR guarantee the rights to social security and an adequate standard of living

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<sup>187</sup> *Substantive Inputs on the Focus Area ‘Social protection and social security (including social protection floors)’* [Substantive inputs – Social protection], Working document submitted by the Office of the High Commissioner for Human Rights (OHCHR), A/AC.278/2019/CRP.3 (2019), [https://social.un.org/ageing-working-group/documents/tenth/A\\_AC.278\\_2019\\_CRP.3.pdf](https://social.un.org/ageing-working-group/documents/tenth/A_AC.278_2019_CRP.3.pdf); *Substantive Inputs in the form of Normative Content for the Development of a Possible International Standard on the Focus Areas ‘Education, Training, Lifelong learning and Capacity Building’ and ‘Social Protection and Social Security (including social protection floors) on the Focus Area ‘Social protection and social security (including social protection floors)’*, Working document submitted by the Department of Economic and Social Affairs (DESA) in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), A/AC.278/2020/CRP.2 (2020).

<sup>188</sup> *World Social Protection Report 2017–19*, above n 184, 78. The coverage of women is slightly lower.

<sup>189</sup> *Id* at 79.

<sup>190</sup> Social Protection Department International Labour Office, *Social protection for older persons: Key policy trends and statistics*, Social Protection Policy Paper No 11 (2014), ix.

<sup>191</sup> *Substantive inputs – Social protection*, paras 23-27.

<sup>192</sup> *World Social Protection Report 2017–19*, above n 184, 86-88. See also Committee on the Elimination of Discrimination against Women, *Ciobanu v Moldova*, Communication No 104/2016, views of 4 November 2019.

<sup>193</sup> *Id* at 87.

<sup>194</sup> *Substantive inputs – Social protection*, para 28.

<sup>195</sup> *Substantive inputs – Social protection*, para 20.

<sup>196</sup> *Substantive inputs – Social protection*, paras 3-8; 2012 Analytical Study, pp 15-17.

respectively in general terms. Other principal United Nations human rights treaties also guarantee some aspects of these rights,<sup>197</sup> as do a number of regional human rights instruments.<sup>198</sup> Some of these guarantees refer explicitly to older persons, while others do so by necessary implication, for example those that guarantee social security. The right to an adequate standard of living also includes the right to adequate housing<sup>199</sup> and the right to adequate food.<sup>200</sup> The right to an adequate standard of living is generally guaranteed in the ICESCR and other treaties, although these guarantees generally do not refer explicitly to older persons.<sup>201</sup>

155. The tripartite constituents of the International Labour Organization have also developed a body of social security Conventions and Recommendations with a view to giving substance to the human right to social security by reference to the core principles of administration and financing and minimum benchmarks of protection which should be ensured, including in the case of old age. The Social Security (Minimum Standards) Convention, 1952 (No 102),<sup>202</sup> the Old-Age, Invalidity and Survivors' Benefits Convention, 1967 (No 128),<sup>203</sup> and its accompanying Recommendation No 131, and the Social Protection Floors Recommendation, 2012 (No 202), are the most important ILO instruments in this context. They have been described as providing 'an international reference framework setting out the range and levels of social security benefits that are necessary and adequate for ensuring income maintenance and income security, as well as access to health care in old age.'<sup>204</sup> Although their ratification rate has so far not reached that of human rights instruments, ILO social security Conventions have shaped the development of social security systems around the world.<sup>205</sup> Alongside ILO Conventions which are open to ratification by member States and have the potential of creating legal obligations, social security Recommendations, while not binding, are also important sources of policy guidance to Member States of the ILO and subject to mandatory submission to national Parliaments for consideration.<sup>206</sup> As soft law instruments, ILO Recommendations have allowed the emergence and recognition in international law of new notions such as that of social protection floors.

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<sup>197</sup> Convention on the Elimination of All Forms of Discrimination against Women, Articles 11(1)(e), 11(2)(b) and 14(2)(c); Convention on the Rights of the Child, Articles 26 and 27(1); International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(e)(iv); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 27 and 54; Convention on the Rights of Persons with Disabilities, Article 28.

<sup>198</sup> For example, the Revised European Social Charter; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights 1988, Article 9; the Inter-American Convention on Protecting the Human Rights of Older Persons, Article 17.

<sup>199</sup> 2012 Analytical Study, pp 20-21.

<sup>200</sup> 2012 Analytical Study, pp 19-20.

<sup>201</sup> However, Article 23 of the Revised European Social Charter explicitly guarantees 'the right of elderly persons to social protection'; Article 17 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights provides that everyone 'has the right to social protection in old age'; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, Article 7 (Social protection) requires States parties to ensure that the right of older persons to income security and other forms of social protection is ensured.

<sup>202</sup> Entered into force 27 April 1955. As of 28 December 2020 the Convention had received 59 ratifications. As of December 2020 187 States which were members of the International Labour Organization.

<sup>203</sup> Entered into force 1 November 1969. As of 28 December 2020 the Convention had received 17 ratifications.

<sup>204</sup> *World Social Protection Report 2017–19*, above n 184, 77; *Substantive inputs – Social protection*, para 4 n 4.

<sup>205</sup> ILO, *Universal Social Protection for Human Dignity, Social Justice and Sustainable Development: General Survey Concerning the Social Protection Floors Recommendation, 2012 (No. 202)* (2019). ILC.108/III/B. [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_673680.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_673680.pdf).

<sup>206</sup> The obligation of Member States is to submit the recommendations to the competent national authorities for consideration: Constitution of the International Labour Organization, art 19(6). As of 21 January 2021, 69 of the 187 Member States of the ILO had not yet submitted Recommendation 202 to the relevant national authorities:

156. The ILO Social Protection Floors Recommendation, 2012 (No 202) has been described as completing the framework established by the earlier instruments ‘by calling for the guarantee of basic income security to all persons in old age, prioritizing those in need and those not covered by existing arrangements.’<sup>207</sup> The arrangements recommended are also seen as a key means of contributing to the realization of a number of the Sustainable Development Goals, notably SDG 1 aimed at ending poverty in all its forms everywhere, including by implementing nationally appropriate social protection systems and measures for all including floors, and to achieve by 2030 substantial coverage of the poor and the vulnerable (target 1.3). The instrument ‘provides guidance’ to Members as to how to create comprehensive social protection systems, including social protection floors as a key element thereof, and to design policies aimed at progressively ensuring higher levels of social security to as many people as possible as soon as possible. ‘Social protection floors’ are defined as ‘nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion’<sup>208</sup> and should include ‘basic income security, at least at a nationally defined minimum level, for older persons.’<sup>209</sup>

157. The CESCR adopted a general comment on the right to social security in 2008.<sup>210</sup> This largely adopted the framework set out in ILO conventions and recommendations on the topic and included specific reference to old age as one of the branches of social security.<sup>211</sup> It notes the gender bias in many arrangements relating to employment, retirement ages and contributory pension schemes,<sup>212</sup> and sets out in detail the obligations of States parties.

