

발 간 등 록 번 호

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노인인권의 국제적 현안 분석과 유엔에서의 주류화를 위한 로드맵

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이 보고서는 연구용역수행기관의 결과물로서,
국가인권위원회의 입장과 다를 수 있습니다

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- 부록: 새로운 유엔 노인권리협약에 포함되어야 할 권리들

I. 서론

2016년 12월, 고령화에 관한 개방형 실무그룹(이하 ‘실무그룹’)은 제 7차 세션에서 새 협약에 관한 찬반 논의에서 벗어나 노인 권리의 규범적 내용에 초점을 맞춰야 할 시점이 되었다는 데에 동의하였고, 국가인권기구(NHRI)에 추후 세션에 참여할 수 있는 권한을 부여했다. 이 두 중요한 전개상황을 감안해 볼 때, 대한민국 국가인권위원회(NHRCK)는 노인 권리의 규범적 내용에 대한 논의에 의견을 제시하고 영향을 미칠 수 있는 기회를 얻게 되었다.

본보고서는 노인 권리에 대한 새로운 유엔협약의 논거를 살펴보고, 새로운 유엔협약의 규범적 내용에 관해 권고하며, 대한민국 국가인권위원회가 그 과정에서 취할 수 있는 조치를 제안하고자 한다.

II

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2012년 유엔 인권최고대표는 “노인들의 상황은 특수하고도 급박한 많은 인권 문제를 드러내고 있다”¹⁾라고 밝혔다. 본 섹션에서는 이러한 광범위한 도전과제들을 조명하고자 한다. 하지만 각 과제의 심층적인 세부사항을 모두 검토할 수는 없다는 점을 밝혀 둔다.

2.1 노인의 사례공유

2015년 노인 권리 국제연대(Global Alliance for the Rights of Older People)는 노인들의 노년기 권리 관련 경험을 더 잘 이해하기 위하여 50개국 노인을 대상으로 나이 때문에 다른 대우를 받거나 차별당한다고 생각하는지, 그런 상황이 일상생활에서 어떻게 영향을 미치는지, 왜 노인들이 다른 대우를 받거나 차별당한다고 생각하는지²⁾ 조사했다.

대다수 노인들이 나이 때문에 다른 대우를 받거나 차별당한다고 응답했다. 소수는 종종 긍정적인 방향으로 다른 대우를 받았다고 응답했고, 극소수는 항상 더 우대받는다고 답했다. 브루나이의 한 여성은 “나이 먹은 덕에 항상 그에 걸맞게 대우받고 어디를 가나 우선권이 주어져 기쁘다”라고 응답했다.

그러나 이는 예외적인 경우였다. 다르게 대우 받는다고 응답한 대다수 노인들은 훨씬 더 부정적으로 답했다. 가족들과 일터의 동료들과의 관계, 지역사회와 인맥, 그리고 각급 기관 차원에서 노인들은 자신들이 정부정책 및 입법, 지역사회나 민간 사회기관의 고려 대상이 아니라고 응답했다. 또한 노인들은 자신들이 외면, 회피, 무시당하고 의심받으며, 여러 형태의 폭력과 학대, 강제 퇴거뿐 아니라 방임, 유기까지 당한다고 표현했다. 세르비아의 한 요양원 입소 노인은 “요양원 측은 우리를 위협하고, 돈을 모두 뺏고, 용돈도 주지 않고, 똑바로 행동하지 않으면 쫓아낸다고 끊임없이 겁을 주었다”고 말했다.

응답자들은 사회활동, 재정 서비스, 정치적 의사결정과정, 경제생활, 발전적 활동과 지도적 위치로부터 배제되었다고 밝혔다. 또한 건강보험, 독립적 생활을 위

1) 유엔 인권최고대표 보고서, E/2012/51, p.17, 64항

2) Sleep, In Our Own Words: What older people say about discrimination and human rights in older age, 노인 권리를 위한 국제연대, 2015

한 돌봄과 지원, 완화 의료와 임종간호, 교육, 사회보장, 정보, 적절한 주거, 재정 서비스, 고용, 이동, 신기술, 공공건물과 더 넓게는 공공환경 출입 같은 재화와 서비스에서 배제되었다고 말했다. 아르헨티나의 어느 노인은 “이 나이가 되면 단지 65세 이상이라는 이유로 충분한 은행대출도 받을 수 없고 건강보험도 가입할 수 없다”고 말했다.

어떤 이들은 나이를 비롯한 성별, 혼인여부, 경제적·신체적·정신적 건강상태 같은 기타 특징을 근거로 교차 차별을 당한다고 응답했다. 일례로 미국의 어느 여성은 “난 앞으로 절대 2등급 이상을 받지 못할 거예요. 여자인데다 이제는 나이까지 들었으니까요”라고 말했다.

다른 이들은 낙인찍히고, 모욕당하고, 무시당하고, 선심 쓰는 것 같은 느낌을 받는다고 답했다. 또 어떤 이들은 신체적 폭력, 혹은 언어폭력, 실직, 심지어 외출 자체에 대하여 불안하고 겁을 내고 있었다. 어떤 이들은 외롭고, 고립되고, 배제되고, 소외되고, 방임되었다고 느끼고 있었다. 많은 이들이 눈에 띄지 않고, 잊혀지고, 원치 않고, 불필요하며, 가치가 없어졌다는 느낌을 토로했다. 대한민국의 한 50대 남성은 “사회로부터 쉽게 배제되고 비참한 기분이 든다”고 말했다.

부정적인 쪽으로 다르게 대우받거나 차별 받았는지에 관한 질문에는 노인과 노년기에 관한 무지, 오해, 고정관념, 편견을 그 이유로 꼽았다.

여러 번 언급된 표현으로는 노인들을 사회, 가정, 건강보험, 경제, 사회복지제도의 짐으로 여긴다는 의견이 있었다. 노인들은 판단력이 없고, 무능하며, 쓸모 없고, 업무상 비효율적이고 이윤을 내지 못하며, 생산적이지 못하다고 여겨진다고 응답했다. 우간다의 한 남성은 “나를 사회에 아무 기여도 못하는 다 쓴 인력으로 봐요. 이제 내 차례는 끝났으니 젊은이에게 자리를 양보해야 한다는 거죠”라고 말했다.

2017년 19개국의 여성 노인들이 제 8차 고령화에 관한 실무그룹 세션³⁾에 앞서 실시한 설문조사에 응했다. 그들은 삶의 여러 영역에서 차별 당했다고 응답했다. 고용 및 건강보험을 비롯하여 공공생활 참여, 재정 서비스, 사법제도, 재산의 소유와 처분, 이동, 다른 자원에 대한 접근, 인도주의적 대응과 자기계발 프로그램,

3) Sleep, Entitled to the same rights: What older women say about their rights to on-discrimination and equality, and to freedom from violence, abuse and neglect, 헬프에이지 인터내셔널, 2017

그리고 미디어, 교육, 주택, 자료수집에서 차별 당했다고 밝혔다. 또한 여성 노인들의 나이, 혼인 상태, 장애, 이민자 여부, 난민 여부, 주거지역, 신체적 혹은 정신적 건강상태, 경제, 사회 혹은 교육 상태에 근거한 다중차별을 당했다고 응답했다.

그 외에도 다양한 가해자들이 행하는 각종 형태의 폭력, 학대, 방임을 가정과 지역사회와 공공장소에서 경험했다고 털어놓았다. 이들 여성 노인들은 장애를 가졌거나, 농촌지역에 거주하거나, 저학력이거나, 이민자나 난민이거나, 독신 혹은 배우자와 사별했거나, 생활보호 대상자, 가장이거나, 농촌에서 도시로 이주한 여성 노인들이 그런 위험에 특히 더 취약하다고 응답했다.

여성 및 남성 노인들은 그간의 경험을 바탕으로 다음과 같은 세상에 살고 있다고 답했다. 즉, 사람들은 노인에 대해 낙인을 찍고 비인간적 편견과 고정관념을 가지고 있었지만 이에 대한 인식조차 없었다. 또한 노인들을 무시하거나 억지로 참아주고 다른 이들의 삶에 해를 끼치는 존재라고 여기고 있었다. 어떤 권리를 박탈당했는지를 묻는 질문에는 삶의 모든 면에서의 권리라고 이구동성으로 응답했다.

2.2 노인인권 문제에 대한 유엔의 인식

노인들이 삶의 여러 영역에서 차별과 독특한 도전에 직면해 있다는 사실에 대해 모든 유엔회원국들 사이에 광범위한 공감대가 형성되어 있다. 이는 유엔회원국을 포함한 여러 단체들이 최근 발표한 많은 보고서에도 잘 나타나 있다.

2009년, 노인 인권 조사를 위해 독일 본에서 모인 유엔전문가집단은 노인 권리가 개인 및 기관 차원에서 여러모로 침해당하고 있으며, 건강권, 고용, 폭력과 학대, 사법제도에 대한 접근, 수입안정 등과 관련한 차별과 노년기 권리 침해의 근본원인은 연령주의라고 결론 내렸다.⁴⁾

2010년, 유엔 인권이사회사문위원회(UN Human Rights Council Advisory Committee) 실무보고서에서는 연령차별, 학대 및 폭력, 가난, 고용거부와 열악한 근로환경, 제한된 사회적 연금 수혜범위, 자연 및 기타 재해 시 정보와 지원에 대한

4) Report of the Expert group Meeting Rights of Older Persons, 2009년 5월5일~7일. 유엔 경제사회국, 2009

접근성 부족 등의 영역에서 노인에 대한 부당한 처우와 권리침해가 확인되었다.⁵⁾

2011년 유엔 경제사회국(United Nations Department for Economic and Social Affairs, UN DESA)은 주거권,⁶⁾ 근로권과 관련한 연령차별,⁷⁾ 사회보장 수급권 박탈,⁸⁾ 신용대출을 비롯한 재정서비스로부터의 배제,⁹⁾ 건강보험에서의 연령차별,¹⁰⁾ 폭력 및 학대와 방임¹¹⁾과 관련하여 노인들이 직면한 문제를 보고하였다. 해당 보고서는 “연령주의적 고정관념이 사회에 만연해 있으며 그것이 노인에 대한 인식과 처우에 중요한 역할을 하고 있다”¹²⁾라고 결론지었다.

2012년 유엔 인권최고대표(UN High Commissioner for Human Rights) 보고서는 노인들이 시민적, 문화적, 경제적, 정치적, 사회적 영역의 권리를 특히 더 침해당하고 있다는 점을 집중 조명했다. 그 중 가장 시급한 문제로는 연령차별, 법적 능력 및 법 앞의 평등, 장기요양, 폭력 및 학대, 생산적 자원, 노년기 일자리, 식량, 주거, 사회적 보호 및 사회보장을 받을 권리, 완화 의료를 포함한 건강보험 및 임종간호 보장권에 대한 접근, 노년 및 장애, 수감 노인, 법에 대한 접근성으로 밝혀졌다. 그리고 이런 각 영역에서 보호를 받을 때 규범과 시행 상의 격차로 인해 노인들이 처한 상황이 더 악화되는 것으로 나타났다.¹³⁾

다음은 2013년 유엔 인권최고대표가 실시한 설문조사에서 확인된 과제이다. 1)

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- 5) The necessity of a human rights approach and effective United National mechanism for the human rights of the older person, 인권이사회 자문위원회 위원 정진성 작성 실무보고서, A/HRC/AC/4/ CRP.1, 2010
 - 6) Current Status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide, 유엔 경제사회국, 2012, p.11
 - 7) Current Status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide, 유엔 경제사회국, 2012, pp.19~20, 22
 - 8) Current Status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide, 유엔 경제사회국, 2012, p.26
 - 9) Current Status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide, 유엔 경제사회국, 2012, p.29
 - 10) Current Status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide, 유엔 경제사회국, 2012, pp.42, 44-45
 - 11) Current Status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide, 유엔 경제사회국, 2012, p.48
 - 12) Current Status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide, 유엔 경제사회국, 2012, p.150
 - 13) E/2012/51, p.17, 64항

경제위기의 영향으로 초래된 노년기의 가난, 기아, 문맹, 실업, 식량조달 불안, 노숙, 2)노인들에 대한 폭력과 학대의 규모, 3)생활보호나 사회서비스의 적용범위 부족, 고 비용 및 부 적절성, 4)노인들의 요구에 특화된 서비스 전문 인력 부족, 5)노인들의 고립, 6)가정 돌봄보다 기관요양을 우선시하는 법률구조와 수단, 7)연령차별에 대한 일반적인 법적 인식 부족, 8)노인에 대한 개별화된 자료의 부족 등이 포함되었다. 그 외 과제로는 1)노인들의 사법제도에 대한 접근성 부족, 2)디지털화 같은 의무 조치로 인한 정보의 부족, 3)정치참여를 독려하기 위한 수단 부족, 4)성적 지향, 소수 언어나 소수 민족 출신, 이민, 장애, 농촌거주, 국내 강제 이주나 투옥¹⁴⁾같은 요소와 노년기가 맞물려 나타나는 문제에 대한 관심 등이 포함되었다.

제 2차 세계 고령화 총회와 마드리드 국제고령화 행동계획(MIPAA)의 후속으로 연이어 나온 유엔 사무총장 보고서도 노인 권리에 대한 특별한 도전과제들을 집중 조명하고 있다. 2009년, 유엔 사무총장은 노인들이 일, 사회보장, 주택, 건강보험, 교육, 문화와 관련하여 연령차별과 연령주의에 노출되어 있으며, 노인 학대가 “문화적, 사회적, 경제적 경계를 넘어서는 보편적 현상”¹⁵⁾이라고 보고했다. 2010년 사무총장 보고서는 연령주의 고정관념이 여전히 존재하며, 노인들이 건강서비스나 장기요양보험의 충분한 도움을 받지 못하며, 문해율과 교육적 성취가 상대적으로 낮고, 사회참여에서 배제되어 있으며, 노인들에 대한 상당한 수준의 학대나 방임사례가 보고되고 있다고 결론지었다.¹⁶⁾ 2011년 사무총장 보고서는 노년기의 다중차별과 그것이 온전한 인권 향유에 미치는 영향을 포함하여 노인에 대한 특수한 인권도전과제가 범세계적으로 인식되고 있다는 사실을 인정했다.¹⁷⁾ 2012년 보고서에서는 “행동계획이 채택된 지 10년이 지난 지금에도 노인에 대한 개인 및 기관 차원의 편협한 태도와 차별적 관행이 노인들의 사회참여를 저해하고 있다”라고 결론을 내렸다.¹⁸⁾ 2013년¹⁹⁾과 2014년 보고서에서는 이런

14) Summary report of the consultation on the promotion and protection of the human rights of older persons, 유엔 인권최고대표, A/HRC/24/25, 2013, p.4

15) Follow up to the Second World Assembly on Ageing, 사무총장 보고서, A/64/127, 2009

16) A/65/157, 2010

17) A/66/173, 2011

18) A/67/188, 2012

연령주의와 연령차별을 인정하고 대처할 필요성이 다시 거론되었다. 이 보고서에서 사무총장은 다중차별을 포함, 고용과 직업 차원을 넘어서서 노인을 대상으로 한 연령 관련 차별의 세부내용에 대처하는 것이 우선이라고 밝혔다.²⁰⁾

유엔 회원국들은 특히 그 중에서도 다음과 같이 노인의 권리가 충분히 보호받지 못하거나 증진되지 못하고 있는 분야를 다루어야 한다는 유엔총회 결의안을 채택했다. 1)권리관련 정보에 대한 접근 권리 및 권리 주장 능력,²¹⁾ 2)연령과 성별에 근거한 다중차별,²²⁾²³⁾ 3)노인 권리를 감시, 실행할 국가의 역량,²⁴⁾ 4) 특히 여성 노인과 장애인에 대한 부정적인 고정관념,²⁵⁾ 5) 방임, 폭력, 및 학대에 대한 효과적인 예방 전략과 법적 보호,²⁶⁾ 6)건강관련 정책과 프로그램에서의 연령 차별,²⁷⁾ 7)장기요양 제공기준,²⁸⁾ 8)노인들에게 영향을 미치는 정책의 수립, 시행, 감시에 대한 노인들의 참여²⁹⁾등이 결의안에 포함되었다. 2015년 유엔 총회에서는 노인 권리문제 중 “폭력과 학대에 대한 예방과 보호, 사회적 보호, 식량과 영양, 주택, 고용, 법적 능력, 법에 대한 접근성, 그리고 신체적 및 정신적 건강지원과 같은 건강 서비스, 장기요양과 완화 의료서비스”와 같은 영역에서 도전에 직면해 있다는 점을 인정했다.³⁰⁾

유엔 인권위원회는 “폭력 및 학대의 예방과 보호, 사회적 보호, 식량 및 주택, 일자리, 평등과 차별금지, 사법제도에 대한 접근 교육훈련, 건강 지원, 장기요양 및 완화 의료, 평생교육, 참여와 접근성의 영역을 포함하여” 노인의 권리가 직면한 여러 형태의 차별과 특별한 도전과제를 인정했다.³¹⁾

19) A/68/167, 2013

20) A/69/180, 2014

21) A/RES/64/132, 2009

22) A/RES/66/127, 2012

23) A/RES/69/146, 2015

24) A/RES/66/127, 2012

25) A/RES/66/127, 2012

26) A/RES/66/127, 2012

27) A/RES/69/146, 2014

28) A/RES/69/146, 2014

29) A/RES/69/146, 2014

30) A/RES/70/164, 2015

31) A/HRC/RES/33/5, 2016

유엔 인권위원회 조약기구 및 특별절차(Treaty Bodies & Special Procedure)에서는 노인의 권리 및 관련 특수 규정과 연관된 주요 관심분야를 강조했다. 일례로 2010년 인권 및 극빈 담당 유엔 독립전문가들은 노인들, 특히 극빈층 여성 노인과 사회보장의 혜택도 받지 못하는 사람들의 상태에 관해 보고했다.³²⁾ 모든 이가 최대한의 신체적, 정신적 건강을 누릴 권리에 관한 특별보고관(Special Rapporteur)은 2011년 주제별 연구에서 일차 보건의료 및 만성 질병, 장기요양, 보호자의 역할을 포함한, 완화 의료 및 환자 사전의료의향서와 같은 관심분야를 다루었다.³³⁾

노인의 모든 인권을 누릴 권리를 담당하는 유엔 독립전문가는 2016년 종합보고서에 노인들이 직면한 복합적이고 특수한 인권 문제에 대한 폭넓은 인식을 반영했다. 이 보고서에서는 돌봄, 사회적 보호, 일자리, 평등 및 차별금지, 폭력 및 학대로부터의 자유, 참여, 적절한 생활수준, 법의 보호, 교육, 훈련 및 평생교육 및 접근성 등의 노인 권리를 다루었다.³⁴⁾

2.3 제8차 고령화 실무그룹 회의에 앞서 제출된 자료 검토

2.3.1 평등 및 차별금지

30개 유엔회원국과 EU국가, 22개 국가인권기구, 36개 NGO단체들이 제 8차 실무그룹 세션 전에 의장이 보낸 안내성 질문에 응답했다. 이에는 각 지역에 걸쳐 55개국을 포함, 14개 유엔단체도 참여했다.

비록 참여한 응답 국들이 유엔 회원국 전체를 대표하는 것도 아니고 안내성 질문의 영역에도 한계가 있었지만 제출된 응답을 검토해보면 현재 노인들에게 가해지는 차별에 대한 보호조치가 일관적이지 않고 부적절하다는 것이 잘 드러난다.³⁵⁾

32) A/HRC/14/31 2010

33) 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 attainable standard of physical and mental health, Anand Grover, A/HRC/18/37, 2011

34) A/HRC/33/44, 2016

모든 형태의 노년기 차별로부터의 보호와 평등보장은 나라별로 여러 면에서 다양하다. 어떤 나라는 연령에 따른 차별에 대한 법적 보호조치가 아예 없다고 응답했다.³⁶⁾ 법적 보호 장치가 일부 있는 나라에서도 차별금지의 근거가 나라별로 차이가 있었다. 이들 근거에는 헌법³⁷⁾과 국법(연방법이나 지방정부/주정부 법)이 포함되었다.³⁸⁾ 어느 나라는 나이에 근거한 차별을 보호하는 헌법 혹은 국법은 없지만 지방정부 법이나 국제인권법이 더 우위에 있었다.³⁹⁾

법적 보호의 실질적 범위, 즉 삶의 어떤 영역에 적용되는지도 역시 다양했는데 어떤 나라는 범위를 한 가지 영역, 가장 흔하게는 고용,⁴⁰⁾ 혹은 소수의 영역에만 국한시키고 있었다.

안내성 질문은 구체적으로 어떤 형태의 차별이 금지되었는지, 교차 및 누적 차별을 포함한 다중 차별이 현 법령 안에 존재하는 지에 관해서는 특별히 질문하지 않았다. 2016년 51개 아셈(ASEM)회원국을 대상으로 한 차별금지 법에 관한 검토에서는 다중 차별로부터의 보호는 드물고 주로 단일 이유로 인한 차별에 대한 청구만 허용하고 있는 것으로 밝혀졌다.⁴¹⁾

마찬가지로 안내성 질문은 법령 안에 구조적인 차별과 개별적 차별사례뿐 아니라 해로운 연령주의적 사회규범을 변화시킬 국가의 의무가 포함되어 있는지 확인하지 않았다.

제출된 응답을 검토한 결과 많은 나라들이 나이를 근거로 한 차별이 법에 저촉되지 않는 다른 영역에서 각기 다른 대우와 예외를 허용하고 있는 것으로 나타났다. 몇몇 나라에서는 공공과 민간부문에 공통으로 정년퇴직이 있거나,⁴²⁾ 공

35) 검토는 2017년 6월 2일 저자에 의해 실시됨. 응답은 <https://social.un.org/ageing-working-group/eighthsession.shtml>에서 확인 가능하다

36) 예를 들면 방글라데시, 카메룬, 중국, 이집트, 인도, 이라크, 자메이카, 일본, 레소토, 나이지리아, 카타르, 탄자니아, 수단, 트리니다드 토바고, 베트남

37) 예를 들면 볼리비아, 브라질, 캐나다, 도미니카, 에콰도르, 라트비아, 멕시코, 몽고, 파라과이, 세르비아

38) 예를 들면 호주, 칠레, 콜롬비아, 코스타리카, 크로아티아, 체코, 도미니카, 프랑스; 독일, 그리스; 과테말라; 이탈리아, 리투아니아; 모리셔스; 멕시코; 몽고; 파라과이; 페루; 필리핀, 폴란드, 한국, 러시아 연방, 세르비아, 슬로베니아, 스웨덴, 영국, 미국

39) 아르헨티나

40) 예를 들면 코스타리카, 이탈리아, 필리핀, 폴란드, 한국, 러시아 연방

41) Sleep, Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries, 대한민국 국가인권위원회(2016)

공부문에만 있거나,⁴³⁾ 특수 업종마다 다른 정년퇴직 연령이 있다.⁴⁴⁾ 정년퇴직의 적용 나이는 성별에 따라 다른 경우⁴⁵⁾도 있다. 하지만 또 다른 나라에는 정해진 정년퇴직 연령이 없고 각 고용주가 나름대로 정하기도 한다.⁴⁶⁾ 유엔 직원의 정년퇴직 연령은 일을 시작한 연도에 따라 60세, 62세, 또는 65세로 정해져 있다.⁴⁷⁾

그러나 가장 흔하게 예외가 보고된 부문은 건강보험을 비롯한 기타 보험, 은행이나 주택담보대출 같은 대출과 관련된 금융서비스 분야였다.⁴⁸⁾ 차별화된 대우가 합법적인 다른 분야는 일반적 상품 및 서비스,⁴⁹⁾ 숙박,⁵⁰⁾ 건강 프로그램,⁵¹⁾ 고용,⁵²⁾ 교육,⁵³⁾ 이민 및 시민권 법⁵⁴⁾이다. 응답에 따르면 차별화된 대우가 일반적이고 폭넓게 수용되고 있었다.

대다수의 국가에서 대중교통 요금면제나 보조금,⁵⁵⁾ 건강보험 요금면제나 보조금 지급,⁵⁶⁾ 문화 활동 할인,⁵⁷⁾ 연금이나 기타 사회보장혜택⁵⁸⁾을 포함한 연령관련 혜택사례를 제시하였다. 라틴 아메리카의 3개국은 노인들이 법적 절차를 진행할 때 지원을 받을 수 있었다.⁵⁹⁾ 3 개국만이 법에 특별조치가 허용되어 있다고 밝혔다.⁶⁰⁾

42) 예로는 아르헨티나, 카메룬, 필리핀, 한국, 탄자니아, 터키, 베트남

43) 예로는 트리니다드 토바고

44) 일례로 캐나다는 경찰, 소방관, 민간 항공기 조종사, 인도는 공무원, 판사, 헌병, 폴란드는 판사, 공증인, 집행관, 군인, 나이지리아는 공무원, 판사, 학자들

45) 예로는 아르헨티나와 베트남

46) 예로는 독일과 영국

47) 국제민간항공기구(ICAO)

48) 예로는 아르헨티나, 호주, 캐나다, 칠레, 체코, 독일, 인도, 라트비아, 레소토, 모리셔스, 슬로베니아, 스웨덴, 트리니다드 토바고, 영국, 베트남

49) 예로는 호주, 캐나다, 라트비아, 스웨덴과 영국

50) 캐나다

51) 예로는 호주, 칠레, 인도, 일본

52) 일례로 호주, 캐나다, 칠레, 독일, 그리스, 리투아니아, 모리셔스, 필리핀, 폴란드

53) 일례로 리투아니아와 폴란드

54) 호주

55) 일례로 아르헨티나, 중국, 칠레, 에콰도르, 인도, 독일, 라트비아, 러시아 연방, 세르비아

56) 일례로 중국, 칠레, 에콰도르, 인도, 일본, 미국

57) 일례로 중국, 칠레, 에콰도르, 이집트, 독일, 라트비아, 영국

58) 일례로 호주, 볼리비아, 캐나다, 인도, 레소토, 모리셔스, 멕시코, 한국, 러시아 연방, 슬로베니아, 영국, 미국

59) 볼리비아, 칠레, 코스타리카

안내성 질문에서는 개선책, 제재, 시행에 관해 조사하지 않았다.

국가 차원에서 연령을 근거로 한 차별에 관한 일관성 있는 정보를 얻을 수는 없었다. 응답한 국가 중 20개국이 정보를 얻을 수 없다고 답했다.⁶¹⁾ 정보를 얻을 수 있는 경우에도 주로 설문조사, 국가인권기구에 제출된 민원, 학술연구 또는 NGO 연구 등 그 출처가 다양하였다.

2.3.2 폭력, 학대 및 방임

30개 유엔회원국과 EU국가, 22개 국가인권기구, 36개 NGO단체들이 제 8차 실무그룹세션 전에 의장이 보낸 안내성 질문에 응답했다. 응답에는 각기 다른 지역의 55개국이 포함되었다. 유엔단체로는 14개 단체가 응답에 참여했다.

비록 응답자들이 모든 유엔 회원국을 대표하는 것도 아니고 안내성 질문의 영역에도 한계가 있었지만 제출된 응답을 검토해보면 현재 노인들에게 가해지는 폭력, 학대 및 방임에 대한 보호조치가 일관적이지 않고 부적절하다는 것이 잘 드러난다.⁶²⁾

노인들은 여러 다양한 사회경제적, 문화 및 정치적 맥락에서 각기 다른 형태의 폭력, 학대, 방임을 당하고 있다. 여기에는 신체적,⁶³⁾ 재정적,⁶⁴⁾ 성적,⁶⁵⁾ 심리적⁶⁶⁾ 폭력 및 학대, 그리고 방임⁶⁷⁾과 유기⁶⁸⁾가 포함된다.

60) 호주, 그리스, 멕시코

61) 아르헨티나, 볼리비아, 카메룬, 칠레, 중국, 콜롬비아, 도미니카, 프랑스, 인도, 자메이카, 일본, 레소토, 필리핀, 폴란드, 카타르, 탄자니아, 슬로베니아, 트리니다드 토바고, 터키, 미국

62) 검토는 2017년 6월 2일 저자에 의해 실시됨. 응답은 <https://social.un.org/ageing-working-group/eighthsession.shtml>에서 확인 가능하다.

63) 신체적 폭력과 학대가 보고된 나라는 호주, 아르헨티나, 카메룬, 캐나다, 콜롬비아, 코스타리카, 크로아티아, 체코, 도미니카, 에콰도르, 프랑스, 독일, 그리스, 과테말라, 인도, 아일랜드, 일본, 레소토, 모리셔스, 멕시코, 페루, 필리핀, 폴란드, 한국, 탄자니아, 러시아 연방, 세르비아, 슬로베니아, 토고, 트리니다드 토바고, 우간다, 우크라이나, 미국

64) 재정적 폭력 및 학대가 보고된 나라는 호주, 아르헨티나, 볼리비아, 카메룬, 캐나다, 코스타리카, 크로아티아, 도미니카, 에콰도르, 프랑스, 독일, 그리스, 아일랜드, 이라크, 일본, 레소토, 모리셔스, 페루, 필리핀, 폴란드, 한국, 탄자니아, 러시아 연방, 세르비아, 슬로베니아, 트리니다드 토바고, 우간다, 우크라이나, 미국, 짐바브웨

65) 성적 폭력 및 학대가 보고된 나라는 호주, 카메룬, 캐나다, 콜롬비아, 코스타리카, 도미니카, 에콰도르, 독일, 그리스, 아일랜드, 일본, 레소토, 페루, 필리핀, 폴란드, 한국, 탄자니아, 러시아 연방, 세르비아, 슬로베니아, 토고, 트리니다드 토바고, 우간다, 미국

특히 더욱 심각한 피해를 당했다고 보고된 사례 중에는 여성 노인⁶⁹⁾과 인지장애를 가진 노인⁷⁰⁾들을 비롯하여 돌봄과 생활보호 대상 노인들이 포함되었다. 그 밖에 특히 더욱 심각한 위험에 처한 노인에는 사회적으로 고립된 노인들,⁷¹⁾ 가족폭력 경험이 있는 노인들,⁷²⁾ 70세나 80세 이상의 노인들,⁷³⁾ 다문화이거나 다언어권의 노인들,⁷⁴⁾ 홀몸이거나, 이혼했거나, 미혼, 또는 사별한 노인들,⁷⁵⁾ 또는 수감된 노인들⁷⁶⁾이 포함되었다. 고소득⁷⁷⁾과 저소득⁷⁸⁾노인들 모두 고학력⁷⁹⁾과 저학력⁸⁰⁾ 노인들과 농촌/오지⁸¹⁾나 도시 거주 노인⁸²⁾들의 경우와 마찬가지로 각기 특수한 폭력과 학대의 위험에 처해 있는 것으로 보고되었다.

폭력, 학대 및 방임은 사적인 환경과 공적인 환경에서 두루 발생했다. 일례로 집과 가족 내,⁸³⁾ 요양 시설,⁸⁴⁾ 의료시설,⁸⁵⁾ 거리 및 대중교통,⁸⁶⁾ 그리고 시장⁸⁷⁾

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- 66) 심리적 폭력 및 학대가 보고된 나라는 호주, 볼리비아, 카메룬, 캐나다, 칠레, 코스타리카, 크로아티아, 체코, 도미니카, 에콰도르, EU, 프랑스, 독일, 그리스, 과테말라, 인도, 아일랜드, 일본, 레소토, 모리셔스, 페루, 필리핀, 폴란드, 한국, 탄자니아, 러시아 연방, 세르비아, 슬로베니아, 스페인, 토고, 트리니다드 토바고, 우간다, 우크라이나, 미국
- 67) 방임이 보고된 나라는 호주, 캐나다, 코스타리카, 도미니카, 에콰도르, 프랑스, 독일, 그리스, 인도, 아일랜드, 일본, 모리셔스, 필리핀, 한국, 탄자니아, 세르비아, 슬로베니아, 스페인, 트리니다드 토바고, 미국
- 68) 유기가 보고된 나라는 칠레, 코스타리카, 한국, 미국
- 69) 특별한 위험에 처한 여성 노인: 아르헨티나, 카메룬(배우자 사별), 프랑스, 독일, 이라크, 아일랜드, 모리셔스, 한국, 탄자니아, 필리핀, 러시아 연방, 세르비아, 슬로베니아(배우자 사별한 남성 노인이 방임/유기 위험에 처함), 트리니다드 토바고, 우간다(배우자 사별), 우크라이나, 미국, 짐바브웨(배우자 사별)
- 70) 인지 손상을 포함하여 돌봄 및 지원을 받는 노인: 호주, 캐나다, 칠레, 콜롬비아, 체코, 도미니카, 프랑스, 독일, 아일랜드, 슬로베니아, 스페인, 트리니다드 토바고, 미국
- 71) 사회적으로 격리: 호주, 캐나다, 슬로베니아
- 72) 가족 폭력 경험: 호주, 캐나다, 이라크
- 73) 70세~80세 이상: 호주, 아일랜드, 레소토
- 74) 다 문화, 다 언어: 호주
- 75) 독신 상태: 슬로베니아, 러시아 연방
- 76) 감옥: 영국
- 77) 고소득: 독일, 과테말라
- 78) 저소득: 칠레, 슬로베니아
- 79) 높은 교육수준: 독일
- 80) 낮은 교육수준: 콜롬비아, 슬로베니아
- 81) 농촌/오지: 호주, 볼리비아
- 82) 도시 환경: 모리셔스
- 83) 사적인 환경에서 발생했다고 보고된 나라는 호주, 카메룬, 칠레, 콜롬비아, 코스타리카,

내에서도 일어났다. 가해자들은 이런 각기 다른 환경을 대변하듯 가족 구성원,⁸⁸⁾ 요양보호사,⁸⁹⁾ 법적 후견인,⁹⁰⁾ 친구들,⁹¹⁾ 경찰,⁹²⁾ 의료진,⁹³⁾ 강도,⁹⁴⁾ 그리고 전문 범죄자들⁹⁵⁾로 다양했다.

안내성 질문에는 폭력, 학대, 방임을 예방하거나 피해자들을 지원하는 데에 국가의 책임은 무엇이고 국가가 취하는 조치는 무엇인지는 포함되지 않았다. 또한 실행, 개선책, 배상대책도 포함되지 않았다.

제출된 보고서에는 노인을 상대로 한 폭력, 학대, 방임에 관한 자료와 정보가 부적절하고 일관적이지 않다는 점이 잘 나타나 있다. 극소수 나라만 국가차원의 정기 조사와 최신 조사결과를⁹⁶⁾ 가지고 있다고 알려왔고, 있다 하더라도 조사와 자료의 성격은 모두 달랐다.⁹⁷⁾ 일부 나라들은 현지 또는 지역 연구,⁹⁸⁾ 국가인권

크로아티아, 체코, 도미니카, 프랑스, 독일, 인도, 아일랜드, 이라크, 자메이카, 일본, 레소토, 모리셔스, 필리핀, 한국, 러시아 연방, 세르비아, 슬로베니아, 트리니다드 토바고, 우크라이나, 미국, 짐바브웨

84) 요양시설에서 발생했다고 보고한 나라는 호주, 캐나다, 코스타리카, 크로아티아, 체코, 프랑스, 독일, 아일랜드, 자메이카, 일본, 라트비아, 파라과이, 필리핀, 한국, 러시아 연방, 슬로베니아, 트리니다드 토바고, 미국

85) 의료시설에서 발생했다고 보고한 나라는 프랑스, 한국, 필리핀, 탄자니아

86) 거리와 대중교통에서 발생했다고 보고한 나라는 크로아티아, 탄자니아

87) 시장에서 발생했다고 보고한 나라는 카메룬

88) 가족 구성원이 가해자인 경우: 호주, 카메룬, 칠레, 콜롬비아, 코스타리카, 크로아티아, 체코, 도미니카, 프랑스, 독일, 인도, 아일랜드, 이라크, 자메이카, 일본, 모리셔스, 필리핀, 한국, 러시아 연방, 세르비아, 슬로베니아, 트리니다드 토바고, 우크라이나, 미국, 짐바브웨

89) 요양보호사가 가해자인 경우: 호주, 캐나다, 칠레, 프랑스, 독일, 아일랜드, 자메이카, 일본, 라트비아, 리투아니아, 한국, 러시아 연방, 슬로베니아, 트리니다드 토바고

90) 후견인이 가해자로 보고된 나라는 독일

91) 친구가 가해자로 보고된 나라는 캐나다

92) 경찰이 가해자로 보고된 나라는 러시아 연방

93) 의료진이 가해자로 보고된 나라는 프랑스, 러시아 연방

94) 강도가 가해자로 보고된 나라는 레소토

95) 전문 범죄자가 가해자로 보고된 나라는 미국

96) 일례로 코스타리카의 조사는 오래 전 자료였다.

97) 일례로 캐나다는 중단된 조사, 중국은 노인들의 생활상에 관한 조사, 미국은 2016년에 국가 정보보고 시스템을 도입, 한국과 일본은 보고된 사례에 관해 연도별 자료를 갖고 있다.

98) 일례로 칠레, 독일, 멕시코, 필리핀

위원회에 제출된 민원,⁹⁹⁾ 경찰 통계,¹⁰⁰⁾ 학술¹⁰¹⁾ 또는 NGO보고서를¹⁰²⁾ 갖고 있다고 밝혔다. 몇몇 나라들은 제한적이거나¹⁰³⁾ 자료나 정보가 전혀 없다고¹⁰⁴⁾ 보고했다.

법과 관련하여, 제출된 보고서는 현재의 법 조항들이 너무 다양하고, 복잡하며, 일관성이 부족하고, 부적절하다는 것을 드러냈다. 일부 나라에서는 아무런 보호 조치가 없다고 밝혔다.¹⁰⁵⁾ 다른 국가에는 노년기 폭력, 학대, 및 방임에 특화된 법이 있었다.¹⁰⁶⁾ 일부 나라들도 그러한 법이 부분적으로 있다고 응답했지만 노인들과 노령화에 관한 법 안에 더 폭넓게 폭력, 학대 및 방임의 모든 면이 포함되지는 않았다.¹⁰⁷⁾ 일부 나라들은 비록 노인이 특별히 명시되었는지 여부는 확인되지 않았지만 가족과 가정 내 상황에 적용되는 가정폭력 법을 사용한다고 언급했다.¹⁰⁸⁾ 또 다른 나라에서는 다양한 상황과 유형의 폭력, 학대 및 방임에 인용된 법적인 보호의 근거로¹⁰⁹⁾ 형법,¹¹⁰⁾ 민법,¹¹¹⁾ 후견인 법,¹¹²⁾ 사회 서비스 법,¹¹³⁾ 장애인 법,¹¹⁴⁾ 수감 관련 법,¹¹⁵⁾ 법률 조력법,¹¹⁶⁾ 가족법¹¹⁷⁾이 있다고 밝

99) 일레로 라트비아

100) 일레로 호주, 캐나다, 체코, 탄자니아, 슬로베니아, 트리니다드 토바고

101) 일레로 슬로베니아

102) 일레로 카메룬, 인도, 레소토, 필리핀, 탄자니아, 세르비아, 슬로베니아

103) 일레로 방글라데시, 몽고, 세르비아 (시설 환경에 대한 정보 없음)

104) 일레로 볼리비아, 크로아티아, 그리스, 과테말라, 이라크, 이탈리아, 자메이카, 토고, 터키, 우크라이나

105) 관련 법 부재: 아르헨티나, 트리니다드 토바고, 모리셔스, 탄자니아, 러시아 연방, 토고

106) 노년기 폭력, 학대 및 방임에 대한 법 적용: 카메룬(보고 불충분), 일본(가족이나 전문 요양보호사 가해자에 국한), 필리핀(법안 계류 중), 미국

107) 노인들에 관한 법 적용: 볼리비아, 중국, 콜롬비아, 코스타리카, 도미니카, 프랑스, 독일, 인도, 자메이카, 페루, 한국, 트리니다드 토바고(법안 계류 중)

108) 가족 폭력법 적용: 칠레, 코스타리카, 크로아티아(검토 중), 도미니카, 독일, 그리스, 과테말라, 자메이카, 리투아니아, 레소토, 페루, 필리핀, 폴란드, 슬로베니아, 영국, 우크라이나

109) 헌법: 볼리비아, 도미니카, 에콰도르, 레소토

110) 형법: 호주, 콜롬비아, 크로아티아, 코스타리카, 과테말라, 이라크, 라트비아, 레소토, 리투아니아, 필리핀, 한국, 카타르, 탄자니아, 러시아 연방, 세르비아, 슬로베니아

111) 민법: 라트비아, 터키

112) 후견인 법: 호주

113) 사회 서비스 법: 스웨덴, 터키, 영국, 우크라이나

114) 장애인 법: 자메이카



했다. 재정적 착취 또는 재산 상속에 관한 특별법에는 재정적 규제,¹¹⁸⁾ 은행,¹¹⁹⁾ 사기,¹²⁰⁾ 소비자 보호,¹²¹⁾ 상속 및 부동산,¹²²⁾ 토지,¹²³⁾ 절도,¹²⁴⁾ 종교¹²⁵⁾ 관련법이 있었다. 그러나 일부 나라는 재정적 착취나 재산의 상속에 대한 아무런 법적 보호 장치가 없다고 응답했다.¹²⁶⁾

115) 형 집행 법: 영국(www.korea.kr/common/download.do?tblKey=EDN&fileId=206724)

116) 법률 조력법: 볼리비아

117) 가족법: 이라크, 레소토

118) 재정적 제재: 호주

119) 은행: 크로아티아

120) 사기: 자메이카

121) 소비자 보호: 크로아티아

122) 상속 및 부동산: 호주, 도미니카 공화국, 인도, 슬로베니아, 영국

123) 토지 법: 레소토

124) 절도: 자메이카

125) 종교 법: 인도, 카타르

126) 재정적 착취에 대한 법률적 보호 없음: 아르헨티나, 카메룬, 콜롬비아, 체코, 이탈리아, 레소토, 폴란드, 카타르(샤리아 법 이외의 법), 탄자니아, 토고

Ⅲ

국제인권법체제 내에서 노인인권 현황

3.1 노인인권 현황과 국제법 제도 간의 격차	21
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나이를 먹는다고 인간의 권리가 변하는 것은 아니며 ‘아동의 권리에 관한 협약’을 제외하고 국제인권조약이 노인들에게 적용된다. 그러나 현재의 세계인권법에는 노인이나 연령에 대한 명확한 언급이 매우 드물다. (표 1 참조)

〈표 1〉 현 세계 인권법상 노인 및 나이에 관한 구체적 언급

국제인권 체계	조	조항
세계인권선언 (UDHR, 1948)	25	모든 사람들이 노년기에 편안할 권리
모든 형태의 여성차별 철폐에 관한 협약 (CEDAW, 1979)	11.1.e	노년기를 포함 모든 여성이 평등한 사회보장을 받을 권리
이주노동자와 그 가족에 관한 국제협약 (ICMW, 1990)	1.1 및 7	연령을 이유로 한 차별금지
장애인 권리에 관한 협약(CRPD, 2008)	13.1	장애인에게 법의 도움을 보장하는 연령에 적합한 편의의 필요성을 인식
	16.2	학대방지를 위한 연령별 조치
	16.4	연령별 회복과 재활
	23.1.b	생식 건강에 관한 연령별 정보제공
	25b	노인에게 발생하는 추가적 장애를 최소화하고 예방하기 위한 서비스 제공
	28.2.b	장애 노인의 사회적 보호와 빈곤퇴치 프로그램에 대한 접근 보장

3.1 노인인권 현황과 국제법 제도 간의 격차

2010년 제안된 A/RES/65/182 결의안에서는 고령화에 관한 개방형 실무그룹 [이하 ‘실무그룹’]이 새로운 규범의 실행가능성을 포함하여, 노인 권리와 관련한 현재의 국제인권법의 체계를 검토하고 격차가 있는 지와 그 해결방안을 찾아내도록 위임을 받았다.¹²⁷⁾ 이 위임 받은 내용을 볼 때, 격차의 존재에 대한 논의가 계속 실무그룹 세션의 주 의제였다는 것을 알 수 있다. 1차와 2차 세션에서 규범, 실행, 감시, 정보¹²⁸⁾의 네 가지 격차가 확인되었다.

127) 결의안 A/RES/65/182 (2010)

128) 제1차, 제2차, 실무그룹 세션 보고서 참조 A/AC. 278/2011/4 그리고 A/AC. 278/2011/5

4가지 격차의 정의¹²⁹⁾

규범적 격차는 현행 국제인권법 내에서 한 인간의 존엄성을 끊임없이 박탈하는 행위, 환경, 제도적 요인을 아예 다루지 않았거나 충분히 다루지 않았을 때 발생한다.¹³⁰⁾

실행의 격차는 현행 국제인권법 내의 권리 및 의무가 국내법으로 완벽히 전환 및/또는 실천되지 않았을 때 발생한다.

감시의 격차는 국가들이 국제인권법 내 의무를 지키는지 확인하도록 위임 받은 독립된 감시기구가 없을 때, 또는 현재의 감시기구가 국가 측의 준수여부를 적절하게 감시하지 못할 때 발생한다.

정보의 격차는 통합된 자료와 통계의 부족으로 인해 현 상황을 정확하게 파악하지 못하고 감시기구가 소정의 세부 권고사항을 내놓지 못하게 될 때 발생한다.

3.2 국제법 제도에 의해 보호되지 않는 구체적인 권리

2012년 유엔 인권최고대표는 “현재 노인 인권을 보호하기 위한 모든 국가적 혹은 국제적 차원의 조치는 부적절하다”¹³¹⁾라고 말했다.

앞서 제시된 정의를 바탕으로 본 섹션에서는 현행 국제인권법 체계 내 격차의 사례를 제공하고자 한다. 그러나 빠짐없이 철저한 검토를 목표로 한 것은 아니다.

129) International human rights law and older people: Gaps, fragments and loopholes, 헬프에이지 인터내셔널, 2012, p.2

130) 이 정의의 출처는 국제 인권정책위원회, Human Rights Standards: Learning from Experience, 2006, p.7, http://www.ichrp.org/files/reports/31/120b_report_en.pdf

131) 유엔 인권최고대표 보고서, E/2012/51, p.17, 64항

3.2.1 규범적 격차

보편적인 인권기준은 노인의 존엄성을 훼손하는 지속적인 행위, 환경, 제도적인 요인에 대해 충분히 다루고 있지 않다. 이는 섹션 2에 제시된 다음과 같은 경우에¹³²⁾ 잘 나타나 있다.

1. 노인의 경험과 관련된 분야가 철저히 간과되었다.
2. 노년기와 노인에 대한 언급이 없었던 점이 노인을 인권보호 차원에서 상대적으로 주목 받지 못하게 만드는데 기여했다.
3. 현재의 규범적 기준은 부분적으로만 타당하다.

여기에는 노인의 권리 중 1)교차 및 누적 차별을 포함한 평등 및 차별금지 권리, 2)폭력, 학대, 방임으로부터의 자유, 3) 장기요양보호, 4)자신의 집에서 나이 들기, 5)법적 능력 및 법 앞의 평등, 6)임종간호를 위한 법적 및 재정적 계획, 7)완화 의료¹³³⁾가 포함된다.

• 노년의 평등 및 차별금지에 관한 권리

각 협약에 명시된 법 앞의 평등과 그와 관련한 권리를 누리는 데 있어서 차별 금지는 세계 인권선언(UDHR),¹³⁴⁾경제적, 사회적, 문화적 권리에 관한 국제 규약(ICESCR),¹³⁵⁾시민적, 정치적 권리에 관한 국제규약(ICCPR),¹³⁶⁾ 그리고 아동¹³⁷⁾ 및 여성,¹³⁸⁾ 장애인¹³⁹⁾과 이주노동자¹⁴⁰⁾를 위한 국제협약에서 인정하고 있다. 시민·정치적 권리에 관한 국제협약 제 26조의 적용은 해당 협약 내 조약을 넘어 차

132) 유엔 인권최고대표 보고서, Normative Standards in international human rights law in relation to older persons: Analytical Outcome Paper, 2012. 8월, p.34

133) International Law's Grey Area: The Human Rights of Older Persons, Craig Mokhiber, 유엔 인권최고대표, 베를린, 2012

134) 세계인권선언, 2항, 1948

135) 경제적, 사회적, 문화적 권리에 관한 국제 규약, 2항, 1966

136) 시민적, 정치적 권리에 관한 국제규약, 2항 및 26항, 1966

137) 아동의 권리에 관한 협약(CRC), 2항, 1989

138) 모든 형태의 여성차별 철폐에 관한 협약(CEDAW)), 2항, 1979

139) 장애인 권리에 관한 협약(CRPD), 5항, 2006

140) 이주 노동자와 그 가족에 관한 국제협약(ICMW), 7항, 1990

별적 법을 만들거나 법을 차별적인 방식을 적용하지 않도록 확장되어 해석되어 왔다.¹⁴¹⁾

그러나 나이를 근거로 한 차별은 단 한 국제인권협약, 즉 이주노동자와 그 가족에 관한 국제협약(ICMW)에서만 명시적으로 금지되어 있으며 그런 보호도 이주 노동자와 그 가족만으로 한정되어 있다.¹⁴²⁾ 다른 국제인권협약의 차별금지 조항에 명시된 금지 근거에는 나이가 명시되어 있지 않다.

이 금지 근거 목록이 완벽하지도 않고 경제·사회·문화적 권리위원회가 연령이 ‘기타 지위’¹⁴³⁾라는 포괄적인 범주에 포함될 수 있다고 밝혔지만, ‘기타 지위’라는 범주는 나라별로¹⁴⁴⁾ 선택적으로 해석될 여지가 있으며, 연령을 금지 근거로 명시적으로 언급하지 않으면 차별금지 조항의 실행과 감시에 있어 연령을 근거로 한 차별이 비교적 눈에 띄지 않게 된다.¹⁴⁵⁾

또한 연령을 기준으로 한 차별이 어떤 경우에 합법적인지 명확하지 않은 경우가 있다. 위원회는 ‘연령을 근거로 한 차별이 몇몇 맥락에서 금지’[강조 표시]¹⁴⁶⁾ 되어 있다고 결론 내렸다. 이는 연령을 근거로 한 차별적 대우가 국제 법에서 모두 금지된 것은 아니라는 점을 나타낸다. 그에 따라 ‘여러 나라에서 이 권리의 성격이 제대로 규정되지 않았고 다양한 법원의 법 해석체계도 너무 미비하여 판사가 정한 법이 그 격차를 제대로 메우기 힘들다’고 밝혔다.¹⁴⁷⁾

국제인권법에서 노년기 다중 차별의 복잡한 본질을 교차 차별, 즉 나이와 다른 개인적 특성과의 복합효과 또는 2가지 이상의 노년기 특징과 다른 하나 이상의 이유와 더불어 발생하는 복합효과라는 관점에서 다루지 않았다. 마찬가지로 누

141) 유엔 인권최고대표 보고서, Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper, p.8, 2012. 8월

142) 이주노동자와 그 가족에 관한 국제협약(ICMW)), 7항, 1990

143) 일반 논평 No.6, The economic, social and cultural rights of older persons, 12항, 1996

144) 헬프페이지 인터내셔널, International human rights law and older people: Gaps, fragments and loopholes, 2012, p.4

145) 유엔 인권최고대표 보고서, Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper, p.8, 2012 8월

146) 일반 논평 No. 20, Non-discrimination in economic, social and cultural rights, 29항. 2009

147) Allen, Discussion papers: Legal issues for strengthening international legislation on the rights of older person, Age UK

적 차별, 다시 말해, 시간을 두고 여러 번에 걸친 차별도 다루지 않았다. 특정 노인 집단이 겪은 교차 및 누적 차별의 심화된 위험도 제대로 언급되지 않았다.

