

**The Rights of Older People: International Law, Human
Rights Mechanisms and the Case for New Normative
Standards**

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1. Introduction

This paper surveys the interface between international law and the experiences of older people, with a particular focus on the provisions of human rights law. It has been commissioned to inform an international symposium to be convened January 2009 by the International Federation on Ageing (IFA) and HelpAge International (HAI). Specifically, the symposium will explore the question of whether new legal instruments are needed to protect and promote the rights of older people more effectively. This paper therefore aims to provide relevant information to feed into this debate, and to stimulate thinking about where NGOs can best direct their campaign efforts in what is a relatively untested field.

It should be stated from the outset that there will be numerous forces of resistance against any campaign to create new international legal standards. Governments are cautious about agreeing to new binding commitments which will demand the redeployment of resources and expose them to additional scrutiny. Moreover, it is not just states that resist the development of new laws at an international level. Some in the human rights world believe that a proliferation of standards is not an unadulterated good: new standards can sometimes lead to a dilution of existing commitments for example. In addition, the systems set up to monitor current obligations are under stress: it is onerous and sometimes untenable both for states to prepare multiple reports, and for committees to consider them. Consequently, some jurists and NGOs believe efforts should focus on invigorating existing standards and compliance systems rather than creating new ones. Any case for a new convention needs to address these concerns.

This paper is structured as follows. The first section considers existing provisions in international law and their relevance to the experiences of older people. It seeks to establish whether what some have termed a “normative gap” exists, a conclusion which would be a central element of a case for new standards. The second section overviews how human rights mechanisms have addressed the experiences of older people to date, exposing whether what can be termed an “implementation gap” is present. Again, the existence of such a gap may also be part of a case for invigorated action on the rights of older people. This second section also considers the mechanics of standard setting and derives some lessons from previous experience. The third section concludes the paper with a set of strategic questions for consideration.

2. International law and the rights of older people

This section seeks to locate the experiences of older people in an international legal context. It begins with an overview of the nature of international law which is necessarily brief but aims to highlight some of the key dimensions that have a bearing on the questions at hand in this paper. Second, it outlines in more depth relevant provisions from the human rights canon, and isolates important principles that govern their application. Third, it considers the legal protection provided by humanitarian law in times of crisis. Finally, it assesses whether a normative gap can be discerned.

2.1 What is international law?

International law is that contracted by states with other states and as such, it primarily governs their behaviour towards one another. It stems from two sources: positive international law which is encoded in treaties, conventions and the like; and customary law, which comprises norms so widely accepted that they are considered binding on all states. It follows that while states are bound by customary norms

whether they like it or not, they are only bound by positive law if they have both signed and ratified the relevant instrument. Moreover, the provisions of many international legal texts only become “active” when a critical mass of states has ratified them: for example, the *Convention on the Rights of People with Disabilities* (2006) required 20 ratifications in order for its provisions to become binding on signatories.

In addition to the “hard law” of treaties and their equivalents, there is a considerable body of “soft law” at an international level. This comprises the numerous declarations, principles, advisory opinions and the like that encode norms and precepts which states agree to be guided by, but which lack any obligatory content. They are thus regarded as something of a second tier in terms of protection. That said, their leverage should not be underrated. Some have argued that because they operate at a less visible level, and often provide greater specificity than hard law, soft law is more effective at governing state behaviour.¹ In some cases, observance can be so widespread they gain the status of customary law, either in totality or for certain provisions, the most notable example of this being the *Universal Declaration of Human Rights* (1948). Moreover, they are more likely to emerge as the result of academic and non-governmental processes rather than the state to state deliberations that typically produce hard law.

It is important to note that states can dilute their hard law commitments in numerous ways. For example, they can enter reservations into any treaty thereby agreeing to be bound only by certain provisions and not others. In addition, some treaties allow for derogations in times of emergency which allow states to suspend certain obligations. In the final analysis, some treaties allow states to denounce their terms, withdrawing from their obligations altogether. Moreover, many argue that the efficacy of international law is severely compromised by the fact that there are few, if any, effective enforcement mechanisms. States abide by their commitments to each other more through diplomatic pressure rather than because of the threat of sanctions. Those mechanisms that do have some leverage – notably the International Court of Justice and the UN Security Council – typically reserve their powers only for situations marked by the most outrageous breaches of international law. That said, states continue to frame their actions in terms of international law, and those who flout its provisions do so at the risk of incurring considerable censure both domestically and internationally.