#### *Limitations, deficiencies and gaps*

158. There is an extensive system of international legal instruments in relation to social protection which applies in principle to older persons either implicitly (by subjecting persons in active age to old age protection mechanisms) or explicitly (by reference to persons in situation of old age). However, there are a number of limitations in the binding normative framework in the principal treaty provisions.

159. One of the major issues in discussions about ensuring adequate social protection for ageing populations has been concern about the financial sustainability of such systems as the ratio of older persons to younger person increases. While this is an issue, it is clear that sometimes this discussion is influenced by ageist assumptions and stereotypes, for example the assumption that the ‘working population cohort’ is all engaged in work and that the older population is not, in calculating dependency ratios.<sup>213</sup> These factors need to be recognized in policy discussions and defining the obligations of States to ensure social protection for older persons.

160. In relation to children, persons with disabilities, and migrant workers, the respective thematic United Nations conventions all include the right to social security, but tailored to the specific situation of the groups protected by the specific convention. While any new normative instrument on the rights of older persons would be expected to include a provision modelled on existing provisions, the drafting of a new provision would provide the opportunity both to update the general guarantees contained in the ICESCR (which make no explicit reference to older persons) and to address issues that have emerged as important in the international discussion in the half a century since the ICESCR was adopted, including the implications of increased longevity and economic activity post traditional retirement age.

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<sup>207</sup> *World Social Protection Report 2017–19*, above n 184, 77.

<sup>208</sup> Paragraph I(1) and (2).

<sup>209</sup> Paragraph II(2)(d).

<sup>210</sup> CESCR, *General comment No 19 (the right to social security (art 9))*, E/C.12/GC/19 (2008).

<sup>211</sup> E/C.12/GC/19, para 15 (2008).

<sup>212</sup> E/C.12/GC/19, para 32 (2008).

<sup>213</sup> United Nations Department of Social and Economic Affairs Population Division, *World Population Ageing 2019: Highlights* (United Nations, 2019), ST/ESA/SER.A/430, 13.

## ***Conclusion on the right to social protection***

161. Although there are extensive international human rights and ILO standards on the right to social protection and social security, there is a case for bringing some of these provisions up to date in view of the major challenges and transformations impacting the world of work and old age-related policies and legal frameworks with a view to developing a new potentially binding international standard specifically addressing these concerns and setting the reference framework in this respect.

### **G. Education, training, lifelong learning and capacity-building**

162. The submissions provided to the Open-ended Working Group on Ageing, especially at its tenth session, have indicated the importance of access by older persons to education, training, lifelong learning and capacity building to ensure their enjoyment of a full range of human rights, and the barriers that exist around the world to such access.<sup>214</sup> Those submissions also show that there has been increasing awareness of this and the adoption of policies and programs that seek to provide older persons with greater levels of access to the forms of learning that they want and need. Nonetheless, there is still an enormous amount to be done both in the detailed articulation of this right as well as in its realization.

163. The goals of the right to education, training, lifelong learning and capacity building include the acquisition by a person of the necessary knowledge and skills to become and remain competitive in the labour market or for the performance of other forms of activity. However, it is well accepted that the objectives go well beyond this instrumental, though important, purpose.<sup>215</sup> They include the full development of human potential, talents and creativity and sense of dignity and self-worth; the strengthening of respect for human rights, fundamental freedoms and human diversity; enabling persons to participate effectively in a free society; promoting understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and furthering the activities of the United Nations for the maintenance of peace.<sup>216</sup> All of these objectives are as relevant to older persons as they are to other members of society.

164. The material presented to the Open-ended Working Group on Ageing and NGO consultations with older persons have given further content to the meaning of lifelong learning for older persons. In addition to the updating of work-related skills and skills need to participate fully in the digital aspects of society so that they can find the means to survive and to participate in society, older persons also want opportunities to acquire the skills, knowledge and resilience to cope with the changes in their lives, including the process of ageing and its social consequences, the changes in their social roles and how they are perceived.<sup>217</sup>

165. The barriers and challenges that older persons face as a result of their age and society's response to older persons are many. Ageist stereotypes about the interest and capability of older persons to take part in such activities, often combined with an assumption that such investments are not worthwhile, are prevalent and limit opportunities.<sup>218</sup> These attitudes are found not just in those who design policy and decide on access to employment-related training opportunities, but also among some older persons themselves who have internalised pervasive social attitudes. In many countries adult education is a low

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<sup>214</sup> These are summarized in *Substantive Inputs on the Focus Area 'Education, training, life-long learning and capacity-building'*, Working document submitted by the Department of Economic and Social Affairs (DESA) [Substantive Inputs – Education], A/AC.278/2019/CRP.2 (2019).

<sup>215</sup> See, eg, the *Report of the Independent Expert on the human rights of older persons*, A/HRC/33/44, para 76 (2016) (importance of lifelong learning to social integration).

<sup>216</sup> See, in particular, ICESCR, Article 13(1); CRPD, Article 24(1).

<sup>217</sup> See B Sleaf, *Living, not just surviving: What older people say about their rights to social protection and social security, and to education, training, lifelong learning and capacity building* (HelpAge International, 2019) 12-19, submission to the tenth session of the Open-ended Working Group on Ageing, <https://social.un.org/ageing-working-group/documents/tenth/Living%20not%20just%20surviving%202019.pdf>.

<sup>218</sup> *Substantive Inputs – Education*, para 19.

priority with the major focus on younger people<sup>219</sup> and there may be limited focus on non-formal education.<sup>220</sup> Other barriers identified include the imposition of age limits for access to vocational and other educational programmes and age-based differential treatment in access to scholarships;<sup>221</sup> courses delivered in forms or venues that make them inaccessible for some older persons;<sup>222</sup> the Catch-22 of limited literacy<sup>223</sup> or digital literacy making it difficult to access information about available training; and teachers who may have negative attitudes or who are not properly trained to deal with older age cohorts where that may be necessary.<sup>224</sup> The lack of effective access to redress for violations of older persons' right in this area was also identified,<sup>225</sup> as was the lack of appropriate robust and disaggregated data<sup>226</sup> and the impact of the lack of policy coherence and coordination on the enjoyment of this right by older persons.<sup>227</sup> A number of submissions to the tenth session of the Open-ended Working Group on Ageing also addressed the consequences of the lack of a specific detailed guarantee of the rights of older persons to education, training and life-long learning.

#### *Existing treaties and their conceptual framework*

166. The framework underpinning the guarantees of the right to education in the fundamental human treaties is one developed in a world where people were assumed to receive basic education in school, with the goal of secondary education and further education as appropriate. This would prepare them for employment and they would work for a number of decades before retiring from the work force, with most people living only a few years in retirement. Many things have changed, but above all the significant increases in the numbers and percentages of persons living well beyond standard retirement ages (where those are relevant) and in many cases continuing to engage in remunerative work, but also engaging in many other activities of social and economic value.