이런 이유로 노령화와 노인이 겪는 연령차별은 국제인권법에서 적절히 다루고 있지 않다. 그러므로 규범적 격차가 발생한다.

- 폭력, 학대 및 방임으로부터 자유로울 권리

노인들에게 일반적이거나 특별하게 적용되는 유엔 국제인권조약에서 노년기에 겪는 모든 형태의 폭력, 학대 및 방임이라는 특수한 경험으로부터 보호해야 한다고 명시된 권리는 없다.

그러나 유엔 인권조약 내에 폭력에 대한 보호조항이 일부 존재한다. 고문 및 그 밖의 잔혹한, 비인도적인 또는 굴욕적인 대우나 처벌의 방지에 관한 협약(Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)과 그에 따른 선택 의정서(Optional Protocol)가 그에 포함된다. 이는 모든 국가 혹은 국영 구금시설뿐 아니라 장기요양시설에 있는 노인들에 대한 고문 및 그 밖의 잔혹한, 비인도적인 또는 굴욕적인 대우를 방지할 수 있는 잠재력을 갖고 있다.

그 외에도 여성차별철폐위원회의 여성 노인과 그들의 인권보호에 관한 27번 일반권고(General Recommendation, 2010)와 그보다 범위는 작지만 여성에 대한 폭력에 관한 19번 일반권고(1992) 개정안이 있다. 그러나 이들은 남성 노인이 아니라 여성 노인에게만 적용된다. 마찬가지로 고문 및 그 밖의 잔혹한, 비인도적인 또는 굴욕적인 대우나 처벌의 방지를 다룬 장애인 권리에 관한 협약(2006)은 장애 노인에게만 적용된다.

노인들이 겪는 특수하고 복잡한 모든 형태의 폭력, 학대 및 방임은 기존 국제인권법으로는 제대로 다루지 못한다. 그러므로 여기에서 규범적 격차가 발생한다.

국제법상 폭력과 학대로부터 자유로울 권리의 보호에 관한 전체 개요는 대한민국 국가인권위원회가 2016년 발간한 슬립(Sleep)저 <아셈 회원국 노인인권 이슈분석 및 구체적 협력방안 연구>의 3.4.1절을 참고하기 바란다.

● 자신의 집에서 나이들 권리

자신의 집에서 나이들 권리는 ‘나이, 수입, 능력과 무관하게 자신의 집과 지역 사회에서 안전하고, 독립적이며, 편안하게 살 능력’¹⁴⁸⁾으로 정의되었으나 이를 초월하여 ‘그들이 사는 장소에서 독립과 자율, 보살핌을 주고받는 관계와 역할을 통해서 느끼는 자기 정체성¹⁴⁹⁾을 포함하는 것이라고 흔히 언급된다. 어디서 누구와 살 것인지를 선택하는 자유를 박탈당하는 것은 심각하게 존엄을 침해 받는 일이다.

자신의 집에서 나이 드는 것 자체는 국제인권법 상에서 그리 독특하거나 특수한 경험으로 여겨지지 않는다. 자신의 집에서 나이 들기 위해서는 국제인권법의 체계 내에서 법률로 보호된 여러 권리를 향유할 수 있어야 하지만 국제인권법에는 자신의 집에서 나이 드는 권리를 적용한다는 분명한 언급이 없다. 그러므로 여기에 규범적 격차가 존재한다.

● 장기요양보호 및 지원을 받을 권리

국제인권법 내에 장기요양 및 지원을 받을 권리에 대한 특수 조항은 없다.

장기요양 및 지원을 받는 사람들¹⁵⁰⁾에 적용할 만한 일련의 조항이 국제인권법 내에 있긴 하지만 여기저기에 분산되어 있으며 이 맥락에 적용하는 문제에 대하여 국제인권법 체계 내에 명시되어 있지도 않다. 그러므로 여기에 규범적 격차가 있다.

국제인권법 내 장기요양 및 지원을 받을 권리 보호의 개요는 대한민국 국가인권위원회가 2016년 발간한 슬립(Sleep)저 <아셈 회원국 노인인권 이슈분석 및 구체적 협력방안 연구>의 3.3.1절을 참고하기 바란다.

148) 미국질병관리본부 <https://www.cdc.gov/healthyplaces/terminology.htm>

149) Wiles et al, The Meaning of Aging in Place to Older People, 노년학회지 제론토로지스트, 2012, 52 (3): 357-366

150) 일레로 European Charter of the rights and responsibilities of older people in need of long term care and assistance참조

• 완화 의료를 받을 권리

완화 의료를 받지 못하는 것이 노인에게만 국한된 것은 아니지만 수명이 점차 연장되는 데다 극심한 통증이 동반되는 노년기 만성질환의 증세 악화를 감안할 때 마약성 진통제를 처방 받는 것은 노인들에게 특히 중요한 권리이다. 그럼에도 불구하고 노인에 대한 완화 의료는 종종 우선순위에서 뒤로 밀린다.¹⁵¹⁾

경제적, 사회적, 문화적 권리위원회는 일반 권고 제 14번에서 만성질환자나 시한부 환자에게 피할 수 없는 고통을 덜어주고 존엄사가 허용되도록 조치를 취해야 한다고 밝히고 있다.¹⁵²⁾ 그럼에도 불구하고 완화 의료는 유엔 인권최고대표 보고서에서 노인들의 경우에는 고려되지 않은 것으로 나타나 있다.¹⁵³⁾

국제인권법 내에 전체적인 완화 의료를 받을 권리에 대한 조항이 없다. 그러므로 규범적 격차가 존재한다.

• 존엄한 죽음에 대한 권리

최고수준의 신체적, 정신적 건강을 유지할 권리에 관한 유엔 건강권 특별보고관은 환자는 적절한 진통제, 임종할 장소, 환자의 뜻에 반하는 생명연장치료 거부에 관해 자율적이고 충분한 고지에 입각한 결정을 내릴 수 있어야 한다고 밝혔다.¹⁵⁴⁾

생애 말기 및 개인 의사결정, 일례로 선호하는 돌봄과 지원의 형태에 관한 사전 결정권을 보호하고 규제할 국제인권법 기준은 없다. 그러므로 규범적 격차가 존재한다.

• 법적 능력 및 법 앞에 평등

장애인권리 위원회 보고서 제 12조는 장애인의 법적 능력에 관해 언급하며 개인의 의사 및 선호에 근거를 둔 의사결정 지원상의 중요한 변화를 가져왔다.¹⁵⁵⁾

151) FXB Health and Human Rights Resource Guide, 2013, p.5.3 https://cdn2.sph.harvard.edu/wp-content/uploads/sites/25/2014/03/HHRRG_Chapter-5.pdf , 2016.7.29

152) E/C.12/2000/4, 25항

153) 유엔 인권최고대표 보고서, Normative standards in international human rights law in relation to older persons: Analytical Outcome Paper, 2012, p.26, 2016, 8월. 1

154) A/HRC/18/37

그러나 국제인권법에는 나이 들면서 겪는 법적 능력과 신체 혹은 인지능력의 쇠퇴라는 특수한 문제에 관한 고찰이 거의 없다.¹⁵⁶⁾ 한 가지 특별히 주목해야 할 점은 노인들이 스스로의 의사결정을 저해하는 후견인 조치에 의해 불필요하게 법적 능력을 박탈당하게 될 가능성이다.¹⁵⁷⁾

또 우려되는 점은 법적 능력의 핵심인 자유롭고도 고지에 기반을 둔 사전 동의와 관련되어 있다. 노인들, 특히 어떤 식으로든 돌봄과 지원을 받고 있는 노인들은 의학적 치료, 임종간호를 포함하여 돌봄과 지원의 유형, 돈의 사용방법, 식사 메뉴와 식사 시간 같은 일상적 결정의 선택에 있어서 자유로운 사전 동의를 위한 시간, 기회, 지원이 박탈되었을 가능성이 있다. 이런 동의절차의 생략이 인지능력의 쇠퇴나 장애 상태를 근거로 결정되지 않았을 수도 있으므로 장애인 권리위원회가 정한 보호조치가 적용되지 않을 수도 있다. 건강권에 관한 특별보고관은 지속적인 고지 기반의 사전 동의 절차 생략은 신체적이고 정신적인 학대의 한 형태로 볼 수 있다고 밝혔다.¹⁵⁸⁾

많은 이들이 의학적 치료나 장기요양치료 형태의 선택에 관해 자유롭고 고지에 기반을 둔 사전 동의를 할 수 있는 기회를 박탈당한다. 이러한 영역에서 당사자의 희망이 존중되지 않는 것은 자율의 부정이며 존엄성의 박탈이다. 국제 인권법은 이러한 동의 및 법적 능력에 관한 관심이 매우 제한적이다.¹⁵⁹⁾ 그러므로 이 영역에 규범적 격차가 존재한다.

• 법에 관한 권리

법 앞에 평등하게 인정받을 권리와 공정한 재판을 받을 권리는 시민적, 정치적 권리에 관한 국제규약(ICCPR) 16조와 14조에 따라 보호받는다.

155) 유엔 인권최고대표 보고서, Normative Standards in international human rights law in relation to older persons”: Analytical Outcome Paper, 2012. 8월, p.21

156) 유엔 인권최고대표 보고서, Normative Standards in international human rights law in relation to older persons: Analytical Outcome Paper, 2012. 8월, p.21

157) 유엔 인권최고대표 보고서, Normative Standards in international human rights law in relation to older persons: Analytical Outcome Paper, 2012. 8월, p.21

158) A/HRC/18/37, 65항

159) 유엔 인권최고대표 보고서, Normative Standards in international human rights law in relation to older persons: Analytical Outcome Paper, 2012. 8월, p.22

그러나 노인들은 충분한 시간에 걸쳐 다른 판례를 검토하는 것을 포함하여 자신들의 권리인식, 법적 조력에 대한 접근, 효과적 개선책의 가용성과 관련하여 고유의 특수한 도전에 직면한다. 이러한 특수한 상황과 나이에 맞는 법적 기준에 접근하기 어려운 점은 국제인권법에서 거의 주목을 받지 못했다.¹⁶⁰⁾

자유를 박탈당한 사람들의 권리는 시민적·정치적·문화적 권리에 관한 국제협약 제 10조에 의거하여 보호된다. 그러나 노인 수감자와 존엄성을 빼앗긴 상황에서의 권리는 국제인권법 체계 내에 제대로 다루지 않았다.

흔히 노인 수감자들이 직면하는 문제는 감옥 대부분이 젊은 수감자 중심으로 설계되어 있어 노인으로 하여금 기본적 욕구를 충족하거나 각종 활동에 참가하기 어렵게 만든다는 점이다.¹⁶¹⁾ 일상 활동이나 복합 질환자 돌봄을 위한 적절한 지원이 불가능할 수도 있고 수감자 중 치매환자 비율도 대체로 알려져 있지 않다.¹⁶²⁾ 사회복지훈련과 출소대비 프로그램에서 노인 수감자가 직면할 사회 재 정착 과제를 다루지 않을 수도 있다.¹⁶³⁾

특별한 지원, 보행 장애로 인한 지원, 폭력으로부터의 보호, 적절한 교육과 직업 훈련이 필요한 수감자의 안전한 구금조건과 같이 노인과 관련된 다른 문제들도 국제조약기구에서 제대로 다루지 않았다.¹⁶⁴⁾ 그러므로 규범적 격차가 존재한다.

• 건강권

최고 수준의 신체적, 정신적 건강을 유지할 권리는 경제적·사회적·문화적 권리에 관한 국제 협약 제 12조, 여성차별철폐에 관한 협약 제 12조, 장애인권리협

160) 유엔 인권최고대표 보고서, Normative Standards in international human rights law in relation to older persons: Analytical Outcome Paper, 2012. 8월, p.31

161) 유엔 마약·범죄 사무국, Handbook on prisoners with special needs, 2009, 6장, http://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf

162) Moll, Losing Track of Time: Dementia and the ageing prison population: treatment challenges and examples of good practice), 2013 <http://www.mentalhealth.org.uk/content/assets/PDF/publications/losing-track-of-time-2013.pdf?view=Standard>

163) Sleep, Old age behind bars: how can prisons adapt to the needs of increasingly elderly populations, 패널 개혁 인터내셔널, 2014

164) 유엔 인권최고대표 보고서, Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper, p.32, 2012, 8월

약 제 25조 (b)항과 시민적·정치적 권리에 관한 협약 제 7조를 포함한 많은 국제 인권조약에 보장되어 있다. 경제적·사회적·문화적 권리 위원회의 건강할 권리에 관한 일반 논평(General Comment) 제 14번 조항은 노인의 권리에 관한 일반 논평 제 6번의 34, 35호의 내용을 재확인한다. 그 내용은 신체적이고 심리적인 재활 조치를 포함하여 노인들에 대한 예방 및 재활 치료의 필요성을 밝히고 있다.

그럼에도 불구하고 건강권에 관한 조항은 대략적이고 노인들의 경험과 건강관심사, 일례로 만성질병과 비 감염성질환 같은 내용을 반영하지 못하고¹⁶⁵⁾ 노년기의 맥락에서 권리의 효과적인 실행에 필요한 구체성도 제공하지 못한다.¹⁶⁶⁾ 그 외에 장애인 권리에 관한 협약 내의 조항은 장애 노인에게만, 여성차별철폐에 관한 협약의 조항은 여성 노인에게만 적용 가능하다. 그러므로 여기에 규범적 격차가 존재한다.

국제법 내 건강권 보호에 관한 전체 개요는 대한민국 국가인권위원회가 2016년 발간한 슬립(Sleep)저 <아셈 회원국 노인인권 이슈 분석 및 구체적 협력 방안 연구>의 3.2.1절을 참고하면 된다.

3.2.2. 실행의 격차

연령주의, 연령차별, 자신들의 권리 박탈, 노인들이 권리를 누리기 위해 계속 직면해야 하는 특수한 도전과제(섹션 2에서 예시한대로)에 대한 유엔의 폭넓은 인식은 노년기와 노인이라는 특수한 맥락에서 보면 현재의 보편적 인권기준의 실행에 중요한 격차를 나타내고 있다.

또한 실행의 격차는 국제인권기준이 국가 차원의 법적 보호로 전환되지 못한 경우에도 볼 수 있다. 법적 일관성 없고 부적절한 노년기 인권보호는 제 8차 실무그룹 세션 사전에 실시한 노년기 차별에 대한 법적 보호 및 폭력, 학대 및 방임으로부터의 자유(섹션 2 참조)에 관한 안내성 질문의 응답에 잘 나타나 있다.

이 두 분야에 관한 다른 여러 검토서도 이점을 확인해준다. 2016년 아셈 회원국 전체를 대상으로 실시한 국내 차별금지법에 관한 보고서는 나이를 근거로 한

165) Judge, The Rights of Older People: International Law, Human Rights Mechanisms and the case for new Normative Standards, 2009

166) 유엔 인권최고대표 보고서, Normative Standards in international human rights law in relation to older persons: Analytical Outcome Paper, 2012. 8월, p.24

차별금지가 아셈 회원국 모든 노인이 누리는 권리가 아님을 보여주었다. 유럽 국가들은 모두 일정 형태의 나이차별에 대한 법적 보호 장치를 갖추고 있었지만 많은 경우 법적 보호는 포괄적이지 않았다. 아시아에서는 많은 나라들, 예를 들어 방글라데시, 브루나이, 캄보디아, 인도, 인도네시아, 일본, 카자흐스탄, 라오스, 말레이시아, 미얀마, 필리핀은 연령차별을 특별히 금지하는 법적 보장 장치를 갖고 있지 않았다.¹⁶⁷⁾

실행 상 격차의 다른 예는 노년기 폭력, 학대 및 방임으로부터의 일관성 없는 보호, 지원 서비스 및 보상금의 일관성 없는 존재에서 볼 수 있다. 유엔 경제사회국 2013년 보고서 <노인 여성을 대상의 방임, 학대 및 폭력>에서는 가정폭력 법이 일반적으로 특히 여성 노인을 포함시키지 않는다는 점을 강조했다. 법이나 실생활에서 노인 대상 폭력에 주목하는 경우는 드물다.¹⁶⁸⁾

2014년 133개국 대상의 세계보건기구 조사 <폭력 예방에 관한 글로벌 현황보고서>에서 단지 59%만이 노인 학대를 금하는 법을 갖고 있다고 응답했고 그 중 30%만이 온전히 실행되고 있다고 답했다. 41%는 노인 학대에 대한 실행계획을 갖고 있다고 응답했다. 그러므로 34%만이 노인학대사례를 조사하고 구출된 피해자를 지원하는 성인보호 서비스를 실행하고 있다는 것은 그리 놀랍지 않다. 이러한 성인보호 서비스 부재상태는 전 지역에 걸쳐 나타났다.¹⁶⁹⁾

3.2.3 감시의 격차

현 국제인권 감시기구가 노인 권리에 관해 적절히 대처하지 못하여 감시상의 격차가 명백히 드러나고 있다.

2009년 유엔총장은 회원국들이 “인권보고 시 나이를 인식하지 못한다”며 2000년부터 2008년에 걸친 인권위원회 보고서에서 124개국 중 단 4개국 만 노인에 대해 지나가는 정도로 언급을 했다는 사실을 예로 들었다.¹⁷⁰⁾

167) Slep, Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries, 대한민국 국가인권위원회, 2016

168) <http://www.un.org/esa/socdev/documents/ageing/neglect-abuse-violence-older-women.pdf>

169) 세계보건기구, 유엔 마약범죄사무국, 유엔 경제협력개발기구, Global Status Report on Violence Prevention, 2014

170) 사무총장 보고서, Follow up to the Second World assembly on Ageing, A/66/173, 2011

좀 더 최근의 예로는 1999년부터 2016년 4월까지 조약기구들과 아셈 회원국을 위한 조약기구 및 특별절차에 의해 작성된 노인 인권에 관한 유엔 인권최고대표 보편적 인권지표(Universal Human Rights Index)연구가 있다. 이 연구에 의하면 17년에 걸쳐 51개 회원국 중 41개국에 198건의 권고사항이 전달되는데 그쳤다. 노년기 차별에 관해 16건의 권고가 전달되었고 이마저도 복합 차별에 대해서는 거의 언급하지 않았다. 폭력과 학대에 관한 권고는 5건이었다. 시민 및 정치적 권리에 거의 주목하지 않았고 관련 권고는 일반적이었으며 해당국에 실행의 개선책에 대해서 거의 지침을 제공하지 않았다.¹⁷¹⁾

마찬가지로 2016년 6월까지 51개 아셈 회원국에 보낸 보편적 국가별 인권상황 정기검토(Universal Periodic Review) 중 12,431건의 권고에서 46건만이 노인 인권에 관한 것이었다.¹⁷²⁾

2016년 검토서를 살펴보아도 인권의 5개 영역에 관해 조약기구에 보내는 아셈 회원국들의 보고와 조약기구의 권고가 부적절하고 산발적임을 알 수 있다. 절반 미만의 회원국이 나이를 근거로 한 차별과 관련 대처방안에 관해 언급했다. 폭력, 학대 및 방임을 당하지 않을 노인 권리에 관해서는 22개국만이 국제인권조약, 모든 형태의 여성차별 철폐에 관한 협약, 이주노동자와 그 가족에 관한 국제협약, 장애인 권리에 관한 협약 이후 이행을 위한 가장 최근 보고서에서 노인에 대한 폭력, 학대 및 방임 사례를 언급했다. 3개국만이 그 내용을 공통핵심문서(Common Core document)에서 다루었다. 조약기구가 아셈 회원국에 보낸 권고는 1999년부터 2016년 4월까지 6개의 특수 언급에 그칠 정도로 미미했다.¹⁷³⁾

171) 저자의 계산은 대한민국 국가인권위원회가 발간한 Sleep, Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries의 국가별 인권상황 데이터베이스 <http://www.upr-info.org/database/> (2016, 6.5)를 참조하였다.

172) Ibid.

173) Sleep, Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries, 대한민국 국가인권위원회, 2016

3.2.4 정보 격차

제 8차 실무그룹 세션에 앞서 보낸 안내성 질문에 대한 응답을 보면 노년기 차별과 폭력, 학대 및 방임에 관한 정보가 부족하다는 것이 드러난다(섹션 2 참조).

49세 이상 성인에 만연한 폭력에 관한 자료가 부족하다는 사실이 2013년 세계보건기구 보고서 <여성에 대한 폭력의 국제 및 지역적 추정(Global and regional Estimates of Violence against Women)>에 잘 나타나 있다. 세계보건기구가 분석에 사용한 추정치 392건은 성폭력과 배우자 폭력이었으며 66건만이 49세 이상 여성 노인 대상 폭력이었다. 세계보건기구는 49세 이상 여성에 관한 자료가 적은 이유가 여성 대상의 폭력에 대한 조사 또는 폭력 모듈을 이용한 조사가 15세 또는 18세부터 49세까지의 여성을 대상으로 했기 때문이라고 설명했다.¹⁷⁴⁾

2014년 133개국 대상으로 실시된 세계보건기구 조사 <폭력예방에 관한 글로벌 현황보고서>에서 17%의 나라만 노인 학대에 관한 조사 자료를 제출했으며 제출 국 대다수는 고소득 국가였다. 동남아 국가 중에는 조사를 실시했다고 보고한 나라는 없었으며 노인 학대는 저소득 국가의 폭력형태 조사 중 가장 조사가 미비한 부문이었다.¹⁷⁵⁾

3.3 새로운 유엔 노인권리협약의 필요성

그러므로 노인 권리에 관한 새로운 유엔 협약은 실무그룹이 확인한 4가지 모든 격차를 다음과 같은 방식으로 다룰 필요가 있다.

규범적 격차

새로운 협약은:

- 노인 권리에 관한 국제적 보호를 강화한다.¹⁷⁶⁾

174) 세계보건기구, Global and Regional Estimates of Violence against Women, 2013, p. 16 http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf

175) 세계보건기구, 유엔 마약범죄사무국, 유엔경제협력개발기구, Global Status Report on Violence Prevention, http://www.who.int/violence_injury_prevention/violence/status_report/2014/en/

176) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current

- 노인과 관련한 국가의 의무에 관하여 분명한 규범을 제공한다.¹⁷⁷⁾
- 노인 권리를 인권으로 규정하고 그 권리의 파기는 용납할 수 없다는 것을 분명히 보여준다.¹⁷⁸⁾
- 노인들에게 해를 끼치지 않을 의무와 노년의 평등을 보장할 적극적 의무를 포함하여 노인 인권의 개념을 확장한다.¹⁷⁹⁾
- 노인들이 누구나 권리를 찾을 수 있도록 보장한다.¹⁸⁰⁾
- 노인의 권리와 국가의 의무를 단일 맥락으로 통합한다.¹⁸¹⁾

실행격차

새로운 협약은:

- 노인들이 권리를 누리는 데에 있어 직면한 도전을 더 정확히 파악할 수 있게 한다.¹⁸²⁾
- 국가가 노인들에 대한 인권의무를 실행할 수 있도록 조치에 관한 지침을 제공한다.¹⁸³⁾

situation and outlook, 유엔 라틴아메리카 카리브 경제위원회, 유엔 인구기금, 스웨덴 국제개발협력청, 2011

177) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, 유엔 라틴아메리카 카리브 경제위원회, 유엔 인구기금, 스웨덴 국제개발협력청(2011) 및 유엔 경제사회국, Report of the Expert group Meeting 'Rights of Older Persons' 5-7 2009.5

178) Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회사업학회지 브리티시 저널 오브 소셜 워크, 2006, 36, 1135-1150

179) Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회사업학회지 브리티시 저널 오브 소셜 워크, 2006, 36, 1135-1150

180) 유럽 의회, 고용 및 사회문제 위원회, Report on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations (2014/2255(INI), A8-0241/2015

181) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook; 유엔 라틴아메리카 카리브 경제위원회, 유엔 인구기금, 스웨덴 국제개발협력청, 2011; 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009. 5월, 5-7

182) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, 유엔 라틴아메리카 카리브 경제위원회, 유엔 인구기금, 스웨덴 국제개발협력청, 2011

- 평등 및 차별금지를 증진하는 동시에 성별 및 나이에 근거를 둔 장벽을 제거한다.¹⁸⁴⁾
- 노령화 대비 정책 추진 시 권리에 바탕을 둔 접근방식을 독려한다.¹⁸⁵⁾
- 더욱 공정한 자원할당 방식을 장려한다.¹⁸⁶⁾
- 범세계적으로 노령화에 대한 태도변화 및 사회집단으로서 노인층을 보는 패러다임을 전환시킬 플랫폼이 된다.¹⁸⁷⁾
- 부정적인 태도를 변화시키고¹⁸⁸⁾ 부정적인 고정관념, 연령주의, 연령차별에 도전하는데 기여한다.¹⁸⁹⁾
- 노인 인권에 관하여 옹호 및 대중 교육의 토대가 되고¹⁹⁰⁾, 인식제고 및 증진의 도구가 된다.¹⁹¹⁾
- 국내외적 법적 분쟁을 해결하는 데 사용된다.¹⁹²⁾

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- 183) What are the options? Potential human rights instrument on the rights of older people, 헬프페이지 인터내셔널, 2012, p.1
- 184) Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회사업학회지 브리티시 저널 오브 소셜 워크, 2006, 36, 1135-1150
- 185) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, 유엔 라틴아메리카 카리브 경제위원회, 유엔 인구기금, 스웨덴 국제개발협력청, 2011
- 186) 유엔 경제사회국, 전문가그룹회의, 'Rights of Older Persons' Advantages of a convention on the rights of older persons, 2009. 5월; Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회사업학회지 브리티시 저널 오브 소셜 워크, 2006, 36, 1135-1150
- 187) 유럽 의회, 고용 및 사회문제 위원회, Report on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations (2014/2255(INI), A8-0241/2015
- 188) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009.5월. 5~7
- 189) 인권이사회 자문위원회 위원 정진성 작성 실무보고서 A/HRC/AC/4/ CRP.1, 2009
- 190) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009.5월. 5-7; Doron & Apter, The Debate Around the need for an International Convention on the Rights of Older Persons, 노년학회지 제론톨로지스트 포럼, 2010; Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, 유엔 라틴아메리카 카리브 경제위원회, 유엔 인구기금, 스웨덴 국제개발협력청, 2011
- 191) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009.5월. 5-7; Doron & Apter, The Debate Around the need for an International Convention on the Rights of Older Persons, 노년학회지 제론톨로지스트 포럼, 2010
- 192) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009.5월. 5-7; Doron &

감시격차

새로운 협약은:

- 참여국이 해당국의 법과 실천을 협약의 수준과 동일하게 맞추도록 보장하는 감시 체계를 제공한다.¹⁹³⁾
- 노인 인권 침해를 보상하는 책무 체계를 제공한다.¹⁹⁴⁾
- 국가, 시민 사회, 노인 간 상시 대화를 독려한다.¹⁹⁵⁾

정보격차

새로운 협약은:

- 자료의 수집, 세분화, 분석, 전파를 독려하고¹⁹⁶⁾ 정부가 모든 자료를 연령 및 성별 별로 세분화하고 연령관련 지표에 따른 자료를 수집하도록 요구한다.¹⁹⁷⁾

Apter, The Debate Around the need for an International Convention on the Rights of Older Persons, 노년학회지 제론톨로지스트 포럼, 2010

193) Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회사업학회지 브리티시 저널 오브 소셜 워크, 2006, 36, 1135-1150

194) 유엔 경제사회국, 전문가그룹회의, Advantages of a convention on the rights of older persons, 2009.5월

195) 유엔 경제사회국, 전문가그룹회의, Advantages of a convention on the rights of older persons, 2009.5월

196) 유엔 경제사회국, 전문가그룹회의, Advantages of a convention on the rights of older persons, 2009.5월

197) What are the options? Potential human rights instrument on the rights of older people, 헬프에이지 인터내셔널, 2012, p.1

IV

새로운 유엔 노인권리협약 규범적 내용

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4.1 새로운 노인권리협약의 규범에 대한 일반 정보

새로운 유엔 협약이 필요한 이유는 단지 증가하는 노인 인구 때문만은 아니다. 그 이유는 현 국제인권법의 체계가 노인의 존엄성을 빼앗고, 사회의 모든 계층과 삶의 모든 영역에서 만연해 있으며, 종종 심각하게 비인도적이지만 무관심했던 연령주의로 인해 발생하는 지속적인 행위, 상황, 그리고 제도적 요인을 제대로 다루지 못하고 있기 때문이다. 소정의 효과를 거두려면 협약의 규범적 내용은 이러한 상황에 직접 대응해야만 한다. 이러한 대응은 다음과 같은 3가지 방식으로 가능하다.

첫째, 연령주의는 차별의 주요 동인이며, 노인 삶의 모든 영역에서 권리를 박탈하는 해로운 사회규범이다. 새로운 유엔 협약은 노인들이 당하는 교차 및 누적 차별을 포함한 모든 개별 차별사례로부터 노인을 보호할 필요가 있다. 그와 동시에 협약은 연령주의를 해로운 사회규범으로 인식하고, 국가로 하여금 체계적이고 구조적인 연령주의를 타파하기 위한 구체적 조치를 취하도록 해야 한다.

둘째, 협약의 내용은 노년기 인권의 독특하고 특수한 상황을 고려해야 한다. 일반적 인권기준을 단순히 반복한다면 효과적인 준수, 실행, 및 감시가 필요한 노년기 인권적용 방법에 관해 명확한 해법을 제시하지 못할 것이다. 새 협약은 인권이 노인들과 노년기 삶의 모든 영역에서 어떻게 적용되어야 하는 지에 관해 강조하고, 재확인하고, 명료하게 밝혀야 할 필요가 있다. 이러한 노년기 권리에 영향을 미치기 위해 국가가 해야 할 일을 상세하게 설명해야 한다. 협약이 실행의 관점에서 효과적인 안내서가 되려면 이러한 것이 필수적이다. 또한 실제적 평등을 보장하기 위한 특별조치도 허용해야만 한다.

셋째, 협약의 조항은 포괄적이어야 한다. 경제적·사회적 권리뿐 아니라 시민적·정치적·문화적 권리를 모두 아우르는 것이어야 한다. 인권은 나뉘질 수도 없고 상호의존적이다. 협약은 노인들 삶의 모든 영역에서의 인권을 고루 다루어야 한다.

4.1.1 협약의 목적과 범위

협약의 목적은 노년기 모든 인권의 온전하고도 평등한 향유를 보호 및 보장하기 위해서 평등을 도모하는 것이다.

협약의 범위는 연령주의의 영향을 받는 사람, 고령이라는 단일 이유로 혹은 다른 형태의 차별과 합쳐져 복합적으로 차별당하고 권리를 침해당한 모든 사람을 포함해야 한다.

노인을 생활연령이라는 단일 기준으로 정의하면(일례로 60세 이상) 협약의 범위에서 해당 생활연령에 속하는 사람은 아니지만 연령주의로 인해 피해를 입고, 그 실제 연령이나 추정 연령을 근거로 차별이나 권리를 침해당한 사람을 제외시킬 수도 있다. 이러한 것들이 새 협약이 다루려고 하는 행위, 상황, 제도적 요인임을 감안한다면, 생활 연령이라는 정의는 협약의 목적을 훼손할 수도 있다. 그러므로 협약의 범위는 노인의 생활 연령이라는 정의로 결정되어서는 안 된다.

4.1.2. 일반 원칙

협약은 협약 내의 모든 조항에 적용되는 일반 원칙을 토대로 삼아야 한다. 이 원칙은 다음 내용을 포함하지만 여기에 국한되지는 않는다:

- 차별금지
- 평등
- 존엄
- 자율
- 존중
- 자아성취 및 자기계발
- 온전하고도 효과적인 사회 참여와 편입
- 차이와 다양성에 대한 존중
- 접근성

4.1.3 일반의무

협약에는 국가가 지켜야 할 많은 의무가 포함되어야 한다. 이에 다음 내용이 포함되지만 이에 국한되지는 않는다:

- 협약에서 인정한 권리의 실행을 위해 모든 적절한 입법, 행정, 기타 조치를 채택한다.
- 연령을 근거로 노인들에 대한 차별을 허용하는 현행 법, 규제, 관습, 관행을 수정하거나 폐지하기 위하여 입법을 포함한 모든 적절한 조치를 취한다. 이때 연령으로 인한 차별은 연령이 단일 요인으로 작용하거나, 다른 요인과 함께 복합적으로 작용하는 교차 차별, 시간을 두고 반복되는 누적 차별의 요인에는 성, 장애, 종교 혹은 신념, 정치적 혹은 기타 의견, 신체적·정신적·인지적 건강, 필요한 돌봄과 조력의 정도, 혼인 및 가족 상태, 경제적 상태, 기술에 대한 접근성, 성적 취향, 성 정체성 혹은 성적 표현, 이주민 상태, 난민 상태, 노숙인 여부, 부자유 상태 여부, 토착민·소수민족·인종적 소수집단, 민족 혹은 언어 상태, 재산, 지리적 위치, 시민권, 국적, HIV감염 여부, 출생 혹은 기타 조건 혹은 상태 등이 포함된다.
- 평등 실천을 보장하기 위한 특별 조치를 취한다.
- 노인들에 관한 모든 결정, 특히 연령과 관련한 정책의 결정 시 각기 다른 파급효과를 체계적으로 고려한다.
- 모든 관련 정책과 프로그램에서 노인 인권의 보호와 증진을 보장한다.
- 협약에 명시된 권리와 어긋나는 어떤 행위나 관행을 삼간다.
- 민간 부문의 계약자나 기업 같은 제 3자로 하여금 협약에 명시된 권리를 준수하도록 한다.
- 타인, 조직, 민간 기업이 연령에 근거하여—연령이 단일 요인으로서 혹은 다른 요소와 결합하여—노인에게 차별을 가하는 형태를 철폐할 수 있는 모든 적절한 조치를 취한다.
- 노령화 및 노인들에게 특히 영향을 미치는 문제에 관한 연구를 수행하고 독려한다. 자료가 연령과 성별을 망라하여 수집, 세분화, 분석, 이용, 전파되도록 보장한다.
- 노인들에게 권리와 혜택 및 자원의 수급권에 대한 접근 가능하고 적절한 정보를 제공한다.
- 노인들이 사회와 의사결정 과정에 온전히 효과적으로 참여하도록 적절한 조치를 취한다.
- 연령주의를 타파하고 세대 간 협동과 노년에 대한 긍정적인 이미지를 장려

하기 위한 인식 제고 캠페인을 포함하여 정책을 개발하고 적절한 조치를 취하며 동시에 노인들을 위엄과 존중하는 태도로 대하도록 장려한다.

4.1.4 협약에 포함되어야 할 권리들

새 규범에 포함되어야 할 사항에 관하여 실무그룹에 제출한 보고서에는 광범위한 권리가 포함되었다(섹션 5 참조). 새로운 유엔 협약에 포함되어야 할 권리들은 다음을 포함하지만 여기에 국한되지는 않는다:

1. 평등 및 차별금지
2. 법 앞의 평등
3. 자율과 독립
4. 독립적인 생활을 위한 지원과 장기요양
5. 사생활과 가정생활
6. 완화 의료
7. 존엄사
8. 생명
9. 건강
10. 의학적 치료와 관련하여 고지에 입각한 자유로운 동의
11. 자아성취
12. 대중과 정치생활에 온전하고 효과적으로 참여
13. 여가
14. 자신의 집에서 나이 들기
15. 주거
16. 환경
17. 개인 이동
18. 접근성
19. 모든 형태의 폭력, 학대 및 방임으로부터의 자유
20. 고문 및 그 밖의 잔혹한, 비인도적인 또는 굴욕적인 대우나 처벌로부터의 자유
21. 적절한 생활수준
22. 일자리

23. 사회보장과 사회보호
24. 평생 교육과 학습
25. 재산
26. 사법제도
27. 개인적 자유와 안정
28. 표현, 의사, 정보 접근의 자유
29. 결사와 집회의 자유
30. 이동과 국적의 자유
31. 위협과 강제이주 상황에서의 권리
32. 국제 협력
33. 자료와 통계
34. 특별한 위험에 처한 노인들

위에 언급한 권리의 규범적 요소 및 규범적 근거에 관해서는 부록1 참조.

4.1.5 실행, 감시 및 책임

새로운 협약은 소정의 효과를 거두기 위해서 국제적 차원과 국가적 차원에서 실행, 감시 및 책임을 위한 강력한 체계를 구축해야만 한다.

국가 차원에서 새 협약은 조약을 체결한 국가 측의 협약 내 조항을 이행할 책임과 더불어 협력하는 체계를 구축해야 한다. 이 때 협약의 조항 이행과 관련한 일련의 조치를 원활하게 추진하도록 정부 내에 핵심 부분이 설정되어야 한다. 또한 협약의 조항을 이행하도록 국가와 다른 이해당사자들의 역량 강화를 지원하는 조치에 관심을 기울여야 한다.

협약은 조약을 체결한 각국 내에 독립적인 국가 차원의 감시기구를 설립하도록 해야 한다. 시민 사회, 특히 노인과 그들을 대표하는 단체가 이들 감시기구에 적극적으로 참여해야 한다. 개인에게는 국가 차원의 강제력 있는 민원체제에 접근이 허용되어야 한다.

국제적 차원에서, 새 협약은 국가 차원의 이행을 감사하고, 정기 보고를 받으며, 민원을 접수하고, 조사를 실시하고, 규범 내 조항들과 일치하는 권고를 하기 위한 독립조약기구를 만들어야 한다.

새로운 규범은 지역 기구들이 역량을 발휘하고 법을 만들 수 있는 영역이 협약의 조항을 거치도록 지역통합기구가 서명, 비준, 가입할 수 있도록 개방되어야 한다.

4.2 평등과 차별금지 권리에 관한 협약 규범 내용¹⁹⁸⁾

4.2.1 서론: 주요 쟁점

연령주의와 연령차별

연령주의를 겪을 수 있거나 혹은 겪을 것 같거나, 노령으로 인해 차별을 겪을 특정 또는 보편적 연령은 없다. 연령주의는 고정관념, 편견, 차별, 희롱, 중상, 학대, 착취, 방임 및 폭력의 형태로 드러나며 삶의 모든 영역에서 사회적 불의, 배제, 차별을 초래한다.

차별적인 대우

인간은 연령에 상관없이 평등하게 대우받아야 하지만 동시에 평등한 기회 또는 접근을 보장하기 위해서 차별적인 대우 역시 허용되어야 한다.

그러나 연령 구분은 차별적이고 배타적일 수 있으므로 세심하고 상세하면서 정당한 근거가 필요하다. 현재로서는 수용할 만한 연령차별적 대우도 차별금지와 평등을 표방하는 인권의 원칙과는 일치하지 않을 수 있으며, 용인가능성을 평가하기 위한 정당성 테스트도 연령주의적 고정관념, 가정, 배타적인 태도로 인해 부정적인 영향을 받을 수 있다.

예외

연령 차별금지에 대한 예외, 즉 연령차별이 합법적인 영역—일례로 재화나 서

198) 본 섹션은 저자가 저술하였거나 공동 저술한 다음의 실무그룹 제출용 보고서를 바탕으로 한다: HelpAge International Submission on Equality and Non-discrimination, 2017년 5월, 그리고 유럽 AGE 플랫폼과 헬프에이지 인터내셔널, 호주 지역사회법 센터연합 공동보고서, The Law in the Service of the Elderly, 2017년 5월

비스-에서의 예외는 연령차별의 중요성과 심각성을 감소시킨다. 또한 예외는 부정적인 연령주의 태도 및 관행을 강화하고 영구화시키며, 차별을 체감하는 방식을 과장한다.

4.2.2. 규범적 체계

정의

- 노년기

노인이나 노년기에 대한 정적이고 생활연령 기준의 단일 정의는 새 협약에는 적절하지 않은 기초이다.

- 평등

노년기의 평등은 노인의 존엄에 대한 평등한 존중에 기초하여 사회의 모든 영역에 고루 참여하고 편입되는 것이다.

- 차별

차별은 정책, 법, 규칙, 관행, 필요조건, 조건이나 상황 등에서 객관적 근거 없이 직·간접적으로 한 개인이나 그와 관련된 사람에게 가한 다음과 같은 모든 행위 혹은 행위의 생략을 의미한다:

- 덜 우호적인 대우를 한다
- 부담, 의무, 불이익을 준다
- 혜택, 기회, 이익을 보류한다
- 인간의 존엄성을 훼손한다
- 권리와 자유를 평등하게 누리는 것에 부정적인 영향을 미친다

노인에게 실제 연령 혹은 추정 연령을 근거로, 또는 연령과 개인의 다른 특징과의 결합효과를 근거로, 또는 연령과 둘 이상의 특징과의 결합효과를 근거로, 또는 반복된 차별의 누적된 결과로, 또는 체계적인 불이익을 초래하거나 영속화시키는 것을 의미한다.

국가의 일반 의무

권리는 국가로 하여금 노년기에 공식적이고 실질적인 평등을 보장하는 일련의 일반 의무를 갖도록 해야 한다. 이러한 일반 의무는 포괄적이고 광범위해야 하며, 특히 노인들에 대해 연령에 근거한 정책 수립 시 정부의 결정이 갖는 차별적인 영향을 고려할 의무를 포함해야 한다.

특별 조치

특별 조치, 즉 노인들에게 평등 및 실생활에서 차별을 겪지 않고 불이익에 대처할 진정한 혜택을 보장하는 선제적 조치가 허용되어야 한다.

모든 형태의 차별

- 노년기에 대한 차별 금지와 관련 법적 보호 장치가 제한 없이 모든 삶의 영역에 적용되어야 한다.
- 권리는 직·간접적으로, 관련되었다는 사실만으로, 인식에 의해서, 잘못을 전가하거나 괴롭히는 것을 포함하여 모든 형태의 노년기 차별을 다루어야 한다.
- 노년기 차별금지는 금지된 다른 근거보다 더 폭넓게 평등 대우의 원칙의 적용대상이 되어서는 안 된다. 연령 대응기준을 포함한 어떤 예외의 적용에도 구체적 근거가 제시되어야 한다.

복합 차별

- 권리는 노인들을 교차 차별로부터 보호해야 한다. 이는 연령과 다른 개인적 특징이 결합한 효과 또는 연령과 둘 이상의 특징이 결합한 효과로 인한 차별을 말한다.
- 권리는 노인들을 누적 차별, 즉 시간을 두고 수없이 발생하는 차별로부터 보호해야 한다.
- 복합 차별이 발생할 수 있는 근거는 포괄적이어야 한다.
- 권리는 고도의 체계적인 및/혹은 공통으로 차별을 받거나 권리가 무시당한 특정 노인집단에게 보호조치를 제공해야 한다.

연령주의, 구조적 및 체계적 차별

- 권리는 개별적, 구조적, 체계적 연령주의로 인한 차별로부터 노인을 보호해야 하고 그에 관한 국가의 의무는 포괄적이어야 한다.
- 국가는 해로운 연령주의적 사회규범과 관행을 없애기 위한 조치를 취할 의무를 가져야 한다.

예외

- 노년기 차별과 불평등한 금지에 대한 예외근거는 광범위하게 적용되어서는 안 된다.
- 연령 대응기준을 포함한 어떤 예외도 노인에 대한 모든 결정의 차별적인 영향을 고려할 의무에 따라 특수한 근거와 검토가 필요하다.
- 허용 가능할 수준의 정당한 근거라 하더라도 차별금지, 평등 및 존엄을 포함한 인권 원칙을 훼손하지 않아야 한다.

개선책, 제재, 시행

- 국가는 노인들이 배상을 청구하거나 법의 도움을 받는 데에 도움을 주어야 한다.
- 노인들이 민원을 제기하는 데에 제공된 조력은 개인 별 맞춤형이어야 하며 포괄적이어야 한다.
- 국가는 적절한 손해배상금 지급을 포함한 연령차별에 관한 배상과 보상을 설정할 때 누적 차별을 고려해야 한다.

인식 제고 및 정보

노년기의 평등과 차별금지에 관한 정보와 연구를 보장하고, 대중의 인식을 제고하기 위해서 정부는 다음과 같은 의무가 있다:

- 노인들의 권리와 능력에 대한 인식을 제고한다.
- 노인과 노년기에 대한 차별적이고 체계적인 연령주의적 인식 및 관행을 저지한다.

- 노인들의 인권과 존엄에 영향을 미치는 해로운 전통 관행을 없앤다.
- 연령 평등과 노년에 투자하는 일이 주는 혜택에 관한 인식을 증진한다.
- 노령화에 대한 긍정적인 이미지를 홍보한다.
- 노인의 인간 존엄성에 영향을 주는 모든 연령주의의 제도적, 체계적, 또는 구조적 관행을 없앤다.
- 노령화 및 노인들에게 특별히 영향을 주는 문제에 관해 연구를 실시 혹은 장려하고 연구 자료가 나이와 성별과 무관하게 수집, 세분화, 분석, 전파되도록 한다.
- 노인들에게 권리와 혜택 및 자원의 수급권에 관해 접근 가능한 적절한 정보를 제공한다.
- 노인들을 그들의 권리와 이익에 관련된 사회 정책이나 공공 프로그램 수립 시 능동적 동반자 또는 참여자로 편입시킨다.

4.3 폭력과 학대를 받지 않을 권리에 관한 협약 규범 내용¹⁹⁹⁾

4.3.1 서론: 주요 쟁점

폭력, 학대, 방임의 유형

노인들은 신체적, 정신적, 성적, 재정적 폭력과 학대, 방임, 유기, 그리고 해로운 전통이나 습관적 관행 등 다양한 형태의 폭력, 학대 및 방임을 당하기 쉽다. 이러한 것이 일회성 또는 반복되는 행위일 수도 있고 한 개인이 대상이거나 체계적이고 구조적이거나, 제한적인 관행처럼 제도적인 관행의 일부일 수도 있다.

자기 방임

자기 방임을 폭력과 학대로부터의 보호 맥락에 포함시킬지 여부는 논란의 여지가 있다. 폭력, 학대 및 방임이 제 3자에 의해 적극적이거나 수동적으로 발생

199) 본 섹션은 저자가 저술 혹은 공동 저술한 다음의 실무그룹 제출용 보고서를 바탕으로 한다: HelpAge International Submission on Neglect, violence and abuse, 2017년 5월; 유럽 AGE 플랫폼과 헬프에이지 인터내셔널 공동보고서, The Law in the Service of the Elderly; 호주 지역사회법 센터연합; Neglect, violence and abuse, 2017, 5월.

하는 반면, 자기 방임은 노인이 선택한 행동(또는 비 활동)의 결과이다. 여기에는 독특한 생태학적 및 개인적 특징이 작용한다. 자율과 독립이 자기 방임의 위험이 있는 사람들의 안위에 핵심이다. 노년기의 자기 방임 현상은 추가적인 정의와 연구가 필요하다.

환경

폭력, 학대 및 방임은 가정, 지역사회, 혹은 병원이나 장기요양시설을 포함한 사적인 공간과 공공장소에서 두루 발생할 수 있다. 공적인 공간은 물리적이고 가상적인 광범위한 장소를 포함한다. 가정이나 지역사회에서 적정한 요구 평가, 훈련, 적절한 자원 및 지원 없이 돌봄을 제공하는 것은 폭력, 학대 및 방임의 위험을 증가시킬 수 있다.

가해자

다양한 잠재적 가해자 및 특수한 맥락은 노년기 폭력, 학대 및 방임을 다른 종류의 폭력, 예를 들어 남성의 여성에 대한 폭력 같은 형태와 구분 짓는다. 가해자에는 배우자와 동거인 및 다른 가족구성원, 지인이건 아니건 간에 가족이 아닌 지역사회 구성원, 지역사회 지도자, 지역 민병대 혹은 법 집행 집단, 서비스 제공자, 법률 대리인, 후견인, 변호사 등이 포함된다. 가해자와 노인들 간의 상호의존이 어떤 맥락에서는 매우 중대한 반면 모든 가해자들이 기대할 만한 관계이거나 신뢰할 만한 위치에 있다고 분류되는 것은 아니다.

교차 동인

연령주의는 다른 형태의 차별 및 폭력과 결합하여 사회적 고립에 더 노출되어 있고 양질의 건강관리와 사회적 지원을 받을 기회가 적은 장애 노인들, 여성 노인, 성 소수자 노인, 이주민 노인들에게 특히 더 큰 문제를 야기하는데 폭력, 학대 및 방임의 예방에 중요한 요소이다. 그 외에도 다른 편견과 함께 작용하는 체계적 연령주의는 특히 내밀한 작업을 수행할 때 그들의 종교적 신념을 무시하거나, 그들의 요구를 수용하지 않거나, 심지어 나이 든 동성애자 커플에 해를 가하거나, 특히 집중적 지원 요구를 방임하거나 하는 결과를 초래할 수 있다.

4.3.2 규범적 체계

정의

- 폭력, 학대 및 방임

노년기 폭력, 학대 및 방임은 ‘노인에게 사망 혹은 신체적, 성적, 정신적 혹은 경제적 위해 또는 고통을 초래하는 혹은 초래할 수도 있는 어떤 폭력, 학대 및 방임 행위나 이와 같은 행위를 하겠다는 위협’으로 이해될 수 있다. 이 개념이 기대할 만한 관계이거나 신뢰할 만한 위치에만 해당되는 것으로 이해해서는 안 된다.

노인에 대한 폭력, 학대 및 방임은 공적인 환경이건 사적인 환경이건 상관없이 국가 혹은 국가의 대리인이 용인하거나 가하는 강압 혹은 임의적 자유박탈, 지역 사회에서의 축출, 그리고 모든 형태의 유기나 방임을 포함하는 것으로 이해될 수 있다.

폭력, 학대 및 방임은 일회성 또는 반복되는 행위이거나, 필요한 행위를 생략하거나, 행동을 취하지 않는 것, 그리고 한 개인이 대상이거나, 체계적이고 구조적이거나, 습관적이거나, 제도적인 관행의 일부를 포함하는 것으로 이해될 수 있다.

- 학대

신뢰하는 관계 또는 신뢰를 기대할 만한 관계이거나 신뢰할 만한 관계에서 발생했는지에 상관없이—의도했던 아니던—노인의 신체적, 정신적, 재정적 또는 도덕적 완전성을 해치거나 노인 인권과 기본권 향유와 행사를 침해하거나 침해할 수도 있는 심각한 위협을 초래하는 일회성 또는 반복되는 행위, 혹은 행위의 생략하는 일을 말한다.²⁰⁰⁾

- 방임

담당 요양보호사나 다른 이해관계자들이 돌봄이 필요한 노인에게 식사, 의복, 주거, 물/수분 공급, 난방, 건강과 의료, 투약과 같이 생필품이나 중요한 도움, 혹

200) Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, 국가연구 위원회, 2003, p.40; 유엔 경제사회국 인용, Neglect, Abuse and Violence Against Older Women, 2013

은 일상적 도움을 거부하거나 하지 않은 상태를 말한다. 이 범주에는 돌봄이 필요한 노인을 버리는 것—유기라고도 불림—도 포함된다.²⁰¹⁾

모든 형태의 폭력, 학대 및 방임

- 노년기 폭력, 학대 및 방임으로부터 자유로울 권리에는 노인을 대상으로 한 모든 형태의 폭력, 학대 및 방임이 포함되어야 한다.