2.2 Human rights law and older people

Human rights law forms a special subset of international law in that it governs not just state to state but also state to citizen behaviour. Through their adoption of various human rights instruments, states undertake a threefold commitment: to respect, to protect and to fulfill the rights enshrined in the relevant text. The obligation to respect demands that states refrain from interfering with or curtailing the enjoyment of human rights; the obligation to protect requires states to protect individuals and groups against human rights abuses; and the obligation to fulfill compels states to take positive action to facilitate the enjoyment of basic human rights.

Human rights have been encoded in a multitude of instruments at the international level, but a natural starting point for investigation is the three general texts: the *Universal Declaration of Human Rights*, 1948 (UDHR), the *International Covenant on Civil and Political Rights*, 1966 (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*, 1966 (ICESCR). What follows is an attempt to isolate key provisions from these and other relevant instruments and to consider the extent to which they adequately address some of the problems faced by older people today.

- **Non-discrimination** is a core tenet that underpins the whole human rights canon. Article 2 of the UDHR states “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. ICCPR and ICESCR contain similar provisions.² Moreover, non-discrimination has informed the very creation of some key human rights texts, most obviously the *Convention on the Elimination of All Forms of Racial Discrimination*, 1966 (CERD) and the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979 (CEDAW).

However, despite its ubiquity, the norm of non-discrimination rarely specifies age as a prohibited ground for discrimination.³ While texts proscribe discrimination on the basis of gender, race, religion and other categories, in most cases age discrimination is captured only by the catch all phrase “and other status”. In its General Comment 6, the Committee in Economic Social and Cultural Rights considered this omission.⁴ While its conclusions only have traction over the interpretation of ICESCR, it provides the most authoritative thinking on this subject to date. The Committee found that the exclusion of age as a prohibited ground for discrimination was not deliberate, and instead it ascribed the omission to the fact that “the problem of demographic ageing was not as evident or as pressing [when the ICESCR was drafted] as it is now”.⁵ However, it was reluctant to conclude that the phrase “and other status” comprehensively prohibited age discrimination although its members conceded that “the range of matters in relation to which discrimination can be accepted is very limited”⁶ and endorsed the general trend away from age discrimination. Discrimination on the basis of age is, however, squarely recognized as a reality in various soft law instruments, most obviously the *UN Principles for Older Persons* (1991) and the *Madrid International Plan of Action on Ageing* (2002).

- Human rights law encodes a number of what could be termed **livelihood rights** which have clear relevance for older people. Article 23(1) of UDHR states “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”. Article 23(3) brings in another key precept of human rights, that of **dignity**, stating “Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity”.

The provisions of Articles 6 and 7 of ICESCR amplify these commitments. Article 6(2) delineates, for example, steps that states should take to realise the right to work including technical and vocational training, while Article 7 emphasises the need for safe and healthy working conditions and for rest, leisure and the reasonable limitation of working hours. ICESCR General Comment 6 again considers the application of these rights for older people. It recognizes that older people often encounter problems finding and keeping jobs and “stresses the need for measures to prevent discrimination on grounds of age in employment and occupation”.⁷ It also emphasises the special importance of safe conditions for older people, and the need to harness their skills and experience effectively.

These provisions capture, to some extent, the concerns of those in both developed and developing countries. In developed states, the key policy question for older people with respect to work is whether mandatory retirement at a certain age is discriminatory when it effectively excludes many who wish to work beyond that point. For those in developing countries however,

especially older people who work in rural areas or in the informal sector, work remains a necessity far into old age in the absence of other forms of income. For these older people, while conditions of work and fair remuneration are germane, other concerns such as lack of access to credit and training are also pertinent.

Finally, a consideration of livelihood rights perhaps needs to be tempered by the sentiment expressed in Principle 18 of the *UN Principles for Older Persons*. This exhorts governments to value older people “independently of their economic contribution”.

- In the absence of employment or other forms of income, human rights law recognises the responsibility of the state to provide adequate **pensions and other forms of social protection**. Article 25 of UDHR states that “Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family” which includes the right to security in the event of “unemployment, sickness, disability, widowhood, old age”. Article 9 of ICESCR echoes this, asserting “the right of everyone to social security, including social insurance”. This rather terse Article has been unpacked in General Comment 6 and more comprehensively in the recent General Comment 19 to produce a number of clearer obligations on states vis-à-vis older people.⁸ For example, General Comment 19 isolates key elements of the normative content of the right to social security, namely availability, the types of risks that protection should cover including old age, adequacy of any provision, and accessibility of any scheme. It also highlights that social protection programmes must “pay full respect to the principle of human dignity” and that states must take into account the especial needs of women, part time and casual workers, home-workers and those active in the informal economy.