167. These underlying assumptions can be seen in the major international guarantee of the right to education, Article 13 of the ICESCR. This article does state that education should be 'directed to the full development of the human personality and the sense of its dignity' and should 'strengthen the respect for human rights and fundamental freedoms' and that it should 'enable all persons to participate effectively in a free society'. However, its overwhelming focus is on the early stages of life, seeking to ensure universal primary and secondary education as a priority and tertiary education as well. The article also speaks of tertiary education being 'equally accessible to all, on the basis of capacity' and the need for 'fundamental education' to be 'encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.' While these are potentially applicable to older persons, it is clear that the overwhelming thrust of the guarantee is towards younger people and that this has influenced how States have approached the implementation of the right to education, notwithstanding the many positive developments in recent years to develop educational opportunities for older persons. This is reflected in the material presented to the Open-ended Working Group on Ageing.<sup>228</sup>

168. A similar focus is reflected in other instruments, for example in Article 10 of the CEDAW Convention. While that treaty does make reference to continuing education programs and the need to organise 'programmes for girls and women who have left school prematurely', the overwhelming

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<sup>219</sup> *Substantive Inputs – Education*, para 27.

<sup>220</sup> *Substantive Inputs – Education*, para 28.

<sup>221</sup> *Substantive Inputs – Education*, para 43.

<sup>222</sup> *Substantive Inputs – Education*, paras 23 and 44.

<sup>223</sup> Especially in the case of older women: *Report of the Independent Expert on the rights of older persons*, A/HRC/27/46, para 43 (2014).

<sup>224</sup> *Substantive Inputs – Education*, para 22.

<sup>225</sup> *Substantive Inputs – Education*, paras 46-53.

<sup>226</sup> *Substantive Inputs – Education*, paras 34-38.

<sup>227</sup> *Substantive Inputs – Education*, para 54.

<sup>228</sup> *Substantive Inputs – Education*, para 38.

concern of Article 10 is ‘pre-school, general, technical, professional and higher technical education, as well as . . . all types of vocational training’ (Article 1(a)).

169. The UNESCO Convention against Discrimination in Education 1960 obliges States parties to eliminate and prevent discrimination in education. According to Article 1, discrimination ‘includes any distinction, exclusion, limitation or preference. . . based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education’ generally and in specific respects. Older age is not explicitly identified as a potential category of discrimination, although Article 4(c) requires States parties to ‘encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity . . .’.

170. Article 24 of the CRPD contains an extensive and detailed statement of the right to education for persons with disabilities which addresses a range of specific situations and barriers. States parties undertake to ensure an inclusive education system at all levels and lifelong learning directed to the broad goals of education and, among other things, to ‘ensure that persons with disabilities are able to access general tertiary education, vocational training adult education and lifelong learning without discrimination’ (Article 24(1) and 24 (5)).<sup>229</sup> To the extent that an older person is also a person with disability (or vice versa<sup>230</sup>), they would benefit from the CRPD guarantee.

171. A prominent feature of the CRPD provision is the manner in which it addresses a range of specific barriers to an inclusive education that person with disabilities often face. By focusing on them, it helps States to design targeted policies and programs to address the problems.

172. In 2016 the CRPD Committee adopted *General comment 4* on the right to inclusive education.<sup>231</sup> In that general comment the Committee notes in particular that States parties are obliged ‘to ensure equal access for all women and men with disabilities to affordable and quality technical, vocational and tertiary education, including university, and lifelong learning.’<sup>232</sup>

173. Older persons face a range of specific barriers to full participation in education, training, lifelong learning and capacity building that are not contemplated by the general guarantees of the right to education. While these general guarantees have had a limited impact in addressing the situations of older person, they fall well short of fully ensuring the enjoyment of the right. For example, none of them directly addresses the issue of ageism, none refers explicitly to the importance of intergenerational learning – older persons are not just recipients of knowledge or the learners of new skills but are also transmitters of knowledge, experience, and culture<sup>233</sup> – nor do they specifically address the need to collect and analyse data based on age alone (broken down into a number of older-age cohorts) and in relation to other personal and group characteristics.<sup>234</sup>

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<sup>229</sup> ‘The inclusion of lifelong learning is a significant divergence between CRPD and prior international conventions and declarations.’ D Anastasiou, M Gregory and J M Kauffman, ‘Article 24: Education’ in Bantekas, Stein and Anastasiou, above n 59, 656, 703.

<sup>230</sup> See the *Report of the Special Rapporteur on the rights of persons with disabilities* about the difference in self-identification between person who reach older age after having lived their lives with disability, compared with many older persons who acquire an impairment/disability in older age. A/74/186, para 6 (2019).

<sup>231</sup> *General comment No 4 (2016) on the right to inclusive education*, CRPD/C/GC/4 (2016).

<sup>232</sup> CRPD/C/GC/4, para 24 (2016).

<sup>233</sup> *Report of the Independent Expert on the human rights of older persons*, A/HRC/30/43, paras 57 and 65 (2015).

<sup>234</sup> *Substantive Inputs – Education*, para 24.

*The practice of the human rights treaty bodies*

174. The 2012 Analytical Study referred to the significant statements made by the CESCR in its *General comment 6 (1995) on the economic, social and cultural rights of older persons*<sup>235</sup> and CEDAW in its *General recommendation 27 (2010) on the human rights of older women*.<sup>236</sup> In *General comment 6* the CESCR refers to a number of aspects of the right to education mentioned in submissions to the Open-ended Working Group on Ageing and elsewhere as important for the realization by older persons of their right to education, training, lifelong learning and capacity building, including the role of intergenerational learning.<sup>237</sup> Yet it is now a quarter of a century since it was adopted and thinking has further developed in this area.

175. The CEDAW Committee noted that employers often view older women ‘as non-profitable investments for education and vocational training’, that women ‘do not have equal opportunities to learn modern information technology, nor the resources to obtain them’ and that many older women ‘are denied the right to education and receive little or no formal or informal education’, with resulting adverse effects on their participation in work, in public and political life, and more generally.<sup>238</sup> It underlined that States parties were obliged to ‘ensure that older women have access to adult education and lifelong learning opportunities . . .’.<sup>239</sup>

176. Despite the importance of these statements, they do not appear to have generated significant momentum even in the bodies that adopted them. For example, there appear to have been almost no references to lifelong learning, (re)training or education relating explicitly to older persons in the concluding observations adopted by the CESCR in the period from 2012 to 2020.<sup>240</sup> These issues have received more attention in CEDAW concluding observations: in the 211 sets of concluding observations adopted by the CEDAW Committee from 2012 to March 2020, there were just over a dozen concluding observations that referred to older women in the context of education.<sup>241</sup> However, the overwhelming majority of these referred to older women as one of a number of categories of women to whom attention needed to be given and frequently these references were combined with references to a number of areas only one of which was education. There were almost no references that focused only on older women and their right to education, training and lifelong learning in a substantial way. While it is clear that both these committees have recognised the importance of the right to education of older persons, their otherwise crowded agendas and word limits for Committee and State party documents seem to provide little opportunity for them to engage substantially and systematically with the right as it relates to older women, though the CEDAW Committee raises a variety of other issues relating to older women.

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<sup>235</sup> E/1996/22, at 20 (1996). The CESCR’s *General comment No 13* on the right to education refers back to *General comment 6* and also contains a further brief substantive reference to older persons. The Committee notes that ‘the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and lifelong learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.’ *General comment 6 (the right to education: Article 13 of the Covenant)*, E/C.12/1999/10, para 24.