공적 환경 및 사적 환경

- 이 권리는 공적 환경과 사적 환경에서 발생하는 폭력, 학대 및 방임에 적용된다.
- 사적 행위자와 공적 행위자의 행동 모두 권리의 대상이 된다.
- 국가가 다음과 같은 사항에 관해 사전 주의의무를 다하지 못했다면 노인에 대한 폭력, 학대 및 방임의 사적인 행위에 대해 국가가 책임져야 할 수도 있다:
 - 노인들 대상의 폭력·학대·방임 행위를 예방한다.
 - 피해자/생존자를 보호하고 지원한다.
 - 폭력·학대·방임 행위를 기소하고 고발한다.
 - 가해자를 처벌한다.
 - 피해자/생존자에게 피해에 대하여 배상한다.

예방

- 국가는 노인에 대한 공적이나 사적 환경에서 발생한 폭력·학대·방임 행위를 예방하기 위한 포괄적인 조치를 취할 의무가 있다. 이 의무에는 다음을 포함되지만 여기에 국한되지는 않는다:
 - 모든 형태의 폭력·학대·방임 행위에 대해 확인, 조사, 배상을 보장하기 위해 효과적인 법과 정책을 수립한다.
 - 효과적인 이행을 위해 충분한 자원을 할당한다.
 - 가족이나 기타 비공식 요양보호사를 포함, 모든 요양 서비스 제공자를 훈

201) 세계보건기구 참조, 2002 유엔 경제사회국 인용, Neglect, Abuse and Violence Against Older Women, 2013

련시킨다.

- 돌봄과 지원 상황에서 적절한 요구 평가와 감시 체계를 확립한다.
- 폭력의 상호 교차적 동인에 특별한 주의를 기울인다.
- 노년기의 모든 형태의 폭력·학대·방임의 확인 및 예방 방법에 관해 사회의 인식을 제고하고 민감하게 반응하게 한다.

지원 서비스

권리는 폭력·학대·방임의 생존자들에게 폭넓은 지원 서비스에 대한 접근을 다루어야 한다. 지원 서비스에는 다음을 포함하지만 여기에 국한되지는 않는다:

- 모든 분야의 의료, 심리, 재활, 법률 서비스
- 활용 가능한 지원 및 서비스에 관한 정보 접근
- 적절한 피해자 지원 서비스에 대한 접근
- 효과적인 치료법과 배상에 대한 접근

개선책 및 배상

- 이 권리에는 생존자가 민원을 제기할 수 있도록 돕는 국가의 의무가 포함되어야 한다.
- 이 권리에는 조사하고 고발할 수 있는 국가의 의무가 포함되어야 한다.
- 국가는 생존자가 자신의 안위를 스스로 판단할 수 있고 자기결정을 할 수 있는 최적의 상태에 있어야 한다는 전제에서 시작해야만 한다.
- 형사 사법적 대응, 형사 사건 및 선고 관행에서는 노인 대상 범죄의 불량한 죄질로 인한 가중처벌 가능성을 반영해야 한다.
- 노년기를 이유로 손해배상 혹은 생존자 서비스가 제한되어서는 안 된다.

자료 및 통계

- 이 권리에는 정부가 모든 형태의 폭력·학대·방임에 관한 적절한 정보와 통계 자료를 정기적으로 수집, 세분화, 분석, 활용, 공표할 의무가 있다는 점이 포함되어야 한다.
- 이에는 발생률과 추세, 위험 요인, 가해자, 지원 서비스 및 효과적인 개선책

과 배상에 대한 접근 방법이 포함되어야 한다.

- 모든 정보수집과 연구는 통계의 수집과 사용상의 국제 규범과 윤리 원칙을 준수해야만 한다.

다른 권리와 의 상호의존관계

노년기의 폭력, 학대 및 방임으로부터 자유로울 권리는 다음 권리를 포함하여 노년기 다른 권리와 관련되어 있다:

- 고문 및 그 밖의 잔혹한, 비인도적인 또는 굴욕적인 대우나 처벌을 받지 않을 자유
- 신체적, 심리적 완전성
- 자율과 독립
- 연령주의와 연령차별로부터의 자유

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5.1 현황

2015년 유엔 총회에서 회원국들은 노인 권리의 보호와 증진을 목적으로 한 다양성 정책, 기준, 제도 등이 일관성 없는 노인 권리 보호로 이어질 수 있고, 현 국제수준의 접근법이 노인들에 관한 현존 조약의 의무사항에 대한 보고와 감시에 공백을 초래할 수 있으며, 고령화가 가시적으로 뚜렷하지 않고, 노인의 모든 인권이 효과적으로 향유되고 실현될 수 있도록 추가 개선이 필요하다는 점을 인정하는 결의안을 채택하였다.²⁰²⁾ 결의안은 넓은 지역에 걸쳐 여러 회원국들이 공동 제안하였으며 고령화 개방형 실무그룹(이하 “실무그룹”)에서 이루어진 합의와 진척 사항 등을 담고 있다.²⁰³⁾

새 유엔노인권리협약을 지지하는 회원국이 점차 증가하고 있지만 새로운 규범의 초안 작성 개시에 관해서는 아직 합의에 이르지 못하였다. 회원국들과 NGO들이 2015년 실무그룹의 제 6차 세션에서 이 부분에 진척이 이루어지지 않는 데 대한 불만을 제기하였다.²⁰⁴⁾ 논의의 진행을 위해 2016년 실무그룹의 제 7차 세션에 참가국 다수가 실무그룹으로 하여금 노년기 권리의 규범적 내용 및 향후 모든 기준설정의 형식과 자격에 대한 실질적 논의에 재 집중할 것을 요청하였다.²⁰⁵⁾ 실무그룹의 제 7차 세션에서 새롭게 바뀐 사항은 국가인권기구(NHRIs)에 처음 참여권을 부여한 것이다.²⁰⁶⁾

그에 따라 2017년 7월에 열린 실무그룹 제 8차 세션에서는 평등과 차별금지, 그리고 방임 및 폭력과 학대에 초점을 맞추었다. 회원국, 시민사회단체, NHRIs, 유엔 기구들이 세션이 열리기 전 이 두 가지 노인 권리 분야에 관한 일련의 안내성 질문에 답을 하였다. 유엔 사무국은 제 8차 세션의 논의를 이끌어 가기 위해

202) A/RES/70/164

203) 결의안은 오스트리아, 브라질, 중앙아프리카 공화국, 콜롬비아, 코스타리카, 크로아티아, 에콰도르, 과테말라, 온두라스, 인도네시아, 이스라엘, 리히텐슈타인, 말라위, 말레이시아, 말타, 멕시코, 모로코, 네팔, 파나마, 페루, 필리핀, 슬로베니아, 터키, 미국, 우루과이에서 공동 후원하였다.

204) 성명서 참조, <https://social.un.org/ageing-working-group/sixthsession.shtml>

205) 영국의 예시 성명서 참조, <http://statements.unmeetings.org/media2/7664282/united-kingdom.pdf>

206) 일곱 번째 세션에서의 회장 연설 요약 참조, <https://social.un.org/ageing-working-group/documents/seventh/ChairsSummaryOE-WG7.pdf>

제출 받은 실무 자료를 편찬할 예정이다.²⁰⁷⁾

5.1.1 실무그룹의 권한

노인 권리의 규범에 관한 제안이 아르헨티나에 의해 1948년 처음 유엔에 제출되었다.²⁰⁸⁾ 당시에는 별 진전이 없었고 그 후로부터 50년이 지난 2010년에야 유엔 실무그룹인 고령화 개방형 실무그룹이 설립되어 노인 권리문제를 다루기 시작하였다.²⁰⁹⁾

2008년 고령화에 관한 제 2차 세계의회 후속 조치에 관한 연례 결의안을 통해 유엔 총회에서 사무총장으로 하여금 마드리드 고령화국제행동계획(MIPAA)의 이행실태에 관한 보고서에 노인 인권의 증진과 보호에 관한 정보를 포함할 것을 요구하였다.²¹⁰⁾ 2009년 유엔 총회는 회원국들에게 국제인권 규범과 기준이 노인들이 인권을 온전히 향유하고 새로운 정책, 제도 혹은 조치들의 가능성을 최대한 보장할 수 있는 방법을 고려하도록 촉구하였다.²¹¹⁾

이듬해인 2010년에 유엔 총회는 ‘기존 노인 인권을 위한 국제체계를 고려하고 발생 가능한 격차를 파악하며 추가 규범과 조치의 타당성을 타진하는 등 허점을 해결할 수 있는 최선의 방법을 강구’함으로써 노인 권리 강화를 위해 실무그룹을 설립할 것을 결의하였다.²¹²⁾

실무그룹과 관련한 후속 결의안들이 2011년 이후로 유엔 총회에서 채택되어 실무그룹의 본래 권한을 강화하고 구체적인 업무를 할당하였다. 2011년 회원국들과 다른 유엔 인권기관 및 시민사회단체들이 실무그룹의 작업에 지속적으로 기여할 수 있도록 초청되었다.²¹³⁾ 2012년 유엔 총회에서는 실무그룹으로 하여금 그 중에서도 노인의 인권과 존엄을 증진하고 보호할 수 있는, 국제법규에 반드시

207) 2017년 3월 30일 회장이 회원국들에게 답변을 요청한 내용 참조,
<https://social.un.org/ageing-working-group/documents/eighth/Letter-Member-States.pdf>

208) A/C.3/213/REV.1, 1948년 11월 26일

209) A/RES/65/182

210) A/RES/63/151

211) A/RES/64/132

212) A/RES/65/182

213) A/RES/66/127

포함되어야 하는 주요 요소들이 포함된 안을 제출하도록 요구하였다.²¹⁴⁾ 또한 유엔 사무총장에게 노인 권리를 다루는 기존 국제법규, 기록, 프로그램을 엮어 실무그룹에 제출하도록 요구하였다.

2013년 유엔 총회는 관련 이해당사자들에게 실무그룹의 작업에 지속적으로 기여해 줄 것을 요청하였다.²¹⁵⁾ 2014년 총회에서는 공개적으로 회원국들에게 “[실무그룹]이 위임 받은 권한을 수행할 수 있도록, 노인의 권리와 존엄을 증진하고 보호하는데 기여할 수 있는 구체적인 제안, 실질적 조치, 그리고 그간의 경험을 제출’하고 이러한 내용을 엮어 제 70차 유엔 총회에 제출할 것을 요구하였다.²¹⁶⁾

2015년 제 2차 세계의회의 후속 조치에 관한 당해 결의안이 없는 가운데 유엔 총회에서는 노인 권리 및 존엄의 증진과 보호를 강화하는 조치에 관한 결의안이 채택되었다. 이 결의안에서 회원국들은 법적 구속력이 있는 노인만을 위한 국제 인권규범의 부재를 인정하고, 기존 규범의 시행 강화 중요성도 언급했지만 노인 권리 보호를 개선할 수 있는 대체 방안을 계속 강구하도록 촉구하였다. 회원국들에게 재차 “[실무그룹]이 소기 권한을 수행할 수 있도록, 모범사례, 경험, 가능성 있는 다자간 규범 내용을 제출”하도록 요구하였다.²¹⁷⁾ 이러한 요청은 2016년에도 되풀이되었다.²¹⁸⁾

5.1.2 실무그룹 사무국

실무그룹이 설립된 이후부터 아르헨티나가 실무그룹의 의장국을 맡았다. 실무그룹사무국은 각 유엔 지역 그룹을 대표하는 회원국 한 곳으로 구성되어 있다. 현재는 다음과 같다:²¹⁹⁾

- 아프리카 지역 그룹: 나미비아
- 아시아 태평양 지역 그룹: 카타르(부의장)
- 동유럽 지역 그룹: 슬로베니아(부의장)

214) A/RES/67/139

215) A/RES/68/134

216) A/RES/69/146

217) A/RES/70/164

218) A/RES/71/164

219) <https://social.un.org/ageing-working-group/bureau.shtml> 2017년 5월 11일 방문.

- 카리브 제도와 라틴 아메리카 지역 그룹: 아르헨티나(의장)
- 서유럽 및 기타 지역 그룹: 오스트리아

5.1.3 회원국의 실무그룹 세션 참여

실제 실무그룹 세션에 참여한 회원국들에 대한 공식 기록은 없다. 대신 회원국의 세션 등록 자료를 보면 2011년에 있었던 처음 두 세션의 참석률은 매우 낮다. 2011년 4월에 있었던 제 1차 세션의 회원국 36%가 등록하였고, 2011년 8월에 있었던 제 2차 세션의 회원국 26%가 등록하였다. 헬프페이지 인터내셔널이 회의장에서 직접 추산한 비공식 인원수를 보면 제 3차에서 7차 세션에 걸쳐 회원국들의 참석률은 계속 낮았다.²²⁰⁾

제 1차 세션 2011년: 36% 등록

제 2차 세션 2011년: 26% 등록

제 3차 세션 2012년: 비공식 참석 회원국 수 73개국(39%)

제 4차 세션 2013년: 비공식 참석 회원국 수 96개국(50%)

제 5차 세션 2014년: 비공식 참석 회원국 수 105개국(54%)

제 6차 세션 2015년: 비공식 참석 회원국 수 101개국(52%)

제 7차 세션 2016년: 비공식 참석 회원국 수 70개국(36%)

헬프페이지 인터내셔널이 현장에서 집계한 참가국 수는 5개의 유엔 지역 그룹 간의 참석 불균형을 보여준다.²²¹⁾ 일반적으로 카리브 제도와 라틴 아메리카 지역 그룹과 서유럽 및 기타 지역 그룹 회원국들의 참석률이 높은 반면, 아프리카 지역 그룹, 아시아 태평양 지역 그룹, 동유럽 지역 그룹의 회원국들의 참석률은 저조했다.

예를 들어, 2015년 제 6차 세션에서 회원국들의 비공식 참석률을 보면 서유럽 및 기타 지역 그룹의 참석률이 86%, 카리브 제도와 라틴 아메리카 지역 그룹이 63%, 동유럽 지역 그룹이 47%, 아시아 태평양 그룹 지역은 47%, 아프리카 지역 그룹이 37%였다. 2017년 제 7차 세션에서 회원국들의 비공식 참석률을 보면 서

220) 해당 숫자는 암시적이며 공식적 혹은 정확한 참석 기록을 나타내는 것이 아니다.

221) <http://www.un.org/depts/DGACM/RegionalGroups.shtml>

유럽 및 기타 지역 그룹이 68%, 카리브 제도와 라틴 아메리카 지역 그룹이 51%, 아시아 태평양 지역 그룹이 30%, 동유럽 지역 그룹이 26%, 아프리카 지역 그룹이 18%였다.²²²⁾

〈표 2〉 회원국들의 실무그룹 세션 참석률

유엔 지역 그룹	회원국들의 실무그룹 세션 참석률 ²²³⁾			
	2013년	2014년	2015년	2016년
서유럽 및 기타 지역 그룹	82%	68%	86%	68%
카리브 제도와 라틴 아메리카 지역 그룹	39%	66%	63%	51%
동유럽 지역 그룹	39%	65%	47%	26%
아시아 태평양 지역 그룹	41%	50%	47%	30%
아프리카 그룹	27%	38%	37%	18%

5.1.4 실무그룹 세션에서 다룬 의제 항목

아래 표 3은 각 실무그룹 세션에서 다룬 주요 의제 항목을 보여준다.²²⁴⁾ 2011년 제 1차 세션에서는 2010년 유엔 총회에서 위임된, 주로 ‘기존 노인 인권을 위한 국제체계를 고려하고 발생 가능한 격차를 파악하며 추가 규범과 조치의 타당성을 타진하는 등 허점을 해결할 수 있는 최선의 방법을 강구’할 수 있는 실무그룹의 권한에 대한 주요 내용을 다루었다.²²⁵⁾ 후속 회의에서는 기존 인권 체제에는 집중하지 않았지만 대신 인권의 특정 분야 혹은 기타 지역 인권, 사회 및 개발 정책 체계에 주목하였다.

의제 결정방법이 실무그룹으로 하여금 권한을 온전히 이행하는 데 방해가 된다는 주장이 있을 수 있다. 또한 결의안에 대한 후속 논의에 할당된 시간이 대단히 짧고 회원국들 간의 적절한 논의가 아닌 시민사회 단체와의 상호 논의에 주로 국한되어 있었던 것도 사실이다.

222) 해당 숫자는 암시적이며 공식적 혹은 정확한 참석 기록을 나타내는 것이 아니다.

223) 해당 숫자는 암시적이며 공식적 혹은 정확한 참석 기록을 나타내는 것이 아니다.

224) 각 세션에서 다룬 모든 프로그램 내용은 <https://social.un.org/ageing-working-group/index.shtml> 참조

225) A/RES/65/182

〈표 3〉 실무그룹 세션의 주요 의제 항목

세션	의제 항목
제 1차 - 2011년	기존 국제 체계 기존 지역 체계
제 2차 - 2011년	차별 사회적 보호 보건 폭력과 학대
제 3차 - 2012년	차별 사회보장 및 자원 접근 자율성, 독립적 생활 및 건강보험 폭력과 학대 사법 접근
제 4차 - 2013년	차별 사회보장 보건 일자리 접근 MIPAA에 대한 2차 검토 및 평가 다자간 절차 갱신 67/139 결의안에 대한 후속조치
제 5차 - 2014년	폭력과 학대: 경제 인권과 돌봄 임종간호: 경제적 및 법적 계획 노인과 2015년 이후 의제 MIPAA 시행 개선을 통한 노인 인권 강화 방법 유엔 인권이사회 사회포럼의 결과 노인 인권 독립전문가
제 6차 - 2015년	차별(나이와 성별 간의 교차차별) 노인 인권에 관한 최근 정책 변경사항 및 계획 노인 인권에 관한 최근 입법 및 법적 변경사항과 도전과제 노인과 2015년 이후 발전 의제 노인 인권 독립전문가 68/164 결의안에 대한 후속조치
제 7차 - 2016년	노인 인권 독립전문가 노인 인권에 관한 최근 지역별 변경사항 및 계획 최근 정책 변경사항 및 다자간 절차에서 노인 관련 인권이 차지하는 부분 70/164 결의안에 대한 후속조치

5.1.5 새로운 규범의 내용에 대한 구체적 제안

실무그룹 의장은 처음 2013년 A/RES/67/13 결의안, 그리고 2015년 A/RES/69/146 결의안에 대한 대응으로 회원국들에게 두 번에 걸쳐 노인 권리 증진과 보호를 위한 구체적 제안, 실질적 조치, 모범사례, 경험을 제출하여 실무그룹으로 하여금 위임 받은 권한을 이행할 수 있도록 요청하였다.

표 4는 2013년 제 4차 세션에서 유엔 사무총장이 회원국, 유엔 기구, 시민사회 단체들로부터 제출 받은 답변을 요약한 것이다.²²⁶⁾ 유엔 사무총장은 아래와 같은 주제로 권리를 분류하였다.

표 5는 2015년 회원국, 유엔 기구, 시민사회단체들이 법적 구속력이 있는 새로운 국제규범에 포함시킬 것을 제안한 권리들을 저자가 직접 요약한 것이다.²²⁷⁾

〈표 4〉 2013년 실무그룹에 제안한 권리 요약

경제권 강화 생활수준 사회적 보호, 경제적 안정 및 사회 부조 일자리 접근 신용, 창업, 이익창출 활동, 재산권에 대한 접근 교육과 훈련	사회 및 시민 참여 접근권 정보 법률 서비스 사법 보호 법 앞의 평등 공적 및 정치적 삶 사회 및 문화적 삶/레크리에이션과 스포츠 결사의 자유	보건 돌봄과 장기요양 건강보험 및 정신건강 필수 의약품 사회서비스
존엄 사생활 존중 폭력과 학대로부터의 자유 신체적 안정 삶 임종 존엄사	다양성 고령 원주민 고령 재소자 고령 장애인 여성 노인 고령 이주자	

226) 모든 제출자료는 <https://social.un.org/ageing-working-group/fourthsession.shtml> 참조

227) 모든 제출자료는 <https://social.un.org/ageing-working-group/sixthsession.shtml> 참조

〈표 5〉 2015년 실무그룹에 제안한 권리 개요

2015년 구체적 제안 사항		
차별	고문, 비인도적 및 모멸적 대우	환경
존엄한 삶	교육과 평생학습	사법제도
사회보장	삶	주거
적절한 생활수준	존엄한 죽음	폭력과 학대로부터의 자유
자율성 및 독립	참여	성적 정체성 및 표현
장기요양	재산	표현의 자유
독립 지원	일자리	결사의 자유
내 집에서 나이 들기	사생활 및 개인적 삶	정보
접근권 및 이동성	법 앞의 평등	이동과 국적의 자유
보건	문화 및 여가	

위의 제안들이 광범위한 권리들을 다루고 있지만 동시에 제 6차 실무그룹 세션 전 의장에게 제출된 우수 사례와 실질적 조치의 과반수가 소득보장, 보건, 폭력과 학대, 장기요양에 한정되어 있어 노인 인권과 노년기 삶에 대한 이해의 폭이 매우 좁음을 보여준다. 교차차별과 누적차별 등 노인차별과 모든 형태의 차별을 방지하고 없앨 수 있는 조치가 거의 전무하다. 노인의 인권, 즉, 재판을 받을 권리, 효과적 치료를 받을 권리, 임종 단계에서의 존엄권, 본인 집에서 노년을 보낼 수 있는 적절한 주거에 대한 권리, 지속적 자기 만족감 및 자기계발, 자율과 자기결정권을 실현하기 위한 조치가 매우 적다.

여기서 알 수 있는 것은 제시된 사례가 아무리 권리 중심적이거나 효과적이다 하더라도 이와는 관계없이 노인 인권 관련 국가의 의무에 대한 대응이나 이해가 부족하다는 것이다.

5.2 유엔 노인권리협약에 대한 찬반 의견

본 섹션에서는 노인 권리에 대한 새로운 유엔 협약을 찬성 혹은 반대하는 주요 주장의 내용을 일부 살펴본다.

5.2.1 새로운 유엔 협약에 대한 찬성 의견

1. 노인은 본인의 인권에 대한 독특하고 특별한 여러 과제에 직면하고 있음.

섹션 2에서 다룬 바와 같이 노인들이 본인의 권리를 온전히 누리는 데 있어 독특하고 특별한 문제에 직면하고 있고 이를 시급히 해결해야 한다는 사실에 대한 폭넓은 공감대가 형성되어 있다. 노인들이 구체적 관심이 필요한 독특한 집단이라는 점을 인정해야 한다는 주장이 계속되고 있다.²²⁸⁾

2. 기존 국제인권법 적용상의 모순이 존재함.

노인의 권리는 기존 보편적 국제인권법의 보호를 받는다. 그러나 이 법을 적용할 때 모순이 존재하고 보편적 규범이 노인에게 공평하게 적용되지 않았다.²²⁹⁾

i. 현 국제보호체계가 부적절함.

섹션 3에서 살펴본 바와 같이 노인 권리와 관련하여 규범, 실행, 감시, 정보 상의 격차가 존재한다. 2012년 전 유엔 인권최고대표는 국제적 차원에서 노인 권리를 보호하기 위한 현 방식이 부적절하다고 명시한 바 있다.²³⁰⁾ ²³¹⁾ 이는 기존 인권문헌 내 규범적 격차에 기인한 것으로 보인다.²³²⁾ 기존의 인권규범 가운데 노인에게 적용하는 구체적 방법이나 노인이라는 맥락에서 구체적으로 언급한 것은 거의 없다. 인권기구들은 지금까지 노인 인권에 관한 체계적 작업 결과를 도출하지 않았다.²³³⁾

228) 인권이사회 자문위원회 위원 정진성 작성 실무보고서, A/HRC/AC/4/CRP. 1, 2009, p.19

229) Quinn, Human Rights and Older Persons in Ireland- Policy Paper, 2013, p.19

230) E/2012/51 p.17

231) 인권이사회 자문위원회 위원 정진성 작성 실무보고서, A/HRC/AC/4/CRP. 1, 2009, p.18

232) 인권이사회 자문위원회 위원 정진성 작성 실무보고서, A/HRC/AC/4/CRP. 1, 2009, p.18

233) E/2012/51 p.6

ii. 특정한 중요 문제들에 대한 관심이 불충분함.

지금까지 노인 권리가 대부분 사회권에 국한되었다는 주장이 있다.²³⁴⁾ 유엔 인권최고대표(OHCHR)는 2010년 행위능력, 사법적 구제에 대한 접근, 의무 정년, 노동권 및 은퇴 후 노동 관련 기준, 사전 동의에 입각한 보건의료, 이동의 자유, 고문으로부터의 자유 등 노인 문제를 다루는데 있어 국제인권체계에서 고려하는 권리의 범위가 매우 좁고 이에 대해 추가 해석이 필요하다고 지적하였다.²³⁵⁾ 2013년 회원국들과의 협의에 기초하여 유엔 기구와 시민사회, OHCHR는 특별히 노인과 관련된 일부 인권문제들, 그 중에서도 연령차별, 일자리에 대한 접근, 적절한 의료서비스와 사회적 보호, 폭력, 학대, 방임으로부터의 보호, 장기요양 등의 문제를 기존의 국제인권협약이나 인권단체와 체계의 관행에서 충분히 다루지 않았다고 결론 내렸다.²³⁶⁾

기존의 국제인권체계에서 부적절하게 다뤄진 다른 분야로는 민간부문과 가족이 노인에게 미치는 영향과 노인 권리를 보호하기 위한 국가적 책임이 이러한 제 3자들에 의해 실행되고 있다는 점, 그리고 응급 및 인도적 대응 대상에서 노인이 제외되어 있는 점을 들 수 있다.²³⁷⁾

iii. 노인 문제가 표면화되지 않음.

유엔 총회는 고령화 문제가 충분히 표면화되지 않았음을 인정하였다.²³⁸⁾ 일례로 심사위원이 지적한 바와 같이 국가와 다른 관계자들이 노인들의 존재를 인식하지 않았기 때문에 나이를 차별 금지근거로 분명히 명시하지 못함으로써 노인이 겪은 차별 경험이 표면화되지 않았다.²³⁹⁾ 또한 노인에 대한 국가의 인권보호

234) Quinn, Human Rights and Older Persons in Ireland- Policy Paper, 2013, p.19

235) Human Rights of older persons: International human rights principles and standards, 배경 보고서, 전문가그룹회의, 2010년 5월, p.17

236) A/HRC/24/25 p.16

237) Judge, The Rights of Older People: International Law, Human Rights mechanisms, and the Case for New Normative Standards, 에이지 컨선, 헬프에이지 인터내셔널, IFA, 2009년

238) A/RES/70/164

239) Judge, The Rights of Older People: International Law, Human Rights mechanisms, and the Case for New Normative Standards, 에이지 컨선, 헬프에이지 인터내셔널, IFA, 2009년, p.11

의무가 기존 유엔 인권규범에 모호하게 되어 있어 구체적 명시의 부재로 인해 이러한 국가의 의무가 국가 및 일반 국민들에게 잘 드러나지 않았으며, 노인의 권리 또한 실행, 감시, 보고에 잘 드러나지 않게 되었다.²⁴⁰⁾

iv. 시행이 부적절함.

여러 국가에서 노인에 관한 국제인권 기준을 국가 법안과 정책에 반영하지 않았다.²⁴¹⁾ 노인에 대한 인권의무 실행방법에 관해 국가들이 조약기구에 어느 정도로 보고하는지 평가하기 위한 다양한 검토가 이루어졌다. 그 결과 부적절하고 일관성 없는 보고가 이루어지고 있으며,²⁴²⁾ 각 조약기구들은 노인의 권리에 관한 일관성 없는 관심을 보여주고 있고,²⁴³⁾ 국가별 인권상황 정기검토(UPR)에서는 노인의 권리에 대해 거의 주목하지 않는다는 것이 밝혀졌다.²⁴⁴⁾

3. 보호체계가 분열됨.

노인들이 본인의 권리를 이해하고 주장하기 위해서는 광범위한 규범을 주의 깊게 들여다보아야 한다. 권리 보호 기준들은 여러 인권서에 분산되어 있다.²⁴⁵⁾ 이러한 문서는 권한의 수준이 각기 다르고, 특별절차의 권고 혹은 조약기구 일반 논평과 같은 법적 구속력이 없는 권고사항을 포함하고 있다. 이와 같이 서로 다른 주제에 집중하고 각기 다른 시간에 작성되고 적용된 이러한 연성법으로는 노인 권리 보호에 필요한 종합적, 체계적 준거틀을 만들 수 없다.²⁴⁶⁾ 유엔 총회는

240) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009년 5월 5~7일

241) 인권이사회 자문위원회 위원 정진성 작성 실무보고서, A/HRC/AC/4/CRP. 1, 2009, p.24

242) 예를 들어, Judge, The Rights of Older People: International Law, Human Rights mechanisms, and the Case for New Normative Standards, 에이지 컨선, 헬프페이지 인터내셔널, IFA, 2009년

243) Human Rights of older persons: International human rights principles and standards, 배경 보고서, 전문가그룹회의, 2010년 5월, p.17

244) 헬프페이지 인터내셔널, International human rights law and older people: Gaps, fragments and loopholes, 2012, p.6

245) Judge, The Rights of Older People: International Law, Human Rights mechanisms, and the Case for New Normative Standards, 에이지 컨선, 헬프페이지 인터내셔널, IFA, 2009년

246) 헬프페이지 인터내셔널, International human rights law and older people: Gaps, fragments and loopholes, 2012, p.6

이러한 국제 노인 보호체계의 다양성과 분열이 일관성 없는 보호 및 노인에 대한 기존 조약 의무의 보고와 감시 상의 차이로 이어질 수 있음을 인지하였다.²⁴⁷⁾

4. 노인의 권리를 다루는 데 있어 법적 구속력이 있는 국제규범이 부재함.

MIPAA가 현재 유일하게 노인에게 특화된 국제규범이지만, 2012년에 유엔 인권최고대표가 인정한 바와 같이 노인을 위한 포괄적인 인권체계를 제공하지 못한다.²⁴⁸⁾ 2016년 회원국, 유엔 기구, 시민사회, 노인 인권 독립전문가 간의 논의 결과 MIPAA가 노인들로 하여금 자신들의 권리를 온전히 누리는 데 부족하다고 주장하였다. 제시된 이유로는 MIPAA가 인권규범이 아니고, 주로 개발론적 관점에서 고령화 문제를 다루고 있으며, 기존 인권보호 상의 격차를 종합적으로 해결할 수 있도록 제정되지 않았다는 점이다.²⁴⁹⁾

매우 중요하지만 MIPAA에서 다루지 않은 인권문제로는 법 앞의 평등과 차별 금지, 효과적 치료에 대한 접근, 고문 및 그 밖의 잔혹한, 비인도적인 또는 굴욕적인 대우나 처벌로부터의 자유가 있고, 실행을 평가할 수 있는 독립적 모니터링과 책무 메커니즘의 부재도 포함된다.²⁵⁰⁾

5. 노인들을 더 이상 무시할 수 없음.

노인들이 전체 인구에서 점점 큰 비중을 차지하고 세계 각지에서 일어나는 사회구조 상 커다란 변화로 인해 이들의 존재감이 갈수록 커지고 있기 때문에 이들을 더 이상 무시할 수 없다는 주장이 제기되고 있다.²⁵¹⁾

6. 노인의 권리에 대한 새로운 협약의 부가가치가 기대됨.

노인의 권리에 대한 새로운 협약이 노인들의 삶을 개선해 줄 수 있는 긍정적인 변화로 이어질 것이라는 주장이 제기되었다. 새로운 협약은:

247) A/RES/70/164

248) E/2012/51 p.5

249) A/HRC/33/44

250) E/2012/51 p.5

251) E/2012/51 p.17

- 노인의 권리를 인권으로 정의하고 이의 폐기는 용납하지 않을 것이다.²⁵²⁾
- 노인 권리에 대한 보호를 범세계적으로 강화할 것이다.²⁵³⁾
- 노인에게 해를 가하는 행위를 금지하고 노년기 평등을 보장하는 의무를 포함하여 노인 인권 보호의 개념을 확대할 것이다.²⁵⁴⁾
- 국제적 차원에서 고령화에 대한 태도 변화를 유도하고,²⁵⁵⁾ 노인을 사회적 집단으로 보는 패러다임 변화를 위한 중요한 플랫폼이 될 것이다.²⁵⁶⁾
- 노인들에게 본인들의 권리에 관한 평등한 접근을 보장할 것이다.²⁵⁷⁾
- 노인과 관련한 국가의 의무와 관련하여 규범에 명시한다.²⁵⁸⁾
- 노인 권리와 이를 위한 국가 의무를 하나의 본문에 통합할 것이다.²⁵⁹⁾
- 노인들이 권리를 온전히 누리는 데 있어 직면한 과제들을 가시화 할 것이다.²⁶⁰⁾
- 노인 권리를 지지하고 교육하며 인식을 고취하고 증진할 수 있는 기반이자 도구가 될 것이다.²⁶¹⁾

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- 252) Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회학회지 브리티시 저널 오브 소셜 워크(2006) 36, 1135-1150
- 253) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, ECLAC, UNFPA, SIDA, 2011
- 254) Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회학회지 브리티시 저널 오브 소셜 워크(2006) 36, 1135-1150
- 255) 고용사회위원회, Report on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations, (2014/2255(INI), A8-0241/2015
- 256) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009년 5월 5~7일
- 257) 고용사회위원회, 유럽연합 의회, Report on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations, (2014/2255(INI), A8-0241/2015
- 258) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, ECLAC, UNFPA, SIDA, 2011, 그리고 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009년 5월 5~7일
- 259) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, ECLAC, UNFPA, SIDA, 2011, 그리고 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009년 5월 5~7일
- 260) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, ECLAC, UNFPA, SIDA, 2011년
- 261) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009년 5월 5~7일, 그리

- 평등과 차별금지를 장려하고 성별과 나이에 근거한 장벽을 없앨 것이다.²⁶²⁾
- 부정적 태도를 변화시키는 데 기여하고,²⁶³⁾ 부정적 고정관념, 연령주의와 연령차별을 없애기 위해 노력할 것이다.²⁶⁴⁾
- 국내 및 국제 법률 분쟁을 해결하는 데 활용될 것이다.²⁶⁵⁾
- 이행중인 국가들로 하여금 국내법과 관례를 협약의 기준에 맞추도록 하는 모니터링 메커니즘을 제공할 것이다.²⁶⁶⁾
- 노인 인권 침해를 바로잡기 위한 책무 메커니즘을 제공할 것이다.²⁶⁷⁾
- 고령화 정책과 관련하여 권리 중심의 접근법을 장려할 것이다.²⁶⁸⁾
- 보다 평등한 자원 배분을 독려할 것이다.²⁶⁹⁾
- 보다 나은 정보수집, 분석, 보급을 독려할 것이다.²⁷⁰⁾

고 Doron & Apter, The Debate Around the need for an International Convention on the Rights of Older Persons, 노년학회지 제론톨로지스트 포럼, 2010년

- 262) Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회학회지 브리티시 저널 오브 소셜 워크(2006) 36, 1135-1150
- 263) 인권이사회 자문위원회 위원 정진성 작성 실무보고서, A/HRC/AC/4/CRP.1, 2009년
- 264) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009년 5월 5~7일; Doron & Apter, The Debate Around the need for an International Convention on the Rights of Older Persons, 노년학회지 제론톨로지스트 포럼, 2010년; 그리고 Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, ECLAC, UNFPA, SIDA, 2011년
- 265) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009년 5월 5~7일, 그리고 Doron & Apter, The Debate Around the need for an International Convention on the Rights of Older Persons, 노년학회지 제론톨로지스트 포럼, 2010년
- 266) Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회학회지 브리티시 저널 오브 소셜 워크(2006) 36, 1135-1150
- 267) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons: Advantages of a convention on the rights of older persons, 2009년 5월
- 268) Huenchan & Rodriguez-Pinero, Ageing and the protection of human rights: current situation and outlook, ECLAC, UNFPA, SIDA, 2011년
- 269) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons, 2009년 5월 5~7일, 그리고 Tang & Lee, Global Justice for Older People: The Case for an International Convention on the Rights of Older People, 영국 사회학회지 브리티시 저널 오브 소셜 워크(2006) 36, 1135-1150
- 270) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons: Advantages of a convention on the rights of older persons, 2009년 5월

- 현재 진행 중인 국가, 시민사회 및 노인 간의 대화를 독려할 것이다.²⁷¹⁾

새로운 유엔 협약에 지지를 표한 회원국

2016년 12월부로 다음의 회원국들이 실무그룹 혹은 나미비아와 부르키나파소와 같이 제네바에 있는 유엔 인권이사회에 제출한 성명서를 통해 새로운 유엔 협약에 지지를 표했다.²⁷²⁾

〈표 6〉 새로운 협약을 지지한 회원국 명단

카리브 제도와 라틴 아메리카 지역 그룹	아프리카 지역 그룹	아시아 태평양 지역 그룹	동유럽 지역 그룹	서유럽 및 기타 지역 그룹
아르헨티나 베냉 브라질 칠레 콜롬비아 코스타리카 쿠바 도미니카 공화국 엘살바도르 과테말라 멕시코 니카라과 파나마 파라과이 페루 우루과이	부르키나파소 이집트 적도 기니 에리트레아 가나 케냐 말라위 나미비아 모로코 세네갈 남아프리카 우간다	방글라데시 인도네시아 말레이시아 네팔 필리핀 카타르 사우디아라비아 베트남	슬로베니아	

유엔 업무 내 노인 인권을 보다 광범위하게 지원

동지그룹(Group of Friends)은 비공식 집단으로서 뜻을 같이하는 회원국들이 우려되는 사안에 관해 공식 지역 그룹과 공조하기 위해 설립하였다.

다음의 회원국들은 노인들을 위한 제네바 동지그룹(Group of Friends of

271) 유엔 경제사회국, 전문가그룹회의, Rights of Older Persons: Advantages of a convention on the rights of older persons, 2009년 5월

272) 회원국 성명서 <https://social.un.org/ageing-working-group/eighthsession.shtml> 참조, 그리고 각 세션에서의 저자 노트 참조

Older Persons in Geneva)의 회원국들로 제네바에서 이루어지고 있는 유엔 업무 전반에 걸쳐 노인 권리를 증진하고자 하는 국가들이다: 아르헨티나, 오스트리아, 브라질, 엘살바도르, 나미비아, 포르투갈, 몬테네그로, 싱가포르, 튀니지, 슬로베니아, 우루과이.

다음의 회원국들은 뉴욕 동지그룹으로서 뉴욕에서 실행되고 있는 유엔 업무 전반에 걸쳐 노인 권리를 증진하고자 하는 국가들이다: 아르헨티나, 볼리비아, 브라질, 바베이도스, 칠레, 코스타리카, 도미니카 공화국, 에콰도르, 엘살바도르, 과테말라, 온두라스, 인도네시아, 케냐, 말레이시아, 멕시코, 니카라과, 파나마, 페루, 카타르, 슬로베니아, 남아프리카, 트리니다드토바고, 터키, 우루과이.

새로운 국제인권규범에 대한 회원국들의 관심을 평가할 수 있는 다른 방법으로는 실무그룹으로 하여금 유엔 총회에 국제법률규범을 제안할 것을 고려하고 이와 관련된 주요 요소들을 제시할 것을 강제하는 2012년 A/RES/67/139 결의안에 찬성하는 국가들을 확인할 수도 있다. 기권율이 높아 투표 자체에 논란이 있지만, 해당 결의안은 채택되었고 다음의 회원국들이 찬성표를 던졌다:

아르헨티나	엘살바도르	니카라과
방글라데시	적도 기니	파나마
베냉	에리트레아	파라과이
볼리비아	에티오피아	페루
브라질	가봉	필리핀
브루나이	감비아	세네갈
캄보디아	과테말라	싱가포르
차드	기니	남아프리카
칠레	가이아나	스리랑카
콜롬비아	아이티	타지키스탄
콩고	온두라스	태국
코스타리카	인도네시아	토고
쿠바	카자흐스탄	투르크메니스탄
북한	말레이시아	탄자니아
도미니카	몰디브	바누아투
도미니카 공화국	말리	베네수엘라
에콰도르	모리셔스	베트남
이집트	멕시코	

5.2.2 새로운 유엔 협약에 대한 반대 의견

노인 권리에 대한 새로운 협약에 반대하는 기존 문헌에는 회원국들의 관심이 상대적으로 낮았다.²⁷³⁾ 다음의 논거는 2011년~2016년 실무그룹 세션에 발표된 회원국들의 성명서에서 발췌하였다.

1. 노인의 삶에 협약이 미치는 영향이 미비함.

이와 같은 논거에는 새로운 협약이 노인들이 직면한 문제를 해결해 주지 못할 것이고,²⁷⁴⁾ 새로운 협약이 노인들이 처한 상황에 대한 긍정적 영향을 보장하지 않으며,²⁷⁵⁾ 실무그룹에서 인정한 실행, 감시, 정보 격차를 새로운 협약이 해결하지 못하며,²⁷⁶⁾ 새로운 협약이 시의 적절하고 공고한 변화를 가져오지 못 할 것²⁷⁷⁾이라는 논점이 포함되어 있다.

2. 기존의 인권체계가 적합함.

기존 인권체제에 규범적 격차가 없으며 노인 권리는 기존 조약을 통해서도 충분히 보호받고 있다는 의견이 존재한다. 국제적 인정을 받은 현재의 모든 인권기준과 원칙에는 차별 없이 노인을 보호하도록 명시되어 있다. 새로운 협약은 기존 보호 규범에 큰 도움이 되지 않을 것이고, 기존 인권조약의 복사본에 지나지 않을 것이다.²⁷⁸⁾

273) Doron과 Apter, The Debate Around the need for an International Convention on the Rights of Older Persons, 노년학회지 제론톨로지스트 포럼, 2010년

274) 알바니아, 제3차 세션, 2012년,
<https://social.un.org/ageing-working-group/documents/Albania.pdf>

275) 스위스, 제4차 세션, 2013년,
<https://social.un.org/ageing-working-group/govstatementfourth.shtml>

276) 스위스, 제5차 세션, 2014년,
<https://social.un.org/ageing-working-group/govstatementfifth.shtml>

277) 캐나다, 제6차 세션, 2015년,
<http://statements.unmeetings.org/media2/7650792/canada-eng-.pdf>

278) 미국, 스위스, 유럽연합, 제3차 세션, 2012년,
<https://social.un.org/ageing-working-group/govstatementthird.shtml>; 미국, 유럽연합, 제4차 세션, 2013년,
<https://social.un.org/ageing-working-group/govstatementfourth.shtml>; 미국, 유럽연합

3. 보호 상의 격차는 기존 조약의 실행 보완을 통해 해결 가능함.

기존 기준의 적용과 기존 체제를 통해서도 보호 상의 격차를 충분히 해결할 수 있고 국가 행위에 대한 감시를 개선할 수 있다.²⁷⁹⁾ 게다가 그 동안 인권규범이 확산되었다. 새로운 협약보다는 기존 협약을 더욱 효과적으로 실행하고, 특별 절차와 국가별 인권상황 정기검토를 포함한 기존의 인권기구를 통해 노인 권리를 주류에 편입시켜야 한다.²⁸⁰⁾ 많은 보호상 격차는 MIPAA 실행을 통해 해결할 수 있다.²⁸¹⁾

4. 현 체계에 과부하가 걸려 있어 새로운 협약을 다룰 여유가 없음.

새로운 협약은 이미 업무가 과중 된 유엔 보고 및 감시체계에 부담만 더할 뿐이다.²⁸²⁾

5. 새로운 협약의 협상 비용이 너무 높음.

기나긴 새로운 협상 과정보다는 기존 기준의 즉각적인 실행에 자원을 집중해야 한다.²⁸³⁾

합, 캐나다, 제5차 세션, 2014년,

<https://social.un.org/ageing-working-group/govstatementfifth.shtml>; 캐나다, 제6차 세션, 2015년, <http://statements.unmeetings.org/media2/7650792/canada-eng-.pdf>

279) 유럽연합, 제3차 세션, 2012년,

<https://social.un.org/ageing-working-group/govstatementthird.shtml>; 알바니아, 제4차 세션, 2013년,

<https://social.un.org/ageing-working-group/documents/fourth/statements/Albania.pdf>

280) 알바니아, 제3차 세션, 2012년,

<https://social.un.org/ageing-working-group/documents/Albania.pdf>

281) 유럽연합, 제3차 세션, 2012년,

<https://social.un.org/ageing-working-group/govstatementthird.shtml>

282) 캐나다, 제5차 세션, 2014,

<https://social.un.org/ageing-working-group/govstatementfifth.shtml>; 캐나다, 제6차 세션, 2015, <http://statements.unmeetings.org/media2/7650792/canada-eng-.pdf>

283) 스위스, 제4차 세션, 2013년,

<https://social.un.org/ageing-working-group/govstatementfourth.shtml>; 캐나다, 제5차 세션, 2014, <https://social.un.org/ageing-working-group/govstatementfifth.shtml>

6. 오랜 시간이 필요함.

새로운 협약을 위해 협상하고 시행하기까지 수년이 걸릴 것이다. 284)

새로운 협약에 반대한 회원국

다음의 회원국들은 실무그룹에서 성명서를 통해 새로운 협약 제안을 공식 반대하였다: 알바니아, 오스트리아, 캐나다, 덴마크, 인도, 네덜란드, 러시아 연방, 스위스, 미국.²⁸⁵⁾

회원국들 중 일부는 새로운 협약에 공식 반대하지는 않았지만 새로운 협약의 필요성에 대한 논의를 진행하기 전 기존 규범을 제대로 활용하자고 주장하였다. 이는 새로운 협약에 대한 의구심을 나타낸 것으로 해석할 수 있다. 이러한 회원국들로는 중국, 프랑스, 독일, 일본, 노르웨이, 파키스탄, 스웨덴이 있다.²⁸⁶⁾

193개 유엔 회원국의 과반수가 새로운 협약과 관련한 찬반의견을 아직 공식 발표하지 않았다.

5.3 다양한 국제 NGO의 의견

본 섹션은 다양한 NGO의 입장을 세 가지 분야로 요약한다. 노인의 권리에 대한 새로운 협약이 필요한지 여부와 필요하다면 그 이유, 목적은 무엇이 되어야 하는지, 그리고 어떠한 권리가 포함되어야 하는 지로 분류하였다. 다음의 개요는 실무그룹 세션에서 공식 발표된 INGO의 성명서, 발표된 문서, 저자가 INGO에 직접 보낸 다음의 물음에 보내온 답변에 기초하였다.

1. 노인의 권리에 대한 새로운 협약이 필요한가?
2. 그렇지 않다면 이유는?

284) 미국, 제3차 세션, 2012년,

<https://social.un.org/ageing-working-group/govstatementthird.shtml>

285) 실무그룹에서 회원국들이 발표한 성명서는 <https://social.un.org/ageing-working-group/> 참조; 각 세션에서 작가 노트 참조, 미발표.

286) 회원국들의 성명서는 <https://social.un.org/ageing-working-group/eighthsession.shtml> 참조, 그리고 각 세션에서의 저자 노트 참조

3. 그렇다면:

이유는?

새로운 협약의 목표는 무엇이 되어야 하는가?

새로운 협약에는 어떠한 권리가 포함되어야 하는가?

활용 가능한 정보를 모두 얻는 데 부족한 면이 있었다.

• AARP²⁸⁷⁾

새로운 협약 지지 여부: 지지함

이유: 기존의 국제 및 지역 인권법은 노인의 권리를 충분히 보호하지 못한다. 노인의 권리가 국제인권협약에 포함되어 있지만 구체적이지는 않다. 수많은 국제 협약에 걸쳐 여러 기준들이 분산되어 있다. 고령화되어 가는 인구집단에 대한 권리를 다루는 정책이 부족하다.

새로운 협약의 목표: 노인 권리의 본질과 이를 보호하는 정부의 의무를 분명히 규명하는 것이다. 새로운 협약은 연령차별을 방지하고 정책결정의 방향을 제시하며 고령화 문제를 최우선 과제로 삼아야 한다.

새로운 협약의 기본 원칙: 노인의 가치와 기여도, 노인을 포함한 모든 사람들의 타고난 존엄에 대한 존중, 평등과 차별방지, 독립성, 자율성, 사회구성원으로서 온전하고 효과적인 참여와 인정, 정보에 대한 접근, 자아실현, 자기계발, 세대 간 결속과 같은 인권을 포함하지만 이에 국한되지 않는다.

287) 2011년 제2차 실무그룹 세션과 2013년 제4차 세션에서 발표한 성명서는 각각 <https://social.un.org/ageing-working-group/documents/Statement%20AARP%200EWG.pdf> 및 <https://social.un.org/ageing-working-group/documents/fourth/statements/AARP.pdf> 참조; 그리고 AARP Input for the Open-ended Working Group on Aging Regarding Human Rights Instrument for Older Persons, 2013년, <https://social.un.org/ageing-working-group/documents/fourth/AARP.pdf>

새로운 협약에 포함되어야 할 권리: 삶의 질에 대한 권리, 건강권, 지원과 서비스를 받을 권리, 독립적 삶에 대한 권리, 누구도 노인을 해하거나 굴욕감을 주거나 별하거나 고문할 권리가 없음, 모든 형태의 폭력으로부터 보호받을 권리, 노동권, 적절한 생활수준에 대한 권리, 재산을 소유, 매각, 증여, 상속받을 권리, 법 앞에 평등한 권리를 갖는 사람으로서 인정받을 권리, 사법제도에 접근할 권리, 자유롭게 안전하게 살 권리, 만나고 싶은 사람을 자유롭게 만날 수 있는 권리, 타인에게 해가 되지 않는 한 언론의 자유를 누릴 권리, 사생활과 가정생활을 존중 받을 권리, 자유롭게 이동할 권리, 자연재해, 인도주의적 위급상황 혹은 무력 충돌 발생했을 시 보호받을 권리.

● 에이지 인터내셔널(Age International)²⁸⁸⁾

새로운 협약 지지 여부: 지지함

이유: 기존 협약은 국제적 발전 과정에서 고령화와 노인에 대한 적절한 대응이 부족하고 노인이 처한 상황을 문제로 인식하는 정책이 존재하는 지 의문이며, 연령대를 망라하여 보다 긍정적 사회를 건설하기 위한 해결책을 도출할 가능성이 낮다. 연령차별주의는 그 어떠한 단일 요소보다 여성과 남성 노인의 보다 나은 삶과 존엄성을 저해한다. 반면 인권에 기반 한 대응은 모든 사람들에게 전 생애 주기에 존엄하게 살며 자신의 잠재력을 실현시킬 수 있도록 한다. 모든 이들의 권리가 존중 받기 위해서는 이러한 권리들이 법적 체계 내에 분명히 명시되어야 한다.

새로운 협약의 목표: 새로운 협약은 권리가 보편적이고, 나이에 따라 달라지지 않으며, 삶의 다양한 단계에 따라 특별한 보호가 필요할 수 있음을 인정한다. 전

288) A UN convention on the rights of older people: time for the UK to lead, 에이지 인터내셔널, 2015년,
http://www.ageuk.org.uk/Documents/EN-GB/Events/Parliamentary%20Receptions/Time_for_the_UK_to_lead.pdf?dtrk=true 참조; 그리고 Consultation Response Main elements for inclusion in an international human rights instrument for older people, Age UK. 에이지 인터내셔널, 2013년,
<https://social.un.org/ageing-working-group/documents/fourth/AgeUK.pdf> 참조

세계적 고령화에 대한 논의를 완전히 바꾸고, 모든 노인이 갖는 권리를 분명히 명시하며, 사회에 계속 공헌할 수 있도록 해야 한다. 긍정적 변화를 위한 플랫폼 역할을 하고 보다 나은 정책적 대응을 격려해야 한다. 노인이 정부에게 책임을 물을 때 활용 가능한 도구가 되어야 한다. 새로운 협약을 개발, 비준, 실행 과정은 노인의 권리와 요구를 정부의 중요 의제로 올릴 수 있는 동력이 되어야 한다.