It is clear from the General Comments that Article 9 envisages non-contributory schemes for those who fall outside the ambit of contributory pensions as well as a system of compulsory old-age insurance. States are also expected to establish a flexible retirement age that takes account of occupation and working abilities of older people. Additionally, they are also encouraged to guarantee survivors’ and orphans’ benefits. General Comment 19 also identifies some immediately compelling obligations on states: they are expected to ensure that existing programmes are non-discriminatory and promote gender equality; to develop a plan of action for more comprehensive coverage which includes soliciting international assistance if required; and to monitor the impact of programmes to ensure they deliver on their objectives.

In practice, the debate about the provision of pensions in both developed and developing countries revolves around the question of affordability and, in the light of a burgeoning ageing population (and indeed the likelihood of a global recession), sustainability. This brings us to another critical principle that governs those rights encoded in ICESCR, that of **progressive realization**. Article 2(1) of ICESCR commits states to “take steps, individually or through international assistance and co-operation...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights ...by all appropriate means”. Formulated in recognition that many states lack the resources necessary to deliver immediately on all the obligations encoded in ICESCR, some regard Article 2(1) as a let-out clause. The Committee on Economic Social and Cultural Rights has nonetheless discerned a number of immediately compelling obligations implicit in the notion of progressive realization, namely the duty to commence programmes with no

delay and to implement the most efficacious policies to achieve economic, social and cultural rights. They have also considered whether retrogressive policies, that is those that result in a decline in the relevant rights for some, are permitted. They concluded, somewhat controversially, that any retrogression must be fully justified but could be accepted if resources shrank or if, through redeployment of resources, the totality of rights were overall advanced.⁹

- **Health** is clearly a critical priority for older people and is an area which human rights law has considered in some depth. UDHR, Article 25 asserts that the right to a standard of living adequate for health and wellbeing includes food, medical care and necessary social services, and in Article 25(2), singles out motherhood and childhood as especially vulnerable points in the life cycle “entitled to special care and assistance”. Article 12 ICESCR goes further in recognizing “the right of everyone to the highest attainable standard of physical and mental health”. It goes on to highlight particular priorities states should consider, including “the prevention, treatment and control of epidemic, endemic, occupational and other diseases” and “the creation of conditions which would assure to all medical service and medical attention in the event of sickness”.¹⁰

The provisions encoding health rights appear to be more distanced from the experience and concerns of older people than perhaps the livelihood and social protection clusters considered above. General Comment No. 6 provides little amplification of these provisions and their relevance for older people except to point out the need for a comprehensive health strategy which ranges from preventive treatment to rehabilitation to care of the terminally ill.¹¹ As many experts have noted, as a population ages there is a typical transition from infectious diseases and maternal/child mortality to non-communicable disease and chronic conditions¹², yet these types of health problems are not singled out for concern in any key text. Questions such as access to health facilities and age appropriate interventions trouble older people around the world, yet human rights law has little to say on these issues. And of course, how the principle of progressive realization operates in practice, and whether this leads to rationing on the basis of age is pertinent, given that the major policy concern in both developed and less developed countries is spiraling health care costs as the population ages.

That said, the *Convention on the Rights of Persons with Disabilities* (2006) may provide some additional protection for older people who fall into the category of living with a disability. Article 25 states that disabled people have “the right to the highest attainable standard of health without discrimination on the basis of disability. They are to receive the same range, quality and standard of free or affordable health services as provided other persons, receive those health services needed because of their disabilities, and not to be discriminated against in the provision of health insurance”. Moreover, this article points to a construction that captures the need for both non-discriminatory access to generic services as well as health care tailored to particular needs which could serve as a useful precedent for any elaboration of the right to health with respect to older people.

- **Housing** is an issue that human rights law has dealt with less thoroughly than many others, with both UDHR and ICESCR making brief reference to shelter as an integral part of the right to an adequate standard of living.¹³ Yet where one lives, and the **care and support** one receives in that environment, are vital concerns for many older people the world over, a fact that is

acknowledged in General Comment 6 which emphasizes that housing “must be viewed as more than mere shelter” as it clearly contains a psychological and social dimension.¹⁴ Otherwise, the General Comment focuses attention on the need to adapt homes to enable older people to remain there in for as long as they want, and exhorts urban planners to consider the needs of older people in developments.