<sup>236</sup> CEDAW/C/GC/27 (2010).

<sup>237</sup> E/1996/22, paras 36-42, especially para 38.

<sup>238</sup> CEDAW/C/GC/27, para 19 (2010).

<sup>239</sup> CEDAW/C/GC/27, para 19 (2010).

<sup>240</sup> Searches of the UHRI database using search terms ‘lifelong’ and ‘lifelong learning’ as text searches and ‘lifelong learning’, ‘learning’, ‘training’, ‘reskilling’ and ‘education’ in combination with ‘protected group - older persons’ generated only two explicit references to older persons: E/C.12/BGR/CO/4-5, para 9 (2012) and E/C.12/EST/CO/3, para 52 (2019). [search conducted 18 February 2020]

<sup>241</sup> Searches in the UHRI database using similar search strategies to those outlined above for the CESCR produced about a dozen relevant results.

177. This is not atypical of the pattern of consideration of the human rights of older persons across the UN human rights mechanisms, in particular the treaty bodies but also in the special procedures.<sup>242</sup> The importance of these issues is recognized, but there is only limited follow-up of these issues on sustained basis.<sup>243</sup>

*Other consequences of a lack of a specific framework in relation to education, training, lifelong learning and capacity building*

178. The Independent Expert on the rights of older persons has also drawn attention to the drawbacks of not having a specific coherent normative framework on the rights of older persons, generally and in relation to education, training and lifelong learning in the context of the Sustainable Development Goals.<sup>244</sup> She noted in her 2018 thematic report that, although Goal 4 of the Sustainable Development Goals aims to '[e]nsure inclusive and equitable quality education and promote lifelong learning opportunities for all', the goal was not accompanied by 'targets and indicators that can effectively improve opportunities for lifelong learning', with the actions envisaged 'clearly targeted towards children, youth, women and persons with disabilities.'<sup>245</sup> None of the 10 targets or 11 indicators specifically mentions older persons, though they mention other groups. In the annual reports of the Secretary-General on progress in implementing the SDGs from 2016 to 2019,<sup>246</sup> there is no explicit reference to the situation of older persons.

179. These silences and apparent neglect have occurred despite attention being drawn to these issues over many years by bodies such as the CEDAW Committee and the CESCR, especially in their important general comments on the rights of older persons, to say nothing of the attention to these issues under non-binding documents such as the Madrid International Plan of Action on Ageing. Other relevant categories of people such as women, children and persons with disabilities, whose rights *are* explicitly embodied in binding treaties, are much more visible in the SDG framework and its implementation. As the Independent Expert on the rights of older persons has stated:

While the Sustainable Development Goals seek to address some of the world's most blatant injustices, there is no specific focus on exclusion in older age or the neglect and discrimination

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<sup>242</sup> The Human Rights Council's Special Rapporteurs on the right to education, a mandate established in 1999, have devoted little attention to the issue in the last two decades. In the Special Rapporteur's 2016 report on lifelong learning, there are few substantial references to the relevance of the concept for older persons; the coverage is largely implicit: A/71/358 (2016). However, the Special Rapporteur does call on States to 'develop a normative framework that reflects the right to education, [lifelong] learning and training': para 103. The 2017 *Report of the Special Rapporteur on Education*, A/72/496 (2017), which deals with 'the role of equity and inclusion in strengthening the right to education, in particular in the context of achieving the Sustainable Development Goals', is silent on older persons. Although the report discusses twelve different groups that raise particular issues in relating to equality and inclusion, they do not include older persons, and older persons are not a particular focus within any of those other groups. The report affirms the importance of lifelong learning (para 110) but there is no specific discussion of the barriers to the achievement of this by older persons.

<sup>243</sup> There do not appear to have been any cases under any of the individual complaint procedures that have raised issues of older persons' enjoyment of the right to education, training or lifelong learning. Nor do there appear to have been any substantial cases raising these issues before the European Court of Human Rights, the European Committee of Social Rights or the Inter-American Court of Human Rights.

<sup>244</sup> 'The lack of a dedicated legal instrument for older persons may also explain the lack of attention to the specific challenges older persons face in the global policy framework, notably the Sustainable Development Goals, which guide the actions of the United Nations on the ground.' *Report of the Independent Expert on the human rights of older persons*, A/HRC/39/50, para 81 (2018). See also *id* at paras 34-36.

<sup>245</sup> *Report of the Independent Expert on the human rights of older persons*, A/HRC/39/50, para 31 (2018). The Independent Expert gives the example of 'Target 4.4, which seeks to increase the development of skills, is linked with jobs and employability, therefore limiting its relevance to those active in the labour market. That constitutes a missed opportunity to call for real opportunities for lifelong learning, which would enhance the inclusion of older persons and their contribution to their communities.'

<sup>246</sup> Extracts from the annual reports relating to Goal 4 appear on the Sustainable Development Goals Knowledge Platform: <https://sustainabledevelopment.un.org/sdg4>.

of older persons, despite existing population dynamics. Mainstreaming existing human rights norms into the Goals was a colossal task. The lack of attention to the specific challenges older persons face, as opposed to the focus put on other groups, such as children or persons with disabilities, is certainly a reflection of the lack of a dedicated legal instrument for older persons.<sup>247</sup>

### ***Conclusion in relation to the right to education, training, lifelong learning and capacity building***

180. This discussion of normative and related developments has shown limited progress. Although there have been some additional references since 2012 in general comments to the position of older persons and the right to education, training and lifelong learning, there has been at best only modest follow-up in the work of the treaty bodies. The lack of a specific, comprehensive and integrated normative framework appears to be a headwind in the way of more effectively advancing the realization of the human rights of older persons, in the treaty bodies and other mechanisms and in the 2030 Agenda for Sustainable Development.

181. The lack of attention given to the rights of older persons within the SDG framework is striking compared with the significant incorporation of issues addressed by other thematic treaties in the SDGs and the associated targets and indicators. The experience of those working with the CRPD and with the Inter-American Convention also suggests that those dedicated thematic frameworks have made a real difference to the development of law and policy relating to those groups, with important results in the actual enjoyment of human rights by members of those groups, both in relation to the right to education and also in relation to other rights.

182. In relation to the right to education, training, lifelong learning and capacity building, there is a clear case that a normative instrument could helpfully contain a detailed statement of the right that takes into account the needs and situations of older persons.

## **VII. OTHER IMPORTANT ISSUES NOT (ADEQUATELY) COVERED BY THE CURRENT INTERNATIONAL NORMATIVE FRAMEWORK**

### **A. Data gaps and deficiencies**

183. The limitations of the available data in relation to older persons nationally and internationally are well-known and have assumed particular importance in the context of monitoring the implementation of the Sustainable Development Goals.<sup>248</sup> The former Independent Expert on the human rights of older persons, Ms Rosa Kornfeld-Matte has also drawn attention to these issues, in particular in her 2020 thematic report to the Human Rights Council.<sup>249</sup> She described the serious conceptual and methodological inadequacies of existing statistics and data relating to older persons and the implications of these for the enjoyment by older persons of their human rights:

To date, there is a serious gap in the data available to capture the lived realities of older persons and the enjoyment of their human rights. Inequalities faced by older persons therefore often remain invisible. The exclusion of older persons from surveys and national censuses affects the ability to understand the extent to which they are able to participate in society and enjoy their human rights on an equal basis with others. This lack of significant data and information on

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<sup>247</sup> *Report of the Independent Expert on the human rights of older persons*, A/HRC/39/50, para 35 (2018).