새로운 협약의 기본 원칙: 다음의 권리를 포함하지만 여기에 국한되지 않는다: 노인을 포함한 모든 사람들의 타고난 존엄성이 존중 받을 권리, 차별금지, 독립성, 자율성, 사회구성원으로서 온전하고 효과적으로 인정받고 참여할 권리, 성별에 관계없이 모든 노인이 평등할 권리, 기회의 평등, 정보에 대한 접근, 자기개발, 세대 간 평등 및 인권에 관한 생애주기적 접근.

새로운 협약에 포함되어야 할 권리: 다음의 권리를 포함하지만 여기에 국한되지 않는다: 생존권, 건강권, 지원과 서비스를 받을 권리, 자신의 집에서 독립적으로 살며 지역사회에 참여할 권리, 고문 및 그 밖의 잔혹한, 비인도적인 또는 굴욕적인 대우나 처벌로부터 자유로울 권리, 모든 형태의 폭력으로부터 보호받을 권리, 노동권, 적절한 생활수준에 대한 권리, 사회보장을 받을 권리, 교육권, 재산권과 상속권, 금융서비스에 대한 접근권, 법 앞에 평등한 사람으로서 인정받을 권리, 사법제도에 대한 접근권, 자신의 삶에 관한 결정을 내리고 그 결정을 위한 지원을 받을 권리, 정치적 및 문화적 삶에 참여할 권리, 연구 및 기타 과학과 기술 발전으로부터 혜택을 받을 권리, 자유롭고 안전하게 살며 나이 혹은 합법적 사유 없이 억류되지 않을 권리, 결사의 자유를 누릴 권리, 표현의 자유를 누릴 권리, 정보의 습득과 전달을 요구할 권리를 포함한 종교와 언론에 대한 권리, 사생활과 가정생활을 존중 받을 권리, 자유롭게 이동할 권리, 자연재해, 인도주의적 위급 상황 혹은 무력 충돌 발생했을 시 보호받을 권리.

● **에이지 플랫폼 유럽(AGE Platform Europe)**²⁸⁹⁾

새로운 협약 지지 여부: 지지함

이유: MIPAA는 노인 권리의 모든 영역을 다루지 못하고, 법적 구속력과 실행 및 감시체제의 부족으로 인해 노년기 관련 사회적 현실이 악화되고 있는 상황에서 충분한 정책적 변화를 유도하는 데 실패하였다.

새로운 협약의 목표: 노인들이 자신들의 권리를 평등하게 누리고 사회에 참여할 수 있도록 해야 한다. 새로운 협약은 노인의 취약성에 중점을 두거나 그들에게 낙인을 찍어서는 안 된다. 협약은 능동적 노령화 모델에 영감을 주는 존재가 되어야 한다. 협약은 노령화의 부정적 인식을 타파하고, 연령차별을 해소하며, 노인을 받아들이는 데 걸림돌이 되는 장벽을 없애고 이들이 사회에 지속적으로 기여할 수 있도록 해야 한다. 협약은 고령화라는 맥락에 이러한 권리와 자유를 어떻게 접목할 수 있는지, 하나의 문서로 성문화 하고 노인들이 자신의 권리를 효과적으로 행사하기 위해 필요한 조치가 무엇인지, 그리고 노인들이 명을 다할 때까지 노년의 존엄을 누릴 수 있도록 권리 보호가 강화되어야 하는 영역을 명확히 해야 한다.

유엔 협약은 노인들이 사회에서 평등한 가치를 지니고 있음을 인정하고, 그들의 권리를 향유하는 데 걸림돌이 되는 구조적, 문화적 장벽에 대중의 관심을 집중시킬 것이다. 국가가 기존의 보편적 인권규범의 의무를 수행하고 노인들이 자신의 권리를 주장하는 데 활용할 수 있는 체제 확립을 독려하는데 필요한 변화를 규정할 것이다. 협약은 노인들로 하여금 자신들의 권리에 대한 인식을 증진하

289) 2016년 제7차 실무그룹 세션에 제출된 성명서 <https://social.un.org/ageing-working-group/documents/seventh/AGEEurope.pdf> 참조; 고령화 개방형 실무그룹과 관련한 NGO 조언을 구하기 위한 유엔 DESA 요구에 에이지 플랫폼 유럽이 제공한 내용, 2013년, http://www.age-platform.eu/images/AGE_UN_DESA_input_FINAL.pdf; Our vision on human rights in 7 principles: Older people take a stand on their human rights!, 에이지 플랫폼 유럽, 2016년, <http://www.age-platform.eu/sites/default/files/AGE%20Human%20rights%20Manifesto%20Dec2016.pdf>

고, 권리 보유자로서의 힘을 부여하며, 종종 침해당한 인권을 보고하는 일을 주저하게 만드는 내재된 연령차별적 고정관념을 타파하는데 도움이 될 것이다.

새로운 협약의 기본 원칙: 노인의 가치와 기여도를 인정, 차별금지, 사회구성원으로서 온전하고 효과적으로 참여하고 인정받음, 노인의 내재된 존엄성 존중, 자율성과 독립성, 세대 간 결속.

새로운 협약에 포함되어야 할 권리: 국제인권규범은 다음을 포함하지만 여기에 국한되지 않은 노년기 삶의 모든 부분을 다루어야 한다: 평등 및 차별금지, 생존권, 건강권 및 장기요양, 자율성, 폭력과 학대로부터의 자유, 노동권, 사회적 보호와 적절한 생활수준에 대한 권리, 사회구성원으로서 인정받을 권리 및 정치적, 사회적, 문화적 삶에 참여할 권리, 교육권 및 평생교육에 대한 권리, 사법제도에 대한 접근 및 법적 도움을 받고 정보에 접근할 수 있는 권리, 사생활과 가정생활을 존중 받을 권리.

- 알츠하이머병 인터내셔널(Alzheimer's Disease International)²⁹⁰⁾

새로운 협약 지지 여부: 지지함

새로운 협약의 목표: 치매 유무와 상관없이 노인들이 자신의 모든 권리를 온전히 향유할 수 있어야 한다.

- 글로벌 에이징 네트워크(The Global Ageing Network, formerly International Association of Homes and Services for the Ageing, 전 고령화를 위한 주거 및 서비스 국제연합)²⁹¹⁾

새로운 협약 지지 여부: 지지함

290) 노인 권리에 관한 공개실무그룹을 위한 알츠하이머병 인터내셔널의 성명서, 2016년, <https://www.alz.co.uk/sites/default/files/pdfs/Statement-UN-Rights-Older-Persons.pdf>

291) 유엔 고령화 개방형 실무그룹에 제출한 글로벌 에이징 네트워크의 성명서, 2016년, http://globalageing.org/wp-content/uploads/2016/12/Statement-from-the-Global-Ageing-Network-to-the-UN-OEWGoA_Dec2016.pdf

이유: 전 세계 국가에 연령차별주의가 암암리에 퍼져 있다. 노인들은 대부분 저평가되어 있고, 일정 나이에 도달하여 비생산적 혹은 부담으로 받아들여지고 있기 때문에 전체 노인이 일방적으로 똑같은 취급을 받고 있다. 연령차별은 널리 확산되어 있다. 노령화와 노인에 대한 우리의 태도는 전반적으로 부정적이고 대부분 방치되어 있다.

새로운 협약의 목표: 새로운 협약은 노인에 대한 폭력이 처벌 대상이고, 노인들이 일자리를 갖고 유지할 수 있으며, 적절한 보건 서비스에 접근할 수 있는 사회 부조 혹은 연금 혜택을 받고, 요양보호사의 돌봄 지원을 받을 수 있도록 보장해야 한다. 이러한 협약은 노인들을 젊은 세대와 평등한 위치에 놓일 수 있게 해야 하고, 모든 인간이 연령, 국적, 시민권, 인종, 민족성, 언어, 성별, 성적 취향, HIV 감염 여부, 능력에 상관없이 단지 인간이기 때문에 인권을 부여 받는다는 점을 인식해야 한다.

● 노인 권리를 위한 국제연맹(GAROP)²⁹²⁾

새로운 협약 지지 여부: 지지함

이유: 연령차별은 전 세계적으로 허용되고 있고, 노인들은 가정, 지역사회, 기관 차원에서 두루 차별과 인권침해를 경험한다. 유례없는 인구고령화 현상은 노년에 차별과 인권침해를 경험할 수 있는 사람의 수가 점점 증가하고 있음을 의미한다. 국제인권법이 모든 연령의 사람들에게 적용됨에도 불구하고 노인만을 위한 구체적인 언급은 매우 드물다. 그 결과 노인의 권리는 인권 감시 체제, 정부, 인권단체, 시민사회에 의해 충분히 보호되고 있지 않다.

새로운 협약의 목표: 새로운 협약은

- 연령차별이 도덕적, 법적으로 용납되지 않는다는 확정적이고 보편적인 입장을 제공할 것이다.

292) <http://www.rightsofolderpeople.org/why-we-need-a-convention/> 그리고 제4차 실무그룹 세션에 제출된 성명서, <https://social.un.org/ageing-working-group/documents/fourth/statements/The%20Global%20Alliance.pdf> 참조

- 책무 메커니즘과 더불어 법적 구속력이 있는 보호 장치를 마련할 것이다.
- 의무를 가진 자와 권리를 가진 자들이 노인에 대한 자신들의 권리와 책임이 무엇인지를 투명하게 규명할 것이다.
- 현재 여러 다른 규범과 자료에 분산되어 있는 기존 인권기준을 한 데 모을 것이다.
- 모든 불가분의 권리들을 하나의 문서로 통합함으로써 현재 노인의 경제적, 사회적 권리에 대한 분산된 초점을 바로 잡을 것이다.
- 정부, 기부자, NGO 의제에 연령차별과 노인 권리문제를 보다 중요하게 다룰 것이다.
- 고령의 여성과 남성이 겪는 복잡하고 다양한 형태의 차별에 관심을 더 기울이고, 이해도를 높이며, 관련 해결책을 제시할 것이다.
- 권리, 평등, 사회정의를 기반으로 인구고령화에 대한 정책적 대응을 이끌 수 있는 체계를 제공할 것이다.
- 노인과 이들을 대변하는 사람들에게 노인의 권리를 주장하는 데 있어 강력한 지지기반과 교육적 도구를 제공할 것이다.
- 노인을 단순한 복지 수령인에서 책임과 권리를 동시에 지닌 자로의 패러다임 변화를 장려할 것이다.

새로운 협약에 포함되어야 할 권리: 다양한 차별과 실질적 권리의 종합적 범위를 포함하여 연령에 따른 모든 형태의 차별 금지.

- 그레이 팬더(Gray Panthers)²⁹³⁾

새로운 협약 지지 여부: 지지함

새로운 협약의 목표: 사회의 모든 부문에서 공정하고, 경제적으로 지속 가능하며 모두를 포괄하는 미래를 보장하는 것.

293) 노인 인권규범과 관련한 고령화 개방형 실무그룹을 위한 그레이 팬더의 조언, 2013년, <https://social.un.org/ageing-working-group/documents/fourth/GrayPanthers.pdf>, 그리고 제4차 실무그룹 세션에 제출된 성명서 Group <https://social.un.org/ageing-working-group/documents/fourth/statements/Gray%20Panthers.pdf> 참조

새로운 협약의 기본 원칙: 노인의 가치를 인정, 노인을 기여자로 인식, 세대 간 결속 도모.

새로운 협약에 포함되어야 할 권리: 차별금지, 정신건강관리를 포함한 건강관리, 평등한 접근, 노동권, 학대와 가학행위로부터의 자유, 경제적 안정과 생산성에 대한 권리, 위급상황에서의 권리, 장기요양에 대한 권리, 시민, 문화, 정치적 일에 포함될 권리, 정책결정에 평등하게 참여할 권리, 이동의 자유, 생활유지와 식량안전에 대한 권리, 문화적 권리를 평등하게 누릴 권리, 임종을 포함한 삶의 모든 단계에서 존엄성과 개인의 완전성을 유지할 권리를 포함하지만 이에 국한되지 않는다. 여성 노인의 문제와 관심사에 특히 주목할 필요가 있다.

● **헬프에이지 인터내셔널(HelpAge International)**²⁹⁴⁾

새로운 협약 지지 여부: 지지함

이유: 노인 권리에 관한 새로운 국제협약은 하나의 규범으로서 모든 사람이 지금과 미래에 다른 이들과 동등한 조건에서 노년에 자신의 인권을 누릴 수 있도록 하는 가장 효과적인 방법이다. 국제인권법 내에서 노인의 존엄성을 박탈하는 법률, 상황, 제도적 요인들을 명확하게 정의하고 이를 밝혀내지 못함에 따라 노인 권리의 보호와 증진 상의 격차가 발생하고, 국제인권체계 전반에 걸쳐 노인들을 더욱 주목 받지 못하게 만들었다.

294) Why it's time for a new convention on the rights of older people, 헬프에이지 인터내셔널, 2009년, [file:///ven-cfs-3/RedirectedFolders\\$/test.ha2/Downloads/Why%20convention%20older%20people.pdf](file:///ven-cfs-3/RedirectedFolders$/test.ha2/Downloads/Why%20convention%20older%20people.pdf); International human rights law and older people: Gaps, fragments and loopholes, 헬프에이지 인터내셔널, 2012년, <https://social.un.org/ageing-working-group/documents/GapsinprotectionofolderpeoplesrightsAugust2012.pdf>; 제3차 실무그룹 세션에 제출된 성명서, 2012년, <https://social.un.org/ageing-working-group/documents/HelpAgeInternationalopeningstatement.pdf>; A new convention on the rights of older people: a concrete proposal, 헬프에이지 인터내셔널, 2015년, <https://social.un.org/ageing-working-group/documents/sixth/HelpAgeInternational.pdf> 참조

인권이 노인에게 적용되는 방식에 대한 체계적이고 포괄적이면서도 명확한 표현의 부재로 인해 몇 가지 문제가 발생하였다: 규범의 여러 분야에 격차가 발생했고, 노인의 권리가 국제인권체계 내에서 계속 무시되었고 그나마 있었던 관심도 분산되고 분절되어 있으며, 노인 인권에 관한 국가 기준 또한 일관되지 않고 부적절한 경우가 많았고, 국가와 조약기구 위원회 모두 검토 시 연령의 중요성을 인지하지 못했으며, 연령차별은 법적 및 실제적으로 계속 용인되어 왔다.

새로운 협약은 노인에게 깊은 낙인을 찍는 비인도적인 연령차별적 태도를 불식시키고, 현재 사회 전반에 걸쳐 우리가 노년기와 노인들에게 대응하는 방식을 바꾸기 위해 노년기의 존엄, 평등, 자율성, 자기실현을 증진할 수 있는 규범과 기준을 마련하는 데 반드시 필요하다. 국가가 노인에게 갖는 인권의무를 분명히 규명함으로써 노년기 인권을 법적 및 실제적으로 증진하고 보호하는 조치를 개선할 것이다. 또한 노인에 대한 인권 적용방식을 분명히 명시함으로써 사람들이 노년기에 자신의 권리를 이해하고 주장할 수 있도록 할 것이다.

새로운 협약의 목표: 새로운 협약의 목표는 노년기에 모든 인권을 온전하고 평등하게 향유하고 이를 보호할 수 있도록 평등을 증진하고 가능하게 만드는 것이다. 협약의 범위에는 다른 형태의 차별과 더불어 혹은 연령 한 가지를 근거로 발생하는 권리 박탈 혹은 차별의 대상이 되는 모든 사람들을 반드시 포함시켜야 한다.

새로운 협약의 기본 원칙: 차별금지, 존중, 존엄, 자율성, 평등, 자기실현과 자기계발, 사회구성원으로서 온전하고 효과적으로 인정받고 참여하는 것, 다름과 다양성을 존중 받는 것, 접근성 등을 포함하지만 이에 국한되지 않는다.

새로운 협약에 포함되어야 할 권리: 노년기의 모든 인권을 온전하고 평등하게 향유할 수 있도록 새로운 협약은 노년에 받을 수 있는 모든 형태의 차별을 금지하고, 삶의 모든 단계에서의 모든 인권을 강조, 확인, 명시하고, 국가가 개인이 노년기의 권리를 행사하는 데 무엇이 필요한지를 구체적으로 명시해야 한다.

권리에는 다음을 포함하지만 여기에 국한되지 않는다: 평등권과 차별금지, 자율성과 독립권, 법 앞에 평등할 권리, 자기실현에 대한 권리, 여가에 대한 권리,

생명권, 존엄한 죽음에 대한 권리, 온전하고 효과적인 참여권, 자신의 집에서 나
이들 권리, 주거권, 환경권, 이동권, 접근권, 독립적 삶을 위한 장기적 지원에 대
한 권리, 사생활과 가정생활에 대한 권리, 성적 정체성과 표현에 대한 권리, 모든
형태의 폭력과 학대로부터 자유로울 권리, 고문 및 그 밖의 잔혹한, 비인도적인
또는 굴욕적인 대우나 처벌의 방지에 관한 협약으로부터 자유로울 권리, 노동권,
적절한 생활수준에 대한 권리, 사회보장과 사회적 보호에 대한 권리, 건강권, 정
보에 대한 권리, 평생교육과 학습에 대한 권리, 재산권, 재판을 받을 권리, 표현
의 자유에 대한 권리, 집회결사의 자유에 대한 권리, 개인의 자유에 대한 권리,
이동과 국경 선택의 자유에 대한 권리, 인도주의적 보호를 받을 권리, 국제협력.

특히 위험한 상황에 처한 노인들의 권리를 보호하는 데 특별한 관심을 두어야
한다. 이러한 상황에는 다음이 포함되지만 여기에 국한되지 않는다: 성별, 연령,
성취취향 및/혹은 혼인여부와 관계된 차별이 서로 교차하거나 시간이 지남에 따
라 증가하는 여성 노인, 주거형 및 장기요양 시설에 거주하는 노인 (이 때에는
이동의 자유와 관련), 감옥, 수용소 등과 같은 환경에 자유를 박탈당한 노인, 인
도주의적 위기에 빠진 노인, 장애 노인, 치매를 앓는 노인, 레즈비언, 게이, 양성
애, 성전환자, 인터섹스 노인 등 고령의 성 소수자들.

● 휴먼라이츠워치(Human Rights Watch)²⁹⁵⁾

새로운 협약 지지 여부: 지지함

이유: 노인들은 자신의 권리와 관련해 시급히 해결해야 할 문제에 직면해 있다.
그러한 문제로는 시설에서 생활하는 노인들이 자신의 권리를 온전히 누리지 못
하는 상황, 인도주의적 응급사항에 처한 노인들, 그리고 배우자가 사망한 여성
노인을 들 수 있다.

새로운 협약의 목표: 노인의 권리와 존엄을 증진하고 보호한다.

295) Human Rights Watch Calls for Better protections for the Rights of Older People,
2015년 9월,
<https://www.hrw.org/news/2016/09/15/human-rights-watch-calls-better-protections-rights-older-people>

● **노인학 및 노인의학 국제협회(International Association of Gerontology and Geriatrics)**²⁹⁶⁾

새로운 협약 지지 여부: 지지함

이유: 노인의 인권이 충분히 보호되지 않고 있으며 많은 노인들이 빈곤, 질병, 박탈, 고립, 방임, 심지어 폭력과 학대로 고통 받고 있다. 이러한 상황은 사회에서 노인이 차지하고 있는 취약한 입지에서 비롯한다. 기존 유엔 규범으로 보호된 일반 인권은 이러한 특수한 형태의 인권 취약성을 보호하는데 충분하지 못하다. 특히 개발도상국에서는 관련 기준들이 낮으며, 노인을 효과적으로 보호하는데 부적절하다. 기존 인권조항을 발전시키는 일이 반드시 필요하지만 식량에 대한 권리, 건강권, 사회보장에 대한 권리 등 제한된 분야만을 다루기 때문에 노인 인권을 보호하는 데에는 충분조건이 되지 못한다. 성장 중심의 대처는 낮은 사회적 지위, 고립, 연령차별, 방임, 폭력, 학대와 같이 노인들이 직면한 인권관련 문제를 외면하고 있다.

새로운 협약에 포함되어야 할 권리: 개발단계와 무관하게 전 세계적으로 노인의 근본 권리를 다루는 종합적인 국제법규가 필요하다.

● **국제사회복지협의회(International Council on Social Welfare)**²⁹⁷⁾

새로운 협약 지지 여부: 지지함

이유: 노인들에게 영향을 주는 규범적 격차로부터 초래되는 인권보호 상의 부적절성이 존재한다. 노인들은 광범위한 차별, 방임, 폭력에 직면해 있고, 의미 있는 사회적 보호를 받지 못하는 상황이다. MIPAA는 국가 차원에서는 인지도가 낮

296) 제4차 실무그룹 세션에 제출된 성명서, 2013년,

<https://social.un.org/ageing-working-group/documents/fourth/statements/IAGG.pdf>

297) 제3차 및 4차 실무그룹 세션에 제출된 성명서, 2012년,

<https://social.un.org/ageing-working-group/documents/OEWCA.pdf> 그리고 2013년

<https://social.un.org/ageing-working-group/documents/fourth/statements/International%20Council%20on%20Social%20Welfare.pdf>

아 법적 구속력이 없고, 수많은 약속들이 문서상으로만 머물러 있다. 많은 사회에서 노인 대우를 개선하는 결정적인 국가 차원의 조치를 촉진하기 위해서는 MIPAA보다 더 강력한 도구가 필요하다.

새로운 협약에 포함되어야 할 권리: 사회적 보호에 대한 권리를 포함

- 국제노령연맹(International Federation on Ageing, IFA)

국제노령연맹은 GAROP와 입장을 같이한다.²⁹⁸⁾

- 국제장수센터 - 세계연합(International Longevity Centre - Global Alliance, ILC-GA) 그리고 세계노인학대방지 네트워크(International Network for the Prevention of Elder Abuse, INPEA)²⁹⁹⁾

새로운 협약 지지 여부: 지지함

이유: 나이가 들면서 노인들의 권리를 적절히 반영하거나 다루는, 구속력이 있는 보편적 단일 문서의 부재로 인해 노인들이 심각한 불이익을 받고, 조직적 차별과 불평등으로 인해 유해한 문화적, 전통적 관행에 의해 제재를 받으며, 법적 보호를 받지 못하는 연령주의에 근거한 폭력, 학대, 방임의 위협에 처하게 되었다. 따라서 연령과 관계없이 모든 사람들에게 보편적 인권을 보장하기 위해 노인 권리를 별도로 명시한 단일 문서가 필요하다.

새로운 협약의 목표: 새로운 유엔 협약의 구체적 목적은 “노인들이 사회구성원으로서 인정받고, 사회에 통합되며 참여하도록하기 위해, 노인의 모든 권리와 근본적 자유를 대등한 입장에서 온전히 향유하고 행사하며 인정받을 수 있도록 이를 증진, 보호, 보장하기 위함이다.”³⁰⁰⁾ 그러나 새로운 협약은 노인들이 자신의

298) 2017년 5월 7일 조사 질문에 대한 이메일 답변

299) 조사 질문에 ILC-GA와 INPEA는 공동 답변을 보냈다.

300) Inter-American Convention on Protecting the Human Rights of Older Persons, 2015년 제1장.

권리를 알고 주장할 수 있도록 국가가 보호, 증진, 보장, 권한부여를 할 수 있는 국가 차원의 법을 시행하고 사회정책과 정부 관행을 도입할 수 있는 보편적 규범과 기준을 마련해야 한다.

새로운 협약에 포함되어야 할 권리: 모든 규범은 세계인권선언, 1999년 노인을 위한 유엔원칙, 국제규약에 담긴 인권, 특히 여성차별철폐협약의 일반 권고 제 27호와 국제노동기구(ILO) 권고 202에 자세히 명시한 바와 같은 여성 노인들이 직면한 문제에 대한 내용을 포함해야 한다. 우리는 노인 인권 보호에 관한 미주협약(Inter-American Convention on Protecting the Human Rights of Older Persons), 아프리카 노인에 관한 아프리카인권헌장 의정서(Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa), 유럽 지역인권법에서 규정한 권리 또한 수용해야 한다. 그러나 우리는 관심이 필요한 다음의 남성과 여성 노인의 인권 분야와 관련하여 INPEA와 ILC 세계연합에 다음의 위급한 문제들을 강조하고자 한다:

폭력, 학대, 방임으로부터 자유로울 권리

- 전 생애주기에 걸쳐 일반적 노인, 그리고 특별히 여성 노인에 대한 폭력과 방임 학대가 미치는 누적된 효과 뿐 아니라 중복피해라 명명된 여러 형태의 학대(물리적, 정신적, 경제적, 방임)와 다수의 가해자가 미치는 영향.
- 타인에 의한 학대, 방임, 경제적 착취와는 구별되는 자기 방임. 원인으로는 우울증, 전두엽 장애, 치매, 노인병적 증후군 등과 같은 치료받지 못한 정신병이 있다.
- 가정폭력 연구 및 가임 연령 여성을 대상으로 하는 법규에서 규정하는 다른 범주의 가해자 외에도 성인 자녀와 손주에 의한 경제적 착취와 학대.
- 유해한 전통 및 문화적 관행, 과부 의식과 마녀사냥.

사회적 보호에 대한 권리

- 적절하고 보편적 비기여 사회보호체계.

재산권

- 법적 서비스에 대한 적절한 접근, 법 시행, 노인에 대한 연령차별 금지, 토지소유권, 상속권을 포함한 재산권과 관련하여 여성 노인을 보호하는 재정법이 필요하고, 여성 노인과 모든 연령의 배우자와 사별한 여성 노인들에 대한 토지 갈취를 방지할 수 있도록 관련 관습법과 관행(마녀사냥 포함)을 금해야 한다(아프리카인권헌장 의정서).

건강권

- 생애주기적 접근이 필요하다. 노인, 특히 여성 노인들이 연령에 적합하고 적절하며 경제적으로도 부담 없는, 필수 의약품과 진통제를 포함한 건강보험 서비스에 대한 접근이 차단되어 있다. 부적절하거나 제공되지 않는 완화의료와 장기요양 서비스로 인해 초래된 결과가 전 생애에 걸친 성차별적 편견과 빈곤과 연령차별적 태도에 의해 더욱 악화되는 경우가 많다.

자율 및 자기결정권

- 사전 동의에 대한 권리, 치료를 거부할 권리, 임종 결정에 참여할 권리.

고문으로부터 자유로울 권리

- 시설과 감옥에 있는 노인들 뿐 아니라 다약제 투약과 감금 관련 문제.

VI

새로운 노인권리협약 추진 과정에서 대한민국 국가인권위원회의 역할

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대한민국 국가인권위원회(NHRC)는 다음의 분야에서 중요한 역할을 맡는다:

6.1 국가적 차원

노인 권리에 관한 새로운 협약을 찬성하기 위한 국가의 이해당사자들이 진행할 수 있는 활동은 다음과 같다:

- 권리 향유에 관한 노인들의 경험을 들어본다.
- 격차를 확인하기 위해 국가재정법을 검토한다. 노인의 평등과 권리를 얼마나 증진하는 지를 평가한다.
- 한국 내 노인들이 누리는 구체적 권리를 연구한다.
- 노인의 권리 침해로 의심되는 사례들을 조사한다.
- 노인과 국가인권위원회, 국회의원, 시민사회, 정부 간 대화를 통해 노인 권리에 대한 다양한 면모를 논의한다.
- 국내 매체를 통해 노인 권리를 강조한다.
- 실무그룹 세션에 참석하고 국내 노인 인권상황에 대한 성명서를 발표한다.
- 실무그룹 세션에 참석할 국가인권위원회 대표단에 노인들을 참여시킨다.

아셈 글로벌 에이징 센터(ASEM Global Ageing Center):

- 인권을 노년기와 노인들의 상황에 어떻게 적용할 수 있는지에 관해 정부대표, NHRI, 노인, 시민사회, 학계 간 토론을 장려한다.
- 노인 권리문제에 관한 국가차원의 상황에 관한 자원 소재를 개발하기 위해 정부대표, NHRI, 노인, 시민사회, 학계를 지원한다.

6.2 지역적 차원

국가인권위원회는 새로운 협약과 관련하여 아시아 태평양 포럼(Asia Pacific Forum, APF)과의 공동 작업에 중요한 역할을 맡고 있다.

그 역할은 다음과 같다:

- 노인 권리에 관한 새로운 협약의 주제가 앞으로 각 국가인권위원회 지역 네트워크 회의의 의제로 다루어지도록 한다.

- 향후 실무그룹 세션에서 논의될 권리 분야에 집중된 규범적 요소들에 관한 보고서를 APF와 공동 작성한다.
- 새로운 협약의 규범적 요소들에 관한 문서를 APF와 공동 작성한다.
- 실무그룹 세션에서의 공동 사이드 이벤트 및 세션이 없는 기간에 여러 포럼을 진행한다.

아셈 글로벌 에이징 센터:

- 인권을 노년기 및 노인들의 상황에 어떻게 적용할 수 있는지를 주제로 정부대표, NHRI, 노인, 시민사회, 학계 간에 논의할 수 있는 기회를 창출한다.
- 보다 실체적이고 정치중립적인 논의를 위해 유엔 체계의 정치적 제약에서 자유로운 비공식 논의가 정부대표, NHRI, 노인, 시민사회, 학계 간에 이루어질 수 있는 기회를 창출한다.

6.3 국제적 차원

고령화에 관한 GANHRI 실무그룹의 의장으로서 국가인권위원회는 노인 권리 및 전 세계에 NHRI의 새로운 협약에 대한 필요성을 이해하고 지원하는 데 지도적 역할을 맡고 있다. 국가인권위원회의 활동은 실무그룹의 연례 세션에 국한되지 않고 세션이 없는 기간에도 확대되어야 한다. 진행할 수 있는 활동으로는 다음과 같다:

- 향후 실무그룹 세션에서 집중 논의될 권리 분야의 규범적 요소들에 관한 GANHRI 고령화 실무그룹 보고서 작성.
- 새로운 협약의 규범적 요소들에 관한 GANHRI 고령화 실무그룹 보고서 작성.
- 실무그룹 세션에서의 공동 사이드 이벤트 및 세션이 없는 기간에 여러 포럼을 진행.
- 인권과 관련한 노인들의 경험과 이것에 새로운 협약 내용에 어떠한 의미가 있는지를 논의하기 위해 NHRI와 노인 및 관련 기관들 간의 만남을 장려한다.
- 국가재정법이 노인 권리를 보장하고 보호하는 정도와 현 사법체계 하에 권리를 향유하는 데 있어 노인들이 직면한 장벽이 무엇인지에 대한 내용을 비판적으로 분석하기 위한 다중국가 검토 작업에 NHRI를 포함시킨다.

- 새로운 협약에 대한 필요와 내용을 논의하기 위해 가상회의를 포함한 NHRI 간의 지역 회의를 주관한다.
- 노인 권리에 대한 새로운 협약의 주제가 제네바에서 열릴 GANHRI회의에서 의제로 다뤄지도록 한다.
- 제네바에서 열릴 GANHRI회의에서 노인 권리에 관한 사이드 이벤트를 주관한다.
- OEWG, UPR, 유엔 인권이사회, 노인 인권 독립전문가회의 등을 포함하여 추후 참여 가능한 국제적 차원의 기회를 GANHRI 회원들에게 이메일로 알린다.
- NHRI와 고령화에 관한 GANHRI 웹사이트를 운영한다.
<http://nhri.ohchr.org/EN/Themes/Ageing/Pages/WorkingGroup.aspx>

아셈 글로벌 에이징 센터:

- 인권을 고령화 및 노인들의 상황에 어떻게 적용할 수 있는지를 주제로 정부 대표, NHRI, 노인, 시민사회, 학계 간에 논의할 수 있는 기회를 창출한다.
- 보다 실체적이고 정치중립적인 논의를 위해 유엔 체계의 정치적 제약에서 자유로운 비공식 논의가 정부대표, NHRI, 노인, 시민사회, 학계 간에 이루어질 수 있는 기회를 창출한다.
- 노인과 관련 기관, 정부 및 정부기관, 유엔기구, 시민사회, 단체, 학계, 국내 인권기관 및 평등 단체를 포함시키기 위해 국제, 지역, 국가 기관 간의 네트워크를 구축함으로써 국제 및 지역적 유대와 협동을 강화한다.
- 관련 데이터와 정보를 구축하고 공유하기 위한 온라인 포털을 만든다. 이러한 포털이 펼칠 수 있는 활동은 다음과 같다:
 - 노인 권리를 보호하고 증진할 수 있는 우수사례 연구와 같은 노인 권리와 관련된 기록, 유엔 결의안과 보고서, 학계 논문 및 보고서, 언론 뉴스, NHRI 조사 및 결과, 정부 보고서, 시민사회 보고서 등을 저장.
 - 활용 가능한 새로운 자원에 관한 정기적 업데이트 및 네트워크 회원들이 온라인 포털에 관한 흥미와 접근을 유지시킬 수 있는 소식을 정기적으로 발송.
 - 가령, 일련의 인권 주제에 관한 논의를 주관할 수 있는 정기적, 주기적 온

라인 포럼을 개최하는 등 상호 논의를 위한 플랫폼. 개인을 초대하여 게스트 블로그나 글, 자신의 보고서를 게시할 수 있도록 할 수도 있다.

- 온라인 뉴스레터와 특정 주제에 관한 이메일 긴급공지 등 네트워크 회원들 대상의 정기 활동.

- 노인들의 권리 향유에 대한 이해도를 높이고, 보호 상의 허점과 보호되는 권리 사례를 확인하기 위해 국제 트렌드를 예의주시한다.
- 국제인권기준에 기반을 둔 트렌드를 감시하기 위해 권리기반 지표를 개발한다.

VII. 결 론

노인 권리에 관한 새로운 협약의 논거는 분명하다. 전 세계 노인들은 연령차별에 노출되어 있으며 권리와 존엄은 박탈되고 있다. 기존 국제인권체계는 이에 대응하지 못했고, 새로운 협약은 종합적, 체계적 방식으로 이 문제를 해결할 수 있는 가장 효과적인 규범이다.

대한민국 국가인권위원회는 노인 권리에 대한 이해를 넓히고 국가, 지역, 국제적 차원에서 새로운 협약에 대한 지원을 강화해 나가는 데 중요한 역할을 맡고 있다.



Research analyzing the current status of human rights of
older persons in international human rights law and
recommendations for mainstreaming the rights of older
persons in the UN



National Human Rights Commission of Korea

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I . Introduction

The Open-ended Working Group on Ageing [hereafter the Working Group] agreed at its 7th session in December 2016 that the time had come to move away from a discussion for or against a new convention and focus on the normative content of the rights of older persons. It also granted national human rights institutions (NHRI) participation rights in future sessions. Given these two significant developments, the National Human Rights Commission of Korea (NHRCK) has the opportunity to input into and influence this debate on the normative content of the rights of older persons.

This report outlines the case for a new UN convention on the rights of older persons, makes recommendations on the normative content of such a new UN convention, and suggests actions the NHRCK can play in the process towards one.

II

The current status of human rights issues faced by older persons

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In 2012 the United Nations High Commissioner for Human Rights stated that *‘The situation of older persons presents a number of particular and urgent human rights challenges.’*¹⁾ This section aims to highlight the wide range of these challenges. It is beyond the scope of this report to examine the detail of each of the challenges in depth.

2.1 The experience of older persons

To try to better understand older persons’ experience of their rights in older age, in 2015 the Global Alliance for the Rights of Older People asked older persons in 50 countries if they thought they were treated differently or discriminated against because of their older age, how this affected them in their everyday life, and why they thought older people were treated differently or discriminated against.²⁾

The vast majority said that they were treated differently and were discriminated against because of their older age. A few said that the different treatment they experienced was sometimes positive and only a very few of the participants said they were always treated better. One woman from Brunei Darussalam said *“I am glad because of my old age I am treated accordingly and given priority wherever I go.”*

However this was the exception. The majority of people who said they were treated differently described it in much more negatively: within their individual relationships with family members and people they work with; within their community and social networks; and at an institutional level where they said older people are not considered in government policies, legislation, by the community or by civil society organisations. They

1) Report of the United Nations High Commissioner for Human Rights, E/2012/51, page 17, paragraph 64

2) Sleaf, *In Our Own Words: What older people say about discrimination and human rights in older age*, Global Alliance for the Rights of Older People, 2015

described being ignored, avoided, dismissed and treated with suspicion, of being subjected to different types of violence and abuse, neglect and abandonment as well as being forced out of their property. A resident from a nursing home in Serbia said: *“In the home they terrorise us, they take all our money, they don’t give us allowances and they constantly threaten that we’ll be kicked out if we don’t behave.”*

Participants described being excluded from social activities, financial services, political processes, economic life, development activities and leadership positions. They said they have been denied access to goods and services such as health care, care and support for independent living, palliative care and end of life care, education, social security, information, appropriate housing, financial services, employment, transport, new technology, public buildings and an accessible environment more broadly. One participant from Argentina said, *“At my age we are not able to get a decent bank credit or start paying health insurance just because you are more than 65 years old.”*

Others described being subjected to intersectional discrimination based on their age and other characteristics such as their gender, marital, economic and physical or mental health status. A woman from the US, for example said, *“I think I will never get past second class - first because I am female and now because I am older.”*

Others described feeling stigmatised, humiliated, condescended to and patronised. Some felt insecure and frightened of physical and verbal abuse, of losing their job or of going out. Others felt lonely, isolated, excluded, alienated and neglected. Many described feeling invisible, forgotten, unwanted, unnecessary and devalued. A man in his 50’s from the Republic of Korea said, *“I easily withdraw from society and I feel shabby.”*

When asked why they were treated differently and discriminated against with a negative effect, the reasons they gave included ignorance, misconceptions, stereotypes and prejudices about older people and older age.

A view that was repeatedly expressed was that older people are thought to

be a burden on society, on families, on the healthcare system, on the economy and on the welfare system. They are seen as incompetent, incapable and useless, unable to work efficiently, profitably or productively. A man from Uganda said *“I am considered a spent force with nothing left to contribute to society, that I have had my turn and should give way to the youth.”*

In 2017 older women across 19 countries responded to a consultation prior to the 8th session of the Open-ended Working Group on Ageing.³⁾ They described being discriminated against in different areas of their lives: employment, healthcare, participation in public life, financial services, justice, ownership and disposal of property, transport, access to other resources, in humanitarian responses and development programmes, in the media, in education, in housing and in data collection. They described multiple discrimination against older women based on their older age and their marital status, disability, migrant status, refugee status, where they lived, physical or cognitive health status, economic, social and /or educational status.

They described being subjected to all forms of violence, abuse and neglect at home, in their community and in public spaces, committed by a wide range of perpetrators. Older women identified as being at particular risk included older women with disabilities, those living in rural areas, with low literacy levels, older migrant or refugee women, older single or widowed women, those who receive care and support for independent living, older women heads of households and those who had moved from a rural to an urban area.

The experience that older women and men are describing is one of living in a world where deeply stigmatising and dehumanising prejudices and stereotypes are barely recognized, are ignored or tolerated and have very harmful consequences in people’s lives. When asked which rights they were denied, participants’ collective response covered rights in every aspect of life.

3) Sleaf, *Entitled to the same rights: What older women say about their rights to on-discrimination and equality, and to freedom from violence, abuse and neglect*, HelpAge International, 2017

2.2 Recognition of the human rights challenges experienced by older persons across the UN

There is wide recognition and acceptance across the UN that older persons face discrimination and particular and unique challenges to their rights in many areas of their lives. This is demonstrated in a number of reports over recent years from different bodies of the UN, including Member States themselves.

In 2009 a UN expert group convened in Bonn to examine the rights of older persons concluded that the rights of older persons could be violated in a number of ways at individual and institutional levels and that ageism is a root cause of discrimination and violations of rights in older age, including in relation to the rights to health, employment, violence and abuse, access to justice, and income security.⁴⁾

In 2010 a working paper of the Advisory Committee to the Human Rights Council identified unequal treatment and denial of rights of older persons in the areas of age discrimination, abuse and violence, susceptibility to poverty, denial of employment and poor work conditions, limited coverage of social pensions, lack of access to information and assistance during natural and other disasters.⁵⁾

In 2011 the United Nations Department for Economic and Social Affairs (UNDESA) reported on challenges older persons face in relation to their right to housing,⁶⁾ age discrimination in relation to their right to work,⁷⁾ denial of

4) *Report of the Expert group Meeting Rights of Older Persons*, 5-7 May 2009, UN Department of Economic and Social Affairs, 2009

5) *The necessity of a human rights approach and effective United National mechanism for the human rights of the older person*, Working paper prepared by Ms Chinsung Chung, member of the Human Rights Advisory Committee, A/HRC/AC/4/CRP.1, 2010

6) *Current status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide*, UN Department for Economic and Social Affairs, 2012, page 11

7) *Current status of the Social Situation, Well-being, Participation in Development and*

their right to social security,⁸⁾ exclusion from credit and other financial services,⁹⁾ age discrimination in health care,¹⁰⁾ and violence, abuse and neglect.¹¹⁾ The report concluded that '*Ageist stereotypes abound in all societies and play a key role in dictating how older people are perceived and treated.*'¹²⁾

The 2012 report of the UN High Commissioner for Human Rights highlighted particular challenges older persons face to their rights relating equally to civil, cultural, economic, political and social rights. The areas of most pressing concern were identified as being in relation to age discrimination; legal capacity and recognition before the law; long term-care; violence and abuse; access to productive resources, work, food and housing in old age, social protection and the right to social security, the right to health and end of life care, including palliative care; old age and disabilities; older persons in prison; and access to justice. Normative and operational gaps in protection in each of these areas exacerbate the situation older persons face.¹³⁾

The following challenges were identified in a 2013 consultation conducted by the UN High Commissioner for Human Rights: the impact of the financial

Rights of Older Persons Worldwide, UN Department for Economic and Social Affairs, 2012, page 19-20, 22

8) *Current status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide*, UN Department for Economic and Social Affairs, 2012, page 26

9) *Current status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide*, UN Department for Economic and Social Affairs, 2012, page 29

10) *Current status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide*, UN Department for Economic and Social Affairs, 2012, page 42, 44, 45

11) *Current status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide*, UN Department for Economic and Social Affairs, 2012, page 48

12) *Current status of the Social Situation, Well-being, Participation in Development and Rights of Older Persons Worldwide*, UN Department for Economic and Social Affairs, 2012, page 150

13) E/2012/51, page 17, paragraph 64

crisis, the high incidence of poverty, hunger, illiteracy, unemployment, food insecurity and homelessness among older persons; the scale of violence and abuse against older persons; the lack of coverage, high costs of and inadequacy of social protection or social services; the scarcity of professionals in services specific to older persons' needs; the isolation of older persons; the persistence of legal structures and instruments that favour institutional over home care; the lack of general legal recognition of age discrimination; and the lack of disaggregated data on older persons. Other challenges included a lack of accommodation to ensure older persons' access to justice; a lack of information, including due to mandatory digitalization; a lack of measures to promote political participation; the need to pay attention to the intersections of older age with other factors such as sexual orientation, linguistic or ethnic minority origin, migration, disability, living in rural areas, internal displacement and incarceration.¹⁴⁾

Successive reports of the UN Secretary General on the follow up to the Second World Assembly on Ageing and implementation of the Madrid International Plan of Action on Ageing (MIPAA) have also highlighted particular challenges to the rights of older persons. In 2009 the Secretary General reported older people are subjected to age discrimination and ageism in relation to work, social security, housing, health care, and education and culture, and that elder abuse '*has become recognised as a universal phenomenon that cuts across cultural and socio-economic lines*'.¹⁵⁾ The Secretary General's report of 2010 concluded that ageist stereotypes still persist, older persons do not have sufficient access to health services or to long term care, have disproportionately low levels of literacy and educational

14) *Summary report of the consultation on the promotion and protection of the human rights of older persons*, Office of the High Commissioner for Human rights, A/HRC/24/25, 2013, page 4

15) *Follow up to the Second World Assembly on Ageing*, Report of the Secretary General, A/64/127, 2009

attainment and are excluded from full participation in society, and that significant levels of abuse and neglect of older persons are being reported.¹⁶⁾ In 2011 the Secretary General's report acknowledged the global recognition of the particular human rights challenges older persons including that of multiple discrimination in older age and its impact on the enjoyment of all human rights.¹⁷⁾ In 2012 the Secretary General's report concluded that *'Ten years after the adoption of the Plan of Action, prejudicial attitudes and discriminatory practices on the part of individuals and institutions towards older persons continue to undermine their participation in society.'*¹⁸⁾ This need to acknowledge and address ageism and age discrimination was reiterated in 2013¹⁹⁾ and again in 2014 when the Secretary General stated that addressing the specifics of age-related discrimination beyond employment and occupation, including forms of multiple discrimination, towards older persons should be a priority.²⁰⁾

UN Member States have adopted UN General Assembly resolutions calling on them to address areas where older persons' rights are not being sufficiently protected or promoted in relation to, inter alia, older persons' access to information on their rights and ability to claim them;²¹⁾ multiple discrimination on the basis of age and gender;²²⁾²³⁾ national capacity to monitor and enforce the rights of older persons;²⁴⁾ negative stereotypes of

16) *Follow up to the Second World Assembly on Ageing: comprehensive overview*, Report of the Secretary General, A/65/157, 2010

17) *Follow up to the Second World Assembly on Ageing*, Report of the Secretary General, A/66/173, 2011

18) *Follow up to the Second World Assembly on Ageing*, Report of the Secretary General, A/67/188, 2012

19) *Follow up to the Second World Assembly on Ageing*, Report of the Secretary General, A/68/167, 2013

20) *Follow up to the Second World Assembly on Ageing*, Report of the Secretary General, A/69/180, 2014

21) A/RES/64/132, 2009

22) A/RES/66/127, 2012

23) A/RES/69/146, 2015

older persons, in particular older women and older persons with disabilities;²⁵⁾ effective prevention strategies and legal protection against neglect, violence and abuse;²⁶⁾ and age-discrimination in health policies and programmes;²⁷⁾ standards for the provision of long-term care;²⁸⁾ and participation of older persons in the formulation, implementation and monitoring of policies and programmes that affect them.²⁹⁾ In 2015 the General Assembly recognized older persons face challenges to their rights in areas such as *'prevention and protection against violence and abuse, social protection, food and nutrition, housing, employment, legal capacity, access to justice, health services, including physical and mental health support, and long-term care and palliative care services'*.³⁰⁾

The UN Human Rights Council has also recognized the multiple forms of discrimination and particular challenges older persons face to their rights *'including in areas of prevention and protection against violence and abuse, social protection, food and housing, right to work, equality and non-discrimination, access to justice, education training, health support, long-term and palliative care, life-long learning, participation and accessibility'*.³¹⁾

Special Procedures to the Human Rights Council have highlighted areas of concern in relation to the rights of older persons and their specific mandates. For example, in 2010 the Independent Expert on human rights and extreme poverty reported on older persons, in particular older women, living in extreme poverty and the denial of their right to social security.³²⁾ The Special

24) A/RES/66/127, 2012

25) A/RES/66/127, 2012

26) A/RES/66/127, 2012

27) A/RES/69/146, 2014

28) A/RES/69/146, 2014

29) A/RES/69/146, 2014

30) A/RES/70/164, 2015

31) A/HRC/RES/33/5, 2016

32) A/HRC/14/31 2010

Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health addressed the following areas of concern in his 2011 thematic study: primary health care and chronic illness, long-term care, palliative care and informed consent, including guardianship.³³⁾

The UN Independent Expert on the enjoyment of all human rights by older persons reflected this wide recognition of the multiple and particular human rights challenges older persons face in her 2016 comprehensive report where she addressed older persons' rights to care, social protection, work, equality and non-discrimination, freedom from violence and abuse, participation, adequate standard of living, access to justice, education, training and lifelong learning and accessibility.³⁴⁾

2.3 Review of submissions made prior to the 8th session of the Working Group on equality and non-discrimination, and violence, abuse and neglect

2.3.1 Equality and non-discrimination

Thirty Member States plus the European Union, 22 national human rights institutions (NHRIs), 36 non-governmental organizations responded to the Guiding Questions sent out for consultation by the Chair in advance of the 8th Working Group sessions. These responses covered 55 countries from different regions. Fourteen UN bodies also responded.

Whilst this is not representative of the all UN Member States and the guiding questions are limited in their scope, a review of those responses submitted illustrates the current inconsistent and inadequate protection

33) *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 attainable standard of physical and mental health*, Anand Grover, A/HRC/18/37, 2011

34) A/HRC/33/44, 2016

against discrimination in older age afforded to older persons.³⁵⁾

Guarantees of equality and the protection against all forms of discrimination in older age vary across countries in a number of ways. Some countries reported that they had no legal protection against discrimination on the basis of age.³⁶⁾ For those that had some legal protection, the source of anti-discrimination law varies across countries. Sources include constitutional law³⁷⁾ and national law (which includes federal law or regional/state law).³⁸⁾ One state had no constitutional or national protection against age discrimination but looked to regional and international human rights law which takes precedence.³⁹⁾

The material scope of the legal protection, namely to which areas of life it applies, also varied with some countries limiting the scope to just one area, most commonly employment⁴⁰⁾, or only a small number of areas.

The Guiding Questions did not specially ask which forms of discrimination are prohibited and whether multiple, including both intersectional and cumulative, discrimination was provided for in current legislation. A review of anti-discrimination legislation in 51 ASEM member countries in 2016 showed that protection against multiple discrimination is rare and that legislation more commonly only allows claims of discrimination on a single ground.⁴¹⁾

35) The review was conducted by the author on 2 June 2017. Responses are available at <https://social.un.org/ageing-working-group/eighthsession.shtml>

36) For example Bangladesh, Cameroon, China, Egypt, India, Iraq, Jamaica, Japan, Lesotho, Nigeria, Qatar, Republic of Tanzania, Sudan; Trinidad and Tobago; Vietnam

37) For example Bolivia, Brazil, Canada, Dominican Republic; Ecuador, Latvia, Mexico, Mongolia, Paraguay, Serbia

38) For example Australia, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Dominican Republic, France; Germany, Greece; Guatemala; Italy, Lithuania; Mauritius ; Mexico; Mongolia; Paraguay; Peru; Philippines, Poland, Republic of Korea, Russian Federation, Serbia, Slovenia, Sweden, UK, US

39) Argentina

40) For example Costa Rica, Italy, Philippines, Poland, Republic of Korea, Russian Federation

41) Sleaf, *Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries*, National Human Rights Commission of Korea (2016)

Similarly the Guiding Questions did not ask about whether legislation provide for structural discrimination and the duty of the state to change harmful ageist social norms as well individual instances of discrimination.