Perhaps the more valuable contribution made by General Comment 6 with respect to housing and care for older people is through its consideration of Article 10 of the ICESCR. Article 10 commits states to accord “the widest possible protection and assistance ...to the family, which is the natural and fundamental group unit society”. While the further provisions of this article again stress children and mothers as figures of special concern, General Comment 6 also points to the need to support families in responding to the needs of older relatives. Specifically, it stresses the need for measures targeted at low income families caring for older people as well as single people or elderly couples who wish to remain in their homes.¹⁵

However, there is a trend away from older people residing within a family unit. While more apparent in developed countries, migration, the changing roles of women and declining fertility rates have all impacted on the capacity of families to care and support older relatives the world over. The prevalence of HIV/AIDS in many parts of the world has also distorted traditional patterns of intergenerational care, with many noting how older people take on the care of children orphaned by the pandemic. What is thus observed is a rise in the number of older people living in isolation, as well as a rise in the demand for long term care. The next two bullets consider the extent to which human rights law can address some key aspects of these two trends.

- There is a large bundle of commitments found in human rights law that can usefully be termed **participation rights** which seek to guarantee a person’s entitlement to speak out and be heard in society. The UDHR, for example, encodes the right to peaceful assembly and association (Article 20), as well as the right to take part in the government of one’s country (Article 21). The ICCPR fleshes out these two commitments. It pledges states to ensure freedom of thought (Article 18), freedom of expression (Article 19), freedom of assembly (Article 21) and of association (Article 22) as well as the right to take part in the affairs of one’s country (Article 25). The Human Rights Committee which interprets the application of ICCPR has gone one step further by intimating that setting age limits for elective office would be unreasonably discriminatory.¹⁶ Moreover, Article 15 of ICESCR recognizes the right of everyone to take part in cultural life. All governed by the norm of non-discrimination, these rights should comprise a package which ensures the participation of older people in civic and national affairs.

However, in reality, older people are often most notable in their absence from policy debates, even those which specifically affect their lives. One can speculate as to why this is so: the heterogeneity of older people’s interests? A lack of organization? The decline in their status as they become less economically active? Problems identifying entry points into the policy cycle as a result of higher rates of illiteracy, lack of technological know-how or simple problems of physical access to meetings? Whatever the causes, it is clear that special efforts need to be made to bring the voices of older people into policy discussions, both to enable them to air their concerns as well as to draw on their collective expertise. General Comment 6 speaks to this: it points to the need for governments to counter negative stereotyping of older people and

instead, to regard them as repositories of “information, knowledge, traditions and spiritual values”.¹⁷

Finally, ICCPR encodes another key right which has a relevance for older people in their engagement with the state, that of recognition as a person before the law (Article 16). However, older people often struggle to assert their legal identity through lack of papers or documentation, especially in developing countries. Consequently, they are unable to access services to which they are entitled - indeed, one of the objections some governments have raised to state pension provision is that a lack of birth records opens up such schemes to the possibility of widespread fraud - as well as participate fully in political processes.

- As many people age and their independence declines, they become more vulnerable to **abuse and exploitation**. Perhaps the two best documented examples that illustrate malign practice against older people is abuse in residential care homes, and moves made by families to transfer title to property and other assets without sufficient regard for the concerns or preferences of their older relatives. Human rights law has a bearing on both situations. With respect to the first, ICCPR Article 7 forbids “cruel, inhuman or degrading treatment” while UDHR Article 12 and ICCPR Article 17 both have a similar construction, prohibiting “arbitrary or unlawful interference with privacy, family, home or correspondence”. The precept of dignity that informs the whole of human rights law is also of critical importance. Article 17 UDHR moreover forbids the arbitrary deprivation of property, which clearly has relevance in situations of the forced transfer of title.

The key shortcoming of human rights law in protecting older people from violence and interference, however, is that it first and foremost governs the behaviour of state entities. Thus, what it fails to capture are the actions of both **private sector bodies** and private **individuals**. However, there is some room for manoeuvre. It is widely accepted that implicit in a state’s duty to protect the rights to which it signs up is a commitment to enact domestic laws that impede private actors from denying the rights of others. Moreover, human rights texts themselves do impose some obligations on individuals: Article 5 of both ICCPR and ICESCR stress that “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognized herein”. Finally, there is a burgeoning norm in the human rights world that the actions of the private sector do fall within its purview.¹⁸

- The different impact that old age has on women and men has been much commented upon. Because of their longevity, there are more **older women** than men, and they often find themselves doubly stigmatized by both age and gender. Women are more likely than men to be poor in old age, to have no pension provision and to care for others. They are also more likely to suffer from loss of status as they age, for example finding themselves denied property and legal rights on widowhood, and subject to traditional allegations such as witchcraft. Thus, their economic and social exclusion is entrenched.