<sup>248</sup> *Report of the United Kingdom of Great Britain and Northern Ireland on ageing-related statistics and age-disaggregated data*, E/CN.3/2018/19, paras 10-13 (2017). Scholars have noted that much of the published academic research on ageing 'rel[ies] on WEIRD (Western, Educated, Industrialized, Rich, Democratic) samples' and that 'WEIRD societies represent as much as 80% of study participants, but only 12% of the world's population': S D Neupert and X Zhu, 'Heterogeneity in Aging: The Need for a Tripartite Contextual Approach, Book review of M Diehl and H-W Wah, *The Psychology of Later Life: A Contextual Perspective* (2020)' (2021) 61(1) *The Gerontologist* 132, 133 (citation omitted)

<sup>249</sup> *Human rights of older persons: the data gap*, *Report of the Independent Expert on the human rights of older persons*, Rosa Kornfeld-Matte, A/HRC/45/14 (2020).

older persons is, in itself, an alarming sign of exclusion and renders meaningful policymaking and normative action practically impossible.<sup>250</sup>

184. The availability of accurate and disaggregated data that captures the realities of older persons' lives is essential to the analysis of the extent to which their human rights are realized (or not) and policy responses to address shortfalls in protection and enjoyment of their rights, as well as enabling monitoring of the progress being made. Having quality data also contributes to awareness raising and empowerment of older persons, as well as to broader social perceptions of their situation and contributions.<sup>251</sup>

185. Scholars have noted the exclusion of older persons from routine data reporting in relation to certain areas of health care – during the HIV pandemic, in relation to violence against women, in relation to the impact of and response to non-communicable diseases despite their experiencing the highest risk of suffering from these diseases (this last based on the discriminatory concept of 'premature deaths' which sets 70 as the upper limit), and mortality reporting and the exclusion from most surveys of health and population of persons living in residential aged care facilities.<sup>252</sup>

186. In her 2020 report on data gaps the Independent Expert noted, for example, that according to a WHO survey, only 17 per cent of 133 countries surveyed gathered data on abuse of and violence against older persons;<sup>253</sup> many demographic and health surveys typically exclude women over 50 and men over 55 or 60;<sup>254</sup> and many surveys that typically older persons 'are represented in statistics as a single age cohort of 55 plus, 60 plus or 65 plus', something which fails to capture the diversity of experiences;<sup>255</sup> inadequate disaggregation of data by age (including by 5-year age groups above 60) but also by other characteristics such as sex, disability, marital status, household or family composition, type of living quarters and other socio-economic characteristics; focus on defining older age only by reference to chronological age while failing to take into account other relevant factors such as biological ageing;<sup>256</sup> a failure in many cases to take into account older persons living in institutional care, older prisoners or older homeless persons;<sup>257</sup> reliance on old-age dependency ratios that fail to take into account that many older persons contribute economically to their societies in remunerated and unremunerated ways;<sup>258</sup> and other deficiencies. Both the former<sup>259</sup> and current<sup>260</sup> Independent Experts, and the Secretary-General have noted that the COVID-19 crisis 'revealed important gaps in the availability of age-specific data.'<sup>261</sup>

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<sup>250</sup> Id at para 19.

<sup>251</sup> Id at para 22.

<sup>252</sup> P Lloyd-Sherlock et al, 'Problems of Data Availability and Quality for COVID-19 and Older People in Low- and Middle-Income Countries' (2021) 61(2) *The Gerontologist* 141, 141-142 ('Excluding older people from routine data reporting and indicators is a time-honored (or arguably "dishonored") tradition, reflecting normalized ageism'); P Lloyd-Sherlock et al, 'Institutional ageism in global health policy' (2016) 354 *British Medical Journal* i4514, doi: 10.1136/bmj.i4514.

<sup>253</sup> *Human rights of older persons: the data gap, Report of the Independent Expert on the human rights of older persons, Rosa Kornfeld-Matte, A/HRC/45/14, para 27 (2020).*

<sup>254</sup> Id at para 60.

<sup>255</sup> Id at para 33.

<sup>256</sup> Id at para 36.

<sup>257</sup> Id at para 38.

<sup>258</sup> Id at para 59.

<sup>259</sup> Id at para 55.

<sup>260</sup> *Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons, Report of the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, A/75/205, para 66.*

<sup>261</sup> United Nations, *Policy Brief: The Impact of COVID-19 on older persons*, May 2020, at 15.

### *Existing human rights law relating to data collection on older persons*

187. With one exception, existing United Nations human rights instruments do not expressly oblige states to collect statistical and other data and to involve the beneficiaries of the treaty in those processes, although reporting guidelines and general comments or recommendations adopted by the human rights treaty bodies recommend that States parties do this and request them to provide information in their reports under the relevant treaty.<sup>262</sup> None of the treaties expressly require States parties to collect detailed and disaggregated data on older persons.<sup>263</sup>

188. The exception is Article 31 of the Convention on the Rights of Persons with Disabilities, under which States parties ‘undertake to collect appropriate information, including statistical and research data to enable them to formulate and implement policies to give effect to the . . . Convention’, and to do so in accordance with internationally accepted data protection, privacy and ethical standards. Article 31(2) provides that the information shall be disaggregated, as appropriate, and used to help assess the implementation of States parties’ obligations . . . and address the barriers faced by persons with disabilities in exercising their rights, while Article 31(3) obliges States parties to disseminate this data and make it accessible to persons with disabilities and others. This article has provided the Committee on the Rights of Persons with Disabilities with a reference point to encourage States parties to develop better data collection methods at the national level.<sup>264</sup> The Article 31 obligations are supplemented by the general obligation in article 4(3) which requires States parties to consult with and actively involve persons with disabilities through their representative organizations in the development of legislation, policies and decision-making process relating to persons with disabilities.

189. The current conceptual, methodological and practical inadequacies in the availability and collection of statistics and data on older persons have a significant impact on how older persons are viewed in society and the extent to which violations of their rights are identified, analysed and responded to. More comprehensive, inclusive and fine-grained statistics and data are required to ensure that the human rights of older persons are fully respected. Some progress has been made, though that progress has been modest across the international community as a whole and there are areas where there are major gaps. The adoption of an explicit obligation along the lines of Article 31 of the CRPD is likely to add significant impetus to those developments and bring about practical change for older persons.

### **B. Robotics, artificial intelligence and technology**

190. In her 2017 thematic report the Independent Expert on the human rights of older persons took up the subject of ‘the opportunities and challenges of assistive and robotics technology, artificial intelligence and automation for the full enjoyment by older persons of their human rights.’<sup>265</sup> She

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<sup>262</sup> See M Pedersen and F Ferretti, ‘Article 31: Data Collection’ in Bantekas, Stein and Anastasiou, above n59, 924, 926 n 8; M Pedersen, ‘Article 31 (Statistics and Data Collection)’ in V della Fina, R Cera and G Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017) 557, 560 n 5.