The review of submissions showed that a large number of States allow for differential treatment and exceptions across different areas of life where discrimination on the ground of age is considered lawful. In some countries, there is mandatory retirement in both the public and private sector⁴²⁾, for only just the public sector⁴³⁾ or with different mandatory retirement ages for specific professions⁴⁴⁾. Mandatory retirement ages may differ for women and men⁴⁵⁾. In other countries although there is no national mandatory retirement age, employers may still set their own retirement age.⁴⁶⁾ There is a mandatory retirement age for UN staff set at 60, 62 or 65 depending on the year of entering into service.⁴⁷⁾

However, the most commonly reported area of exception was in relation to access to financial services which included health and other insurance, bank and other types of loans such as mortgages.⁴⁸⁾ Other areas of life where differential treatment is lawful include access to goods and services generally,⁴⁹⁾ accommodation,⁵⁰⁾ health programmes,⁵¹⁾ employment,⁵²⁾ education,⁵³⁾ and

42) For example Argentina, Cameroon, the Philippines, Republic of Korea, Republic of Tanzania, Turkey and Vietnam

43) For example Trinidad and Tobago

44) For example Canada for police, firefighters, commercial pilots, India for government employees, judges and GPs, Poland for judges, notaries, bailiffs, and the military, Nigeria for public servants, judges and academics

45) For example Argentina and Vietnam

46) For example Germany and the UK

47) International Civil Aviation Organisation (ICAO)

48) For example Argentina, Australia, Canada, Chile, Czech Republic, Germany, India, Latvia, Lesotho, Mauritius, Slovenia, Sweden, Trinidad and Tobago, UK and Vietnam

49) For example Australia, Canada, Latvia, Sweden and UK

50) Canada

51) For example Australia, Chile, India and Japan

52) For example Australia, Canada, Chile, Germany, Greece, Lithuania, Mauritius, Philippines and Poland

migration and citizenship laws.⁵⁴⁾ The responses show that differential treatment is common and suggest it is widely accepted.

A large number of countries gave examples of age-related benefits including free or subsidized public transport,⁵⁵⁾ some free or subsidized health services,⁵⁶⁾ discounts for cultural activities,⁵⁷⁾ pensions and other social security benefits.⁵⁸⁾ Three countries in Latin America reported support available to older persons in legal proceedings.⁵⁹⁾ Only three countries indicated that their legislation allowed for special measures.⁶⁰⁾

The Guiding Questions did not ask for information on remedies, sanctions and enforcement.

Information on age discrimination is not consistently available at the national level. Twenty countries who responded said no information was available.⁶¹⁾ Where information is available, it comes from a variety of sources including surveys, complaints to NHRIs, and academic or NGO research.

2.3.2 Violence, abuse and neglect

Thirty Member States plus the European Union, 22 national human rights institutions (NHRIs), 36 non-governmental organizations responded to the Guiding Questions sent out for consultation by the Chair in advance of the 8th

53) For example Lithuania and Poland

54) Australia

55) For example Argentina, China, Chile, Ecuador, India, Germany, Latvia, Russian Federation and Serbia

56) For example China, Chile, Ecuador, India, Japan and USA

57) For example China, Chile, Ecuador, Egypt, Germany, Latvia and UK

58) For example Australia, Bolivia, Canada, India, Lesotho, Mauritius, Mexico, Republic of Korea, Russian Federation, Slovenia, UK and USA

59) Bolivia, Chile and Costa Rica

60) Australia, Greece and Mexico

61) Argentina, Bolivia, Cameroon, Chile, China, Colombia, Dominican Republic, France, India, Jamaica, Japan, Lesotho, Philippines, Poland, Qatar, Republic of Tanzania, Slovenia, Trinidad and Tobago, Turkey and US

Working Group sessions. These responses covered 55 countries from different regions. Fourteen UN bodies also responded.

Whilst this is not representative of the all UN Member States and the guiding questions were limited in their scope, a review of those responses submitted illustrates the current inconsistent and inadequate protection against violence, abuse and neglect in older age afforded to older persons.⁶²⁾

Older people are subjected to different types of violence, abuse and neglect across every different socio-economic, cultural and political context. This includes physical,⁶³⁾ financial,⁶⁴⁾ sexual,⁶⁵⁾ psychological⁶⁶⁾ violence and abuse, and neglect,⁶⁷⁾ and abandonment.⁶⁸⁾

62) The review was conducted by the author on 2 June 2017. Responses are available at <https://social.un.org/ageing-working-group/eighthsession.shtml>

63) Physical violence and abuse was reported in submissions from Australia, Argentina, Cameroon, Canada, Colombia, Costa Rica, Croatia, Czech Republic, Dominican Republic, Ecuador, France, Germany, Greece, Guatemala, India, Ireland, Japan, Lesotho, Mauritius, Mexico, Peru, Philippines, Poland, Republic of Korea, Republic of Tanzania, Russian Federation, Serbia, Slovenia, Togo, Trinidad and Tobago, Uganda, Ukraine, USA

64) Financial violence and abuse was reported in submissions from Australia, Argentina, Bolivia, Cameroon, Canada, Costa Rica, Croatia, Dominican Republic, Ecuador, France, Germany, Greece, Ireland, Iraq, Japan, Lesotho, Mauritius, Peru, Philippines, Poland, Republic of Korea, Republic of Tanzania, Russian Federation, Serbia, Slovenia, Trinidad and Tobago, Uganda, Ukraine, USA, Zimbabwe

65) Sexual violence and abuse was reported in submissions from Australia, Cameroon, Canada, Colombia, Costa Rica, Dominican Republic, Ecuador, Germany, Greece, Ireland, Japan, Lesotho, Peru, Philippines, Poland, Republic of Korea, Republic of Tanzania, Russian Federation, Serbia, Slovenia, Togo, Trinidad and Tobago, Uganda, USA

66) Psychological violence and abuse was reported in submissions from Australia, Bolivia, Cameroon, Canada, Chile, Costa Rica, Croatia, Czech Republic, Dominican Republic, Ecuador, the European Union, France, Germany, Greece, Guatemala, India, Ireland, Japan, Lesotho, Mauritius, Peru, Philippines, Poland, Republic of Korea, Republic of Tanzania, Russian Federation, Serbia, Slovenia, Spain, Togo, Trinidad and Tobago, Uganda, Ukraine, USA

67) Neglect was reported in submissions from Australia, Canada, Costa Rica, Dominican Republic, Ecuador, France, Germany, Greece, India, Ireland, Japan, Mauritius, Philippines, Republic of Korea, Republic of Tanzania, Serbia, Slovenia, Spain, Trinidad and Tobago, USA

Older people reported as being particularly affected included older women⁶⁹⁾ and those in receipt of care and support, including with cognitive impairment.⁷⁰⁾ Others cited as being at particular risk included those who are socially isolated,⁷¹⁾ who have a history of family violence,⁷²⁾ who are older for example over 70 or 80 years of age,⁷³⁾ who are culturally or linguistically diverse,⁷⁴⁾ who are single, divorced, never married or widowed,⁷⁵⁾ or who are in prison.⁷⁶⁾ Both high⁷⁷⁾ and low⁷⁸⁾ income levels were reported as putting someone at particular risk as were both high⁷⁹⁾ and low⁸⁰⁾ educational levels and living in rural/remote⁸¹⁾ and urban settings.⁸²⁾

Violence, abuse and neglect takes place in both private and public settings, for example the home and family environment,⁸³⁾ in care facilities,⁸⁴⁾ in

68) Abandonment was reported in submissions from Chile, Costa Rica, Republic of Korea, USA

69) Older women at particular risk: Argentina, Cameroon (widowed), France, Germany, Iraq, Ireland, Mauritius, Republic of Korea, Republic of Tanzania, Philippines, Russian Federation, Serbia, Slovenia (but widowed men at risk of neglect /abandonment), Trinidad and Tobago, Uganda (widowed), Ukraine, USA, Zimbabwe (widowed)

70) In receipt of care and support, including with cognitive impairment: Australia, Canada, Chile, Colombia, Czech Republic, Dominican Republic, France, Germany, Ireland, Slovenia, Spain, Trinidad and Tobago, USA

71) Socially isolated: Australia, Canada, Slovenia

72) History of family violence: Australia, Canada, Iraq

73) Older: Australia, Ireland, Lesotho

74) Culturally and linguistically diverse: Australia

75) Single status: Slovenia, Russian Federation

76) Prison: UK

77) High income: Germany, Guatemala

78) Low income: Chile, Slovenia

79) High educational level: Germany

80) Low educational level: Colombia, Slovenia

81) Rural/remote: Australia, Bolivia

82) Urban setting: Mauritius

83) Occurrence in private settings were reported in Australia, Cameroon, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Dominican Republic, France, Germany, India, Ireland, Iraq, Jamaica, Japan, Lesotho, Mauritius, Philippines, Republic of Korea, Russian Federation, Serbia, Slovenia, Trinidad and Tobago, Ukraine, USA, Zimbabwe

medical facilities,⁸⁵⁾ in the street and on public transport,⁸⁶⁾ and in the market place.⁸⁷⁾ The range of perpetrators reflected these different settings and included family members,⁸⁸⁾ care providers,⁸⁹⁾ legal guardians,⁹⁰⁾ friends,⁹¹⁾ the police,⁹²⁾ medical staff,⁹³⁾ robbers,⁹⁴⁾ and professional criminals.⁹⁵⁾

The Guiding Questions did not ask what obligations States have or what measures they are taking to prevent violence, abuse and neglect or support those affected. The Guiding Questions did not ask about enforcement, remedies and redress.

The submissions illustrated that data and information on violence, abuse and neglect in older age is inadequate and inconsistent. Very few countries reported having regular and up to date national surveys⁹⁶⁾ and for those that did, the nature of the surveys and data varied.⁹⁷⁾ Some countries reported

84) Occurrence in care facilities reported in Australia, Canada, Costa Rica, Croatia, Czech Republic, France, Germany, Ireland, Jamaica, Japan, Latvia, Paraguay, Philippines, Republic of Korea, Russian Federation, Slovenia, Trinidad and Tobago, USA

85) Occurrence in medical facilities reported in France, Republic of Korea, Philippines, Republic of Tanzania,

86) Occurrence in the streets and on public transport reported in Croatia, Republic of Tanzania

87) Occurrence in the marketplace reported in Cameroon

88) Family members were reported as perpetrators in Australia, Cameroon, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Dominican Republic, France, Germany, India, Ireland, Iraq, Jamaica, Japan, Mauritius, Philippines, Republic of Korea, Russian Federation, Serbia, Slovenia, Trinidad and Tobago, Ukraine, USA, Zimbabwe

89) Care providers were reported as perpetrators in Australia, Canada, Chile, France, Germany, Ireland, Jamaica, Japan, Latvia, Lithuania, Republic of Korea, Russian Federation, Slovenia, Trinidad and Tobago

90) Guardians were reported as perpetrators in Germany

91) Friends were reported as perpetrators in Canada

92) The police were reported as perpetrators in the Russian Federation

93) Medical staff were reported as perpetrators in France and the Russian Federation

94) Robbers were reported as perpetrators in Lesotho

95) Professional criminals were reported as perpetrators in the USA

96) For example Costa Rica's survey was reported as outdated,

97) For example Canada has a longitudinal survey, China has one on the living situation of older persons, the USA introduced a national reporting data system in 2016, the

having localised or regional studies,⁹⁸⁾ reports of complaints to NHRIs,⁹⁹⁾ police statistics,¹⁰⁰⁾ academic¹⁰¹⁾ or NGO reports.¹⁰²⁾ Some countries reported having limited¹⁰³⁾ or no data or information.¹⁰⁴⁾

With regard to legislation, the submissions also illustrated the wide variety, complexity, inconsistency and inadequacy of current provisions. No specific protection was reported in some countries.¹⁰⁵⁾ Others had legislation dedicated to violence, abuse and neglect in older age.¹⁰⁶⁾ Some reported having some but not all aspects of violence, abuse and neglect provided for within legislation on older persons and ageing more broadly.¹⁰⁷⁾ Some referred to use of domestic violence legislation to provide for family and home settings although it was not always clear if there was or was not specific mention of older persons in these laws.¹⁰⁸⁾ Others sources of legal protection cited for various settings and types of violence, abuse and neglect included constitutions,¹⁰⁹⁾ criminal (penal) codes,¹¹⁰⁾ civil codes,¹¹¹⁾ guardianship laws,¹¹²⁾

Republic of Korea and Japan have annual data on reported cases

98) For example Chile, Germany, Mexico, Philippines

99) For example Latvia

100) For example Australia, Canada, Czech Republic, Republic of Tanzania, Slovenia, Trinidad and Tobago

101) For example Slovenia

102) For example Cameroon, India, Lesotho, Philippines, Republic of Tanzania, Serbia, Slovenia

103) For example Bangladesh, Mongolia, Serbia (no information for institutional settings)

104) For example Bolivia, Croatia, Greece, Guatemala, Iraq, Italy, Jamaica, Togo, Turkey, Ukraine

105) No legislation Argentina, Trinidad and Tobago, Mauritius, Republic of Tanzania, Russian Federation, Togo

106) Use of legislation on violence, abuse and neglect in older age: Cameroon (but reported as insufficient), Japan (but limited to family or professional care giver perpetrators), Philippines (Act pending) and the USA

107) Use of legislation on older persons: Bolivia, China, Colombia, Costa Rica, Dominican Republic, France, Germany, India, Jamaica, Peru, Republic of Korea, Trinidad and Tobago (Act pending)

108) Use of domestic violence legislation: Chile, Costa Rica, Croatia (under review), Dominican Republic, Germany, Greece, Guatemala, Jamaica, Lithuania, Lesotho, Peru, Philippines, Poland, Slovenia, UK, Ukraine

social services laws,¹¹³⁾ disability acts,¹¹⁴⁾ acts governing prison settings,¹¹⁵⁾ legal assistance legislation,¹¹⁶⁾ and personal status laws.¹¹⁷⁾ Specific laws were cited to provide for financial exploitation or inheritance of property were those on financial regulation,¹¹⁸⁾ banking,¹¹⁹⁾ fraud,¹²⁰⁾ consumer protection,¹²¹⁾ inheritance and estates,¹²²⁾ land,¹²³⁾ larceny¹²⁴⁾ and religious codes.¹²⁵⁾ However some countries reported having no legal protection against financial exploitation or inheritance of property.¹²⁶⁾

109) Constitutions: Bolivia, Dominican Republic, Ecuador, Lesotho

110) Criminal (penal) codes: Australia, Colombia, Croatia, Costa Rica, Guatemala, Iraq, Latvia, Lesotho, Lithuania, Philippines, Republic of Korea, Qatar, Republic of Tanzania, Russian Federation, Serbia, Slovenia

111) Civil codes: Latvia, Turkey

112) Guardianship laws: Australia

113) Social services laws: Sweden, Turkey, UK, Ukraine

114) Disability acts: Jamaica

115) Prison acts: UK

116) Legal assistance legislation: Bolivia

117) Personal status laws: Iraq, Lesotho

118) Financial regulation: Australia

119) Banking: Croatia

120) Fraud: Jamaica

121) Consumer protection: Croatia

122) Inheritance and estate laws: Australia, Dominican Republic, India, Slovenia, UK

123) Land law: Lesotho

124) Larceny: Jamaica

125) Religious codes: India, Qatar

126) No legal protection for financial exploitation: Argentina, Cameroon, Colombia, Czech Republic, Italy, Lesotho, Poland, Qatar (other than Shari'a Law), Republic of Tanzania, Togo

III

The current status of the rights of older persons under international human rights law

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Our rights do not change as we grow older and with the exception of the Convention on the Rights of the Child, international human rights treaties apply to older persons. However, explicit mention of older persons or age is rare under current international human rights law (see Table 1).

〈Table 1〉 Specific mention of older persons and age in international human rights law

International Human Rights Framework	Article	Provision
Universal Declaration of Human Rights (UDHR, 1948)	25	The right of everyone to security in old age
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979)	11.1.e	The equal right of women to social security, including in old age
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, 1990)	1.1 and 7	Prohibits discrimination based on age
Convention on the Rights of Persons with Disabilities (CRPD, 2008)	13.1	Recognises the need for age-appropriate accommodations to ensure persons with disabilities' access to justice
	16.2	Age-sensitive measures to prevent abuse
	16.4	Age-sensitive recovery and rehabilitation
	23.1.b	Age-appropriate information on reproductive health
	25b	Provide services to minimise and prevent further disabilities among older people
	28.2.b	Ensure older people with disabilities' access to social protection and poverty reduction

3.1 Gaps between the current status of the rights of older people and the international legal framework

In resolution A/RES/65/182 in 2010 the Open-ended Working Group on Ageing [hereafter the Working Group] was mandated to review the existing international human rights framework in relation to the rights of older persons, identify any gaps and how to address them, including the feasibility of new instruments.¹²⁷⁾ Given this mandate, discussion on the presence of

gaps has dominated the Working Group sessions. Four gaps were identified during the first and second sessions: normative, implementation, monitoring and information.¹²⁸⁾

Definitions of four types of gaps¹²⁹⁾

A normative gap exists when persistent acts, circumstances and institutional factors depriving a person of their dignity are not provided for, or are inadequately provided for, in existing international human rights law.¹³⁰⁾

An implementation gap exists when the rights and obligations within international human rights law are not fully translated into national law and/or put into practice.

A monitoring gap exists when there is no independent monitoring mechanism mandated to ensure States comply with their obligations under international human rights law, or where existing monitoring bodies fail to adequately monitor State Party compliance.

An information gap exists when the lack of disaggregated data and statistics prevents an accurate picture of the current situation being drawn and prevents monitoring bodies from making targeted and specific recommendations.

127) Resolution A/RES/65/182 (2010)

128) See reports of the first and second Working Group sessions A/AC.278/2011/4 and A/AC.278/2011/5 respectively.

129) See HelpAge International, *International human rights law and older people: Gaps, fragments and loopholes*, 2012, page 2

130) This definition is taken from International Council on Human Rights Policy, *Human Rights Standards: Learning from Experience*, 2006, page 7 http://www.ichrp.org/files/reports/31/120b_report_en.pdf

3.2 Specific rights that are not protected by the current international legal framework

In 2012 the UN High Commissioner for Human Rights stated that ‘*Current arrangements at the national and international level to protect the human rights of older persons are inadequate.*’¹³¹⁾

Using the definitions above, this section provides illustrative examples of gaps in the current international human rights framework. It is not intended as an exhaustive review.

3.2.1 Normative gaps

Universal human rights standards do not adequately provide for the persistent acts, circumstances and institutional factors which deprive older persons of their dignity as illustrated in Section 2 where:¹³²⁾

1. Areas related to the experience of older persons have been completely overlooked
2. Failure to name older age or older persons has contributed to their relative invisibility in terms of human rights protection
3. Current normative standards are only partially relevant

These include older persons’ rights to equality and non-discrimination including intersectional and cumulative discrimination; freedom from violence, abuse and neglect; long-term care; ageing in place; legal capacity and equality before the law; legal and financial planning for end of life care; and palliative care.¹³³⁾

131) Report of the United Nations High Commissioner for Human Rights, E/2012/51, page 17, paragraph 64

132) Office of the High Commissioner for Human Rights, *Normative Standards in international human rights law in relation to older persons: Analytical Outcome Paper*, August 2012, page 34

133) *International Law’s Grey Area: The Human Rights of Older Persons*, presentation

- The right to equality and non-discrimination on the basis of older age

The right to equality before the law and non-discrimination in the enjoyment of relevant rights under each treaty is recognized in the UDHR,¹³⁴⁾ in the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³⁵⁾ and the International Covenant on Civil and Political Rights (ICCPR)¹³⁶⁾ and in the subsequent international human rights treaties for children,¹³⁷⁾ women,¹³⁸⁾ persons with disabilities¹³⁹⁾ and migrant workers¹⁴⁰⁾. The application of Article 26 of the ICCPR has been interpreted to extend beyond just the articles of the ICCPR itself to a general obligation not to enact discriminatory laws or apply laws in a discriminatory way.¹⁴¹⁾

However, discrimination on the basis of age is only explicitly prohibited in one international human rights treaty, the International Convention on the Rights of Migrant Workers and their Families (ICMW) and such protection is contingent on being a migrant worker or a member of their family.¹⁴²⁾ Age is not explicitly mentioned in the list of prohibited grounds in the non-discrimination articles of the other international human rights treaties.

Whilst these lists of prohibited grounds are non-exhaustive and the Committee on Economic, Social and Cultural Rights has stated that age could

by Craig Mokhiber, Office of the High Commissioner for Human Rights, Berlin, 2012

134) Article 2, UDHR, 1948

135) Article 2, ICESCR, 1966

136) Article 2 and Article 26, ICCPR, 1966

137) Article 2, Convention on the Rights of the Child (CRC), 1989

138) Article 2, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979

139) Article 5, Convention on the Rights of Persons with Disabilities (CRPD), 2006

140) Article 7, International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICMW), 1990

141) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 8, August 2012

142) Article 7, International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICMW), 1990

fall under the catch-all category of “other status”¹⁴³⁾, the category ‘other status’ is open to selective interpretation by States¹⁴⁴⁾ and the failure to explicitly mention age as a prohibited ground has rendered age discrimination relatively invisible in the implementation and monitoring of the non-discrimination articles.¹⁴⁵⁾

There is also a lack of clarity about when discrimination on the basis of age may be lawful. The Committee concluded that discrimination on the basis of ‘age is prohibited in *several* contexts’ [emphasis added],¹⁴⁶⁾ suggesting that not all differential treatment based on age is prohibited under international law. Subsequently ‘the true nature of this right is not as yet fully worked out in different states and the jurisprudence of various courts is too little for judge-made law to fill the gap adequately’.¹⁴⁷⁾

The complex nature of multiple discrimination in older age is not adequately provided for under international human rights law, both in terms of intersectional discrimination, namely the combined effect of age and another personal characteristic or the combined effect of any two or more characteristics on the ground of age in combination with one or more other grounds. Similarly cumulative discrimination, namely discrimination on a number of occasions over time, is not provided for. The heightened risk of intersectional and cumulative discrimination experienced by particular sections of the older population has also not been adequately addressed.

143) General Comment No. 6, The economic, social and cultural rights of older persons, paragraph 12, 1996

144) HelpAge International, *International human rights law and older people: Gaps, fragments and loopholes*, 2012, page 4

145) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 8, August 2012

146) *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, paragraph 29. 2009

147) Allen, *Discussion papers: Legal issues for strengthening international legislation on the rights of older person*, Age UK

For these reasons the ageism and age discrimination older persons are subjected to is not adequately provided for under international human rights law. There is, therefore, a normative gap.

- The right to freedom from violence, abuse and neglect

There is no explicit right to protection from the particular experience of all forms of violence, abuse and neglect in older age under UN international human rights treaties that applies generally or specifically to older people.

There is however some protection against violence under UN human rights treaties. This includes the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, which has the potential to help prevent torture and other cruel, inhuman or degrading treatment or punishment of older persons in long-term care facilities as well as all other forms of State or State-authorized detention.

The Committee on the Elimination of Discrimination Against Women's General Recommendation No. 27 on older women and protection of their human rights (2010) and to a lesser extent the draft update of General Recommendation No.19 on violence against women (1992). These, however, only apply to older women and not older men. Similarly the obligations under the Convention of the Rights of Persons with Disabilities (2006) on the prohibition of torture and prevention all forms of violence and abuse only apply to older persons with disabilities.

The particular and complex experience of all forms of violence, abuse and neglect in older age is not adequately provided for under international human rights law. There is, therefore, a normative gap.

For a full summary of protection of the right to freedom from violence and abuse under international law, see Section 3.4.1 of Sleaf, *Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries*, National Human Rights Commission of Korea, 2016.

- The right to age in place

Ageing in place has been defined as ‘*the ability to live in one’s own home and community safely, independently, and comfortably, regardless of age, income, or ability level*’¹⁴⁸⁾ but has been said to go beyond this to include ‘*a sense of identity both through independence and autonomy and through caring relationships and roles in the places people live*’.¹⁴⁹⁾ Being denied the autonomy to choose where to live and with whom constitutes a significant deprivation of dignity.

Ageing in place itself has not been considered or provided for as a unique and particular experience under international human rights law. The ability to age in place requires the enjoyment of a number of rights enshrined within the international human rights framework, but there has been no articulation of the application of these rights to the specific experience of ageing in place. There is, therefore, a normative gap.

- The right to long-term care and support

There is no specific provision for the right to long-term care and support under international human rights law.

Whilst there is a range of provisions under international human rights law applicable to those in receipt of long-term care and support,¹⁵⁰⁾ these are widely dispersed and their application to this context is not articulated within the international human rights framework. There is, therefore, a normative gap.

For a full summary of protection of the right to long-term care and support under international law, see Section 3.3.1 of Sleap, *Issue Analysis and Specific*

148) US Centre for Disease Control, <https://www.cdc.gov/healthyplaces/terminology.htm>

149) Wiles et al, The Meaning of Aging in Place to Older People, *Gerontologist* (2012) 52 (3): 357–366

150) For example, see *European Charter of the rights and responsibilities of older people in need of long term care and assistance*,

Recommendations on the Human Rights of Older Persons in ASEM Countries,
National Human Rights Commission of Korea, 2016

- The right to palliative care

The lack of access to for palliative care is not an issue unique to older persons, but it is one of particular importance to them given increasing life expectancies and the increased likelihood of facing advanced chronic illnesses in older age accompanied by moderate to severe pain that may require treatment with opioid analgesics.¹⁵¹⁾ Despite this, palliative care for older persons is often an afterthought.¹⁵²⁾

The Committee on Economic, Social and Cultural Rights' General Comment No. 14 states measures should be taken to ensure those who are chronically and terminally ill should be spared unavoidable pain and be allowed to die with dignity.¹⁵³⁾ Nonetheless palliative care is an area of human rights that has been identified in a report by the Office of the High Commission for Human Rights as being underexplored in the context of older persons¹⁵⁴⁾.

There is no provision for the right to holistic palliative care under international human rights law. There is, therefore, a normative gap.

- The right to a dignified death

The Special rapporteur on the right to the highest attainable standard of health has stated that patients should be able to make autonomous and

151) Human Rights Watch, *National Drug Control Strategies and Access to Controlled Medicines*, 2016, p.8

152) FXB Centre for Health and Human Rights, *Health and Human Rights Resource Guide*, 2013, p.5.3
https://cdn2.sph.harvard.edu/wp-content/uploads/sites/25/2014/03/HHRRG_Chapter-5.pdf (29 July 2016)

153) E/C.12/2000/4, paragraph 25

154) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons: Analytical Outcome Paper*, 2012, p.26, (1 August 2016)

informed decisions about access to adequate pain relief, location of death and the ability to refuse treatment designed to prolong life when it is against their wishes.¹⁵⁵⁾

There are no standards in international human rights law to safeguard and regulate the end of life and personal decision-making, for example advance decisions for the preferred type of care and support. There is, therefore, a normative gap.

- Legal capacity and equality before the law

CRPD Article 12 addresses the right of persons with disabilities to legal capacity and has brought about an important shift towards supported decision-making based on will and preferences of the individual.

However, there has been little exploration in international law around the specific issues older persons may face in relation to legal capacity and declining physical or cognitive function as they age.¹⁵⁶⁾ An area of particular concern is older persons being unnecessarily stripped of their legal capacity by guardianship measures which deny them the ability to make their own decisions.¹⁵⁷⁾

Another concern is related to free and informed consent, a core component of the right to legal capacity. Older persons, in particular those in receipt of care and support in any setting, may be denied the time, opportunity and support to give their free and informed consent around choice of medical treatment, type of care and support they receive, including at the end of life, how their money is spent, and day to day decisions such as what to eat or

155) A/HRC/18/37

156) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 21, August 2012

157) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 21, August 2012

when to eat. This denial of consent may be not be on the basis of any decline in cognitive function or status as a person with disability so protection under the CRPD would not apply. The Special Rapporteur on the right to health has stated that the persistent denial of the right to informed consent could be a form of physical and psychological abuse.¹⁵⁸⁾

The ability to make free and informed advanced decisions around the choice of medical treatment or type of long-term care and support is also denied to many. That your wishes in these areas might not be respected is a denial of autonomy and a deprivation of dignity.

There has been limited attention to consent and legal capacity under international human rights law.¹⁵⁹⁾ There is, therefore, a normative gap in this area.

- The right to justice

The rights to equal recognition as a person before the law and the right to a fair trial are protected under ICCPR Articles 16 and 14 respectively.

However, older persons face unique and particular challenges in accessing justice in terms of awareness of their rights, access to legal aid and the availability of effective remedies, including having cases heard within a reasonable time. These particular challenges and age-sensitive access to justice standards have received little attention under international human rights law.¹⁶⁰⁾

The rights of those deprived of their liberty are enshrined under ICCPR Article 10. However, the rights of older prisoners and circumstances in which

158) A/HRC/18/37, paragraph 65

159) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 22, August 2012

160) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 31, August 2012

they are deprived of their dignity have not been adequately addressed within the international human rights framework.

Some common challenges older prisoners face include the fact that most prisons are designed for younger people which can prevent older prisoners from satisfying their basic needs or prevent them from participating in activities.¹⁶¹⁾ Appropriate support for daily activities or healthcare for complex co-morbidities may be unavailable and rates of dementia are largely unknown¹⁶²⁾. Rehabilitation and release programmes may not address the resettlement challenges older prisoners may face.¹⁶³⁾

Other issues pertinent to older persons such as safe conditions of confinement for those with special support needs, mobility needs, protection against violence, and appropriate educational and vocational training have not been adequately addressed by international Treaty Bodies.¹⁶⁴⁾ There is, therefore, a normative gap.

- The right to health

The right to the highest attainable standard of physical and mental health is enshrined in a number of international human rights treaties including ICESCR Article 12, CEDAW Article 12, CRPD article 25 (b) and ICCPR Article 7. The Committee on Economic, Social and Cultural Rights' General Comment No. 14 on the right to health reaffirms paragraphs 34 and 35 of

161) United Nations Office on Drugs and Crime, Handbook on prisoners with special needs, 2009, chapter 6, http://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf

162) Moll, *Losing Track of Time: Dementia and the ageing prison population: treatment challenges and examples of good practice*, 2013 <http://www.mentalhealth.org.uk/content/assets/PDF/publications/losing-track-of-time-2013.pdf?view=Standard>

163) Sleaf, *Old age behind bars: how can prisons adapt to the needs of increasingly elderly populations*, Penal Reform International, 2014

164) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons*, Analytical Outcome Paper, page 32, August 2012

their General Comment No. 6 on the rights of older persons which states the need for preventative and rehabilitative health treatment for the older persons, including psychological and physical rehabilitative measures.

Nonetheless, it has been noted that the provisions on the right to health are broad and do not reflect the experience and health concerns of older persons for example in terms of chronic and non-communicable diseases¹⁶⁵⁾, nor provide the degree of specificity necessary for effective implementation of the right in the context of older age.¹⁶⁶⁾ In addition those provisions within the CRPD are applicable only to older persons with disabilities, and those in CEDAW only to older women. There is, therefore a normative gap.

For a full summary of protection of the right to health under international law, see Section 3.2.1 of Sleaf, *Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries*, National Human Rights Commission of Korea, 2016

3.2.2 Implementation gaps

The experience of older people of ageism, age discrimination and denial of their rights and the wide recognition in the UN of the particular challenges older persons continue to face in enjoyment of their rights (as illustrated in Section 2) demonstrate significant gaps in the implementation of existing universal human rights standards to the specific context of older age and older persons.

Implementation gaps can also be seen when international human rights standards are not translated into legal protection at the national level. The inconsistent and inadequate legal protection of human rights in older age is

165) Judge, *The Rights of Older People: International Law, Human Rights Mechanisms and the case for new Normative Standards*, 2009

166) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 24, August 2012

illustrated in the submissions to the Guiding Questions in advance of the 8th session of the Working Group in the areas of legal protection against discrimination in older age and on freedom from violence, abuse and neglect (See Section 2).

Other reviews in these two areas confirm this. A review of national anti-discrimination legislation across ASEM countries in 2016 showed that non-discrimination on the basis of older age is not a right that all older persons across ASEM countries enjoy. Whilst European countries all have some form of legal protection against age discrimination, in many cases it is not comprehensive. In Asia a number of countries, for example Bangladesh, Brunei Darussalam, Cambodia, India, Indonesia, Japan, Kazakhstan, Lao PDR, Malaysia, Myanmar and the Philippines, have no legal guarantees specifically prohibiting age discrimination.¹⁶⁷⁾

Another example of an implementation gap can be seen in the patchwork of inconsistent protection from, and access to support services and redress for, violence, abuse and neglect in older age. A UN DESA report of 2013 *Neglect, Abuse and Violence against Older Women*, highlighted the fact that domestic violence legislation does not, in general, specifically include older women. Attention to violence against older men in law and practice is rare.¹⁶⁸⁾

In the 2014 WHO *Global Status Report on Violence Prevention* survey, of the 133 countries surveyed, only 59% said they have laws to prevent elder abuse and then only 30% said that these were fully enforced. Only 41% said they had an action plan on elder abuse. It is not surprising, therefore, that only 34% have any adult protective services in place to investigate cases of elder abuse and provide support for survivors. This lack of adult protective services is consistent across all regions.¹⁶⁹⁾

167) Sleaf, *Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries*, National Human Rights Commission of Korea, 2016

168) <http://www.un.org/esa/socdev/documents/ageing/neglect-abuse-violence-older-women.pdf>

169) WHO, UNODC, UNDP, *Global Status Report on Violence Prevention 2014* http://www.who.int/violence_injury_prevention/violence/status_report/2014/en/

3.2.3 Monitoring gaps

There is clear evidence of a monitoring gap since older persons' rights have been not been adequately addressed by existing international human rights monitoring bodies.

In 2009 the UN Secretary General reported that Member States “*are age-blind in their human rights reporting*”, giving as an example the fact that just four of 124 state reports to the Human Rights Committee had made even a passing reference to older persons between 2000 and 2008.¹⁷⁰⁾

A more recent example is a search of the Office of the High Commissioner for Human Rights' Universal Human Rights Index for recommendations made by Treaty Bodies and Special Procedures to ASEM countries on the rights of older persons between 1999 and April 2016. This review showed that over 17 years only 198 recommendations were made to 41 of the 51 ASEM countries. Only 16 recommendations were made on discrimination in older age, and these rarely addressed multiple discrimination. There were five recommendations on violence and abuse. There was a lack of attention to civil and political rights and recommendations were general, providing little guidance to State parties on how to improve implementation.¹⁷¹⁾

Similarly up to June 2016, only 46 out of 12,431 recommendations made to the 51 ASEM countries in the Universal Periodic Review process were on the rights of older persons.¹⁷²⁾

The review in 2016 also showed ASEM member countries' reporting to, and recommendations from, Treaty Bodies across five areas of rights to be inadequate and sporadic. Less than half of the countries mentioned discrimination

170) Secretary-General Report, *Follow up to the Second World assembly on Ageing*, A/66/173, 2011

171) Author's calculation based on data available on the UPR Database <http://www.upr-info.org/database/> (5 June 2016) in Sleaf, Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries, National Human Rights Commission of Korea, 2016

172) Ibid

on the basis of older age and measures they are taking to address this. On the right of older persons to freedom from violence, abuse and neglect only 22 countries made reference to violence and abuse against older persons in their most recent periodic reports on their implementation of the following four international human rights treaties: CEDAW, ICESCR, ICCPR and CRPD. Only three included it in the Common Core documents. Recommendations from the Treaty Bodies to ASEM countries were negligible with only six specific references between 1999 and April 2016.¹⁷³⁾

3.2.4 Information gaps

The submissions to the Guiding Questions in advance of the 8th session of the Working Group illustrate the lack of information on discrimination in older age and on violence, abuse and neglect (See Section 2).

The lack of data on prevalence of violence over the age of 49 was also illustrated in the World Health Organisation's *Global and Regional Estimates of Violence against Women* in 2013. Of the 392 estimates the WHO used in their analysis of sexual and intimate partner violence, only 66 were for women over the age of 49. The WHO explains that there is less data for women over 49 because most of the surveys on violence against women, or surveys with a violence module, are carried out on women ages 15 or 18 to 49 years.¹⁷⁴⁾

In the 2014 WHO *Global Status Report on Violence Prevention* survey in 133 countries, only 17% of countries reported any survey data on elder abuse, the majority of which were in high-income countries. No country in South East Asia reported conducting a survey and elder abuse was reported as the least surveyed of different types of violence in low-income countries.¹⁷⁵⁾

173) Sleaf, Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries, National Human Rights Commission of Korea, 2016

174) WHO, *Global and Regional Estimates of Violence against Women*, 2013, page 16 http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf

3.3 Why a new UN convention on the rights of older persons is necessary

A new UN convention on the rights older persons is, therefore, necessary to address all four of the gaps identified by the Working Group, in the following ways:

Normative gaps

A new convention would:

- Strengthen international protection of the rights of older persons¹⁷⁶⁾
- Provide normative clarity on States' obligations with respect to older persons¹⁷⁷⁾
- Define older persons' rights as human rights and demonstrate that their abrogation is unacceptable¹⁷⁸⁾
- Expand the concept of human rights protection for older persons as it would contain both obligations to refrain from doing harm to older persons and positive duties to ensure equality in older age¹⁷⁹⁾
- Guarantee older persons equal access to their rights¹⁸⁰⁾
- Consolidate the rights of older persons and States' obligations towards

175) WHO, UNODC, UNDP, *Global Status Report on Violence Prevention 2014* http://www.who.int/violence_injury_prevention/violence/status_report/2014/en/

176) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011

177) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011 and UN Department of Economic and Social Affairs, Report of the Expert group Meeting 'Rights of Older Persons' 5-7 May 2009

178) Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135-1150

179) Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135-1150

180) Committee on Employment and Social Affairs, European Parliament, *Report on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations (2014/2255(INI))*, A8-0241/2015

them in a single text¹⁸¹⁾

Implementation gaps

A new convention would:

- Provide more visibility about the challenges older persons face to the enjoyment of their rights¹⁸²⁾
- Provide guidance to States on measures they should take to implement their human rights obligations towards older persons¹⁸³⁾
- Promote equality and non-discrimination, removing gender- and age-based barriers¹⁸⁴⁾
- Promote a rights-based approach to ageing policies¹⁸⁵⁾
- Encourage more equitable resource allocation¹⁸⁶⁾
- Be an important platform to create an attitude shift towards ageing on a global scale¹⁸⁷⁾ and a paradigm shift of how older persons are viewed as a social group¹⁸⁸⁾

181) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011; UN Department of Economic and Social Affairs, Report of the Expert Group Meeting 'Rights of Older Persons' 5-7 May 2009

182) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011

183) *What are the options? Potential human rights instrument on the rights of older people*, HelpAge International, 2012, page 1

184) Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135-1150

185) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011

186) UN Department of Economic and Social Affairs, Expert Group Meeting 'Rights of Older Persons' *Advantages of a convention on the rights of older persons*, May 2009; Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135-1150

187) Committee on Employment and Social Affairs, European Parliament, *Report on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations (2014/2255(INI)*, A8-0241/2015

- Contribute to changing negative attitudes¹⁸⁹⁾, challenge negative stereotypes, ageism and age discrimination¹⁹⁰⁾
- Be the basis for advocacy and public education, a tool to raise awareness and promote the rights of older persons¹⁹¹⁾
- Be used to resolve domestic and international legal disputes¹⁹²⁾

Monitoring gaps

A new convention would:

- Provide monitoring mechanisms to ensure participating States bring the national law and practice into line with the standards in the convention¹⁹³⁾
- Provide accountability mechanisms for redress for the violation of older persons' rights¹⁹⁴⁾

188) UN Department of Economic and Social Affairs, Report of the Expert group Meeting 'Rights of Older Persons' 5-7 May 2009

189) Working paper prepared by Ms Chinsung Chung, member of the Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1, 2009

190) UN Department of Economic and Social Affairs, Report of the Expert Group Meeting 'Rights of Older Persons' 5-7 May 2009; Doron & Apter, 'The Debate Around the need for an International Convention on the Rights of Older Persons', *Forum, The Gerontologist*, 2010; Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011

191) UN Department of Economic and Social Affairs, Report of the Expert Group Meeting 'Rights of Older Persons' 5-7 May 2009; Doron & Apter, 'The Debate Around the need for an International Convention on the Rights of Older Persons', *Forum, The Gerontologist*, 2010

192) UN Department of Economic and Social Affairs, Report of the Expert Group Meeting 'Rights of Older Persons' 5-7 May 2009; Doron & Apter, 'The Debate Around the need for an International Convention on the Rights of Older Persons', *Forum, The Gerontologist*, 2010

193) Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135-1150

194) UN Department of Economic and Social Affairs, Expert Group Meeting 'Rights of Older Persons' *Advantages of a convention on the rights of older persons*, May 2009

- Encourage on-going dialogue between States, civil society and older persons¹⁹⁵⁾

Information gaps

A new convention would

- Encourage better data collection, disaggregation, analysis and dissemination¹⁹⁶⁾ and require governments to disaggregate all data by age and sex and collect data on age-specific indicators¹⁹⁷⁾

195) UN Department of Economic and Social Affairs, Expert Group Meeting 'Rights of Older Persons' *Advantages of a convention on the rights of older persons*, May 2009

196) UN Department of Economic and Social Affairs, Expert Group Meeting 'Rights of Older Persons' *Advantages of a convention on the rights of older persons*, May 2009

197) *What are the options? Potential human rights instrument on the rights fo older people*, HelpAge International, 2012, page 1

IV

Normative contents of a new UN convention on the rights of older persons

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4.1 General information on the normative contents of a new UN convention on the rights of older persons

The growing numbers of older people is not in and of itself the reason why we need a new UN convention. We need one because the current international human rights framework fails to provide for the persistent acts, circumstances and institutional factors arising from the widespread, often ignored and deeply dehumanising ageism present at every level of society and across every aspect of life and which deprives older persons of their dignity. The normative contents of a convention must respond directly to this if it is to be effective. It can do this in three ways.

Firstly, ageism is a key driver of discrimination and denial of rights in every aspect of older persons' lives and a harmful social norm. A new UN convention needs to protect against individual instances of discrimination, including the often complex intersectional and cumulative discrimination that older people are subjected to. However, it must also recognise ageism as a harmful social norm and commit States to taking concrete measures to eliminate wider systemic and structural ageism.

Secondly, the contents of a convention must reflect the unique and particular application of human rights in older age. A simple reiteration of generic human rights standards will not provide sufficient clarification of how human rights apply in older age needed for effective compliance, implementation and monitoring. The convention needs to highlight, reaffirm and articulate how human rights apply to older persons and older age across every aspect of life. It must elaborate on what is required by States to give effect to these rights in older age. This is essential if the convention is to be an effective guide in terms of implementation. It must also allow for special measures to ensure equality in practice.

Thirdly, provisions in the convention need to be comprehensive. It must encompass political, civil and cultural rights as well as economic and social

rights. Human rights are indivisible and interdependent. A convention must cover human rights in every aspect of older people's lives.

4.1.1 Purpose and scope of the convention

The purpose of the convention must be to promote and provide for equality in order to protect and ensure the full and equal enjoyment of all human rights in older age.

The scope of the convention must include all people who are subjected to ageism and are discriminated against and denied their rights on the basis of their older age alone or in combination with other forms of discrimination.

A single chronological age definition of an older person (for example over the age of 60) would exclude from the scope of the convention people falling outside that chronological age definition but who are subjected to ageism, discrimination and denial of their rights on the basis of their known or perceived older age. Given these are precisely the acts, circumstances and institutional factors the convention is intended to provide for, a chronological age definition would in effect undermine the purpose of the convention. The scope of the convention should not, therefore, be determined by a chronological age definition of an older person.

4.1.2 General principles

The convention should be underpinned by general principles that apply to every provision within the convention. These include, but are not limited to:

- Non-discrimination
- Equality
- Dignity
- Autonomy
- Respect
- Self-fulfillment and personal development

- Full and effective participation and inclusion in society
- Respect for difference and diversity
- Accessibility

4.1.3 General Obligations

The convention should contain a number of general obligations on State Parties. These include but are not limited to:

- Adopting all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the convention
- Taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against older persons based on age, either as a sole factor or in combination with another factor or factors which can intersect or accumulate over time, including sex, disability, religion or conviction, political or other opinion, physical, mental or cognitive health, degree of care and assistance required, marital or family status, economic status, access to technology, sexual orientation, gender identity or gender expression, migrant status, refugee status, being homeless, being deprived of liberty, indigenous, ethnic, racial, minority, national or linguistic status, property, geographical location, citizenship, nationality, HIV status, birth or any other condition or status.
- Taking special measures to ensure equality in practice
- Systematically considering the differential impact of all their decisions, in particular age-based policies, on older people
- Guaranteeing the protection and promotion of the human rights of older persons where relevant in all policies and programmes
- Refraining from engaging in any act or practice that is inconsistent with the rights in the convention
- Ensuring that third parties, for example, private sector contractors and enterprises, act in conformity with the rights contained in the convention

- Taking all appropriate measures to eliminate discrimination against older persons based on age, either as a sole factor or in combination with another factor or factors by any person, organization or private enterprise
- Undertaking or promoting research on ageing and on issues particularly affecting people in older age, and ensuring data is collected, disaggregated, analysed, utilised and disseminated by all ages and sex
- Providing accessible, appropriate information to older persons on their rights and entitlement to benefits and resources
- Taking all appropriate measures to allow for older persons' full and effective participation in society and decision-making processes
- Developing policies and taking all appropriate measures, including awareness campaigns, to combat ageism and promote intergenerational cooperation and positive images of ageing, encouraging the dignified and respectful treatment of older persons

4.1.4 Human rights to be included in the convention

A wide range of rights have been included in submissions to the Working Group on what should be contained in a new instrument (see Section 5). Human rights to be included within a new UN convention include but should not be limited to the rights to:

1. Equality and non-discrimination
2. Equal recognition before the law
3. Autonomy and independence
4. Long term care and support for independent living
5. Privacy and a family life
6. Palliative care
7. A dignified death
8. Life
9. Health
10. Free and informed consent for medical treatment

11. Self-fulfillment
12. Full and effective participation in public and political life
13. Leisure
14. Age in place
15. Housing
16. The environment
17. Personal mobility
18. Accessibility
19. Freedom from all forms of violence, abuse and neglect
20. Freedom from torture, cruel, inhuman or degrading treatment
21. An adequate standard of living
22. Work
23. Social security and social protection
24. Lifelong education and learning
25. Property
26. Justice
27. Personal liberty and security of person
28. Freedom of expression, opinion, and access to information
29. Freedom of association and assembly
30. Freedom of movement and nationality
31. Rights in situations of risk and displacement
32. International co-operation
33. Data and statistics
34. Older people in situations of particular risk

See Annex 1 for the normative elements and normative basis for each of these rights.

4.1.5 Implementation, monitoring and accountability

To be effective a new convention must establish strong implementation, monitoring and accountability mechanisms at both the international and national level.

At the national level, a new convention should establish a co-ordinating mechanism with responsibility to implement the provisions of the convention in ratifying countries, i.e. States Parties. Focal points should be established within national government to facilitate a range of actions related to implementing the provisions of the convention. Attention should be given to measures to support capacity building of States Parties and other stakeholders to implement the provisions of the convention.

The convention should establish independent national monitoring bodies in each ratifying country (i.e. States Parties). Civil society, in particular older people and the organisations that represent them, should be involved and participate fully in these monitoring bodies. Individuals should be afforded access to enforceable individual complaint mechanisms at the national level.

At the international level, a new convention should create an independent treaty body to monitor States Parties on national implementation, receive periodic reports, receive complaints, conduct investigations and make recommendations on compliance with provisions within the instrument.

A new instrument should be open to signature and ratification and/or accession by regional integration bodies so that areas where regional bodies have competence and regional legislation will be subject to the provisions of the convention.

4.2 Normative contents of the right to equality and non-discrimination¹⁹⁸⁾

4.2.1 Introduction: key issues

Ageism and age discrimination

There is no specific or universal age at which a person can or is likely to experience ageism and related discrimination on the basis of older age. Ageism manifests as stereotyping, prejudice, discrimination, harassment, vilification, abuse, exploitation, neglect and violence and results in social injustice, exclusion and discrimination in every aspect of life.

Differential treatment

People should be treated equally regardless of age whilst simultaneously differential treatment should be permitted in order to ensure equal opportunity or equal access.

However, age categories can be discriminatory and exclusionary so require careful and detailed justification. Differential treatment on the ground of age currently considered acceptable can be inconsistent with the human rights principles of non-discrimination and equality, and justification tests used to assess acceptability can be contaminated by ageist stereotypes, assumptions and exclusionary attitudes.

Exceptions

Exceptions to the prohibition of age discrimination, namely where age discrimination

198) This section is based on the following submissions to the Working Group which the author wrote and co-wrote: *HelpAge International Submission on Equality and Non-discrimination*, May 2017 and *Joint submission by AGE Platform Europe, HelpAge International, The Law in the Service of the Elderly, National Association of Community Legal Centres Australia, Equality and non-discrimination*, May 2017

is considered lawful for example in access to goods and services, diminish the importance of age discrimination and the seriousness with which age discrimination is treated. Exceptions also reinforce and perpetuate negative ageist attitudes and practice and magnify the way discrimination is felt.

4.2.2 Normative framework

Definitions

- **Older age**

A static, single chronological age-based definition of an older person or older age is an inappropriate basis for a new convention.

- **Equality**

Equality in older age is the full participation and inclusion of older persons in all aspects of society based on equal respect for the dignity of older persons.

- **Discrimination**

Discrimination should be defined as including any act or omission in relation to that person or someone associated with them, including a policy, law, rule, practice, requirement, condition or situation, which directly or indirectly and without objective justification:

- Creates less favourable treatment of
- Imposes burdens, obligations or disadvantages on
- Withholds benefits, opportunities or advantages from
- Undermines the human dignity of
- Adversely affects the equal enjoyment of rights and freedoms by

any older person on the basis of their age or perception of their age, or on the basis of the combined effect of their age and another personal characteristic,

or the combined effect of any two or more characteristics, or on the cumulative effect of repeated discrimination, or causes or perpetuates systemic disadvantage.

General obligations on States

The right should contain a range of general obligations on States to ensure both formal and substantive equality in older age. These general obligations must be comprehensive and wide-ranging, and include a duty to consider the differential impact of all their decisions, in particular age-based policies, on older people

Special measures

Special measures, namely proactive measures that favour older people in order to ensure equality and non-discrimination in practice and a genuine benefit to address disadvantage, should be allowed.

All forms of discrimination

- The prohibition of, and guarantee of legal protection against, discrimination in older age should apply to every aspect of life without limitation.
- The right must engage all forms of discrimination in older age including direct, indirect, by association, by perception or imputation, and harassment.
- The prohibition of discrimination in older age should not be subject to a wider range of exceptions to the principle of equal treatment than is permitted for any other prohibited ground. Any exceptions, including age proxies, require specific justification.

Multiple discrimination

- The right should protect older persons from intersectional discrimination, namely the combined effect of age and another personal characteristic or the combined effect of any two or more characteristics.

- The right protect older persons against cumulative discrimination, namely discrimination on a number of occasions over time.
- The grounds upon which multiple discrimination may occur should be comprehensive.
- The right should provide protection for particular groups of older persons who suffer discrimination and denial of rights on heightened or systemic basis and/or as a common experience.

Ageism, structural and systemic discrimination

- The right should provide protection against both discrimination against an individual and structural and systemic ageism and the attendant obligations on States should be comprehensive.
- States should have an obligation to take steps to eliminate harmful ageist social norms and practices.

Exceptions

- The prohibition of discrimination and unequal treatment in older age should not be subject to a wider range of exceptions to the principle of equal treatment than is permitted for any other prohibited ground.
- Any exceptions, including age proxies, require specific justification and review under a duty to consider the differential impact of all decisions on older persons.
- Permissible justifications must not undermine human rights principles including those of non-discrimination, equality and dignity.