<sup>263</sup> The Independent Expert notes that the Committee on Economic, Social and Cultural Rights has recommended the use of disaggregated data in the implementation of economic, social and cultural rights, but considers the coverage does ‘not create an adequate framework for monitoring older persons’ rights and collecting data as evidence of age discrimination’ and that the Committee’s earlier general comment on the rights of older persons did not cover this issue adequately either. She also notes that the general recommendation of the Committee on the Elimination of Discrimination against Women that refers to the need for data disaggregated by age and sex applies only to older women. *Human rights of older persons: the data gap, Report of the Independent Expert on the human rights of older persons, Rosa Kornfeld-Matte, A/HRC/45/14*, para 47 (2020).

<sup>264</sup> See M Pedersen and F Ferretti, ‘Article 31: Data Collection’ above n 262, 924-954.

<sup>265</sup> *Report of the Independent Expert on the human rights of older persons*, A/HRC/36/48, para 1 (2017). See also *Report of the Independent Expert on the enjoyment of all human rights by older persons on her mission to Singapore*, A/HRC/36/48/Add.1, para 111 (2017); *Report of the Independent Expert on the enjoyment of all human rights by older persons on her visit to China*, A/HRC/45/14/Add.1, paras 93-98 (2020); *Report of the Independent Expert on the enjoyment of all human rights by older persons on her visit to New Zealand*, A/HRC/45/14/Add.2, paras 114-117 (2020).

considered that this was ‘a frontier issue, which urgently requires further consideration, and stresses the need for a human rights-based approach to underpin discussions on this subject.’ This report identified ‘remaining challenges and protection gaps and makes recommendations for ensuring that older persons are able to enjoy their human rights on an equal basis with others.’<sup>266</sup> The report also contained a series of detailed recommendations of a normative and policy nature that might appropriately be included in a new normative instrument.

191. This emerging issue and its relevance of the human rights of older persons – indeed for human rights more generally – have not yet been addressed in any international human rights treaty. The advance of robotics and artificial intelligence, as well as other forms of technology, has been seen as providing opportunities to support older persons in the realization of their human rights, but concerns have been expressed about the adverse impact they may have on their human rights. A new normative instrument on the rights of older persons would provide an opportunity to address these issues.

### **C. Refugees, asylum-seekers and IDPs; disaster and emergency situations**

192. Two issues which emerged in a number of submissions to the Open-ended Working Group on Ageing were the position of older refugees, asylum-seekers and internally displaced persons, who are not the explicit subject of existing human rights treaties. Another area was that of the situation of older persons in emergency or disaster situations. The Independent Expert addressed the position of older persons in emergency situations in her report to the Human Rights Council in 2019,<sup>267</sup> as well as in a number of reports based on her visits to member States.<sup>268</sup>

193. Based on a wide-ranging examination of the situation of older persons in emergency situations and the inadequacy of existing approaches, the Independent Expert concluded in 2019 that ‘the lack of a comprehensive and integrated international legal instrument to promote and protect the rights and dignity of older persons has significant practical implications for older persons in such situations.’<sup>269</sup> She also stressed that ‘current instruments do not make the issues of ageing specific or sufficiently visible, and therefore preclude older persons from the full enjoyment of their human rights, particularly in emergency situations.’<sup>270</sup> The current Independent Expert expressed a similar view in her first thematic report to the General Assembly.<sup>271</sup>

194. Thus the existing United Nations human rights treaties do not specifically address emergency situations and older persons in particular. The CRPD addresses explicitly some aspects of this topic in Article 11, which deals with situations of risk and humanitarian emergencies. The CEDAW Committee

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<sup>266</sup> Declaration adopted during the International Expert-Conference on the human rights of older persons, held on 12 and 13 November 2018 in Vienna, in *Report of the Independent Expert on the human rights of older persons*, A/HRC/42/43, Annex, at 18 (2019).

<sup>267</sup> *Report of the Independent Expert on the enjoyment of all human rights by older persons*, A/42/43 (2019).

<sup>268</sup> *Report of the Independent Expert on the enjoyment of all human rights by older persons*, Rosa Kornfeld-Matte, *Mission to Mauritius*, A/HRC/30/43/Add.3, para 114 (2015); *Report of the Independent Expert on the enjoyment of all human rights by older persons on her mission to Namibia*, A/HRC/36/48./Add.2, para 99 (2017); *Report of the Independent Expert on the enjoyment of all human rights by older persons on her mission to Montenegro*, A/HRC/39/50/Add.2, para 98 (2018); *Report of the Independent Expert on her mission to Uruguay*, A/HRC/42/43/Add 1, para 107 (2019); *Report of the Independent Expert on her mission to New Zealand*, A/HRC/45/14/Add. 2, para 118 (2020).

<sup>269</sup> *Report of the Independent Expert on the enjoyment of all human rights by older persons*, A/42/43, para 101.

<sup>270</sup> *Ibid.*

<sup>271</sup> United Nations, *Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons*, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, Claudia Mahler, A/75/205, para 78 (2020).

has also addressed some of these issues, with some reference to older women, in general recommendations adopted in 2013 and 2018.<sup>272</sup>

#### **D. Business and human rights**

195. Business and human rights is another area, which the Independent Expert on the human rights of older persons has identified as requiring greater attention and action by States and others. The Independent Expert has on a number of occasions called on business to adhere to the Guiding Principles on Business and Human Rights<sup>273</sup> and to avoid discrimination against older persons and reminded States of their obligations to regulate private business to ensure they do not discriminate against older persons.<sup>274</sup>

196. However, the work of the United Nations in the field of business and human rights, including the promotion and implementation of the Guiding Principles and the work of the Working Group on the issue of human rights and transnational corporations and other business enterprises has largely neglected older persons. The Guiding Principles make no explicit reference to age discrimination or older persons, though they do refer to ‘vulnerability and/or marginalization’ and the ‘the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.’ It is no coincidence that these are all groups that benefit from explicit protections in the principal United Nations human rights treaties. The Working Group has taken up issues of gender and the rights of children and indigenous peoples, but there has been little (if any) attention focused on the implications of the Guiding Principles framework for older persons.<sup>275</sup>

### **VIII. THE WAY FORWARD**

#### **A. The contribution of human rights treaties to the enjoyment of human rights - general**

197. This Update proceeds on the basis that international human rights treaties, including thematic treaties, can and do contribute to the improvement in the lives of the persons who are beneficiaries under those instruments in practical ways and in their everyday lives. They do this in a number of ways: by making visible and focusing attention on problematic practices amounting to human rights violations (sometimes violations that have previously been relatively invisible, neglected or perhaps not even conceived of as human rights violations); by encouraging governments to review law and practice in light of the framework set out in the treaty; by stimulating international and domestic level advocacy for change; by becoming directly or indirectly part of the legal framework of the State party; and by providing for procedures under which States parties, as well as civil society groups and other stakeholders, can engage in a regular dialogue with an independent expert treaty body that can promote

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<sup>272</sup> *General recommendation No 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30 (2013) and *General recommendation No 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change*, CEDAW/C/GC/37 (2018).

<sup>273</sup> United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (United Nations, 2011), HR/PUB/11/04, 6-7.

<sup>274</sup> *Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, Mission to Slovenia*, A/HRC/30/43/Add.1, para 77 (2015) (difficulties older persons face in accessing financial and insurance services); *Report of the Independent Expert on the enjoyment of all human rights by older persons on her mission to Montenegro*, A/HRC/39/50/Add.2, para 118 (2018); *Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, Mission to Mauritius*, A/HRC/30/43/Add.3, para 128 (2015); *Report of the Independent Expert on the enjoyment of all human rights by older persons on her mission to Costa Rica*, A/HRC/33/44/Add.1, para 112 (2016).

<sup>275</sup> For example, in United Nations Development Programme (UNDP) and the United Nations Working Group on Business and Human Rights, *Gender guidance for the Guiding Principles on Business and Human Rights* (2019) at 6 and 46 older women are referred to only twice in identical passages in the context of intersectionality along with sixteen other personal or group characteristics.

ongoing monitoring of progress and sharing of experience as to how best to realize the full enjoyment of the human rights in question.

198. Of course international human rights treaties are frequently just one component of how the enjoyment of human rights can be or is enhanced at the national level, and progress is not always immediate, consistent, unidirectional or without its challenges. Assessing the impact of treaties poses various challenges. However, a now substantial body of empirical social science literature, reinforced by the experiences of those who have worked with international human rights treaties at the international, regional, national and local levels, shows that international human rights treaties have made a difference in many situations.

## **B. The contribution of specialized conventions to the enjoyment of human rights**

199. The discussion above has shown that the international human rights framework has failed to deliver to older persons clear, comprehensive and effective protection of their human rights. Although there is some engagement with some issues, it is sporadic and inconsistent and does not appear to have increased in scale or sophistication over the last decade. There are various reasons for this, but they include the limited or flawed existing conceptual framework of a number of rights, competing priorities and less familiarity on the part of experts in the system with the field of older persons' rights than with other areas.

200. The General Assembly has requested the Open-ended Working Group on Ageing to submit to it 'at the earliest possible date, a proposal containing, inter alia, the main elements that should be included in an international legal instrument to promote and protect the rights and dignity of older persons, which are not currently addressed sufficiently by existing mechanisms and therefore require further international protection'.<sup>276</sup> This Update suggests that, as part of responding to this request, the Open-ended Working Group on Ageing should directly address the question of whether a new dedicated normative instrument would make a unique and significant contribution to the efforts to ensure the full enjoyment by older persons of the all human rights. Asking this question does not exclude or diminish the importance of efforts to encourage existing mechanisms to engage more consistently with the human rights of older persons. Rather, it reflects the lessons of experience that specialized human rights conventions have made striking and tangible contributions to the realization of the human rights of the group protected by the thematic convention. This has happened at both the international and regional levels.

201. The consideration above of the topics examined at the eighth, ninth and tenth sessions of the Open-ended Working Group has already shown how in specific areas the adoption of new normative standards would remedy gaps and limitations in the coverage of existing treaties. More generally there are good reasons for concluding that the adoption of a specific convention on the human rights of older persons would have a significant impact on promoting the enjoyment of human rights that goes beyond what more effective engagement by existing mechanisms is likely to produce.

202. The international community has had considerable experience with the adoption of specialised thematic conventions that supplement treaties containing general human rights guarantees. At the international level the United Nations treaties on racial discrimination, discrimination against women, torture, the rights of the child, the rights of persons with disabilities, and migrant workers are among the principal examples. At the regional level treaties relating to violence against women, the rights of persons with disabilities and the rights of older persons have also been adopted.

203. These treaties perform a number of important functions. These include the symbolic – a statement by the international community that the particular group and rights in questions matter and are sufficiently important to justify a dedicated instrument to address them. They also promote the visibility of those who suffer from those violations, something of importance given the relative invisibility of older persons and discrimination on the ground of older within the international human rights framework. In the case of older persons, a thematic instrument could also emphasize that older

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<sup>276</sup> Resolution 67/139, para 1 (20 December 2012).

persons lead active, healthy and productive lives and make significant contributions to their societies, and that comprehensively guaranteeing their rights would recognize and expand the opportunities for them to continue doing so. Thematic treaties can also have a catalyzing effect, stimulating governments, civil society and others to engage with the issue and to seek to eliminate the wrongs that have been identified and named.<sup>277</sup> Importantly these external specialized thematic frameworks bring about cross-fertilization with existing treaty bodies and human rights mechanisms (including at the regional level), whose engagement with these issues within their own mandates can then become more focused, nuanced and reflective of the latest thinking on these issues.

204. There is now a large body of literature examining the impact of a number of these thematic conventions.<sup>278</sup> These show that the drafting and adoption of specialised treaties can have a catalysing effect on the relevant constituency, provides a focus for advocacy and solidarity, affords a focused framework for legislative and policy development for governments that is tailored to the specific human rights involved, generates funding for change, stimulates changes in laws, policy and practice, and provides a framework for accountability at international and national levels. In short, such specialized treaties bring about change that has not happened under existing general treaties and was unlikely to do so; and they also provide feedback into those general frameworks, enhancing the consideration of relevant issues by ‘mainstream’ bodies.

205. The impact of the CEDAW Convention<sup>279</sup> and the Convention on the Rights of the Child<sup>280</sup> are two examples, but perhaps the most striking example in recent years has been the impact of the Convention on the Rights of Persons with Disabilities.<sup>281</sup> The process leading to the adoption of that treaty brought together advocates, civil society, governments, and others around disability issues and, since the treaty was adopted, it has provided a critical framework against which many accepted laws and practices have been subject to searching scrutiny and repealed or amended to ensure respect for the rights of persons with disabilities. These have included laws relating to guardianship, mobility and accessibility, independent living arrangements, employment laws, voting and other political participation rights, communication rights and education, among others.<sup>282</sup>

206. The lack of a dedicated normative instrument on the human rights of older persons and the conceptual limitations of existing instruments appears to be a primary reason for the situation described above. The adoption of such a dedicated instrument is the most effective way to bring about the major

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<sup>277</sup> See Georgantzi, above n 38, 255-264.

<sup>278</sup> For a recent review of that literature and an empirical study analysing the impact of reporting under human rights treaties, see Creamer and Simmons, above n 90.

<sup>279</sup> See B A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009) (CEDAW Convention and Convention against Torture); A Byrnes and M Freeman, ‘The Impact of the CEDAW Convention: Paths to Equality (February 20, 2012), UNSW Law Research Paper No. 2012-7, background paper for the World Bank’s World Development Report 2012 on Gender Equality and Development, <https://ssrn.com/abstract=2011655> (in particular the literature review in the Appendix); A Hellum and H Sinding Aasen (eds), *Women’s Human Rights: The CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) (series of country case studies); N E Englehart and M K Miller, ‘The CEDAW Effect: International Law’s Impact on Women’s Rights’ (2014) 13 *Journal of Human Rights* 22-47.