Remedies, sanctions and enforcement

- States should assist older persons in making claims and accessing justice.
- Assistance provided to older persons in making claims should be tailored and comprehensive.

- States should take account of accumulating discrimination when fashioning redress and reparation for age discrimination, including where appropriate in any award of damages.

Awareness raising and information

To ensure information, research and public awareness around equality and non-discrimination in older age States should:

- Raise awareness of the rights and capacities of older persons
- Counter any discriminatory systemic ageist perceptions of and practices towards older persons and older age
- Eliminate any harmful traditional practices which affect the human rights and dignity of older persons
- Promote awareness of the benefits of age equality and of investing in older age
- Promote a positive image of ageing
- Eliminate any ageist institutional, systemic or structural practices which affect the human dignity of older persons
- Undertake or promote research on ageing and on issues particularly affecting people in older age, and ensuring data is collected, disaggregated, analysed, utilised and disseminated by all ages and sex
- Provide accessible, appropriate information to older persons on their rights and entitlement to benefits and resources
- Engage and make older persons partners and active participants in shaping social policies and public programmes which relate to their rights and interests.

4.3 Normative contents of the right to freedom from violence, abuse and neglect¹⁹⁹⁾

4.3.1 Introduction: key issues

Types of violence, abuse and neglect

Older persons are subjected to different types of violence, abuse and neglect, including physical, psychological, sexual and financial violence and abuse, neglect, abandonment and harmful traditional or customary practices. It may be a single or repeated act, may be against one individual or systemic, structural or part of an institutional practice, for example a restrictive practice.

Self-neglect

The inclusion of self-neglect within the context of protection from violence and abuse is controversial. Whereas violence, abuse and neglect are caused actively or passively by a third party, self-neglect is the result of the older person's choice of action (or inaction). It has unique ecological and personal characteristics. Autonomy and independence is central to the well-being of those at risk of self-neglect. The phenomenon of self-neglect in older age needs further definition and study.

Settings

Violence, abuse and neglect may take place within both private and public settings, be it at home, in the community or in public places such as in hospitals or long-term residential facilities. Public spaces include a wide range

199) This section is based on the following submissions to the Working Group which the author wrote and co-wrote: *HelpAge International Submission on Neglect, violence and abuse*, May 2017 and *Joint submission by AGE Platform Europe, HelpAge International, The Law in the Service of the Elderly, National Association of Community Legal Centres Australia, Neglect, violence and abuse*, May 2017

of physical and virtual locations. Providing care and support in the home and community without proper needs assessment, training, adequate resources and support may increase the risk of violence, abuse and neglect.

Perpetrators

The diversity of the potential perpetrators and particular contexts distinguishes violence, abuse and neglect in older age from other forms of violence, for example male violence against women. Perpetrators may include spouses and partners and other family members, community members (non-family) known or unknown to them, community leaders, local militia or law enforcement groups, service providers, legal representatives, guardians and attorneys. Whilst interdependence between the perpetrator and the older person is critical in some contexts, perpetrators are not limited to those who might be considered to fall within an expectation or position of trust.

Intersectional drivers

Ageism intersects with other forms of discrimination and violence creating distinct challenges for, among others, older persons with disabilities, older women, older LGBTI and older migrants and minorities who are more exposed to social isolation and have fewer opportunities to access quality health care and social assistance, which are key elements in prevention of violence, abuse and neglect. In addition systemic ageism intersecting with other prejudices may result in, inter alia, disrespecting religious belief when performing intimate tasks, not accommodating the needs of or even harassing older lesbian and gay couples and neglecting those with high support needs.

4.3.2 Normative Framework

Definitions

- Violence, abuse and neglect

Violence, abuse and neglect in older age is understood as any acts, or threats of such acts, of violence, abuse and neglect that result in, or are likely to result in, death or physical, sexual, psychological or economic harm or suffering to older persons. It should not be understood as limited in relations with an expectation or position of trust.

Violence, abuse and neglect of older persons is understood to include coercion or arbitrary deprivation of liberty, expulsion from the community, and any form of abandonment or neglect that is perpetrated or tolerated by the State or its agents, whether occurring in public or in private settings.

Violence, abuse and neglect is understood as including a single or repeated act or omission or failure to act, and that it may be against one individual or may be systemic, structural, customary or part of an institutional practice.

- Abuse

A single or repeated act or omission to the detriment of an older persons that harms or create a serious risk of harm (whether or not harm is intended) to their physical, mental, financial or moral integrity and infringes the enjoyment or exercise of their human rights and fundamental freedoms, regardless of whether or not this occurs in a relationship of trust, or in a relationship where there is an expectation or a position of trust.²⁰⁰⁾

200) See *Inter-American Convention on Protecting the Human Rights of Older Persons*, 2015 and National Research Council, 2003, p 40 cited in UNDESA, *Neglect, Abuse and Violence Against Older Women*, 2013

- Neglect

The refusal or failure of responsible caregivers and other stakeholders to provide a care-dependent older person with assistance in daily living tasks or essential support or necessities of life such as food, clothing, shelter, water/hydration, warmth, health and medical care and medication and aids to daily living. This can also include desertion of a care-dependent older person, also called abandonment.²⁰¹⁾

All forms of violence, abuse and neglect

- The right to freedom from violence, abuse and neglect in older age should include all forms of violence, abuse and neglect against older persons.

Public and private settings

- The right should apply to violence, abuse and neglect in private and public settings.
- Acts perpetrated by both private and public actors should fall under the right.
- States may be responsible for private acts of violence abuse and neglect of older persons if they fail to act with due diligence to:
 - Prevent acts of violence abuse and neglect against older persons
 - Protect and support the victims/survivors
 - Investigate and prosecute incidents of violence, abuse and neglect
 - Punish the perpetrators
 - Provide redress to the victim/survivors for the harm suffered.

201) See WHO, 2002 cited in UNDESA, *Neglect, Abuse and Violence Against Older Women*, 2013

Prevention

- States should have an obligation to take comprehensive steps to prevent violence, abuse and neglect of older persons in public and private settings including but not limited to:
 - Put in place effective legislation and policies to ensure all forms of violence, abuse and neglect are identified, investigated and redressed
 - Allocate sufficient resources to effective implementation
 - Provide training for all care providers, including family and other informal care providers
 - Put in place a system of appropriate needs assessment and monitoring in situations of care and support
 - Pay specific attention to the intersectional drivers of violence
 - Raise awareness of and sensitise society to the different forms of violence, abuse and neglect in older age and how to identify and prevent.

Support services

The right should provide for access to a range of support services for survivors of violence, abuse and neglect, including but not limited to:

- a full range of medical, psychosocial, rehabilitative and legal services
- access to information about available support and services
- access to appropriate victims support services
- access to effective remedies and redress.

Remedies and redress

- The right should provide an obligation on States to assist survivors with making complaints.
- The right should provide an obligation on States to investigate and lay criminal charges.
- The state should begin with the assumption that the individual is best

placed to judge his or her own well-being and observe self-determination of the survivor.

- Criminal justice responses, criminal offences and sentencing practices should reflect the aggravated nature of offenses against older persons.
- Older age should not limit compensatory damages or access to survivor services.

Data and statistics

- The right should provide an obligation on States to collect, disaggregate, analyze, utilise and make public at regular intervals appropriate information and statistical data on all forms of violence, abuse and neglect.
- This should include prevalence and trends, risk factors, perpetrators, access to support services and effective remedies and redress.
- All information gathering and research should comply with internationally accepted norms and ethical principles in the collection and use of statistics.

Interdependence with other rights

The right to freedom from violence, abuse and neglect in older age relates to other rights in older age, including the rights to:

- Freedom from torture, or other cruel, inhuman or degrading treatment or punishment
- Physical and psychological integrity
- Autonomy and independence
- Freedom from ageism and age discrimination

V

The Open-ended Working Group on Ageing process

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5.1 Where we are now

In 2015 the UN General Assembly adopted a resolution in which Member States recognised the diversity policies, standards and mechanisms aimed at protecting and promoting the rights of older persons may lead to inconsistent protection of their rights; that the current approach at the international level may lead to gaps in reporting and monitoring of existing treaty obligations to older persons; that ageing is not sufficiently visible; and that further progress needs to be made in the effective enjoyment and realization of all human rights of older persons.²⁰²⁾ The resolution was co-sponsored by a geographically wide and diverse group of Member States and represents consensus and progress made at the Open-ended Working Group on Ageing [hereafter the Working Group].²⁰³⁾

However, whilst support for a new UN convention on the rights of older persons is growing among Member States, there is still no consensus to begin drafting a new instrument. Frustration at this lack of progress was voiced by both Member States and non-governmental organisations the 6th session of the Working Group in 2015.²⁰⁴⁾ To move the discussion forward a number of Member States at the 7th Working Group session in 2016 called on the Working Group to refocus on a substantive discussion on the normative contents of rights in older age to inform and the form and status of any future standard setting.²⁰⁵⁾ A further development at the 7th Working Group session was the granting of the participation rights for the first time to national human rights institutions (NHRIs).²⁰⁶⁾

202) A/RES/70/164

203) The resolution was co-sponsored by Austria, Brazil, the Central African republic, Colombia, Costa Rica, Croatia, Ecuador, Guatemala, Honduras, Indonesia, Israel, Liechtenstein, Malawi, Malaysia, Malta, Mexico, Morocco, Nepal, Panama, Peru, the Philippines, Slovenia, Turkey, the USA and Uruguay

204) See statements at <https://social.un.org/ageing-working-group/sixthsession.shtml>

205) See for example the statement by the UK <http://statements.unmeetings.org/media2/7664282/united-kingdom.pdf>

As a result the 8th Session of the Working Group in July 2017 will focus on equality and non-discrimination, and neglect, violence and abuse. Member States, civil society organisations, NHRIs and UN bodies were invited to respond to a set of guiding questions on these two areas of rights in advance of the session. The UN Secretariat will compile a working document from submissions received to guide discussion the 8th session.²⁰⁷⁾

5.1.1 The Working Group's mandate

The proposal for an instrument on the rights older persons was first put forward at the UN by Argentina in 1948.²⁰⁸⁾ The idea did not progress at the time and it took over fifty years for a UN working group, the Open-ended Working Group on Ageing, to be established in 2010 to examine the rights of older persons.²⁰⁹⁾

In 2008, in the annual resolution on the *Follow up to the Second World Assembly on Ageing*, the UN General Assembly requested the Secretary General to include 'information on the promotion and protection of human rights as they pertain to older persons' in its report on the implementation of the Madrid International Plan of Action on Ageing (MIPAA).²¹⁰⁾ In 2009 the General Assembly encouraged Member States to consider how international human rights norms and standards can best ensure the full enjoyment of the rights of older persons and the possibility of new policies, instruments or measures.²¹¹⁾

The following year, 2010, the General Assembly decided to establish a working group with the purpose of strengthening the rights of older persons

206) See Chair's Summary of 7th Session <https://social.un.org/ageing-working-group/documents/seventh/ChairsSummaryOEWG7.pdf>

207) See call for input from the Chair to Member States 30 March 2017 <https://social.un.org/ageing-working-group/documents/eighth/Letter-Member-States.pdf>

208) A/C.3/213/REV.1, 26 November 1948

209) A/RES/65/182

210) A/RES/63/151

211) A/RES/64/132

by ‘*considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering as appropriate, the feasibility of further instruments and measures*’.²¹²⁾

Successive resolutions pertaining to the Working Group have been adopted by the UN General Assembly since 2011, reinforcing the Working Group’s original mandate and allocating specific tasks to it. In 2011 Member States as well as other UN human rights bodies and civil society organisations were invited to continue to contribute to the work of the Working Group.²¹³⁾ In 2012 the General Assembly requested the Working Group to present 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.²¹⁴⁾ In the same resolution the Secretary General was asked to submit to the Working Group a compilation of existing international legal instruments, document and programmes addressing the rights of older persons.

In 2013 the General Assembly invited relevant stakeholders to continue to contribute to the Working Group²¹⁵⁾. In 2014 it explicitly called upon Member States ‘*to present concrete proposal, practical measures, and lessons learned that will contribute to promoting and protecting the rights and dignity of older persons, in order to enable it [the Working Group] to fulfill its mandate*’ and to present a compilation of these to the 70th General Assembly.²¹⁶⁾

In 2015, in the absence of a resolution that year on the *Follow up to the Second World Assembly on Ageing*, the UN General Assembly adopted a resolution on *Measures to enhance the promotion and protection of the human rights and dignity of older persons*. In this resolution Member States

212) A/RES/65/182

213) A/RES/66/127

214) A/RES/67/139

215) A/RES/68/134

216) A/RES/69/146

recognized the lack of a binding international human rights instrument exclusively devoted to older persons, noted the importance of strengthening the implementation of existing instruments but also encouraged Member States to continue to explore alternative measures to improve the protection of the rights of older persons. Again Member States were encouraged ‘*to present best practices, lessons learnt and possible content for a multi-lateral instrument, as appropriate, in order to enable it [the Working Group] to fulfill its existing mandate*’.²¹⁷⁾ This request was reiterated in 2016.²¹⁸⁾

5.1.2 The Bureau of the Working Group

Argentina has chaired the Working Group since it was established. The Bureau is made up of one Member State representative from each of the UN regional groups. They are currently:²¹⁹⁾

- Africa Group: Namibia
- Asia-Pacific Group: Qatar (Vice-Chair)
- Eastern European Group: Slovenia (Vice Chair)
- Latin America and the Caribbean Group: Argentina (Chair)
- Western European and Others Group: Austria

5.1.3 Member State participation in the Working Group sessions

Official records of actual Member State participation in the Working Group sessions are not available. However, using the proxy of registration, intended participation in the first two sessions in 2011 was low: 36 per cent of Member States registered for the first session in April 2011 and 26 per cent registered for the second session in August 2011. An unofficial visual headcount conducted by HelpAge International in the conference room at the 3rd - 7th sessions

217) A/RES/70/164

218) A/RES/71/164

219) <https://social.un.org/ageing-working-group/bureau.shtml> Visited 11 May 2017

shows consistently low rates of participation:²²⁰⁾

- 1st Session 2011: 36% registration
- 2nd Session 2011: 26% registration
- 3rd Session 2012: unofficial count 73 Member States (39%)
- 4th Session 2013: unofficial count 96 Member States (50%)
- 5th Session 2014: unofficial count 105 Member States (54%)
- 6th Session 2015: unofficial count 101 Member States (52%)
- 7th Session 2016: unofficial count 70 Member States (36%)

This visual headcount by HelpAge International also shows an imbalance of attendance across the five UN regional groups,²²¹⁾ with generally higher rates of participation from Member States from the Latin America and the Caribbean Group, and Western European and Others Group and lower levels of participation by Member States from the Africa Group, the Asia-Pacific Group and the Eastern European Group.

For example, at the 6th session in 2015, an unofficial visual count showed attendance by 86 per cent of Member States from the Western European and Others Group, 63 per cent from the Latin America and the Caribbean Group, 47 per cent from the Eastern European Group, 47 per cent from the Asia-Pacific Group, and 37 per cent from the Africa Group. At the 7th session in 2016, a similar unofficial visual headcount showed attendance by 68 per cent of Member States from the Western European and Others Group, 51 per cent from the Latin America and the Caribbean Group, 30 per cent from the Asia-Pacific Group, 26 per cent from the Eastern European Group and 18 per cent from the Africa Group.²²²⁾

220) These numbers are indicative only and do not purport to be an official or accurate record of attendance.

221) <http://www.un.org/depts/DGACM/RegionalGroups.shtml>

222) These numbers are indicative only and do not purport to be an official or accurate record of attendance.

〈Table 2〉 Percentage of Member States attending Working Group session

UN Regional Group	Percentage of Member States attending Working Group session ²²³⁾			
	2013	2014	2015	2016
Western European and Others Group	82%	68%	86%	68%
Latin America and the Caribbean Group	39%	66%	63%	51%
Eastern European Group	39%	65%	47%	26%
Asia-Pacific Group	41%	50%	47%	30%
Africa Group	27%	38%	37%	18%

5.1.4 Agenda items covered at Working Group Sessions

Table 3 below outlines the key agenda items at each Working Group session.²²⁴⁾ The first session in 2011 addressed the key components of the Working Group's mandate as given to it by the General Assembly in 2010, namely '*considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering as appropriate, the feasibility of further instruments and measures*'.²²⁵⁾ Subsequent sessions have paid little attention to the existing human rights framework but have instead focused either on specific areas of rights or on other regional human rights, social or development policy frameworks.

It could be argued that the way the agenda has been set has hindered the progress of the Working Group in fulfilling its mandate in its entirety. In addition the time allocated to follow-up discussion of resolutions has been extremely short and primarily limited to interactive discussion with civil

223) These numbers are indicative only and do not purport to be an official or accurate record of attendance.

224) For full programmes of work for each session see <https://social.un.org/ageing-working-group/index.shtml>

225) A/RES/65/182

society rather than a fully moderated discussion between Member States themselves.

〈Table 3〉 Key agenda items at the Working Group sessions

Sessions	Agenda items
1 st – 2011	Existing international framework Existing regional framework
2 nd – 2011	Discrimination Social protection Health Violence and abuse
3 rd – 2012	Discrimination Social security and access to resources Autonomy, independent living and health care Violence and abuse Access to justice
4 th – 2013	Discrimination Social security Health Access to work 2nd Review and Appraisal of MIPAA Update on multi-lateral processes Follow-up to resolution 67/139
5 th – 2014	Violence & abuse: financial Human rights & care End of life care: financial & legal planning Older persons and the post-2015 agenda How to strengthen the rights of older persons through enhanced implementation of MIPAA Outcome of the Human Rights Council Social Forum Independent Expert on the enjoyment of all human rights by older persons
6 th – 2015	Discrimination (intersection between age and sex) Recent policy developments and initiatives concerning the human rights of older persons Recent legislative and legal developments and challenges in the human rights of older persons Older persons and the post-2015 development agenda Independent Expert on the enjoyment of all human rights by older persons Follow up to resolution 69/146
7 th – 2016	Independent Expert on the enjoyment of all human rights by older persons Recent regional developments and initiative concerning the human rights of older persons Human rights dimensions concerning older persons in recent policy developments and multi-lateral processes Follow up to resolution 70/164

5.1.5 Concrete proposals on contents of a new instrument

The Chair of the Working Group has twice requested Member States to send in their concrete proposals, practical measures, best practices and lessons learned to promote and protect the rights of older persons so the Working Group can fulfill its mandate, first in 2013 in response to resolution A/RES/67/139 and secondly in 2015 in response to resolution A/RES/69/146.

Table 4 represents the summary by the UN Secretariat at the fourth session in 2013 as a summary of the input received from Member States, the UN system and civil society organizations.²²⁶⁾ The rights were organized under these headings by the UN Secretariat.

Table 5 is the author's own summary of the rights suggested in 2015 by Member States, the UN system and civil society organizations for inclusion in a new international legally binding instrument.²²⁷⁾

226) All the submissions can be found at
<https://social.un.org/ageing-working-group/fourthsession.shtml>

227) All the submissions can be found at
<https://social.un.org/ageing-working-group/sixthsession.shtml>

〈Table 4〉 Summary of rights suggested to the Working Group in 2013

Economic Empowerment Standard of living Social protection, financial security & social assistance Access to work Access to credit, establishment of business, income generation activities & ownership of property Education and training	Social & Civil Participation Accessibility Information Legal services Judicial protection Equality before the law Public and political life Social and cultural life/recreation & sport Freedom of association	Health Care and long-term care Health care and mental health Vital drugs Social services
Dignity Respect for privacy Freedom from abuse and violence Physical security Life End of life Dignified death	Diversity Older indigenous people Older prisoners Disabled older people Older women Older migrants	

〈Table 5〉 Summary of rights suggested to the Working Group in 2015

2015 concrete proposals		
Discrimination	Torture, inhuman and degrading treatment	Environment
Life of dignity	Education & lifelong learning	Justice
Social security	Life	Housing
Adequate standard of living	Dignified Death	Freedom from violence and abuse
Autonomy & independence	Participation	Sexual identity & expression
Long term care	Property	Freedom of expression
Support for independence	Work	Freedom of association
Age in place	Privacy & a private life	Information
Accessibility & mobility	Equal recognition before the law	Freedom of movement & nationality
Health	Culture & leisure	

Whilst collectively the suggestions made cover a broad range of rights, at the same time the majority of best practices and practical measures submitted to the Chair prior to the 6th OEWG were confined to income security, health, violence and abuse and long term care, revealing a very narrow understanding of human rights and life in older age. There were very few examples of

measures to prohibit and eliminate ageism and all forms of discrimination, including intersectional and cumulative discrimination. There were few examples of measures to realise human rights in older age to justice, to effective remedies, to dignity at the end of life, to appropriate housing so older person can age in place, to continued self-fulfilment and personal development and to autonomy and self-determination in older age.

What this illustrates is that, regardless of how rights-based or effective the practices presented may be, there is still a narrow response to, and understanding of, the human rights obligations that states have to older persons.

5.2 Arguments for and against a new UN convention on the rights of older persons

This section highlights some of the key arguments that have been put forward both for and against a new UN convention on the rights of older persons.

5.2.1 Arguments for a new UN convention

1. Older persons face a number of particular and unique challenges to their rights

As was demonstrated in Section 2, there is now wide recognition of the particular and unique challenges older persons face to the full enjoyment of their rights that need to be addressed urgently. It has been argued that older persons should be recognized as a distinct group requiring specific attention.²²⁸⁾

2. Inconsistency in the application of existing international human rights law

228) Working paper prepared by Ms Chinsung Chung, member of the Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1, 2009, page 19

Older persons rights are protected under existing universal international human rights law. However, the application of this law has been inconsistent and universal norms have not been applied equally to older persons.²²⁹⁾

i. The current international protection regime is inadequate

As illustrated in Section 3, there are normative, implementation, monitoring and information gaps in relation to the rights of older persons. The former High Commissioner for Human Rights stated in 2012 that current arrangements at the international level to protect the rights of older persons are inadequate.²³⁰⁾ ²³¹⁾ This has been argued to be a normative gap in the existing human rights literature.²³²⁾ Few existing human rights instruments have specific mention of how rights apply to older persons or in the context of older age. International human rights bodies have not produced a systematic body of work on the rights of older persons over time.²³³⁾

ii. Failure to sufficiently address certain critical issues

It has been argued that older people's rights are often limited to social rights.²³⁴⁾ In 2010 the Office of the High Commissioner for Human Rights (OHCHR) pointed out that only a narrow set of rights have been considered by international human rights mechanisms when addressing older persons and others such as legal capacity, access to judicial remedies, mandatory retirement age, the right to work and labour-related standards after retirement, informed consent of health treatments, freedom of movement and freedom

²²⁹⁾ Quinn, *Human Rights and Older Persons in Ireland- Policy Paper*, 2013, page 19

²³⁰⁾ E/2012/51 page 17

²³¹⁾ Working paper prepared by Ms Chinsung Chung, member of the Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1, 2009, page 18

²³²⁾ Working paper prepared by Ms Chinsung Chung, member of the Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1, 2009, page 18

²³³⁾ E/2012/51 page 6

²³⁴⁾ Quinn, *Human Rights and Older Persons in Ireland- Policy Paper*, 2013, page 19

from torture required further interpretation.²³⁵⁾ In 2013, on the basis of a consultation with Member States, UN bodies and civil society, the OHCHR concluded that a number of human rights issues particularly relevant to older persons have not been sufficiently addressed by existing international human rights treaties or in the practice of human rights bodies and mechanisms, inter alia, age discrimination, access to work, adequate health services and social protection, protection from violence, abuse and neglect, and long term care.²³⁶⁾

Other areas identified as being inadequately addressed by existing human rights instruments are the impact that the private sector and families can have on older persons and States obligations to ensure their rights are protected by these third parties, and the exclusion of older persons in emergency and humanitarian responses.²³⁷⁾

iii. Invisibility of older persons

The UN General Assembly has recognised that issues of ageing are not sufficiently visible.²³⁸⁾ For example, as Judge points out, failure to explicitly identify age as a prohibited ground has obscured the discriminatory experiences of older persons because States and other actors have not been alerted to their presence.²³⁹⁾ In addition whilst a range of human rights obligations of States towards older persons are implicit in existing UN human rights instruments, lack of specific mention has rendered these obligations invisible

235) Office of the High Commissioner for Human Rights, *Human Rights of older persons: International human rights principles and standards, Background paper, Expert group Meeting*, May 2010, page 17

236) A/HRC/24/25 page 16

237) Judge, *The Rights of Older People: International Law, Human Rights mechanisms, and the Case for New Normative Standards*, Age Concern, HelpAge International, IFA, 2009

238) A/RES/70/164

239) Judge, *The Rights of Older People: International Law, Human Rights mechanisms, and the Case for New Normative Standards*, Age Concern, HelpAge International, IFA, 2009, page 11

to both States and the public, and older persons' rights remain invisible in implementation, monitoring and reporting. ²⁴⁰⁾

iv. Inadequate implementation

States have not incorporated international human rights standards pertaining to older persons into national legislation and policy action²⁴¹⁾. Various reviews have been done to assess the extent to which States are reporting to Treaty Bodies on how they are implementing their human rights obligations towards older persons. These have found inadequate and inconsistent levels of reporting by States,²⁴²⁾ inconsistent attention to the rights of older persons by the each of the Treaty Bodies²⁴³⁾ and very little attention to the rights of older persons with the Universal Periodic Review system.²⁴⁴⁾

3. Fragmented protection system

Older persons have to look to a wide range of instruments to both understand and claim their rights. Standards which offer protection of their rights are dispersed though many human rights texts.²⁴⁵⁾ These texts vary in

240) UN Department of Economic and Social Affairs, Report of the Expert group Meeting 'Rights of Older Persons' 5-7 May 2009

241) Working paper prepared by Ms Chinsung Chung, member of the Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1, 2009, page 24

242) For example Judge, *The Rights of Older People: International Law, Human Rights mechanisms, and the Case for New Normative Standards*, Age Concern, HelpAge International, IFA, 2009

243) Office of the High Commissioner for Human Rights, *Human Rights of older persons: International human rights principles and standards, Background paper, Expert group Meeting*, May 2010, page 17

244) HelpAge International, *International human rights law and older people: Gaps, fragments and loopholes*, 2012, page 6

245) Judge, *The Rights of Older People: International Law, Human Rights mechanisms, and the Case for New Normative Standards*, Age Concern, HelpAge International, IFA, 2009

their levels of authority and include advisory, non-binding texts such as Special Procedure recommendations and Treaty Body General Comments. No amount of this type of soft law, which focuses on different thematic areas and has been drafted and adopted at different times, can create the comprehensive and systematic framework necessary to protect the rights of older persons.²⁴⁶⁾ The UN General Assembly has recognised that this diversity and fragmentation of the international protection regime for older persons may result in both inconsistent protection of their rights and gaps in reporting and monitoring of existing treaty obligations towards older persons.²⁴⁷⁾

4. There is no binding international instrument that addresses the rights of older persons

MIPAA remains the only international instrument devoted to older persons but as the United Nations High Commissioner for Human Rights acknowledged in 2012, it does not provide a comprehensive human rights framework for older persons.²⁴⁸⁾ In 2016 on the basis of a consultation with Member States, UN bodies and civil society, the Independent Expert on the enjoyment of all human rights of older persons argued that MIPAA is not sufficient to ensure the full enjoyment of their rights by older persons. The reasons stated were because MIPAA is not a human rights instrument; it addresses ageing from a mainly developmental perspective; it has not been designed to comprehensively address existing human rights protection gaps.²⁴⁹⁾

Important human rights issues not provided for within MIPAA include equality before the law and non-discrimination, access to effective remedies and freedom from torture or other cruel, inhuman or degrading treatment or

246) HelpAge International, *International human rights law and older people: Gaps, fragments and loopholes*, 2012, page 6

247) A/RES/70/164

248) E/2012/51 page 5

249) A/HRC/33/44

punishment and there are no independent monitoring and accountability mechanisms to assess implementation.²⁵⁰⁾

5. Older persons can no longer be ignored

It has been argued that older persons can no longer be ignored, as a large and growing segment of the population and because of the major shift in the social fabric across all regions of the world their presence is creating.²⁵¹⁾

6. The value added of a new convention on the rights of older persons

Arguments have been made that a new convention on the rights of older persons would result in significant positive changes that improve the lives of older persons. A new convention would:

- Define older persons' rights as human rights and demonstrate that their abrogation is unacceptable²⁵²⁾
- Strengthen international protection of the rights of older persons²⁵³⁾
- Expand the concept of human rights protection for older persons as it would contain both obligations to refrain from doing harm to older persons and positive duties to ensure equality in older age²⁵⁴⁾
- Be an important platform to create an attitude shift towards ageing on a global scale²⁵⁵⁾ and a paradigm shift of how older persons are viewed as

250) E/2012/51 page 5

251) E/2012/51 page 17

252) Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135–1150

253) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011

254) Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135–1150

255) Committee on Employment and Social Affairs, European Parliament, *Report on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations (2014/2255(INI)*, A8-0241/2015

a social group²⁵⁶⁾

- Guarantee older persons equal access to their rights²⁵⁷⁾
- Provide normative clarity on States' obligations with respect to older persons²⁵⁸⁾
- Consolidate the rights of older persons and States obligations towards them in a single text²⁵⁹⁾
- Provide more visibility about the challenges older persons face to the enjoyment of their rights²⁶⁰⁾
- Be the basis for advocacy and public education, a tool to raise awareness and promote the rights of older persons²⁶¹⁾
- Promote equality and non-discrimination, removing gender- and age-based barriers²⁶²⁾
- Contribute to changing negative attitudes²⁶³⁾, challenge negative stereotypes,

256) UN Department of Economic and Social Affairs, Report of the Expert group Meeting 'Rights of Older Persons' 5-7 May 2009

257) Committee on Employment and Social Affairs, European Parliament, *Report on the implementation, results and overall assessment of the 2012 European Year for Active Ageing and Solidarity between Generations (2014/2255(INI)*, A8-0241/2015

258) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011 and UN Department of Economic and Social Affairs, Report of the Expert group Meeting 'Rights of Older Persons' 5-7 May 2009

259) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011; UN Department of Economic and Social Affairs, Report of the Expert Group Meeting 'Rights of Older Persons' 5-7 May 2009

260) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011

261) UN Department of Economic and Social Affairs, Report of the Expert Group Meeting 'Rights of Older Persons' 5-7 May 2009; Doron & Apter, 'The Debate Around the need for an International Convention on the Rights of Older Persons', *Forum, The Gerontologist*, 2010

262) Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135-1150

263) Working paper prepared by Ms Chinsung Chung, member of the Human Rights

ageism and age discrimination²⁶⁴⁾

- Be used to resolve domestic and international legal disputes²⁶⁵⁾
- Provide monitoring mechanisms to ensure participating States bring the national law and practice into line with the standards in the convention²⁶⁶⁾
- Provide accountability mechanisms for redress for the violation of older persons' rights²⁶⁷⁾
- Promote a rights-based approach to ageing policies²⁶⁸⁾
- Encourage more equitable resource allocation²⁶⁹⁾
- Encourage better data collection, analysis and dissemination²⁷⁰⁾
- Encourage on-going dialogue between States, civil society and older persons²⁷¹⁾

Council Advisory Committee, A/HRC/AC/4/CRP.1, 2009

- 264) UN Department of Economic and Social Affairs, Report of the Expert Group Meeting 'Rights of Older Persons' 5-7 May 2009; Doron & Apter, 'The Debate Around the need for an International Convention on the Rights of Older Persons', *Forum, The Gerontologist*, 2010; Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011
- 265) UN Department of Economic and Social Affairs, Report of the Expert Group Meeting 'Rights of Older Persons' 5-7 May 2009; Doron & Apter, 'The Debate Around the need for an International Convention on the Rights of Older Persons', *Forum, The Gerontologist*, 2010
- 266) Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135-1150
- 267) UN Department of Economic and Social Affairs, Expert Group Meeting 'Rights of Older Persons' *Advantages of a convention on the rights of older persons*, May 2009
- 268) Huenchan and Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, ECLAC, UNFPA, SIDA, 2011
- 269) UN Department of Economic and Social Affairs, Expert Group Meeting 'Rights of Older Persons' *Advantages of a convention on the rights of older persons*, May 2009; Tang & Lee, 'Global Justice for Older People: The Case for an International Convention on the Rights of Older People', *British Journal of Social Work* (2006) 36, 1135-1150
- 270) UN Department of Economic and Social Affairs, Expert Group Meeting 'Rights of Older Persons' *Advantages of a convention on the rights of older persons*, May 2009
- 271) UN Department of Economic and Social Affairs, Expert Group Meeting 'Rights of Older Persons' *Advantages of a convention on the rights of older persons*, May 2009

Member States who have expressed support for a new UN convention

As of December 2016, the following Member States have expressed support for a new UN convention in their statements at either the Working Group or, as in the case of Namibia and Burkina Faso, at the UN Human Rights Council in Geneva:²⁷²⁾

〈Table 6〉 Member States supporting a new convention

Latin America and the Caribbean Group	Africa Group	Asia-Pacific Group	Eastern Europe Group	Western European and Others Group
Argentina Benin Brazil Chile Colombia Costa Rica Cuba Dominican Republic El Salvador Guatemala Mexico Nicaragua Panama Paraguay Peru Uruguay	Burkina Faso Egypt Equatorial Guinea Eritrea Ghana Kenya Malawi Namibia Morocco Senegal South Africa Uganda	Bangladesh Indonesia Malaysia Nepal Philippines Qatar Saudi Arabia Viet Nam	Slovenia	

Support for the human rights of older persons in the work of the UN more broadly

‘Groups of Friends’ are informal groups that like-minded Member States set up when they wish to work across the official regional groups on issues that concern them.

2009

272) See Member States’ statements at <https://social.un.org/ageing-working-group/eighthsession.shtml> and the author’s notes from each session

The following Member States are a members of a Group of Friends of Older Persons in Geneva who wish to promote the rights of older people across the work of the UN in Geneva: Argentina, Austria, Brazil, El Salvador, Namibia, Portugal, Montenegro, Singapore, Tunisia, Slovenia, and Uruguay.

The following Member States are a members of a Group of Friends in New York who wish to promote the rights of older people across the work of the UN in New York: Argentina, Bolivia, Brazil, Barbados, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Indonesia, Kenya, Malaysia, Mexico, Nicaragua, Panama, Peru, Qatar, Slovenia, South Africa, Trinidad and Tobago, Turkey, and Uruguay.

An additional way to assess Member State interest in elaborating a new international human rights instrument is to look at those who voted in favour of resolution A/RES/67/139 in 2012 which mandated the Working Group to consider proposals for an international legal instrument and to present the main elements of such an instrument to UN General Assembly. The vote was controversial due to the high number of abstentions. However, the Resolution was adopted and the following Member States voted in favour of it:

Argentina	El Salvador	Nicaragua
Bangladesh	Equatorial Guinea	Panama
Benin	Eritrea	Paraguay
Bolivia	Ethiopia	Peru
Brazil	Gabon	Philippines
Brunei Dar Salaam	Gambia	Senegal
Cambodia	Guatemala	Singapore
Chad	Guinea	South Africa
Chile	Guyana	Sri Lanka
Colombia	Haiti	Tajikistan
Congo	Honduras	Thailand
Costa Rica	Indonesia	Togo
Cuba	Kazakhstan	Turkmenistan
DPR of Korea	Malaysia	United Rep. of Tanzania
Dominica	Maldives	Vanuatu
Dominican Republic	Mali	Venezuela
Ecuador	Mauritius	Viet Nam
Egypt	Mexico	

5.2.2 Arguments against a new UN convention

Less attention has been paid in existing literature to arguments against a new convention on the rights of older persons.²⁷³⁾ The following arguments have been taken from statements made by Member States at the Working Group sessions 2011–2016:

1. A convention will not make a difference to older people's lives

Arguments made to this effect include the views that a new convention will not tackle the challenges facing older persons;²⁷⁴⁾ there is no guarantee a new convention will have a positive impact on the situation of older persons;²⁷⁵⁾ a new convention would not fill the implementation, monitoring and information gaps recognized by the Working Group;²⁷⁶⁾ and a new convention would not bring about timely and concrete change.²⁷⁷⁾

2. The existing human rights framework is adequate

It has been argued that there are no normative gaps and protection of the rights of older persons under existing treaties is sufficient. All existing internationally recognized human rights standards and principles protect older persons without discrimination. A new convention will not add to the protection that already exists. A new convention will only duplicate the work of existing human rights treaties.²⁷⁸⁾

273) Doron & Apter, 'The Debate Around the need for an International Convention on the Rights of Older Persons', *Forum, The Gerontologist*, 2010

274) Albania, 3rd session, 2012
<https://social.un.org/ageing-working-group/documents/Albania.pdf>

275) Switzerland 4th Session 2013,
<https://social.un.org/ageing-working-group/govstatementfourth.shtml>

276) Switzerland, 5th session, 2014
<https://social.un.org/ageing-working-group/govstatementfifth.shtml>

277) Canada 6th session 2016
<http://statements.unmeetings.org/media2/7650792/canada-eng-.pdf>

3. Any protection gaps can be addressed through better implementation of existing treaties.

Application of existing standards and use of existing mechanisms could address any protection gaps and improve the monitoring of state action.²⁷⁹⁾ There has been a proliferation of human rights instruments. Rather than a new instrument existing ones should be implemented more effectively, and older persons rights should be mainstreamed by existing human rights bodies, including Special Procedures and the Universal Periodic Review.²⁸⁰⁾ Many of the protection gaps can be addressed through implementation of MIPAA.²⁸¹⁾

4. The current system is overloaded and cannot withstand a new instrument

A new convention will only apply more pressure on an already over-burdened UN reporting and monitoring system.²⁸²⁾

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- 278) USA, Switzerland, European Union 3rd session 2012
<https://social.un.org/ageing-working-group/govstatementthird.shtml> ; USA,
 European Union 4th session 2103
<https://social.un.org/ageing-working-group/govstatementfourth.shtml> ; USA, EU,
 Canada 5th session 2014
<https://social.un.org/ageing-working-group/govstatementfifth.shtml>; Canada 6th
 session 2015 <http://statements.unmeetings.org/media2/7650792/canada-eng-.pdf>
- 279) European Union 3rd session 2012
<https://social.un.org/ageing-working-group/govstatementthird.shtml> ; Albania 4th
 session,
[https://social.un.org/ageing-working-group/documents/fourth/statements/Albania.p
 df](https://social.un.org/ageing-working-group/documents/fourth/statements/Albania.pdf)
- 280) Albania, 3rd session, 2012
<https://social.un.org/ageing-working-group/documents/Albania.pdf>
- 281) European Union 3rd session 2012
<https://social.un.org/ageing-working-group/govstatementthird.shtml>
- 282) Canada 5th session 2014
<https://social.un.org/ageing-working-group/govstatementfifth.shtml> ; Canada 6th
 session 2015, <http://statements.unmeetings.org/media2/7650792/canada-eng-.pdf>

5. The cost of negotiating a new instrument is too high

Resources should be dedicated to immediate implementation of existing standards instead of on lengthy negotiating processes.²⁸³⁾

6. It will take too long

Producing a new convention will take years to negotiate and enter into force.²⁸⁴⁾

Member States who have argued against a new UN convention

The following Member States have rejected the proposal of a new UN convention in their statements at the Working Group: Albania, Australia, Canada, Denmark, India, the Netherlands, the Russian Federation, Switzerland and the USA.²⁸⁵⁾

Some Member States, whilst not explicitly rejecting a new UN convention have argued for better use of existing instruments before discussing the need for new instruments. This could be interpreted as an expression of doubt on their part for a new UN convention. These Member States are China, France, Germany, Japan, Norway, Pakistan and Sweden.²⁸⁶⁾

The vast majority of the 193 UN Member States have not yet stated an official position in support of or against a new UN convention.

283) Switzerland, 4th session 2013, <https://social.un.org/ageing-working-group/govstatementfourth.shtml> ; Canada, 5th session 2014 <https://social.un.org/ageing-working-group/govstatementfifth.shtml>

284) USA 3rd session 2012 <https://social.un.org/ageing-working-group/govstatementthird.shtml>

285) For statements made by Member States at the OEWG see: <https://social.un.org/ageing-working-group/> ; Author's notes from each session, unpublished.

286) See Member States' statements at <https://social.un.org/ageing-working-group/eighthsessions.shtml> and the author's notes from each session

5.3 Views of various international non-governmental organisations (INGOs)

This section summarises the position of various INGOs in three areas: whether we need a new UN convention on the rights of older persons and why; what its purpose should be; and, what rights should be contained within it. The summaries below are based on official statements made by the INGOs at the Working Group sessions, published documents, and where received, responses to the following survey questions which were sent to them by the author.

1. Do we need a UN new convention on the rights of older persons?
2. If no, why not?
3. If yes:
 - Why?
 - What should the purpose of a new UN convention be?
 - What rights should be contained in a new UN convention?

There are some gaps in the information available.

- AARP²⁸⁷⁾

Support for a new convention: Yes

Why: Existing international and regional human rights laws do not sufficiently protect the rights of older persons. The rights of older persons are embedded within international human rights conventions but are not specific. Standards

287) See Statements to the 2nd session of the Working Group in 2011 <https://social.un.org/ageing-working-group/documents/Statement%20AARP%20OE WG.pdf> and the 4th session in 2013 <https://social.un.org/ageing-working-group/documents/fourth/statements/AARP.pdf> ; and *AARP Input for the Open-ended Working Group on Aging Regarding Human Rights Instrument for Older Persons*, 2013, <https://social.un.org/ageing-working-group/documents/fourth/AARP.pdf>

are scattered throughout various international conventions. There is a lack of policies addressing the rights of the ageing population.

Purpose of a new convention: To clarify the nature of the rights of older persons and governments' obligations to protect them. A new convention would combat age discrimination, guide policy-making and shift the focus on ageing from marginal to high priority.

Principles underpinning a new convention: Human rights principles include but are not limited to the value and contributions of older persons; respect for the inherent dignity of all people, including older persons; equality and non-discrimination; independence; autonomy; full and effective participation and inclusion in society; access to information; self-fulfillment; personal development; and, intergenerational solidarity.

Rights within a new convention: Right to quality of life; right to health; right to support and services; right to live independently; nobody has the right to hurt, humiliate, punish or torture older people; right to be protected against all forms of violence; right to work; right to an adequate standard of living; right to education; right to own, sell or give away and inherit property; right to be recognized as a person who has rights under the law; right to access to the justice system; right to live freely and safely; right to meet with who they want; freedom of speech as long as it does not harm others; right to respect for privacy, home and family life; right to free movement; rights in times of natural disasters, humanitarian emergencies or armed conflict.

- Age International²⁸⁸⁾

Support for a new convention: Yes

Why: There is an inadequate response to ageing and older persons in international development and what policies there are consider older persons as a problem and are unlikely to construct solutions for a more positive society for all ages. Ageism holds back more older women and men from living well and with dignity than any other single factor. A human rights based response will ensure that everyone can live in dignity and fulfill their potential at every stage of their lives. In order to respect everyone's rights, these rights must be clearly articulated in a legal framework.

Purpose of a new convention: A new convention would recognize rights are universal, do not diminish with age and that people may need special protection at different stages of their lives. It would transform debates about global ageing, clearly articulate the rights every older person has and enable them to continue contributing to society. It would create a platform for positive change and stimulate better policy responses. It would be a tool for older persons to hold their governments to account. The process of developing, ratifying and implementing a new convention would drive the rights and needs of older persons up government's agendas.

Principles underpinning a new convention: Including, but not limited to: Respect for the inherent dignity of all people, including older persons; non-discrimination; independence; autonomy; full and effective participation and inclusion in

288) See *A UN convention on the rights of older people: time for the UK to lead*, Age International, 2015
http://www.ageuk.org.uk/Documents/EN-GB/Events/Parliamentary%20Receptions/Time_for_the_UK_to_lead.pdf?dtrk=true; and *Consultation Response Main elements for inclusion in an international human rights instrument for older people*, Age UK and Age International, 2013
<https://social.un.org/ageing-working-group/documents/fourth/AgeUK.pdf>

society; equality between all older persons regardless of gender; equality of opportunity; access to information; personal development; intergenerational equity and a lifecourse approach to human rights.

Rights within a new convention: Including, but not limited to: Right to life; right to health; right to support and services; right to live independently, in your own home and to participate in the community; freedom from torture or cruel, inhuman or degrading treatment or punishment; right to be protected against all types of violence; right to work; right to an adequate standard of living; right to social security; right to education; right to property and inheritance; right to access to financial services; right to be recognised as a person who has rights under the law; right to access the justice system; right to make decisions, and get support to make those decisions, about their own life; right to participate in political and cultural life; right to benefit from research and other advances in science and technology; right to live freely and safely and not to be detained because of old age or without a reason in line with the law; right to freedom of association; right to freedom of expression; right to religion and opinion, including the right to ask for, receive and pass on information; right to respect for privacy, home and family life; right to liberty of movement; rights in times of natural disasters, humanitarian emergencies or armed conflict.

- AGE Platform Europe²⁸⁹⁾

Support for a new convention: Yes

Why: MIPAA has failed to address the full spectrum of rights of older persons and to trigger sufficient policy change in areas where social realities in old age are worsening due to its lack of binding effect and lack of dedicated implementation and monitoring mechanisms.

Purpose of a new convention: To ensure that older persons enjoy their rights and fully participate in society on an equal basis with others. The convention should not focus on the vulnerability of older persons, nor stigmatize them. It should inspire a model of active ageing. It should aim to tackle negative perceptions of ageing fight ageism and age discrimination and remove barriers to the inclusion of older persons and allow them to continue contributing to society. A convention would clarify how these rights and freedoms apply to the context of ageing, codify in a single document what measures need to be taken to allow older people to effectively exercise their rights, and define areas where protection of rights has to be strengthened to ensure that older people can enjoy a dignified old age until the very end of their life.

A UN convention will acknowledge older persons are of equal value to society and draw public attention to the specific structural and cultural

289) See Statement to the 7th session of the Working Group in 2016
<https://social.un.org/ageing-working-group/documents/seventh/AGEEurope.pdf>;
AGE Platform Europe contribution to the UN DESA Call for NGO input to the Open- Ended Working Group on Ageing, 2013,
http://www.age-platform.eu/images/AGE_UN_DESA_input_FINAL.pdf; and *Our vision on human rights in 7 principles: Older people take a stand on their human rights!* AGE Platform Europe, 2016
<http://www.age-platform.eu/sites/default/files/AGE%20Human%20rights%20Manifesto%20Dec2016.pdf>

barriers that prevent them from enjoying their rights. It will prescribe the changes that are necessary for States to fulfil their obligations under the existing universal human rights instruments and encourage the establishment of mechanisms that older people can use to claim their rights. It will improve older persons' awareness of their rights, empower them as rights holders, and help fight internalised ageist stereotypes that sometimes impede them from reporting rights violations.

Principles underpinning a new convention: Recognition of the value and contributions of older persons; non-discrimination; full and effective participation and inclusion in society; respect for inherent dignity of older persons; autonomy and independence; solidarity between generations.

Rights within a new convention: An international human rights instrument should address all aspects of older persons' lives including but not limited to: Equality and non-discrimination; right to life; right to health and long-term care; right to autonomy and self-determination; freedom from violence and abuse; right to work; right to social protection and adequate standard of living; right to social inclusion and participation to political, social and cultural life; right to education and life-long learning; right to access justice, receive legal assistance and access information; right to respect for privacy, home and family life.

- Alzheimer's Disease International²⁹⁰⁾

Support for a new convention: Yes

Why:

Purpose of a new convention: The full enjoyment of all human rights of older persons with or without dementia.

Principles underpinning a new convention:

Rights within a new convention:

- The Global Ageing Network, formerly International Association of Homes and Services for the Ageing²⁹¹⁾

Support for a new convention: Yes

Why: Insidious ageism permeates countries around the world. Older persons are largely undervalued, lumped together because they have reached a certain age and are assumed to be unproductive and a burden. Age discrimination is widespread. Our collective attitude about ageing and the elderly remains negative and largely unchecked.

Purpose of a new convention: A convention would ensure that violence against older persons is prosecuted, that older persons can get and keep jobs, that they have social assistance or pension access to affordable health services and that caregivers are supported. Such a convention would level the playing field between older persons and other generations, recognizing that

290) Statement of Alzheimer's Disease International on the Open-Ended Working Group on the Rights of Older Persons, 2016
<https://www.alz.co.uk/sites/default/files/pdfs/Statement-UN-Rights-Older-Persons.pdf>

291) Statement from the Global Ageing Network to the United Nations Open-Ended Working Group on Ageing (OEWGA), 2016
http://globalageing.org/wp-content/uploads/2016/12/Statement-from-the-Global-Ageing-Network-to-the-UN-OEWGoA_Dec2016.pdf

human rights are the rights people are entitled to simply because they are human irrespective of their age, citizenship, nationality, race, ethnicity, language, gender, sexuality, HIV status or abilities.

Principles underpinning a new convention:

Rights within a new convention:

- Global Alliance for the Rights of Older People (GAROP)²⁹²⁾

Support for a new convention: Yes

Why: Age discrimination and ageism are tolerated across the world, and older persons experience discrimination and the violation of their rights at family, community and institutional levels. Unprecedented demographic ageing means that the number of people who are likely to experience age discrimination and violation of their rights in old age will increase. Despite the fact that international human rights laws apply to people of all ages, specific reference to older persons is rare. As a result, older persons' rights are not being protected sufficiently by human rights monitoring mechanisms, governments, the human rights community and civil society.

Purpose of a new convention: A new convention would

- Provide a definitive, universal position that age discrimination is morally and legally unacceptable.
- Provide legally binding protection with accompanying accountability mechanisms.
- Provide clarity for duty bearers and rights holders on what their rights and responsibilities are towards older people.

²⁹²⁾ See <http://www.rightsofoldpeople.org/why-we-need-a-convention/> and Statements to the 4th session of the Working Group at <https://social.un.org/ageing-working-group/documents/fourth/statements/The%20Global%20Alliance.pdf>

- Bring together existing rights standards that are currently dispersed throughout various other instruments and interpretive documents.
- Redress the present imbalanced focus on older people's economic and social rights by bringing all indivisible rights into one instrument.
- Put age discrimination and older people's rights more centrally onto governments', donors' and NGOs' agendas.
- Draw attention to, deepen understanding of and provide redress for the complex, multiple forms of discrimination that older women and men experience.
- Provide a framework to guide policy responses to demographic ageing based on rights, equity and social justice.
- Provide a powerful advocacy and education tool for older people and those that represent them for claiming their rights.
- Encourage a paradigm shift from older people being considered recipients of welfare, to older people as rights holders with responsibilities.

Principles underpinning a new convention:

Rights within a new convention: Prohibition of all forms of discrimination on the basis of old age, including multiple discrimination and a comprehensive range of substantive rights.

- Gray Panthers²⁹³⁾

Support for a new convention: Yes

Why:

293) See *Gray Panthers Input for the Open-Ended Working Group on Ageing Regarding Human Rights Instrument for Older Persons*, 2013, <https://social.un.org/ageing-working-group/documents/fourth/GrayPanthers.pdf> and statement to the 4th session of the Working Group <https://social.un.org/ageing-working-group/documents/fourth/statements/Gray%20Panthers.pdf>

Purpose of a new convention: To ensure a future for all segments of society that is fair, economically sustaining and inclusive.

Principles underpinning a new convention: Recognition of the value of older persons; older persons as contributors; intergenerational solidarity.

Rights within a new convention: Including but not limited to non-discrimination; the right to equal access to health care, including mental health care; the right to work; the right to freedom from abuse and ill-treatment; the right to economic security and productivity; rights in emergency situations; the right to long term care; the right to inclusion in civic, cultural and political affairs; the right to equal participation in decision-making; the right to transportation and mobility; the right to sustenance and food security; the right to equal inclusion in cultural rights; the right to dignity and personal integrity in every aspect of life, including at the end of life. Specific attention should be given to the issues and concerns of older women.

- HelpAge International²⁹⁴⁾

Support for a new convention: Yes

Why: A single instrument, a new international convention on the rights of

294) See *Why it's time for a new convention on the rights of older people*, HelpAge International, 2009
[file:///ven-cfs-3/RedirectedFolders\\$/test.ha2/Downloads/Why%20convention%20older%20people.pdf](file:///ven-cfs-3/RedirectedFolders$/test.ha2/Downloads/Why%20convention%20older%20people.pdf); *International human rights law and older people: Gaps, fragments and loopholes*, HelpAge International, 2012
<https://social.un.org/ageing-working-group/documents/GapsinprotectionofolderpeoplesrightsAugust2012.pdf> ; Statement to the 3rd session of the Working group, 2012
<https://social.un.org/ageing-working-group/documents/HelpAgeInternationalopeninstatement.pdf>; *A new convention on the rights of older people: a concrete proposal*, HelpAge International, 2015
<https://social.un.org/ageing-working-group/documents/sixth/HelpAgeInternational.pdf>

older persons, is the most effective way to ensure that all people, now and in the future, enjoy their human rights in their older age on an equal basis with others. The failure to clearly define and provide for persistent acts, circumstances and institutional factors in international human rights law that currently deprive older persons of their dignity has resulted in gaps in the protection and promotion of the rights of older persons and has exacerbated their invisibility throughout the entire international human rights system.

The absence of a systematic and comprehensive articulation of how human rights apply to older persons has had a number of consequences: there are normative gaps in a number of areas; older persons' rights continue to be neglected in the international human rights framework and what little attention there is highly dispersed and fragmented; national standards on the rights of older persons are inconsistent and often inadequate; both States and Treaty Body committees are age-blind during reviews; and ageism and discrimination on the basis of old age continue to be tolerated in both law and practice.

A new convention is necessary to establish norms and standards promoting dignity, equality, autonomy and self-fulfilment in older age to replace the deeply stigmatising and dehumanising ageist attitudes and behaviour that currently dominate the way we at every level in society respond to older age and older people. It would improve the promotion and protection of human rights in older age in law and in practice by clarifying what states' human rights obligations to people in older age are. And, by clarifying how human rights apply in older age, it would enable people to better understand and assert their rights in older age.

Purpose of a new convention: The purpose of a new convention is to promote and provide for equality in order to protect and ensure the full and

equal enjoyment of all human rights in older age. The scope of the convention must include all people who are subjected to ageism and are discriminated against and denied their rights on the basis of their older age alone or in combination with other forms of discrimination.

Principles underpinning a new convention: Including but not limited to non-discrimination; respect; dignity; autonomy; equality; self-fulfillment and personal development; full and effective participation and inclusion in society; respect for difference and diversity; and accessibility.

Rights within a new convention: To ensure the full and equal enjoyment of all human right in older age the convention needs to prohibit discrimination in older age in all its forms and highlight, reaffirm and articulate all human rights across every aspect of life and elaborate on what is required by States to give effect to these rights in older age.

These rights include but are not limited to the right to equality and non-discrimination; the right to autonomy and independence; the right to equal recognition before the law; the right to self-fulfillment; the right to leisure; the right to life; the right to a dignified death; the right to full and effective participation; the right to age in place; the right to housing; the right to the environment; the right to mobility; the right to accessibility; the right to long term support for independent living; the right to privacy and a family life; the right to sexual identity and expression; the right to freedom from all forms of violence and abuse; the right to freedom from torture, cruel, inhuman or degrading treatment; the right to work; the right to an adequate standard of living; the right to social security and social protection; the right to health; the right to information; the right to lifelong education and learning; the right to property; the right to justice; the right to freedom of expression; the right to freedom of association and assembly; the right to personal liberty; the right

to freedom of movement and nationality; rights in humanitarian contexts; and international co-operation.

Particular attention must be paid to ensuring the rights of older persons in particular situations of risk. These include, but are not limited to older women where gender, age, sexual orientation and/or marital status related discrimination may intersect or accumulate over time; older persons living in residential and other long-term care facilities, including their right to freedom of movement in these settings; older persons deprived of their liberty, for example in prison, in detention centres and in other settings; older persons in situations of humanitarian risk; older persons with disabilities; older persons with dementia; and older lesbian gay, bi-sexual, transgender and intersex persons.

- Human Rights Watch²⁹⁵⁾

Support for a new convention: Yes

Why: Older persons face particular challenges to their rights that need to be urgently addressed. The challenges include ensuring the full enjoyment of the rights of older persons living in institutions, older persons facing humanitarian emergencies and widows.

Purpose of a new convention: To promote and protect the rights and dignity of older persons

Principles underpinning a new convention:

Rights within a new convention:

295) Human Rights Watch Calls for Better protections for the Rights of Older People, September 2015 <https://www.hrw.org/news/2016/09/15/human-rights-watch-calls-better-protections-rights-older-people>

- International Association of Gerontology and Geriatrics²⁹⁶⁾

Support for a new convention: Yes

Why: The human rights of older people are not secured sufficiently and too many of them are suffering from poverty, illness, deprivation, isolation, neglect, even violence and abuse. This situation is derived from the vulnerable status of older people in the society. The general human rights enshrined in existing UN instruments are not sufficient for protection against the unique forms of vulnerability. Particularly in developing countries, these standards are quite low, remaining inadequate for the effective protection of older people. Development is a necessary but not sufficient condition to ensure the human rights of older persons since development addresses limited areas of rights such as the rights to food, health and social security. Development responses do not address other human rights challenges older persons can face such as low social status, isolation, age discrimination, neglect and violence and abuse.

Purpose of a new convention:

Principles underpinning a new convention:

Rights within a new convention: We need a comprehensive international legal instrument addressing the fundamental rights of older persons worldwide regardless of the developmental stage.

296) Statement to the 4th session of the Working Group in 2013
<https://social.un.org/ageing-working-group/documents/fourth/statements/IAGG.pdf>

- International Council on Social Welfare²⁹⁷⁾

Support for a new convention: Yes

Why: There are inadequacies of protection stemming from normative gaps affecting older persons. Older persons face widespread discrimination, neglect and violence and there is an absence of meaningful social protection. MIPAA is little known at national level, is not legally binding and many of its commitments have remained on paper. We need a more powerful tool than MIPAA to trigger decisive national action to improve the treatment of older persons in many societies.

Purpose of a new convention:

Principles underpinning a new convention:

Rights within a new convention: Including the right to social protection

- International Federation on Ageing (IFA)

The International Federation on Ageing shares the position of GAROP.²⁹⁸⁾

- International Longevity Centre - Global Alliance (ILC-GA) and International Network for the Prevention of Elder Abuse (INPEA)²⁹⁹⁾

Support for a new convention: Yes

Why: The lack of a single binding universal document that adequately

297) Statements to the 3rd and 4th sessions of the Working Group, 2012
<https://social.un.org/ageing-working-group/documents/OEWCA.pdf> and 2013
<https://social.un.org/ageing-working-group/documents/fourth/statements/International%20Council%20on%20Social%20Welfare.pdf>

298) Email response to survey questions 7 May 2017

299) ILC-GA and INPEA submitted a joint response to the survey questions.

reflects or covers the rights of people as they age, has left older persons at a severe disadvantage and subject to risk of violence, abuse and neglect due to systemic discrimination and inequality, grounded in systemic ageism, often sanctioned by harmful cultural and traditional practices and lack of legal protections. Therefore, a discrete single instrument on the rights of older persons is necessary to ensure universal human rights apply to all persons of all ages.

Purpose of a new convention: The technical purpose of a new UN convention is “*to promote, protect and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration, and participation in society.*”³⁰⁰⁾ However, a new UN convention should set forth universal norms and standards upon which nations can implement domestic legislation and institute responsive social policy and administration practices that protect, promote, ensure and empower older persons to know and to claim their rights.

Principles underpinning a new convention:

Rights within a new convention: Any instrument must incorporate the human rights enshrined in the Universal Declaration of Human Rights, the UN Principles of Older Person, 1999, those found in the Covenants and in particular issues faced by older women as detailed in the CEDAW, General Recommendation No 27, and the ILO Recommendation 202. We as well embrace the rights set forth in the 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, and

300) Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 1

the European regional human rights law. We wish however to emphasize the following emergent issues of concern to INPEA and the ILC Global Alliance regarding the human rights of older women and men which require attention in the following areas:

The right to live free of violence, abuse and neglect

- Cumulative effect of neglect abuse and violence against older women specifically and older persons in general not only across lifespan but also effects of multiple perpetrators and multiple forms of abuse (physical, psychological, financial and neglect) termed poly-victimization
- Self-neglect as separate from abuse, neglect and financial exploitation by others; causes can include untreated mental illness including depression, frontal lobe impairment, dementia and geriatric syndrome
- Financial exploitation and abuse by adult children and grandchildren, in addition to other categories of perpetrator and types of abuse commonly included in domestic violence research and statutes targeting women of reproductive age
- Harmful traditional and cultural practices, widowhood rites and witchcraft accusations

The right to social protection

- Adequate universal non-contributory social protection systems

The right to property

- Requires adequate access to legal services, implementation of laws and policies prohibiting age discrimination against older persons, legislation to protect older women regarding the right to property, including: land rights, and the right to inheritance, and to outlaw customary laws and practices (including accusations of witchcraft) to prevent land grabbing from older women and widows of all ages (Protocol to the African

Charter on Human and Peoples' Rights)

The right to health

- The need for a life course approach, that older persons and especially older women are deprived of access to adequate, age appropriate, affordable health care services, including essential medicines and pain relieving drugs, inadequate or non existent palliative and long term care services, the consequences are often aggravated due to gender bias and poverty across the life course and compounded by ageist attitudes

The right to autonomy and self-determination

- The right to informed consent, to refuse treatment, and participation in end of life decision-making

The right to be free from torture

- Issues of poly pharmacy and restraints, as well as older persons in institutions and prisons

VI

The National Human Rights Commission of Korea's role in the process towards a UN convention on the rights of older persons

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The National Human Rights Commission of Korea (NHRCK) has a key role to play in the following areas:

6.1 National level

Activities to build support for a new convention on the rights of older people among national stakeholders may include

- Consultation with older people on their experience of enjoyment of their rights
- Review of national legislation to identify gaps; assess extent to which it promotes equality and the rights of older people
- Studies into the enjoyment of specific rights of older people in the Republic of Korea
- Lead inquiries into alleged violations of rights of older people
- Convening multi-stakeholder dialogues between older people, the NHRCK, parliamentarians, civil society and the government on different aspects of the rights of older people
- Highlight the rights of older people in the national media
- Attend and make statements about the national context at the Working Group sessions
- Include older people on the NHRCK delegation to the Working Group.

ASEM Global Ageing Centre:

- Encourage discussions between government representatives, NHRIs, older persons, civil society and academia to discuss how human rights apply in the context of older age and to older persons
- Support national actors (between government representatives, NHRIs, older persons, civil society and academia to develop resource materials about the national context of the rights of older persons

6.2 Regional level

The NHRCK has a role to play in the joint work of the Asia Pacific Forum around a new convention. This might include:

- Ensure that the topic of a new convention on the rights of older persons is on the agenda of each forthcoming regional NHRI network conference
- Development of a joint paper APF on the normative elements of the focus areas of rights to be discussed at future Working Group sessions.
- Development of a joint APF paper on the normative elements of a new convention
- Joint side events at the Working Group sessions and other inter-sessional fora.

ASEM Global Ageing Centre:

- Create opportunities for government representatives, NHRIs, older persons, civil society and academia to discuss how human rights apply in the context of older age and to older persons
- Create opportunities for informal discussions between government representatives, NHRIs, older persons, civil society and academia away from the political constraints of the UN system are necessary to allow for a more substantive and less political debate.

6.3 International level

As a chair of the GANHRI Working Group on Ageing, the NHRCK has a leadership role to play in building support and understanding on the rights of older persons and the need for a new convention with NHRIs around the world. Its activities should not be confined to the annual sessions of the Open-ended Working Group but should extend to the inter-sessional period. Activities might include:

- Development of a GANHRI Working Group on Ageing paper on the normative elements of focus areas of rights to be discussed at future Working Group sessions
- Development of a GANHRI Working Group on Ageing paper on the normative elements of a new convention
- Joint side events at the Working Group sessions and other inter-sessional fora.
- Encourage other NHRIs to meet with older persons and their organisations to discuss older persons' lived experience of their human rights and what implications this has for the contents of a new convention
- Involve NHRIs in a multi-country review comprising of a critical analysis of the extent to which national legislation guarantees and protects the rights of older persons and what barriers older persons face to the enjoyment of their rights under current legal systems
- Host regional meetings of NHRIs to discuss the need for, and contents of, a new convention. These could be virtual meetings
- Ensure that the topic of a new convention on the rights of older persons is on the agenda at forthcoming GANHRI meetings in Geneva
- Host side events on the rights of older persons at forthcoming GANHRI meetings in Geneva
- Email alerts to all GANHRI members on forthcoming opportunities for engagement at the international level, for example, but not limited to at the OEWSG, the UPR, the Human Rights Council, the Independent Expert
- Maintain the GANHRI webpage on NHRIs and ageing <http://nhri.ohchr.org/EN/Themes/Ageing/Pages/WorkingGroup.aspx>

ASEM Global Ageing Centre:

- Create opportunities for government representatives, NHRIs, older persons, civil society and academia to discuss how human rights apply in the context of older age and to older persons

- Create opportunities for informal discussions between government representatives, NHRIs, older persons, civil society and academia away from the political constraints of the UN system are necessary to allow for a more substantive and less political debate.
- Strengthen international and regional ties and co-operation by establishing a network of international, regional and national organisations to include older persons' and their organisations, government and inter-governmental bodies, UN bodies, civil society organisations, academia and national human rights institutions and equality bodies.
- Establish an online portal to accumulate and share related data and information. Activities around this portal include:
 - A depository of documentation related to the rights of older persons, for example good practice case studies of how to protect and promote the rights of older persons; UN resolutions and reports; academic articles and reports; media news stories; NHRIs inquiries and findings; government reports; civil society reports.
 - Regular updates on what new resources are available should be sent to network members to maintain interest in and access to the online portal.
 - A platform for interactive discussion, for example regular, periodic online forums could be hosted to discuss a series of human rights topics; persons could be invited to write guest blogs or articles or upload their own reports.
 - Regular outreach to network members for example in the form of a periodic e-newsletter and specific email alerts around specific events.
- Monitoring international trends to deepen understanding of the extent to which older persons enjoy their rights, to identify gaps in protection as well as instances where rights are being protected.
- Develop rights-based indicators to monitor trends must rights-based indicators, based on international human rights standards

VII. Conclusion

The case for a new convention on the rights of older persons is clear: older people around the world are being subjected to ageism and discrimination, denied their rights and deprived of their dignity. The existing international human rights system has failed to respond to this and a new UN convention is the most effective instrument to address this in a comprehensive and systematic way.

The NHRCK has a key role to play in deepening understanding of the rights of older people and building support for a new UN convention at the national, regional and international levels.



**Annex : Human rights to be
included in the new UN convention
on the rights of older people**

Introduction

The rights included in this section are not intended as an exhaustive list and there may be other rights that emerge in the ongoing discussion around a new convention that have not been included here, for example rights related to assistive technologies and robotics which has been the subject of the Independent Expert's most recent report to the Human Rights Council.¹⁾ Elements of each right have been suggested, along with a short review of the normative basis and existing provisions in international human rights treaties and regional human rights law on the rights of older persons. This list of existing provisions and other sources is illustrative and not intended to be exhaustive.

Human rights to be included in the convention

1. Equality and non-discrimination
2. Equal recognition before the law
3. Autonomy and independence
4. Long term care and support for independent living
5. Privacy and a family life
6. Palliative care
7. A dignified death
8. Life
9. Health
10. Free and informed consent for medical treatment
11. Self-fulfillment
12. Full and effective participation in public and political life
13. Leisure

1) A/HRC/36/48, July 2017

14. Age in place
15. Housing
16. The environment
17. Personal mobility
18. Accessibility
19. Freedom from all forms of violence, abuse and neglect
20. Freedom from torture, cruel, inhuman or degrading treatment
21. An adequate standard of living
22. Work
23. Social security and social protection
24. Lifelong education and learning
25. Property
26. Justice
27. Personal liberty and security of person
28. Freedom of expression, opinion, and access to information
29. Freedom of association and assembly
30. Freedom of movement and nationality
31. Rights in situations of risk and displacement
32. International co-operation
33. Data and statistics
34. Older people in situations of particular risk

1. The right to equality and non-discrimination

i) Normative elements²⁾

Affirmation of the right

Older persons have the right to equality and freedom from discrimination on the basis of their age or any other ground, alone or in combination with another ground or grounds.

- Scope of the right

The prohibition of, and guarantee of legal protection against, discrimination in older age shall apply to every aspect of life without limitation.

The right shall engage all forms of discrimination in older age including direct, indirect, by association, by perception or imputation, and harassment.

The prohibition of discrimination in older age shall not be subject to a wider range of exceptions to the principle of equal treatment than is permitted for any other prohibited ground. Any exceptions, including age proxies, require specific justification.

The grounds upon which multiple discrimination may occur shall be comprehensive.

The prohibition of discrimination and unequal treatment in older age shall not be subject to a wider range of exceptions to the principle of equal treatment than is permitted for any other prohibited ground.

- State obligations

State Parties shall take steps and measures to ensure:

Equality

- Formal and substantive equality in older age, including but not limited to

2) See AGE Platform Europe, HelpAge International, The Law in the Service of the Elderly, and National Association of Community Legal Centres Australia, *Equality and non-discrimination*, 2017

a duty to consider the differential impact of all their decisions, in particular age-based policies, on older persons; special measures, namely proactive measures that favour older persons in order to ensure equality and non-discrimination in practice and a genuine benefit to address disadvantage.

Multiple discrimination

- Protection from intersectional discrimination, namely the combined effect of age and another personal characteristic or the combined effect of any two or more characteristics.
- Protection from cumulative discrimination, namely discrimination on a number of occasions over time.
- Protection for particular groups of older persons who suffer discrimination and denial of rights on heightened or systemic basis and/or as a common experience.

Ageism, structural and systemic discrimination

- Protection from discrimination against an individual and from structural and systemic ageism.
- Elimination of harmful ageist social norms and practices.

Exceptions

- Specific justification and review of any exceptions, including age proxies, under a duty to consider the differential impact of all decisions on older persons.
- Permissible justifications do not undermine human rights principles including those of non-discrimination, equality and dignity.

Remedies, sanctions and enforcement

- Older persons have access to tailored and comprehensive assistance in making claims and accessing justice.
- Redress and reparation for age discrimination, including where appropriate in any award of damages takes into account of accumulating discrimination.

Awareness raising and information

- Information, research and public awareness around equality and non-discrimination in older age, inter alia, by:
 - Raising awareness of the rights and capacities of older persons
 - Countering any discriminatory systemic ageist perceptions of and practices towards older persons and older age
 - Eliminating any harmful traditional practices which affect the human rights and dignity of older persons
 - Promoting awareness of the benefits of age equality and of investing in older age
 - Promoting a positive image of ageing
 - Eliminating any ageist institutional, systemic or structural practices which affect the human dignity of older persons
 - Undertaking or promoting research on ageing and on issues particularly affecting people in older age, and ensuring data is collected, disaggregated, analysed, utilised and disseminated by all ages and sex
 - Providing accessible, appropriate information to older persons on their rights and entitlement to benefits and resources
 - Engaging and making older persons partners and active participants in shaping social policies and public programmes which relate to their rights and interests.

ii) Normative basis

The right to equality before the law and non-discrimination in the enjoyment of relevant rights under each treaty is recognized in the UDHR,³⁾ in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁾ and the International Covenant on Civil and Political Rights (ICCPR)⁵⁾ and in

3) Article 2, UDHR, 1948

4) Article 2, ICESCR, 1966

5) Article 2 and Article 26, ICCPR, 1966

the subsequent international human rights treaties for children,⁶⁾ women,⁷⁾ persons with disabilities⁸⁾ and migrant workers⁹⁾. The application of Article 26 of the ICCPR has been interpreted to extend beyond just the articles of the ICCPR itself to a general obligation not to enact discriminatory laws or apply laws in a discriminatory way.¹⁰⁾

However, discrimination on the basis of age is only explicitly prohibited in one international human rights treaty, the International Convention on the Rights of Migrant Workers and their Families (ICMW) and such protection is contingent on being a migrant worker or a member of their family.¹¹⁾ Age is not explicitly mentioned in the list of prohibited grounds in the non-discrimination articles of the other international human rights treaties.

Whilst these lists of prohibited grounds are non-exhaustive and the Committee on Economic, Social and Cultural Rights has stated that age could fall under the catch-all category of “other status”¹²⁾, the category ‘other status’ is open to selective interpretation by States¹³⁾ and the failure to explicitly mention age as a prohibited ground has rendered age discrimination relatively invisible in the implementation and monitoring of the non-discrimination articles.¹⁴⁾

6) Article 2, Convention on the Rights of the Child (CRC), 1989

7) Article 2, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979

8) Article 5, Convention on the Rights of Persons with Disabilities (CRPD), 2006

9) Article 7, International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICMW), 1990

10) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 8, August 2012

11) Article 7, International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICMW), 1990

12) General Comment No. 6, The economic, social and cultural rights of older persons, paragraph 12, 1996

13) HelpAge International, *International human rights law and older people: Gaps, fragments and loopholes*, 2012, page 4

14) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 8,

There is also a lack of clarity about when discrimination on the basis of age may be lawful. The Committee concluded that discrimination on the basis of 'age is prohibited in *several* contexts' [emphasis added],¹⁵⁾ suggesting that not all differential treatment based on age is prohibited under international law. Subsequently 'the true nature of this right is not as yet fully worked out in different states and the jurisprudence of various courts is too little for judge-made law to fill the gap adequately'.¹⁶⁾

The complex nature of multiple discrimination in older age is not adequately provided for under international human rights law, both in terms of intersectional discrimination, namely the combined effect of age and another personal characteristic or the combined effect of any two or more characteristics on the ground of age in combination with one or more other grounds. Similarly cumulative discrimination, namely discrimination on a number of occasions over time, is not provided for. The heightened risk of intersectional and cumulative discrimination experienced by particular sections of the older population has also not been adequately addressed.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 2

International Covenant on Economic, Social and Cultural Rights, 1966, Article 2

International Covenant on Political and Civil Rights, 1966, Article 2 & Article 26

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 2

International Convention on the Protection of the Rights of all Migrant

August 2012

15) *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, paragraph 29. 2009

16) Allen, *Discussion papers: Legal issues for strengthening international legislation on the rights of older person*, Age UK



Workers and Members of Their Families, 1990, Article 7

Convention on the Rights of Persons with Disabilities, 2006, Preamble & Article 8

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 5

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 3

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, II.Non-discrimination

2. The right to equal recognition before the law

i) Normative elements

- Affirmation of the right

Older persons everywhere and at all times have legal capacity and the right to equal recognition before the law on an equal basis with others.

Older persons have the right to designate proxies to make decisions for them in circumstances where the older person is unable to do so.

Older persons have the right to participate in, and challenge, any decisions that interfere with the exercise of their legal capacity.

- Scope of the right

Older persons have legal capacity on an equal basis with others in all aspects of life including, but not limited to, decisions about their long term care and support; leisure time; property; income; finances; place of residence and living arrangements; health and medical treatment or care; end of life care; personal, family and private life, including sexual and intimate relationships; electoral voting; and, funeral arrangements.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have access to the mechanisms and support they may require to exercise their legal capacity in accordance with their conscience, will and preferences, and on an equal basis with others.
- Older persons are able to designate proxies, should they so choose, to make decisions for them in circumstances where the older person is unable to do so.
- All measures, judicial and otherwise, relating to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law, including the

right to legal counsel; respect the rights, will and preferences of the older persons; are free of conflict of interest and undue influence; are proportionate and tailored to the older person's circumstances; are the least restrictive possible; apply for the shortest time possible and solely to specific decisions in which a lack of capacity is at issue; and are subject to regular review by a competent, independent and impartial authority or judicial body.

- Effective access to justice for older persons including through provision of procedural accommodations and special measures to prevent unnecessary delay in the legal process.
- Appropriate training in this area for those working in the administration of justice, including police and prison staff.

ii) Normative basis

The right to equal recognition before the law is well established in international human rights law.¹⁷⁾ It is interdependent with the right to autonomy and independence. Article 12 of the Convention on the Rights of Persons with Disabilities in particular has brought about a paradigm shift in the way equal recognition before the law is understood.

The Committee on the Rights of Persons with Disabilities has elaborated on Article 12 in its General Comment No. 1 in which it clarifies that legal capacity includes, by virtue of being human, both the capacity to be a holder of rights (legal standing) and the capacity to be an actor under the law (legal agency to act on your rights and have your actions recognised by the law).¹⁸⁾ General Comment No. 1 also differentiates between legal capacity and mental capacity, whereby mental capacity refers to the decision-making skills of a person, which vary from one individual to another and are contingent on a

17) See UDHR Article 6; ICCPR Article 16; CRPD Articles 5 and 12

18) CRPD, *General Comment No. 1 (2014), Article 12: Equal recognition under the law*, CRPD/C/GC/1

range of factors including social and political ones.

The Committee stresses that legal and mental capacity should not be conflated and that perceived or actual deficits in mental capacity are not legitimate reasons for the denial or limitation of legal capacity, both legal standing and legal agency.

Mechanisms must be put in place to support people to exercise their legal capacity in line with their will and preferences. This is a significant shift from ‘substituted’ to ‘supported’ decision making. If it is not possible, after significant efforts have been made, to determine the will and preferences of the individual, then the best interpretation of their will and preferences must be used.

The Committee stresses that *‘The “best interests” principle is not a safeguard which complies with article 12 in relation to adults.’* This too is an important shift away from what others consider to be in the best interests of the individual concerned to the individual’s own will and preferences.

Whilst these represents a paradigm shift away from the dependence of the individual and towards their autonomy and independence, there has been little exploration of these issues in international law as they relate to older persons with limited or fluctuating cognitive, mental or physical function and in the context of guardianship.¹⁹⁾

The Special Rapporteur on the right to health raised concerns around denial of older persons’ exercise of legal capacity in relation to free, prior and informed consent to medical treatment.²⁰⁾

The right to equal recognition before the law is interdependent on the right to autonomy and other rights such as the rights to free and informed consent, to live independently and to justice, not least in terms of the right to a fair

19) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, 2012, page 22

20) A/HRC/18/37, paragraph 65

hearing and to participate in decisions and access to a court to challenge decisions that interfere with their legal capacity, including full or partial guardianship orders. ²¹⁾

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 6

International Covenant on Political and Civil Rights, 1966, Article 16

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 15

Convention on the Rights of Persons with Disabilities, 2006, Article 5.1 & Article 12

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 30

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 4

21) Salontaji-Drobnajk v. Serbia (Application no.36500/05), 13 October cited in Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, 2012, page 22

3. The right to autonomy and independence

i) Normative elements

- Affirmation of the right

Older persons have the right to freedom and legal capacity to make decisions, to determine their life plans and to lead autonomous and independent lives in line with their own conscience, will and preferences and on an equal basis with others.

- Scope of the right

Older persons have the right to autonomy, self-determination and choice in all aspects of their life, including but not limited to making decisions about their long term care and support; leisure time; property; income; finances; place of residence and living arrangements; health and medical treatment or care; end of life care; personal, family and private life, including sexual and intimate relationships; and, funeral arrangements.

Older persons have the right to interact with others and full, effective and meaningful participation in social, cultural, public and political life and educational and training activities.

Older persons right to live independently in the community on an equal basis with others. This includes the right to choose where and with whom they live and not to be obliged to live in any particular living arrangement.

- State obligations

States Parties shall take steps and measures to ensure:

- Older persons have access to mechanisms, including supported-decision making, which enable them to exercise their right to autonomy and independence.
- Mechanisms designed to enable the exercise of older persons' right to autonomy and independence shall recognize older persons' right to legal

capacity on an equal basis with others in all aspects of life.

- Any limitations to older persons' exercise of their autonomy should be proportionate to the specific situation, and provided with appropriate and effective safeguards to prevent abuse and discrimination.
- Older persons have access to a range of support services in order to support living and inclusion in the community, and to prevent isolation or segregation from the community. Such support should be available on an equal basis in home, community and residential settings to ensure older persons' enjoyment of their right to choose where and with whom they live.

ii) Normative basis

Autonomy is the ability to make life choices and decisions and act independently, including with support if necessary, according to one's conscience, will and preferences.

Autonomy is both an underlying principle that governs every right within a new convention as well as a right in and of itself. The principle of autonomy presumes that individuals are able to make choices and act independently according to their own conscience, will and preferences. In order to make such autonomous decisions, and for these decisions to be legally effective, the law requires that the individual has the legal capacity to do so.

To enjoy their right to autonomy therefore, older persons must enjoy legal capacity on an equal basis with others. Where legal safeguards are not put in place, it is possible for the relevant authority to presume an older person does not have legal capacity based on ageist notions and prejudices.

The right to autonomy and independence is interdependent with a range of other rights including but not limited to the right to equal recognition before the law, the right to long term care and support for independent living, the right to free and informed consent in medical matters and the right to a family and private life.

Whilst the right to equal recognition before the law²²⁾ and the right to a family and private life²³⁾ are enshrined in international human rights law, the rights to autonomy and independence and to long term care and support for independently living are newly emerging in the application of human rights in the context of older age.²⁴⁾ Concerns have also emerged around the denial of older persons' free and informed consent in areas such as medical treatment, long term care services and end of life treatment.²⁵⁾

The right to autonomy and independence has a public dimension in that it is linked to the active and meaningful participation in social, cultural, public and political life and educational and training activities.²⁶⁾ It also has a private dimension in terms of making decision about one's own life, life plans and well-being²⁷⁾ and includes private and family life²⁸⁾.

The right also encompasses access to mechanisms that enable older persons to exercise their right to make autonomous decisions based on their own will and preferences, including with support when necessary. These may include, for example, access to advance decision making in relation to health and end

22) For example UDHR, Article 6; ICCPR, Article 16; CRPD Article 5.1

23) For example UDHR, Article 12; ICCPR Article 17; CRPD Articles 22 and 23

24) ECLAC, *Challenges to the autonomy and interdependent rights of older persons*, 2017, page 81

25) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, 2012, page 22. See also Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 11; Council of Europe recommendation CM/Rec(2014)2 B. *Consent to medical care*

26) See Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 7; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 5.3; Council of Europe recommendation CM/Rec(2014)2, III. Autonomy and participation, paragraph 10

27) See Inter-American Convention on Protecting the Human Rights of Older Persons, 2015 Article 7, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 5

28) Council of Europe recommendation CM/Rec(2014)2, III. Autonomy and participation, paragraph 11

of life care, access to political decision making processes and access to mechanisms, including support where necessary, to exercise their legal capacity in line with their will and preferences.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 6 & Article 12

International Covenant on Political and Civil Rights, 1966, Article 16 & Article 17: 1

Convention on the Rights of Persons with Disabilities, 2006, Article 5.1, Article 12

Article 22.1 & Article 23.1

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 7, Article 11

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 5:

The EU Charter of Fundamental Rights, 2000, Article 25

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, III. Autonomy and participation

4. The right to long-term care and support for independent living

i) Normative elements

- Affirmation of the right

Older persons have the right to affordable, appropriate, integrated, quality, timely, holistic, social care and support services which are adapted to their individual needs, promote and protect their well-being and maintain their autonomy and independence, without discrimination of any kind.

- Scope of the right

The right applies to long-term care and support in different settings, including but not limited to in the home, in the community, and in residential settings.

- State obligations

State Parties shall take steps to ensure:

Autonomy

- The availability of, and older persons' access to, a range of long-term care and support services, including assistive technologies, in different settings to ensure older persons' enjoyment of the right to choose where they live and with whom on an equal basis with others.
- Long-term care and support services are adapted to the individual needs of older persons and are sensitive to cultural, religious, gender, language, and other distinctions.
- All aspects of an older person's long-term care, including initiation and termination of support services, are carried out with the free, prior and informed consent of the individual.
- Older person's inclusion in the planning, delivery and monitoring of their long-term care and support services, including access to support with decision-making where necessary.

- Older persons have the opportunity to make advance instructions on the type of care and support they would like and who provides it, should it be required at a future point in time.
- Older persons can nominate proxy decision-makers in the event they are unable to make or communicate their decisions.

Participation

- Older persons receiving long-term care and support services have opportunities to participate in the community and in civic, educational, recreational, social, and cultural activities in accordance with their interests and abilities, and to receive the necessary technological and other support to facilitate access to these activities, without discrimination of any kind.

Restrictive practices

- The limitation and regulation the use of all restrictive practices and ensure that the use of a restrictive practice is the least restrictive option, is used for the shortest time necessary and is used with a view to eliminating the use of restrictive practices over time.
- Restrictive practices are only allowed when they are used to prevent immediate harm, with the approval of an independent decision-maker, and in accordance with the behaviour management plan of the person to whom the restrictive practice is being applied.

Standards and quality of long-term care and support

- regulation, monitoring and enforcement of quality standards of long-term care and support services provided by both State actors and by private enterprises, including not for profit organisations.
- All care providers receive education, training, supervision and support, including respite, and are subject to laws, policies and procedures to protect older persons from violence, abuse and neglect.
- Appropriate resourcing, training of care providers and public awareness to safeguard the rights of older persons receiving long-term care and support in any setting.

Redress

- Older persons have access to effective complaint mechanisms to seek redress for practices that arbitrarily restrict their liberty and autonomy or in situations where violations occur.

Information

- Older persons have access to information about their health, long-term care and support, and the confidentiality of that information should be guaranteed.
- Older persons can effectively use and select available long-term care and support services.

Financing

- Development and implementation of policies to address public and private financing of long term care and support services, and ensure that older persons are not unfairly denied necessary and appropriate support and services based on their financial means.

ii) Normative basis²⁹⁾

There is no specific right to long-term care and support for independent living in older age in international human rights law.

The Convention on the Rights of Persons with Disabilities, 2006, Article 19, provides for the right to independent living for older persons with disabilities, which includes the provisions of support services to enable such independent living.

The Optional Protocol to the Convention Against Torture (OP-CAT) establishes the Sub-Committee for the Prevention of Torture (SPT) and National Prevention Mechanisms (NPM) and sets out their mandate to visit any place where persons are deprived of liberty³⁰⁾. Social care institutions are listed as one of

29) For more information see Sleaf, Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries, National Human Rights Commission of Korea, 2016.

the places of detention that the SPT can visit³¹⁾. This creates the potential for independent inspections of long term care institutions.

A wide range of general provisions in international human rights law³²⁾ are pertinent in long-term care settings but their specific application in this area has yet to be fully explored.

For example in the context of compulsory institutionalisation all people are protected from arbitrary deprivation of their liberty under Article 9 (1) of the International Covenant on Civil and Political Rights but such safeguards against forced institutionalisation in international law have been criticised as being inadequate³³⁾. Similarly there has been little demonstrable effort by State parties or Treaty Bodies to interpret and apply the prohibition on torture, cruel, inhuman or degrading treatment in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to older persons living in long term care settings³⁴⁾.

Another area of particular concern that has not been sufficiently addressed is the use of restrictive practices to manage challenging behaviour in long-term care and support settings.³⁵⁾ Restrictive practices include seclusion, surveillance,

30) A/RES/57/199

31) *The SPT in Brief*, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Brief.aspx> (11 May 2016)

32) For example, non-discrimination (ICCPR Art 26); the right to life (ICCPR Art 6); the right to liberty and security of person (ICCPR Art 9); the right to health (ICESCR Art 12); the right to an adequate standard of living (ICESCR Art 11); the right to social security (ICESCR Art 9); the right of disabled people to live independently with the community (CRPD Art 19); the right to freedom of expression and information (ICCPR Art 19); equal recognition before the law (ICCPR Art 16); and, the right to access to justice and redress (ICCPR Art 2).

33) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons*, pp.8 – 9

34) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons*, p.9

35) See for example Office of the Public Advocate Queensland, *Legal frameworks for the use of restrictive practices in residential aged care: A an analysis of Australian and international jurisdictions*, 2017

including the use of tagging systems, close observation, exclusionary time out and consequence-driven restrictive practices. may be physical, chemical, mechanical, psychosocial, environmental or technological. These practices can amount to violations of human rights including deprivation of liberty, restriction of free movement, breach of privacy and assault.³⁶⁾

Provisions at the regional level establish long-term care as a justiciable right but are limited and vary in scope and the strength of protection they provide.³⁷⁾ The Inter-American Convention on Protecting the Human Rights of Older Persons affirms in Article 12 that older persons have the right to a comprehensive system of care that not only protects and promotes their well-being but also maintains their independence and autonomy. However, the coverage of provisions related to long term care in Article 12 are limited by the Convention's definition of an older person receiving long term care services as being someone 'who resides temporarily or permanently in a regulated, public, private or mixed establishment'. They do not, therefore, apply to someone receiving long-term care and support in their own home.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa establishes only limited State obligations in relation to care and support in home and residential settings. The Council of Europe recommendation CM/Rec(2014)2 makes recommendations on both home and residential care settings but does not establish long term care as a right.

iii) Provisions in existing international human rights law and other sources

International human rights law

International Covenant on Political and Civil Rights, 1966, Article 9.1

Convention on the Rights of Persons with Disabilities, 2006, Article 19

36) AGE Platform Europe, HelpAge International, The Law in the Service of the Elderly, and National Association of Community Legal Centres Australia, *Freedom from violence, abuse and neglect*, 2017, page 3-4

37) ECLAC, *Challenges to the autonomy and interdependent rights of older persons*, 2017, page 137

- Advisory documents

The Committee on Economic, Social and Cultural Rights recommends in its the General Comment No. 6 (2006) that State parties should provide social services to support older persons who live with family members or who live alone and to older couples who prefer to stay in their own home.

The Committee on Economic, Social and Cultural Rights' General Comment No. 14 reiterates the need for preventive, curative, and psychological and physical rehabilitative health treatment for older people. State parties should also pay attention to care for the chronically and terminally ill, sparing them avoidable pain and enabling them to die with dignity.³⁸⁾

The Committee on the Elimination of Discrimination Against Women's General Recommendation No. 27 (2010) recommends that State parties adopt a comprehensive health care policy aimed at protecting the health care needs of older women including social care and care that allows for independent living and palliative care.³⁹⁾

The Committee for the Prevention of Torture's General Comment No. 2 specifically refers to the obligation on State parties to "*prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example in...institutions that engage in the care of...the aged*".⁴⁰⁾

The Independent Expert on the enjoyment of all human rights by older persons recommended that states should provide long-term care through a comprehensive and inter-sectoral approach along with recommendations on the inclusion of older persons in the design and evaluation of care services, provision of support to informal and family caregivers, revision of legislation and settings of standards to prevent forced institutionalisation, monitoring and regulation systems, and the development of home and community-based care services.⁴¹⁾

38) E/C.12/2000/4, CESCR, 2000, paragraph 25

39) CEDAW/C/GC/27, CEDAW, 2010, paragraph 45

40) CAT/C/GC/2, CAT, 2008. paragraph 15

United Nations Principles for Older Persons, Adopted by General Assembly resolution 46/91 of 16 December 1991, "Care

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 12

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016 , Article 10 & Article 11:

European Social Charter, Article 23

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, VI.Care

41) A/HRC/30/43, IE Older Persons, paragraphs 115 - 123

5. The right to privacy and a family life

i) Normative elements

- Affirmation of the right

Older persons have the right to privacy, home and family life and correspondence, and to protection of the law against arbitrary or unlawful interference with these rights.

Older persons have the right to freely form intimate and sexual relationships, to choose sexual partners and to continue to have sex and to privacy in intimate relationships.

Older persons have the right to freedom of expression of their sexuality and freedom from discrimination on the grounds of sexual orientation and gender identity.

- Scope of the right

The right recognizes the evolving concept of family to include such relationships as older persons may choose, including extended caregiving roles and grandparenthood.

The right shall be respected and protected in all settings where older persons temporarily or permanently reside, including but not limited to, hospitals and residential long-term care settings.

- State obligations

State Parties shall take steps and measures to ensure:

- To eliminate discrimination against older persons in all matters related to privacy, home, communication, marriage and family.
- The right of a widow or widower to reside in the matrimonial home, even upon re-marriage, and be protected from unlawful interference therewith.
- Provision of social services and financial support to older persons responsible for the care of grandchildren or other children.
- Protection against the arbitrary and unlawful interference with the rights

of older persons to choose where they live and with whom, and the privacy of their communications and information.

- Older persons have access to information on sexual health, including on HIV and other sexually transmitted infections.

ii) Normative basis

The right to privacy and a family life is well established in international human rights law, for example in UDHR Article 12, ICCPR Article 17.1 and CRPD Article 22.1. However, this right has not been specifically applied to the context of older age in the international human rights framework.

At the regional level older persons' right to privacy and a family life is enshrined in Article 16 of the Inter-American Convention on Protecting the Human Rights of Older Persons. In addition Article 5 recognises that older persons should not be discriminated against on the grounds of, inter alia, their sexual orientation, gender, or gender identity. Article 9 recognises that older persons have right to live without violence and to be treated with respect and dignity regardless of, inter alia, their sexual orientation, gender, or gender identity.

An element of the right is included in Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa in relation to older persons' right to access support for children under their care.

Specific areas highlighted as needing attention include the separation of couples when one or both require long-term care and support, separation from other family members when the care and support is only available too distant from families to allow older persons to maintain meaningful family ties. Underlying assumptions about the abnormality of older persons engaging in sexual activity may result in the prevention of older persons having a sex life. Barriers in place may include excessive surveillance or policies that prevent them from so doing in the belief that this will protect them.⁴²⁾

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 12

International Covenant on Political and Civil Rights, 1966, Article 17: 1

Convention on the Rights of Persons with Disabilities, 2006, Article 22.1

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 5, Article 9, Article 16

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 12

42) Megret, 'The Human Rights of Older Persons: A Growing Challenge', *Human Rights Law Review* 11.1, 2011, 37-66

6. The right to palliative care

i) Normative elements

- Affirmation of the right

Older persons have the right to holistic palliative care, without delay and without discrimination of any kind.

- Scope of the right

The right applies to holistic palliative care and is not limited to pain relief.

- State obligations

State Parties shall take steps and measures to ensure:

- Availability and accessibility of essential medicines, including controlled medicines, for the treatment and palliative care of older persons.
- Prevention of cruel, inhuman and degrading treatment of older persons including as a result of the failure to adequately treat pain and other symptoms.
- Palliative care services are available and accessible for older persons, as well as to support their families.
- Older persons are able to express their free, prior and informed consent on their palliative care and any other health matters.
- Older persons have access to palliative care in a setting which is consistent with his or her needs and preferences, including at home and in long-term care settings.
- Processes are in place for supported decision-making where necessary, whilst retaining legal capacity.
- Establishment procedures by which older persons may prepare advanced directives, living wills and other legally binding documents that set out their will and preferences around medical interventions, palliative care and other support and care at the end of life, including place of care, as

well as make other relevant legal decisions.

- Adequate and appropriate training of health and care personnel in palliative care.
- Regulation and monitoring of compliance of all palliative care providers with professional obligations and standards.

ii) Normative basis

The World Health Organization defines palliative care as *‘an approach that improves the quality of life of patients (adults and children) and their families who are facing problems associated with life-threatening illness. It prevents and relieves suffering through the early identification, correct assessment and treatment of pain and other problems, whether physical, psychosocial or spiritual.’*⁴³⁾

There is no explicit right to palliative in the existing international human rights treaties. However there is a growing body of advisory documents that establish access to palliative care as a right. The Committee on the Elimination of Discrimination Against Women’s General Recommendation No. 27 recommends that State parties adopt a comprehensive physical and mental health care policy that ensures older women’s access, inter alia, to palliative care⁴⁴⁾.

The Special Rapporteur on the right to health has highlighted that a core obligation under Article 12 of the ICESCR is the provision of essential drugs defined under the WHO Action Programme on Essential Drugs and that limiting equal access of all persons to palliative care on the basis of age cannot be considered appropriate and may amount to discrimination on the basis of age⁴⁵⁾. The Special Rapporteur has also recommended that states

43) <http://www.who.int/mediacentre/factsheets/fs402/en/>

44) CEDAW/C/GC/27, CEDAW, paragraphs 45 – 46

45) A/HRC/18/37, *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 attainable standard of physical and mental health*, 2011, Anand Grover,

should ensure that patients be able to make autonomous, informed decisions regarding access to pain relief, location of death and refusal of treatment designed to prolong life if this is against their wishes so that they can die with dignity⁴⁶⁾.

The Independent Expert on the enjoyment of all human rights by older persons recommended that the right to palliative care should be enshrined in the legal framework, and that states should ensure the availability and accessibility of palliative care in public and private settings⁴⁷⁾.

In addition, two special rapporteurs on torture have stated that denial of pain relief can constitutes cruel, inhuman or degrading treatment or punishment.⁴⁸⁾

At the regional level, the right to palliative care is enshrined in articles on the rights to life and dignity in old age (Article 6), to give free and informed consent on medical matters (Article 11), of older persons receiving long-term care (Article 12), and to health (Article 19) in the Inter-American Convention on Protecting the Human Rights of Older Persons, 2015.

Article 11 on residential care in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016 recognizes the right of older persons in palliative care to receive adequate care and pain management medication.

The Council of Europe's Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of the human rights of older persons has a detailed section on necessary measures to realise and the right to palliative care⁴⁹⁾.

paragraphs 56 & 57 http://ap.ohchr.org/documents/alldocs.aspx?doc_id=18920 (27 July 2016)

46) A/HRC/18/37, SR Health, paragraph 59

47) A/HRC/30/43, IE Older Persons, paragraphs 130 - 131

48) A/HRC/10/44, 2009 and A/HRC/22/53, 2013

49) CM/Rec(2014)2, paragraphs 44-50

iii) Provisions in existing international human rights law and other sources

International human rights law

- Advisory documents

Committee on Economic, Social and Cultural Rights General Comment No. 14 (2000), paragraph 34

Committee on the Elimination of Discrimination Against Women, General Recommendation No. 27, (2010), paragraph 45

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/10/44, 2009, paragraph 72

Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 2013, paragraph 54, 86

Report of the Independent Expert on the enjoyment of all human rights by older persons, A/HRC/30/43, 2015, paragraph 87, 131

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 6, Article 1, Article 12, Article 19

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 11

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, D. Palliative care

7. The right to a dignified death

i) Normative elements

- Affirmation of the right

Older persons have the right to die with dignity.

- Scope of the right

Older persons have the right to choose where to die, to refuse or to withdraw consent for medical treatment.

Older persons have the right to make advance instructions on the type of end of life care they receive in line with their will and preferences.

Older persons have the right to determine whether and to what extent treatment, including life-prolonging measures, should be initiated or continued and to have advance instructions respected.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have access to holistic palliative care, including pain relief and without delay.
- Older persons have access to end of life care, without discrimination.
- Respect and observance of the older person's religious beliefs and any wishes expressed prior to death about the arrangements for care and treatment of their body after their death.
- Medical and care professionals involved in the older person's end-of-life care include and offer support to those close to the older person or other trusted persons, according to the older person's wishes. The right to exclude certain people should be respected.

ii) Normative basis

The right to a dignified death has been recognized by the Committee on Economic, Social and Cultural Rights as a component of the right to health. This has been reaffirmed by the Secretary General. The Special rapporteur on the Right to health has also stated that the right to health encompasses the process of dying and outlines elements necessary to die with dignity, including palliative care and being able to make *'autonomous, informed decisions regarding the quality of health during the process of dying. That includes choices about access to adequate pain relief and other necessary interventions, location of death, and the ability to refuse treatment designed to prolong life when it is not desired by the patient.'*⁵⁰⁾

This understanding of dignity in the process of dying is not the same as, and should not be confused with, concepts that allow a person to make the autonomous choice to die such as euthanasia, assisted dying or assisted suicide.

At the regional level, Article 6 of the Inter-American Convention on Protecting the Human Rights of Older Persons outlines some of the components necessary for dignity at the end of life such as access to palliative care and the right of older persons to refuse procedures that cause unnecessary suffering and are futile and useless.

iii) Provisions in existing international human rights law and other sources

International human rights law

- Advisory documents

Paragraph 25 of the Committee on Economic, Social and Cultural Rights' General

50) *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 attainable standard of physical and mental health*, A/HRC/18/37, 2011

Comment No. 14, The right to the highest attainable standard of health, (E/C.12/2000/4)

Report of the Secretary-General of Follow-up to the Second World Assembly on Ageing, A/66/150, paragraph 33

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 attainable standard of physical and mental health, A/HRC/18/37, 2011, paragraph 59, 60

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 6

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 11

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, *D. Palliative care*

8. The right to life

i) Normative elements

- Affirmation of the right

Older persons have the right to life on an equal basis with others.

- Scope of the right

The State is obliged to protect the right to life of older persons in all settings, including but not limited to, medical and long-term care settings, and prisons and other places of detention.

- State obligations

State Parties shall take steps and measures to ensure:

- Prevention of the non-consensual, arbitrary or discriminatory denial or rationing of health and other services, support or sustenance to older persons which may be life threatening.
- Protection of the enjoyment of this right including by enacting legislation in relation to, and prosecuting, non-state actors.
- Regulation, monitoring and enforcement of standards of support and services in all settings.

ii) Normative basis

The right to life is recognised as a right of every person in both international human rights law in general terms, for example in the UDHR, the ICCPR and CRPD. It comprises both the prohibition of the State from unlawfully taking the life of an individual and the obligation on the State to take steps to protect the lives of individuals within its jurisdiction. The right can be engaged when the State knew of a real and immediate risk to the life of the individual in question and failed to take measures within the scope of its

powers which, when judged reasonably, might have been expected to avoid that risk.

The right can be limited in certain circumstances but it is non-derogable and so the State cannot suspend its obligation to comply with this right, even in times of emergency. However international human rights law does not currently address how the right specifically applies in the context of older age.

At the regional level, the Inter-American Convention on Protecting the Human Rights of Older Persons explicitly links the right to life with dignity and up to the end of life.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 3

International Covenant on Political and Civil Rights, 1966, Article 6

Convention on the Rights of Persons with Disabilities, 2006, Article 10

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 6

9. The right to health

i) Normative elements

- Affirmation of the right

Older persons have the right to the enjoyment of the highest attainable standard of physical and mental health without discrimination on the basis of their age or any other status or condition.

- State obligations

State Parties shall take steps and measures to ensure:

- A continuum of quality and appropriate physical, mental and cognitive health services are available and accessible to older persons and which deliver primary, secondary and tertiary health care integrated with community and social support services and informal and formal long-term care, wherever they may reside.
- Older persons have access to holistic palliative care, including access to essential drugs and controlled medicines.
- Older persons have access to sexual and reproductive health services, including for prevention and treatment of HIV and other sexually transmitted infections, and post-menopausal health services for women.
- Older persons have access to health information in appropriate formats.
- Confidentiality of, and personal access to, their medical records by older persons.
- Older persons are able to make free and informed decisions about their health care and where it is provided, and enact legal and other mechanisms, including advance instructions about health care, including palliative and end of life care.
- Older persons have access to palliative care and are offered choices, and make decisions upon free and informed consent, about treatment, pain relief and location of death.