<sup>280</sup> UNICEF, *Protecting the World’s Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (Cambridge University, 2007); L Lundy et al, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (UNICEF UK, 2012); J E Doek and T Liefwaard, *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015).

<sup>281</sup> J E Lord and M A Stein, ‘Charting the Development of Human Rights Law Through the CRPD’ in Della Fina, Cera and Palmisano (eds), above n 262, 731-748.

<sup>282</sup> See, for example, the tracking of major changes at the national level in the European Union following the ratification of the CRPD: European Union Agency for Fundamental Rights, chapters on ‘Developments in the implementation of the Convention on the Rights of Persons with Disabilities’ in *Fundamental Rights Report 2017* (2017) 223-236; *Fundamental Rights Report 2018* (2018) 225-235; and *Fundamental Rights Report 2019* (2019) 227-237.

changes required to the manner in which the international human rights system engages with the human rights of older persons.

### **C. Better implementation through existing human rights mechanisms – potential and limitations**

207. As noted above, all those engaged in the debate over how to improve the international human rights system in its engagement with the human rights of older persons have accepted that there may be ways in which existing mechanisms can do more. Advocates for a new normative instrument see this as helpful but in itself insufficient, and support a two-track approach involving a new instrument *and* improved implementation in existing institutions. However, others maintain that improving the implementation of existing binding norms and non-binding norms and policy documents will of itself be sufficient.

208. A reliance on the potential of existing mechanisms to make up the current shortfall in relation to older persons' human rights assumes that those bodies are in a position to do this in a way that will make a substantial difference. Yet, it has not been demonstrated that existing mechanisms are able to make this shift. If existing bodies cannot expand their engagement in a sustained and systematic manner that reflects older persons' perspectives, and address the persistent acts and circumstances that threaten their dignity, then adopting the strategy of better implementation alone will necessarily fall short.

209. There do appear to be a number of ways in which existing mechanisms might increase their engagement with the human rights of older persons or ageing issues. Such measures might include the treaty bodies including more, specific questions in lists of issues provided to States parties prior to reporting or in response to reports and ensuring that recommendations on these matters are regularly included in concluding observations; States parties themselves could take concerted measures to include more information about issues relating human rights in older age in their reports, and civil society organizations, both those working on ageing and human rights and those working on general human rights issues, could ensure that issues relating to human rights in older age are brought to the attention of treaty bodies in the material they provide to them. However, by themselves these are likely to bring about only incremental change.

210. In assessing what existing mechanisms might be able to do it is important to keep in mind the mandates, workloads, expectations and expertise of those mechanisms and the practical constraints that these entail even for those that are willing to give great attention to these issues among all the other competing concerns that they are being called on to address. The reasons for the inconsistent and fragmented engagement of existing human rights mechanisms (in particular the human rights treaty bodies) with the human rights of older persons are various. They include the many competing substantive priorities on the agenda of the individual treaty bodies that result from the provisions of their governing treaty and the concerns raised before them by States parties and civil society; the relatively limited amount of time to explore more issues in the constructive dialogue with States parties under reporting procedures; the limitation on the length of documents and the number of issues that can be put to States parties in writing and orally; the non-binding status of general comments or recommendations addressing these issues; and limited expertise of Committee members in the field of ageing and human rights. The lack of a coherent external framework on the human rights of older persons also makes it more difficult for Committee members to identify and comment on relevant matters within the framework of treaties that were, for the most part, adopted long before the human rights of older persons crystallised as an important issue on the international level.

211. To suggest that human rights treaty bodies should do significantly more in relation to one sub-field of human rights covered by treaties broad in their scope seems unrealistic and impractical in light of the current workload and resources of those bodies that significantly limit their ability to add new priority issues to their existing areas of focus, and the efforts over the last few decades to streamline their operations even as their workload has continued to grow.

## IX. CONCLUSIONS

212. Since the preparation of the 2012 Analytical Study for the third working session of the Open-ended Working Group on Ageing, there have been a number of significant normative developments relating to the human rights of older persons, mainly at the regional level. However, at the international level, the existing human rights framework continues to provide fragmented and inconsistent coverage of the human rights of older persons in law and practice. This reflects the conceptual limitations of the existing treaties for addressing the violations of human rights that older persons experience and the lack of a coherent, comprehensive and integrated normative framework on the rights of older persons.

213. The engagement by the UN human rights treaty bodies ranges from extremely limited to substantial engagement with some aspects of the human rights of older persons by certain treaty bodies. However, overall it cannot be said that there is a coherent approach to the human rights of older persons that is systematically applied across the human rights treaty bodies and the absence of a specialised instrument is part of the reason for that.

214. The mandate of the Independent Expert on the human rights of older persons has brought focus and depth to the issue since its creation in 2014, but that single mandate is insufficient to address many gaps and cannot compensate for the lack of a comprehensive normative framework on the rights of older persons. While other special procedures have at times substantially considered the human rights of older persons, these efforts have tended to be ad hoc and one-off interventions which, while helpful, have not necessarily been based on a coherent and holistic approach to the human rights of older persons that is more broadly sustained.

215. The discussions at the Open-ended Working Group have shown the interrelatedness of the various human rights considered and the need for a coherent, integrated and detailed set of normative standards to address them. Existing conceptual frameworks are not adequate to fully address the violations suffered by older persons. The protection afforded under the current frameworks and standards is in some cases seriously deficient and in other cases too general to give adequate guidance to governments, policymakers and advocacy groups about what actions are appropriate to ensure the realization of specific human rights for older persons.

216. The appropriate inquiry to consider at this stage of discussions in the Open-ended Working Group is whether a new normative instrument would add a significant impetus to efforts to better ensure the protection of the human rights of older persons. Experience with other specialised treaties at the United Nations and regional levels suggests that such treaties do indeed make distinct and substantial contributions to the realization of the rights that they guarantee and that this would equally be the case with a new normative instrument on the human rights of older persons.

217. The assumption that existing United Nations human rights mechanisms, in particular the human rights treaty bodies, can give significantly greater time and attention to the human rights of older persons is unrealistic and impractical, given the many competing priorities they are mandated to consider under their constituent treaties, the pressure on the time and resources available to them and the limits on the length of treaty body and State party documents. While there are some measures that the human rights treaty bodies, States parties and other stakeholders could take to improve consideration of ageing issues by existing bodies, these are likely to bring about only incremental change.

218. There is no clear articulation in any of the United Nations human rights treaties of the nature and significance of ageing, its social construction and the phenomenon of ageism. Without such a coherent conceptual framework to inform the interpretation and application of existing human rights norms and to frame the development of new norms and interpretations that address the realities of older persons' lives, the international human rights system will continue to fall short in delivering on its promises to ensure that all persons, including all older persons, fully enjoy their human rights and fundamental freedoms.

219. The silence, neglect and relative invisibility of human rights issues of central concern to older persons are so widespread and systemic in the international human rights system that it is clear that

fundamental change is required. Simply exhorting existing mechanisms to do more and to include the perspectives of older persons in the execution of their mandates is not enough; a new dedicated normative instrument is needed to comprehensively remedy those deficiencies.