- Older persons have access to healthcare workers with relevant and adequate training in geriatric, dementia and palliative care.
- Older persons have access to health insurance on an equal basis with others and without discrimination on the basis of their age.
- Older persons enjoy the benefits of scientific progress on an equal basis with others.

ii) Normative basis

The right to health is well established in international human rights law, for example in UDHR Article 25, ICESCR Article 12, CEDAW Article 12 and CRPD Article 25. However, this right has not been specifically applied to the context of older age in the international human rights law.

At the regional level older persons' right to health is enshrined in Article 19 of the Inter-American Convention on Protecting the Human Rights of Older Persons and Article 15 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 25

International Covenant on Economic, Social and Cultural Rights, 1966, Article 12

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 12

Convention on the Rights of Persons with Disabilities, 2006, Article 25 - Health

- Advisory documents

The Committee on Economic, Social and Cultural Rights General Comment 14 on the highest attainable standard of health (2000) outlines the core elements

of the right to health of availability; accessibility, including non-discrimination, physical access, affordability and access to information; acceptability; and quality. With specific regard to older persons, General Comment No. 14 builds on the earlier Committee on Economic, Social and Cultural Rights General Comment No. 6 on the economic, social and cultural rights of older persons (1996)⁵¹⁾ by reaffirming the importance of an integrated approach, combining preventive, curative and rehabilitative health treatment. General Comment No. 14 states that such measures should be based on maintaining the functionality and autonomy of older persons and that care should be given to chronically and terminally ill persons which spares them avoidable pain and enables them to die with dignity⁵²⁾.

The Committee on the Elimination of Discrimination Against Women's General Recommendation No. 27 recommends that State parties adopt a comprehensive physical and mental health care policy that ensures older women's access to affordable health care, appropriately trained health workers and appropriate medicines, including for palliative care, which is based on free and informed consent.⁵³⁾

The Special Rapporteur on the right to health has highlighted that a core obligation under Article 12 of the ICESCR is the provision of essential drugs defined under the WHO Action Programme on Essential Drugs and that limiting equal access of all persons to palliative care on the basis of age cannot be considered appropriate and may amount to discrimination on the basis of age⁵⁴⁾. The Special Rapporteur has also recommended that states should ensure

51) *General Comment No. 6*, CESCR, 2006, paragraph 34 & 35

52) E/C.12/2000/4, CESCR, 2000, paragraph 25

53) CEDAW/C/GC/27, CEDAW, paragraphs 45 - 46

54) A/HRC/18/37, *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 attainable standard of physical and mental health*, 2011, Anand Grover, paragraphs 56 & 57 http://ap.ohchr.org/documents/alldocs.aspx?doc_id=18920 (27 July 2016)

that patients be able to make autonomous, informed decisions regarding access to pain relief, location of death and refusal of treatment designed to prolong life if this is against their wishes so that they can die with dignity⁵⁵⁾.

The Independent Expert on the enjoyment of all human rights by older persons recommended that states should ensure the availability of geriatric and gerontological specialists in different types of care services and facilities, that the right to palliative care should be enshrined in the legal framework, and that states should ensure the availability and accessibility of palliative care in public and private settings⁵⁶⁾.

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 19

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 15

- Advisory documents

The Council of Europe's Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of the human rights of older persons makes a number of recommendations on availability, accessibility, affordability and quality of health care services for older persons. It also includes recommendations on confidentiality and privacy as well as the need for regulatory and assessment systems.⁵⁷⁾ The Recommendation also has a detailed section on necessary measures to realise the right to free consent to medical care⁵⁸⁾ and the right to palliative care.⁵⁹⁾

55) A/HRC/18/37, SR Health, paragraph 59

56) A/HRC/30/43, IE Older Persons, paragraphs 130 - 131

57) CM/Rec(2014)2, paragraphs 29-35

58) CM/Rec(2014)2, paragraphs 36-39

59) CM/Rec(2014)2, paragraphs 44-50

10. The right to free and informed consent for medical treatment

i) Normative elements

- Affirmation of the right

Older persons have the right to give free, prior and informed consent to any medical decision, treatment, procedure or research in the area of health, and to modify or revoke such consent

Older persons have the right to refuse or suspend any medical treatment, procedures or research and to be given timely and clear information about the consequences and risks of such a decision.

Older persons have the right to amend, expand, or revoke advance instructions at any time, and the right to access legally recognized and enforceable procedures to do so.

- Scope of the right

The administration of any medical treatment, procedure or research administered by public or private institutions or health personnel without the free, prior and informed consent of the older person is a violation of their human rights.

In life-threatening medical emergencies where free, prior and informed consent cannot be obtained, and an advance instruction has not been made, any medically necessary intervention may be carried out immediately for the benefit of the health of the older person.

- State obligations

State Parties shall take measures to ensure:

- Older persons have access to support in making decisions regarding consent to their medical treatment, should they so need it.
- Prevention of abuse and strengthening of the capacity of older persons to give their free and informed consent by, inter alia, ensuring the provision of accessible, appropriate and timely information.

- Procedures and mechanisms which enable older persons to indicate and give instructions in advance, and in accordance with their will and preferences, with regard to medical and other health care interventions, including use of assistive technologies and palliative and end of life care.
- Appropriate and effective safeguards are provided to prevent abuse at every point of the consent procedure

ii) Normative basis

Free and informed consent for medical treatment is a pre-requisite to autonomy to autonomy and to the right to health but has yet to be explicitly provided for in international human rights law.

At the regional level older persons' right to give free and informed consent for medical treatment is enshrined in Article 11 of the Inter-American Convention on Protecting the Human Rights of Older Persons. It is also implicit in the right to make decisions in Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

iii) Provisions in existing international human rights law and other sources

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 11

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 5

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, *B. Consent to medical care*

11. The right to self-fulfillment

i) Normative elements

- Affirmation of the right

Older persons have the right to live meaningful and self-fulfilling lives in accordance with their will and preferences.

Older persons have the right to freely develop their personality and to pursue opportunities for the full development of their potential, without discrimination of any kind.

- Scope of the right

The right applies in every setting where older people may reside and to every aspect of life.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons, wherever they may reside, have access to opportunities without discrimination to fully develop their potential.

ii) Normative basis

At the international level the right to the development of your personality is enshrined in Article 22 of the UDHR.

At the regional level the self-fulfillment of older persons is a recognized in Articles 7 and 22 of the Inter-American Convention on Protecting the Human Rights of Older Persons.

Living lives of self-expression and meaning in which we can fulfill our hopes and ambitions is central to our humanity and dignity at any age. Nonetheless, prevailing ageist assumptions about older persons and older age limit the parameters of older persons lives and restrict their concerns to issues

of health, income security and freedom from violence, ignoring self-fulfillment as a core element of human dignity. Although self-fulfilment is one of the UN Principles for Older Persons (1991), inadequate attention has been paid to its human rights dimensions.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 22

- Advisory documents

United Nations Principles for Older Persons, Adopted by General Assembly resolution 46/91 of 16 December 1991, Self-fulfilment

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons (2015), Article 7 & Article 22

12. The right to full and effective participation in public and political life

i) Normative elements

- Affirmation of the right

Older persons have the right to full and effective participation in public and political on an equal basis with others.

Older persons have the right to enjoy the benefits of scientific progress and its application, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the older person is an author.

- Scope of the right

The right applies to participation in all aspects of life at household, community and national levels, in social and leisure activities, including within the family, in the community and in long-term care and support settings.

The right includes the prohibition of upper age limits for standing for election, voting or participating in political or public life.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons can effectively and fully participate in political life on an equal basis with others, directly or through freely chosen representatives, including the right to vote and be elected by providing voting procedures, facilities and materials that are appropriate, accessible and accommodate the particular needs to older voters.
- Older persons can vote in secret without intimidation in elections and public referendums, and are able to freely express their will as voters, including by allowing with their consent and in line with their will and preferences a person of their choice to assist them in voting.

- Older persons have access to all aspects of public and political life, especially in, but not limited to, the formulation of policies impacting their interests.

ii) Normative basis

The right to participation in public and political life is enshrined in international human rights law for example in UDHR Article 21, ICCPR Article 25, CEDAW Article 7 and CRPD Articles 29 and 30.

However, this right has not been specifically applied to the context of older age in the international human rights framework. Specific areas highlighted as needing attention include the direct and informed participation of older persons in the design of public policy and barriers to political participation and enfranchisement.⁶⁰⁾

At the regional level Article 27 of the Inter-American Convention on Protecting the Human Rights of Older Persons recognizes older persons' political rights and outlines the steps States must take to realize these rights.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 21 & Article 27

International Covenant on Political and Civil Rights, 1966, Article 25

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 7

Convention on the Rights of Persons with Disabilities, 2006, Article 29 & Article 30 – Participation in cultural life, recreation, leisure and sport

60) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 32-33, August 2012

- Advisory documents

United Nations Principles for Older Persons, Adopted by General Assembly resolution 46/91 of 16 December 1991, Participation

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 8 & Article 27

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 17

European Social Charter, Article 4

13. The right to leisure

i) Normative elements

- Affirmation of the right

Older persons have the right to leisure and to pursue opportunities for the full development of their personality, without discrimination of any kind.

Older persons' have the right to organise, develop and participate in the arts, sports, social and cultural life of the community in which they live.

- Scope of the right

The right to leisure includes the right to retire fully or partially from work if they so choose, and to access the cultural and recreational resources of society.

The right applies to every setting in which older persons may reside, including those where they receive long-term care and support.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have access on an equal basis with others to a variety of affordable recreational and leisure activities.
- Older persons can freely choose their recreational and leisure activities and experiences according to their preferences and beliefs, and engage in them for their self-fulfilment and continued development of their personality.

ii) Normative basis

The right to leisure in older age is enshrined in international human rights law in the UDHR, the ICESCR, and the CRPD. At the regional level the right is protected in the European Union Charter of Fundamental Rights, the

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.

An examination of the development of the right over time in international law shows that it has shifted from being associated solely with free time from work and labour as in the UDHR and ICESCR to a broader right of all individuals to participate in a variety of leisure, sport and cultural activities as in the CRPD.⁶¹⁾

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 24

International Covenant on Economic, Social and Cultural Rights, 1966, Article 7

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 13

Convention on the Rights of Persons with Disabilities, 2006, Article 30

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 21 & Article 22

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 17

The EU Charter of Fundamental Rights, 2000, Article 25

61) Iris Karev & Israel (Issi) Doron, 'The Human Right to Leisure in OldAge: Reinforcement of the Rights of an Aging Population', *Journal of Aging & Social Policy*, 2016, DOI:10.1080/08959420.2016.1261388

14. The right to age in place

i) Normative elements

- Affirmation of the right

Older persons have the right to freely choose their living arrangements, where and with whom to live, on an equal basis with others.

Older persons are not obliged to live in any particular living arrangement and have the right to live in the community.

- Scope of the right

The right should recognise older persons may choose to, live in shared residential settings. Such residential settings fall within the scope of the right to age in place.

- State obligations

State Parties shall take steps and measures to ensure:

- Availability of, and older persons' access to, a range of in-home, residential, and other community-support services, including personal assistance, necessary to support living and inclusion in the community, to prevent their isolation or segregation from the community.
- Affordable and adequate transportation to and from one's place of residence.

ii) Normative basis

'Ageing in place' is a term that is often used to describe continuing to live in your own home as you get older with access to a continuum of support services as your needs change that enable you to live an autonomous and independent life. 'Place' should not be restricted to a home as a physical building but should extend to the community, since attachments, connections

feelings of security and familiarity extend to community and relationships.⁶²⁾

There is no right to age in place in international human rights law although the CRPD Article 19 recognizes the right of older persons to live independently within the community. However the right to choose where and with whom you live is central to the enjoyment of autonomy and independence in older age.

At the regional level older persons' right to choose where and with whom you live is enshrined in Article 7.b of the Inter-American Convention on Protecting the Human Rights of Older Persons. An element of the right is included in Article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa which obligates States to ensure in law that residential care is both optional, namely a choice, and affordable.

iii) Provisions in existing international human rights law and other sources

International human rights law

Convention on the Rights of Persons with Disabilities, 2006, Article 19

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 7

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 11

The European Social Charter, 1996, Article 23

62) Wiles et al, The meaning of 'aging in place' to older people.' *Gerontologist*. 2012 Jun;52(3):357-66. doi: 10.1093/geront/gnr098. Epub 2011 Oct 7

15. The right to housing

i) Normative elements

- Affirmation of the right

Older persons have the right to adequate, affordable, quality, appropriate and accessible housing designed to accommodate their preferences and requirements and which can be adapted to their changing capacities.

- Scope of the right

The right protects older persons from illegal forced eviction and protect their security of tenure.

The right also applies in situations of crisis, displacement, humanitarian and other emergencies.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have access to public housing, subsidies and access to land programmes which take into account their specific needs.
- Availability of, and older persons' access to, a range of in-home and community-support services to enable them to live in their own home, should they choose to.
- Older persons have access to home loans and other forms of financing, without discrimination of any kind, including on the basis of their age.
- Older persons have access to architecturally suitable and accessible housing for older persons, protect older persons from illegal forced evictions, and promote programmes to prevent accidents inside or in the vicinity of older persons' homes.

ii) Normative basis

The right to housing is well established in international human rights law, for example in UDHR Article 25.1, ICESCR Article 11.1 and CEDAW Article 14. Article 2 of the CRPD recognizes the concept of universal design to ensure accessibility and housing is further included in Article 9 on accessibility.

The right encompassed to housing is therefore more than just shelter. It includes the affordability, availability, adequacy and standard of houses themselves (e.g. quality, heating, sanitation) and their suitability, for example in terms of accessibility and social integration. It also includes legal security of tenure. Adequate housing is a prerequisite for an adequate standard of living and affects one's ability to live an independent and autonomous life and to age in place.

Affordability, accessibility and adequacy of housing and legal security of tenure are issues affecting older persons' enjoyment of their right to housing.⁶³⁾ However, this right has not been specifically applied to the context of older age and older persons within the international human rights framework.

At the regional level Article 24 of the Inter-American Convention on Protecting the Human Rights of Older Persons recognizes older persons' right to decent and adequate housing and access to land. It obliges States to promote the adoption of expedited procedures for complaints and redress in the event of older persons being evicted and obliges them to promote programs to prevent accidents inside, and in the vicinity of, older persons' homes.

Adequate housing has both a negative and positive aspect in the sense that it is both a shelter *from* natural and human dangers (e.g. the elements and violence) but also a platform *for* activities that give people a sense of dignity, worth and purpose. Any right needs to acknowledge and encompass both aspects.

63) Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, page 20, August 2012

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 25(1) age or other lack of livelihood in circumstances beyond his control.

International Covenant on Economic, Social and Cultural Rights, 1966, Article 11.1

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 14(h)

Convention on the Rights of Persons with Disabilities, 2006, Article 2 & Article 9

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 24

The European Social Charter, 1996, Article 23 & Article 31

- Advisory documents

R162 Older Workers Recommendation, 1980, 5

Council of Europe recommendation CM/Rec(2014)2, V Social protection and employment, 23

16. The right to the environment

i) Normative elements

- Affirmation of the right

The right should affirm older persons' right to enjoy a safe, clean, healthy and sustainable environment.

- Scope of the right

The right to a healthy environment includes older persons' access to drinking water, sanitation and other services on an equal basis with others.

The arbitrary denial of access to sanitation facilities, including to toilets due to the unnecessary use of diapers and other incontinence products, by public or private institutions or health personnel is a violation of the human rights of older persons.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have access to sanitation facilities, including toilets, adapted to their needs.
- The right to privacy is respected in relation to sanitation facilities, including during the use of toilets and bathing.

ii) Normative basis

At the international level the work of the Special rapporteur on human rights and the environment has established that 'a safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.'⁶⁴⁾

64) <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>

At the regional level, Article 25 of the Inter-American Convention on Protecting the Human Rights of Older Persons affirms older persons' right to a healthy environment.

iii) Provisions in existing international human rights law and other sources

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 25

17. The right to personal mobility

i) Normative elements

- Affirmation of the right

Older persons have the right to personal mobility.

- Scope of the right

This right applies to every setting in which older persons may reside.

- State obligations

State Parties should take steps and measures to ensure:

- Older persons have access to affordable and adequate transport on an equal basis with others and which is affordable, physically accessible, available and safe, particularly in rural areas, and can be used without fear of abuse.
- Older persons have access to quality, affordable mobility aids and devices that can be used safely without fear of abuse or harm.
- Elimination of obstacles to mobility including in infrastructure and communications.

ii) Normative basis

Personal mobility is a pre-requisite to living an independent, autonomous life. It is enshrined in international human rights law in Article 20 of the CRPD. However, only older persons with disabilities fall within the scope of this right.

At the regional level the Inter-American Convention on Protecting the Human Rights of Older Persons addresses the rights to accessibility and personal mobility in Article 26.

iii) Provisions in existing international human rights law and other sources

International human rights law

Convention on the Rights of Persons with Disabilities, 2006, Article 20

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 26:

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 18

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, V. Social protection and employment, 22

18. The right to accessibility

i) Normative elements

- Affirmation of the right

Older persons have the right to accessibility to the physical, social, economic and cultural environment.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have access on an equal basis with others to the physical environment, including but not limited to buildings, roads, transportation and other indoor and outdoor facilities, including places of education, housing, medical facilities and workplaces.
- Facilities and services open or provided to the public and provided by both public and private entities take into account all aspects of accessibility for older persons.
- Older persons have access on an equal basis with others to information and to information communication technologies and systems.
- Development, implementation and monitoring of standards on accessibility of facilities and services provided by both public and private entities to older persons.

ii) Normative basis

The right to accessibility is provided for in Article 9 of the CRPD but there is no explicit provision of older persons' right to accessibility in international human rights law.

At the regional level the Inter-American Convention on Protecting the Human Rights of Older Persons addresses the rights to accessibility and personal mobility to a broad range of environments in Article 26. Article 18 of

the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa provides for older persons' right to access to infrastructure, including buildings and public transport.

iii) Provisions in existing international human rights law and other sources

International human rights law

Convention on the Rights of Persons with Disabilities, 2006, Article 9

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 26

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 18

19. The right to freedom from all forms of violence, abuse and neglect

i) Normative elements⁶⁵⁾

- Affirmation of the right

Older persons have the right to freedom from violence, abuse and neglect.

- Scope of the right

The right includes all forms of violence, abuse and neglect against older persons.

The right applies to violence, abuse and neglect in private and public settings.

Acts perpetrated by both private and public actors fall under the right.

States may be responsible for private acts of violence abuse and neglect of older persons if they fail to act with due diligence to:

- Prevent acts of violence, abuse and neglect against older persons
- Protect and support the victims/survivors
- Investigate and prosecute incidents of violence, abuse and neglect
- Punish the perpetrators
- Provide redress to the victim/survivors for the harm suffered.

- State obligations

State Parties shall take steps and measures to ensure:

Prevention

- Prevention of violence, abuse and neglect of older persons in public and private settings by, inter alia:
 - Putting in place effective legislation and policies to ensure all forms

65) See AGE Platform Europe, HelpAge International, The Law in the Service of the Elderly, and National Association of Community Legal Centres Australia, *Freedom from violence, abuse and neglect*, 2017

- of violence, abuse and neglect are identified, investigated and redressed
- Allocating sufficient resources to effective implementation
- Providing training for all care providers, including family and other informal care providers
- Putting in place a system of appropriate needs assessment and monitoring in situations of care and support
- Paying specific attention to the intersectional drivers of violence
- Raising awareness of, and sensitising society to, the different forms of violence, abuse and neglect in older age and how to identify and prevent.

Support services

- Older persons have access to a range of support services for survivors of violence, abuse and neglect, including but not limited to:
 - a full range of medical, psychosocial, rehabilitative and legal services
 - access to information about available support and services
 - access to appropriate victims support services
 - access to effective remedies and redress.

Remedies and redress

- Older persons have access to assistance with making complaints.
- Investigation and laying of criminal charges.
- The state should begin with the assumption that the individual is best placed to judge his or her own well-being and observe self-determination of the survivor.
- Criminal justice responses, criminal offences and sentencing practices reflect the aggravated nature of offenses against older persons.
- Older age does not limit compensatory damages or access to survivor services.

Data and statistics

- Collection, disaggregation, analysis, utilisation and making public at regular intervals appropriate information and statistical data on all forms

of violence, abuse and neglect. This should include prevalence and trends, risk factors, perpetrators, access to support services and effective remedies and redress.

- Compliance of all information gathering and research with internationally accepted norms and ethical principles in the collection and use of statistics.

ii) Normative basis

There is no explicit right to protection from the particular experience of all forms of violence, abuse and neglect in older age under UN international human rights treaties that applies generally or specifically to older people.

There is however some protection against violence under UN human rights treaties. This includes the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, which has the potential to help prevent torture and other cruel, inhuman or degrading treatment or punishment of older persons in long-term care facilities as well as all other forms of State or State-authorised detention.

The Committee on the Elimination of Discrimination Against Women's General Recommendation No. 27 on older women and protection of their human rights (2010) and to a lesser extent the draft update of General Recommendation No.19 on violence against women (1992). These, however, only apply to older women and not older men. Similarly the obligations under the Convention of the Rights of Persons with Disabilities (2006) on the prohibition of torture and prevention all forms of violence and abuse only apply to older persons with disabilities.

The particular and complex experience of all forms of violence, abuse and neglect in older age is not adequately provided for under international human rights law. There is, therefore, a normative gap.

For a full summary of protection of the right to freedom from violence and abuse under international law, see Section 3.4.1 of Sleaf, *Issue Analysis and Specific Recommendations on the Human Rights of Older Persons in ASEM Countries*, National Human Rights Commission of Korea, 2016.

iii) Provisions in existing international human rights law and other sources

International human rights law

Convention on the Rights of Persons with Disabilities, 2006, Article 16

- Advisory documents

The Committee on the Elimination of Discrimination Against Women's General Recommendation No. 27 on older women and protection of their human rights⁶⁶⁾ identifies different forms of violence and abuse against older women as a concern, including exploitation when their legal capacity is deferred to others without their consent⁶⁷⁾ and makes recommendations on providing older women with information on their rights and access to services, on training public authorities, the judiciary and law enforcement and on enabling older women to seek redress when their rights are denied.

The Committee on the Elimination of Discrimination Against Women's General Recommendation No. 27 on older women and protection of their human rights (2010) and to a lesser extent the draft update of General Recommendation No.19 on violence against women (1992). These, however, only apply to older women and not older men.

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 9

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 8 & Article 9

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, IV. Protection from violence and abuse

66) CEDAW/C/GC/27, CEDAW, 2010

67) CEDAW/C/GC/27, CEDAW, 2010, paragraphs 14, 16 and 27

20. The right to freedom from torture, cruel, inhuman or degrading treatment

i) Normative elements

- Affirmation of the right

Older persons have the right to be free from torture or cruel, inhuman or degrading treatment or punishment, and not to be subjected to medical or scientific experimentation without free, prior and informed consent.

- Scope of the rights

The right shall recognize that violence, abuse and neglect of older persons, including in settings where they are detained or receive support, services or care, can reach the threshold of torture, inhuman or degrading treatment and requires protection on an equal basis with others from being subjected to such treatment.

The right shall only allow the use of restrictive practices when they are to prevent immediate harm, with the approval of an independent decision-maker, and in accordance with the behaviour management plan of the person to whom the restrictive practice is being applied.

- State obligations

State Parties shall take steps and measures to ensure:

- All effective legislative, administrative, judicial or other measures to prevent older persons from being subjected to torture or cruel, inhuman or degrading treatment or punishment.
- Adoption of policies and standards to prohibit physical, chemical, mechanical, technological, psychological or environmental restraints, close observation, surveillance and seclusion of older persons wherever they reside, unless necessary to prevent imminent harm.
- Regulation and monitoring of the use of all restrictive practices.

- Use of a restrictive practice is the least restrictive option, is used for the shortest time necessary and is used with a view to eliminating the use of restrictive practices over time.
- Adopt and implementation of appropriate policies and standards to ensure older prisoners are protected from cruel, inhuman or degrading conditions and are provided with care and support in accordance with their needs.

ii) Normative basis

The prohibition on torture, other cruel, inhuman or degrading treatment is an absolute right that applies to older persons and is protected in the UDHR Article 5 and the ICCPR Article 7, CRPD Article 15, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984).

Whilst the Optional Protocol to the CAT applies to the context of older persons in institutional or settings, the specific application of this right to the context of older people and older age has not been articulated in international human rights law.

At the regional level older persons' right to freedom from torture, cruel, inhuman or degrading treatment is enshrined in Article 10 of the Inter-American Convention on Protecting the Human Rights of Older Persons.

The prohibition on torture covers the most serious forms of abuse and ill-treatment and there may be situations where the violence and abuse older persons are subjected to can be challenged on the basis of being inhuman treatment which causes severe mental or physical harm or degrading treatment which is humiliating and undignified. Such situations may include the use of physical or chemical restraints, detention in prison if it prevents access to necessary care and support, being made to systematically wear diapers⁶⁸⁾ or inadequate care such as being left in your own faeces or urine

68) Megret, 'The Human Rights of Older Persons: A Growing Challenge', *Human Rights*

for several hours⁶⁹⁾.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 5

International Covenant on Political and Civil Rights, 1966, Article 7

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Convention on the Rights of Persons with Disabilities, 2006, Article 15

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 10

Law Review 11.1, 2011, 37-66

69) British Institute of Human Rights *Your Human Rights: A Guide for Older People*, Second Edition, 2010, British Institute of Human Rights, <https://www.bihhr.org.uk/olderpeopleguide> (15 July 2016)

21. The right to an adequate standard of living

i) Normative elements

- Affirmation of the right

Older persons and their families have the right to an adequate standard of living, including adequate food, clothing, housing and to the continuous improvement of living conditions, without discrimination on the basis of age or any other ground.

- Scope of the right

The right shall recognise older persons' right to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic use and to adequate sanitation facilities and services that protect their dignity and privacy.

The right shall apply in every setting an older person may reside.

- State obligations

State Parties shall take steps and measures to ensure:

- Facilitation, promotion and access by older persons, including during times of emergency, to food that is adequate, available, accessible and nutritionally appropriate, and to non-discriminatory access to policies, programmes and technologies providing assets and support for food production.
- Policies and programmes affecting the cost of food, including during times of emergency, provide protective stabilizing measures for older persons on fixed incomes to provide sufficient food at times of price inflation.
- Older persons have access to public housing, subsidies and access to land programmes which take into account their specific needs.
- Protect the right of older persons to adequate housing in situations of

crisis and displacement, emergencies and evictions, with particular regard for their specific needs.

- Older persons have access to poverty reduction programmes on an equal basis with others.
- Older persons have access to basic necessities, including fuel and other energy sources.
- Water supply technologies and sanitation facilities are accessible to older persons wherever they reside and that those older persons who require support, including in residential facilities, are not denied access to sanitation facilities when they so require.
- Continuous improvement of living conditions of older persons.

ii) Normative basis

The right to an adequate standard of living is well established in international human rights law, for example in UDHR Article 25, ICESCR Article 9 and CRPD Article 38. However, this right has not been specifically applied to the context of older age in the international human rights framework.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 25

International Covenant on Economic, Social and Cultural Rights, 1966, Article 11

Convention on the Rights of Persons with Disabilities, 2006, Article 28

22. The right to work

i) Normative elements

- Affirmation of the right

Older persons have the right to meaningful and decent work on an equal basis with others.

Older persons have the right to determine when and at what pace to withdraw from the labour force.

- State obligations

State Parties shall take steps and measures to ensure:

- Prohibition of discrimination against older persons on the basis of age alone or in combination with other grounds in all matters related to employment, including recruitment, hiring and employment, continuance of employment, career advancement, retirement policies and safe and healthy working conditions in the formal and informal sectors, including harassment on the basis of age.
- Prohibition of mandatory retirement ages on the basis of age.
- Reasonable accommodation made for gradual transition to retirement.
- Protection of the rights of older persons, on an equal basis with others, to dignity at work, to just and favourable working conditions, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.
- Older persons have access to general, technical and vocational guidance programmes, placement services, and vocational and skills development training.
- Promotion of employment opportunities and career advancement for older persons in the labour market, as well as assistance for older persons in

locating, obtaining, maintaining and returning to employment.

- Labour policies account for the needs and characteristics of older persons, and workplaces are suitable in terms of working conditions, environment, work hours, and organization of tasks.
- Promotion of opportunities for older persons for self-employment and entrepreneurship, and support appropriate and effective measures to protect the rights of older persons working in the informal sector.
- Older persons are able to exercise their labour and trade union rights.
- Older persons are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

ii) Normative basis

The right to work is protected in international human rights law under UDHR Article 23, ICESCR Articles 6 and 7, CEDAW Article 11, CRPD Article 27 and the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (1990), the only international human rights convention to explicitly prohibit discrimination the grounds of age. International human rights law has not adequately addressed the specific application of the right to work to the context of older age and older persons.

At the regional level, various aspects of the right to work are protected under the European Social Charter, revised 1996, Articles 1-6, Articles 9 - 10 and Articles 24 - 29 and the Charter of Fundamental Rights of the European Union, 2007, Articles 15, 27-31. The EU Employment Equality Directive 2000/78/EC (hereafter the EU Directive forbids direct and indirect discrimination, harassment, instructions to discriminate and harassment on the grounds of, inter alia, age. However, it also allows employers to justify differential treatment on ground of age⁷⁰⁾.

70) Ghosheh, *Age discrimination and older workers: Theory and legislation in comparative context*, ILO, 2008, p.15

Older persons' right to work and employment is enshrined in Article 18 of the Inter-American Convention on Protecting the Human Rights of Older Persons and Article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

Issues requiring specific attention include, but are not limited to, practices ensuing from various forms of discrimination on the ground of age such as maximum recruitment ages, fixed term contracts for older employees, lower pay for equal work, limited access to skills development programmes, access to only irregular, seasonal, poorly paid or unpaid jobs, age-based prejudices in hiring and promotion, and mandatory retirement ages.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 23

International Covenant on Economic, Social and Cultural Rights, 1966, Article 6 & Article 7

International Covenant on Political and Civil Rights, 1966, Article 8

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 11

International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, 1990

Convention on the Rights of Persons with Disabilities, 2006, Article 27

The ILO Convention on Discrimination (Employment and Occupation) Convention, 1958 (No.111) does not include age in its list of prohibited grounds in Article 1 (1) (a) although Article 1 (1) (b) permits States parties to add additional grounds for domestic purposes.

- Advisory documents

The Committee on Economic, Social and Cultural Rights General Comment No. 6 on the economic, social and cultural rights of older persons (1996) urges

State parties to take measures to prevent discrimination in employment on the basis of age and encourages the employment of older workers in circumstances that make the best use of their experience and to prepare workers for retirement⁷¹⁾. The Committee on Economic, Social and Cultural Rights also pointed out that areas where discrimination on the basis of age is still tolerated, including mandatory retirement ages, the trend is to eliminate such discrimination and states should take steps to expedite this⁷²⁾.

The Committee on Economic, Social and Cultural Rights General Comment No. 18 on the right to work (2006) recalls General Comment No. 6 and highlights the need to take measures to prevent discrimination on the grounds of age in employment and occupation ⁷³⁾.

The Committee on the Elimination of Discrimination Against Women's General Recommendation No. 27 (2010) affirms States parties' obligation to facilitate older women's participation in paid work without discrimination based on their age or gender, that older women should not be forced into early retirement and that the impact of gender-pay gaps on older women should be monitored⁷⁴⁾.

The Independent Expert on the enjoyment of all human rights by older persons recommended that states should introduce incentives to employers and employees to extend working lives along with recommendations on the adapting of working environments and conditions, continued vocational training and social security systems that do not penalise older persons who continue to work beyond retirement age⁷⁵⁾.

International Labour Organisation (ILO) recommendations that address the situation of older workers and discrimination in employment such as R162

71) *General Comment No. 6*, CESCR, 1996, paragraphs 22 – 25

72) *General Comment No. 6*, CESCR, 1996, paragraph 12

73) E/C.12/GC/18, CESCR, 2006, paragraph 16

74) CEDAW/C/GC/27, CEDAW, paragraph 41

75) A/HRC/30/43, IE Older Persons, paragraph 107

Older Workers Recommendation, 1980 and R166 Termination of Employment Recommendation, 1982

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 18

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 6

- Advisory documents

Council of Europe's Recommendation CM/Rec(2014)2, V. Social protection and employment

23. The right to social security

i) Normative elements

- Affirmation of the right

Older persons have the right to social security, and to the enjoyment of that right without discrimination on the basis of age or any other ground.

Older persons have the right to unconditional, autonomous use of income from social security schemes.

- Scope of the right

The right shall include access to and portability of pensions in cases where older persons have migrated or spent time working overseas earlier in their lives.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have access to, without discrimination:
 - a) social security including an adequate, guaranteed, minimum income in older age
 - b) appropriate social assistance and in-kind social security
 - c) financial support to pay for age-related health care, medication and aids.
- Older persons have access to information on all aspects of social security schemes, including eligibility.
- Older persons have access to support in application processes, including for those without identity documentation.
- Older persons have access to procedures for complaint, appeal and redress.

ii) Normative basis

The right to social security is well established in international human rights law, for example in UDHR Article 22, ICESCR Article 9 and CEDAW Article 11 and Article 28 of the CRPD on the right to an adequate standard of living and social protection.

At the regional level older persons' right to social security is enshrined in Article 17 of the Inter-American Convention on Protecting the Human Rights of Older Persons and Article 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 22

International Covenant on Economic, Social and Cultural Rights, 1966, Article 9

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 11

Convention on the Rights of Persons with Disabilities, 2006, Article 28

There are a number of International Labour Organisation (ILO) conventions and recommendations that also provide standards including the Social Security (Minimum Standards) Convention, 1952 (No.102), the Old Age, Invalidity and Survivors' Benefits Convention, 1967 (No. 128) and its accompanying Recommendation No. 131 and more recently the Social Protection Floors Recommendation, 2012 (No. 202). This calls for guaranteed basic income security for those without access to contributory pension schemes addressed in other ILO standards or whose pension are inadequate for an adequate standard of living⁷⁶⁾.

76) ILO, *World Social Protection Report 2014-15: Building economic recovery, inclusive development and social justice*, 2014 ILO, p.79

- Advisory documents

The Committee on Economic, Social and Cultural Rights General Comment 19 on the right to social security (2008) provides comprehensive guidance on the elements of the right to social security and measures States parties should take to meet their obligations⁷⁷⁾. It also covers the right's core elements of availability, including in old age; adequacy of benefits in amount and duration; accessibility, including coverage, eligibility, affordability, participation, information and physical access; and non-discrimination and equality including gender equality. It states that non-contributory pensions are required to ensure universal protection of the right. This builds on the earlier Committee on Economic, Social and Cultural Rights General Comment No. 6 on the economic, social and cultural rights of older persons (1996) in which the Committee says that providing non-contributory old age-benefits or other assistance for those without access to other pensions or resources is necessary to fulfil Article 9 of the ICESCR⁷⁸⁾.

The Committee on the Elimination of Discrimination Against Women's General Recommendation No. 27 also addresses gender equality in social security and recommends that State parties ensure that retirement ages do not discriminate against women and that pension policies are not discriminatory in any way⁷⁹⁾.

The Independent Expert on the enjoyment of all human rights by older persons recommended that states should ensure that the right social security is enshrined in domestic legislation, that schemes should be designed in line with human rights standards and that austerity and fiscal consolidation programmes should be revised to ensure the provision of basic income to older persons⁸⁰⁾.

77) E/C.12/GC/19, CESCR, 2008

78) *General Comment No. 6 on the economic, social and cultural rights of older persons*, CESCR, 2006, paragraph 30

79) CEDAW/GC/27, CEDAW, 2010, paragraph 42

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 17

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 7

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, V. Social protection and employment

80) A/HRC/30/43, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, Rosa Kornfeld-Matte, 2015, paragraphs 102 – 105

24. The right to lifelong education and learning

i) Normative elements

- Affirmation of the right

Older persons have the right to lifelong education and learning on an equal basis with others and without discrimination.

- Scope of the right

The right shall recognize the role of older persons as repositories of knowledge, skills and culture.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have equal access to opportunities for all levels of education, including tertiary education, vocational training and retraining, adult education, and skills training in literacy, numeracy and technological competencies.
- Educational materials in an appropriate format are available and accessible to older persons.
- Intergenerational transmission of knowledge.

ii) Normative basis

The right to education is well established in international human rights law, for example in UDHR Article 26, ICESCR Article 13 and CEDAW Article 10. Article 24 of the CRPD obligates States to ensure inclusive education systems and life long learning that is directed to ‘the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity’.

However, this right has not been specifically applied to the context of a

life-course approach to education or to education in older age in the international human rights framework.

At the regional level older persons' right to education is enshrined in Article 20 of the Inter-American Convention on Protecting the Human Rights of Older Persons and Article 16 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 26

International Covenant on Economic, Social and Cultural Rights, 1966, Article 13

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 10

Convention on the Rights of Persons with Disabilities, 2006, Article 24

- Advisory documents

The Committee on Economic, Social and Cultural Rights General Comment No. 6 on the economic, social and cultural rights of older persons (1996), paragraph 37

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 20

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 16

25. The right to property

i) Normative elements

- Affirmation of the right

Older persons have the right to deal with property including to own, use, occupy, transfer, dispose, sell, inherit and distribute land and other property without discrimination of any kind.

- Scope of the right

The right includes right of older persons to participate in the redistribution of land and property programmes on an equal basis with others.

- State obligations

State Parties shall take steps and measures to ensure:

- Effective exercise of older persons' right to property, including the arbitrary or unlawful deprivation of their property.
- Elimination of traditional widowhood practices which deprive women of property and inheritance rights and ensure that upon the death of a spouse, a widow or widower has the right to an equitable inheritance and to reside in the matrimonial home even upon the event of remarriage.
- Older persons have access to financial services, including bank loans, micro-loans, mortgages and other forms of financial credit on an equal basis with others.
- Regulation and monitoring of the mechanisms by which land and other property are levied or dealt with in a material way in exchange for, or to pay for, the provision of support and care services.
- Older persons have access to effective remedies to provide redress for arbitrary or unlawful deprivation of property.

ii) Normative basis

The right to property is well established in international human rights law, for example in UDHR Article 17, CEDAW Articles 15.2 and 16.h and CRPD Article 12.5. However, this right has not been specifically applied to the context of older age in the international human rights framework.

At the regional level older persons' right to property is enshrined in Article 23 of the Inter-American Convention on Protecting the Human Rights of Older Persons. Older women's right to property is protected in Article 9 on older women in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 17

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 15 & Article 16

Convention on the Rights of Persons with Disabilities, 2006, Article 12

Regional human rights law on older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 23

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 9

26. The right to justice

i) Normative elements

- Affirmation of the right

Older persons have the right to justice on an equal basis with others in all legal and administrative proceedings at any stage, including through the provision of procedural accommodations and special measures to prevent unnecessary delay in legal proceedings, particularly in situations of immediacy.

Older persons have the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against them or for the determination of their rights and obligations of a civil, labour, fiscal, or any other nature.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons have access to legal services, including legal assistance and legal aid on an equal basis with others.
- Facilitation of the effective role of older persons as participants at all stages of legal proceedings on an equal basis with others.
- Adequate and appropriate training on ageing for all those working in the administration of justice and law enforcement, including the judiciary, police and prison staff.

ii) Normative basis

The right to justice is well established in international human rights law, in a range of rights such as equal recognition before the law dealt with above. Other rights related to justice include the right to an effective remedy (UDHR Article 8), freedom from arbitrary arrest or detention (UDHR Article 9) and

the right to a fair trial (UDHR Articles 10 and 11; ICCPR Articles 14 and 15). CRPD Article 13 protects the rights of persons with disabilities to access to justice. However, this right has not been specifically applied to the context of older age in the international human rights framework.

At the regional level older persons' right to justice is enshrined in Article 31 of the Inter-American Convention on Protecting the Human Rights of Older Persons and Article 31 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 8, Article 9, Article 10, Article 11

International Covenant on Political and Civil Rights, 1966, Article 14, Article 15

Convention on the Rights of Persons with Disabilities, 2006, Article 13

Regional human rights law on older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 31

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 4

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, VII. Administration of justice

27. The right to personal liberty and security of person

i) Normative elements

- Affirmation of the right

Older persons have the right to liberty and security of persons on an equal basis with others.

Older persons deprived of their liberty have the right to appropriate accommodation in prisons and other places of detention, to regular monitoring of health and provisions of appropriate physical, mental and cognitive health care, to appropriate access to sanitary, sports, education, training and leisure facilities, to release from prison if no longer a threat to society and to support on re-entry into society on release from prison.

- Scope of the right

Age as a justification for deprivation of liberty shall be prohibited.

- State obligations

State Parties shall take steps and measures to ensure:

- Any restriction or deprivation of liberty of an older person is in conformity with the law and proportionate.
- Older persons who are deprived of their liberty have access to justice including through special measures to prevent unnecessary delay in the legal process.
- Detention of older persons does not amount to inhuman or degrading treatment
- Consideration is given to alternatives to detention of older persons.
- Safety of older prisoners and detainees who are at risk of victimisation.
- Comprehensive policies and strategies for addressing the needs of older prisoners or detainees with regard to the built environment and facilities, the programmes and activities, healthcare and preparation for release.

- Adequate and appropriate training on ageing for staff involved in the supervision and care of older prisoners.
- Older prisoners and detainees have access to paid work opportunities and to programmes related to early release without discrimination.
- Conditions of confinement, including sleeping arrangements, accommodate older prisoners and detainees who require support with activities of daily living.
- Older prisoners and detainees have access to appropriate health care services, drinking water, nutritional food, clean clothing and washing and sanitation facilities.
- Older prisoners and detainees have access to legal services, including the provision of support in decision-making to those who may require it.
- Older prisoners and detainees have access to appropriate rehabilitation, recreational, educational, vocational and other social reintegration programmes and support before and after release.

ii) Normative basis

The right to personal liberty and security of person is well established in international human rights law, for example in UDHR Article 3, ICCPR Articles 9 and 10 and CRPD Article 14. However, this right has not been specifically applied to the context of older age in the international human rights framework.

At the regional level older persons' right to liberty and security of person is enshrined in Article 13 of the Inter-American Convention on Protecting the Human Rights of Older Persons.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 3

International Covenant on Political and Civil Rights, 1966, Article 9, Article 10
Convention on the Rights of Persons with Disabilities, 2006, Article

Regional human rights law on older persons

Inter-American Convention on Protecting the Human Rights of Older Persons,
2015, Article 13

- Advisory documents

Council of Europe recommendation CM/Rec(2014)2, VII. Administration of
justice

UNODC, *Handbook on Prisoners with special needs*, 2009, Chapter 6

28. The right to freedom of expression, opinion, and access to information

i) Normative elements

- Affirmation of the right

Older persons have the right to freedom of expression, opinion and access to information.

Older persons have the right to exercise, manifest or change their religious beliefs.

Older persons have the right to impart and pass on their opinions, knowledge and experience.

Scope of the right

The right applies to all aspects of life.

State Parties shall take steps and measures to ensure:

- Older persons can exercise their right to freedom of opinion and expression, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through the communication medium of their choice.
- Older persons have access to information on a range of good and services, and their legal rights and entitlements, including through, inter alia, awareness campaigns, the media, internet sites and other social media and national associations or office on ageing.
- Older persons have access to information in accessible and appropriate formats.
- Older persons have access to their own physical and digital records.
- Older persons have access to access to appropriate advice.

ii) Normative basis

The right to freedom of expression, opinion and access to information is well established in international human rights law, for example in UDHR Article 19, ICCPR Article 19 and CRPD Article 21. However, this right has not been specifically applied to the context of older age in the international human rights framework.

At the regional level older persons' right to freedom of expression, opinion, and access to information is enshrined in Article 14 of the Inter-American Convention on Protecting the Human Rights of Older Persons.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 19

International Covenant on Political and Civil Rights, 1966, Article 19

Convention on the Rights of Persons with Disabilities, 2006, Article 21

Regional human rights law on older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 14

29. The right to freedom of association and assembly

i) Normative elements

- Affirmation of the right

Older persons have the right to freedom of assembly and association.

Older persons have the right to form organisations and associations for all purposes, inter alia, political, economic, public, cultural or religious, or protection of their interests.

Older persons to participate in social, political, economic, cultural or religious groups on an equal basis with others.

- State obligations

State Parties shall take steps and measures to ensure:

- Support for the formation by older persons of organisations and associations for all purposes, inter alia political, economic, public, cultural or religious, or protection of their interests.

ii) Normative basis

The right to freedom of association and assembly is well established in international human rights law, for example in UDHR Article 20, ICCPR Articles 21 and 22 and CRPD Article 21. However, this right has not been specifically applied to the context of older age in the international human rights framework.

At the regional level older persons' right to freedom of expression is enshrined in Article 28 of the Inter-American Convention on Protecting the Human Rights of Older Persons.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 20

International Covenant on Political and Civil Rights, 1966, Article 21, Article 22

Regional human rights law on older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 28

30. The right to freedom of movement and nationality

i) Normative elements

- Affirmation of the right

Older persons have the right to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others.

Older persons have the right to acquire and change a nationality on an equal basis with others and not to be deprived of their nationality arbitrarily.

- State obligations

State Parties shall take steps and measures to ensure:

- Older persons are not deprived, on the basis of their age, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration and asylum proceedings, that may be needed to exercise of the right to liberty of movement.
- Older persons are free to leave or enter any country on an equal basis with others.
- Older persons are not deprived, arbitrarily or on the basis of their age, of the right to enter their own country.

ii) Normative basis

The right to freedom of movement and nationality is well established in international human rights law, for example in UDHR Articles 13 and 15, ICCPR Article 12, CEDAW Article 9 and CRPD Article 18. However, this right has not been specifically applied to the context of older age in the international human rights framework.

At the regional level older persons' right to freedom of movement and nationality is enshrined in Article 28 of the Inter-American Convention on

Protecting the Human Rights of Older Persons.

iii) Provisions in existing international human rights law and other sources

International human rights law

Universal Declaration of Human Rights, 1948, Article 13, Article 15

International Covenant on Political and Civil Rights, 1966, Article 12

Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 9

Convention on the Rights of Persons with Disabilities, 2006, Article 18

Regional human rights law on older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 15

31. Rights in situations of risk and displacement

i) Normative elements

- Affirmation of the right

Older persons have the right to promotion and protection of their rights in situations of risk and displacement, including situations of armed conflict, humanitarian emergencies and occurrence of natural disasters.

- State obligations

State Parties shall take steps and measures to ensure:

- Identification of, and consultation with, older persons to assess their needs for assistance and protection, and their capabilities for recovery, as part of the design and delivery of appropriate humanitarian responses, including resettlement and durable solutions, prevention and response to rights violations, promotion of a protective environment, peace and reconciliation efforts as well as economic recovery and support to families.
- Older persons have access to appropriate, accessible, safe, dignified and adequate essential services including assistance with registration and documentation requirements, food, water and sanitation, fuel, shelter, opportunities for family reunification, transport, health care, psycho-social and nutrition support, livelihood intervention on an equal basis with others.
- Where appropriate, and based on assessment of older persons' needs, the delivery of services designed and adapted to address the specific requirements of older persons, for example in health care, psycho-social and nutrition assistance.
- Older persons have access to information about the emergency, the changing security situation, and the availability of humanitarian assistance and rights protection services on an equal basis with others.

- Responsive disaster preparedness plans, policy and legislation to reduce older persons' risk in disasters are in place.

ii) Normative basis

The promotion and protection of human rights in situations of risk and displacement is recognized under international humanitarian law and in CRPD Article 11. However this right has not been specifically applied to the context of older age in the international human rights framework.

iii) Provisions in existing international human rights law and other sources

International human rights law

Convention on the Rights of Persons with Disabilities, 2006, Article 11

Regional human rights law on older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 29

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 14

32. International co-operation

i) Normative elements

- Affirmation of the right

States shall recognize the importance of international co-operation for the realisation of the purpose and objectives of the convention and to ensure international development programmes are inclusive of, accessible to, and of benefit to all older persons.

- State obligations

State Parties shall take steps and measures to ensure:

- Appropriate and effective measures are in place, including but not limited to capacity-building through training or information sharing; facilitating co-operation in, and access to, research; and providing appropriate, technical and economic assistance, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of older persons.

ii) Normative basis

International co-operation is included in ICESCR, Article 23, and the CRPD, Article 32.

iii) Provisions in existing international human rights law and other sources

International human rights law

International Covenant on Economic, Social and Cultural Rights, 1966, Article 23

Convention on the Rights of Persons with Disabilities, 2006, Article 32

33. Data and statistics

i) Normative elements

- Affirmation of the right

Older persons have the right to be included in research and data collection on an equal basis with others, and with their free and informed consent, particularly in, but not limited to, areas of life that affect them.

- State obligations

State Parties shall take steps and measures to ensure:

- Production of quality and reliable data on older persons that is made available in a timely manner.
- Collection, disaggregation, analysis, utilisation and dissemination of data by all ages which is disaggregated by age cohorts.
- Intersections are reported by age, sex, disability and other grounds.
- Older persons are included at every stage in the data process from design, data collection, analysis and reporting and dissemination.
- Such data and statistics are available and accessible to older persons.
- The process of collecting and maintaining this information complies with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of older persons, and complies with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

ii) Normative basis

The obligation on States to collect, analyse and disseminate data in relation to the enjoyment of human rights is established Article 31 of the CRPD. However, this right has not been specifically applied to the context of older

age in the international human rights framework.

At the regional level obligations on States related to data and statistics on older persons are enshrined in Article 4.g of the Inter-American Convention on Protecting the Human Rights of Older Persons and Article 21 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.

iii) Provisions in existing international human rights law and other sources

International human rights law

Convention on the Rights of Persons with Disabilities, 2006, Article 31

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 21

34. Older persons in particular situations of risk

i) Normative elements

Particular attention must be paid within a new convention to ensuring the rights of older persons in particular situations of risk.

These include, but are not limited to older women where gender, age, sexual orientation and/or marital status related discrimination may intersect or accumulate over time; older people living in residential and other long-term care facilities, including their right to freedom of movement in these settings; older people deprived of their liberty, for example in prison, in detention centres and in other settings; older people in situations of humanitarian risk; older people with disabilities; older people with dementia; and older lesbian, gay, bi-sexual, transgender and intersex people.

ii) Normative basis

At the regional level the need to pay particular attention to older persons in situations of heightened risk is recognized in Article 5 of the Inter-American Convention on Protecting the Human Rights of Older Persons. This article outlines a non-exhaustive list of older persons who may be at heightened risk and obligates State Parties to develop particular approaches to address such risk in policies, plans, and legislation on ageing and older age.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa takes a different approach whereby it has specific articles providing for particular older persons at risk: Article 9 on older women, Article 11 on older persons in residential care and Article 13 on older persons with disabilities.

These two approaches are not mutually exclusive and either one or a combination of both could be used within a new convention. A challenge is to ensure that the convention does not exclude any, and allows for as yet unidentified, situations of risk.

iii) Provisions in existing international human rights law and other sources

Regional human rights law on the rights of older persons

Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Article 5

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016, Article 9, Article 11, Article 13

노인인권의 국제적 현안 분석과 유엔에서의 주류화를 위한 로드맵

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