While the generic provisions of the key human rights texts all assert their equal application to men and women it is CEDAW that offers older women more explicit and tailored protection. Article 2 employs strong language and “condemns” discrimination on the basis of gender, calling on states to enact legislation to erase such discrimination, ensure judicial recourse, and apply

measures against “persons, organisations and enterprises” that do treat women differently from men. It also exhorts states to ensure that women have the same social benefits as men as well as access to credit on the same terms. Article 5 demands states take measures against pernicious cultural practices that discriminate against women, while Article 14 considers the especial vulnerability of rural women. Given the prevalence of older people in rural areas in developing countries, this is a particularly relevant article, emphasizing the need for special measures to ensure rural women are able to access healthcare and other social services and urging states to ensure that rural women are able to influence development policies that affect them. Finally, CEDAW also offers women some protection from sexist inheritance practices: Article 15 ensures equality before the law and owning property while Article 16 gives women the same rights as men to acquire, manage and dispose of property.

The Committee on the Elimination of Discrimination against Women has provided some additional amplification on the commitments encoded in CEDAW that has relevance for older women. In its General Recommendation 25 (2004) it recognises that discrimination against women can be compounded by other types of exclusion including age, and allows states to take temporary special measures to overcome the entrenched nature of discrimination such women face. However, its most in depth consideration of the problems faced by older women to date comes in General Recommendation 24 (1999) on health which recognises the need to consider that women disproportionately “suffer from disabling and degenerative conditions such as osteoporosis and dementia” as well as bear the costs of looking after other relatives. In addition, the Committee has recently mandated a working group to draft a general recommendation specifically addressing the concerns of older women.

2.3 Humanitarian law and older people

Although concerned with protecting people from violence and ensuring their dignity, humanitarian law developed as a completely different branch of law from human rights. It has a longer history, a different philosophical framework, and a separate machinery for monitoring its application. That said, it clearly seeks to address many similar problems to human rights law. The key difference is that humanitarian law only operates in situations of conflict and occupation.

A vast and complex body of law, humanitarian law is based on the fundamental principle that in any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited. A basic rule follows from this principle: that of distinguishing at all times between the civilian population and combatants, and directing operations only against military objectives. Thus, for example, using civilians as human shields, employing violence to terrorise civilians, using starvation as a weapon of war, and desecrating the environment or cultural property are all prohibited. The *Geneva Conventions* pay particular attention to the protection of women and children. The one notable reference to older people comes in consideration of safety zones which “may be established before or after the outbreak of hostilities to protect wounded, sick and aged persons”.¹⁹

Humanitarian law essentially fails to recognise the acute vulnerability of older people in times of conflict, and, of course, does not apply in other types of crisis such as natural disasters. Yet in any humanitarian emergency, lack of mobility can result in older people being abandoned, and impede their access to humanitarian distributions. Chronic poor health can be compounded, while specific nutritional requirements often go overlooked. Isolation is often identified by older people as a key source of stress in

crisis situations, and abuse and sexual violence are more likely to occur when resources are stretched and older people considered a burden.²⁰ However, there are two recent initiatives that have sought to address the discrimination encountered by older people in times of crisis as follows:

- In 2000, the UN High Commissioner for Refugees promulgated a policy on **older refugees**.²¹ This recognised that older people formed a larger percentage of UNHCR's caseload than perhaps would be expected, and committed the organisation to protect older people most at risk. It also pledged to ensure that the concerns of older people were considered through all the stages of programme design and implementation. In addition, it recognised the positive contribution of older people in times of crisis.
- In 2004, a group of NGOs agreed a **Humanitarian Charter** under the aegis of the Sphere Project.²² Essentially an attempt at self-regulation, the Charter sets professional standards for the provision of relief in disaster situations. It considers the plight of older people in some depth, highlighting that they make up a large proportion of the most vulnerable in disaster-affected populations. It sees isolation as the most significant factor creating vulnerability for older people, often compounded by disruption to livelihood strategies, to family and community support structures, chronic health and mobility problems, and "potential mental deficiencies". However, the Charter also places much emphasis on the contributions older people have to make in survival and rehabilitation.

2.4 A normative gap?

As the above survey shows, there is a multitude of provisions in human rights and humanitarian law that offer generic protection for vulnerable groups which clearly includes older people. Moreover, various soft law documents such as the *UN Principles on Older Persons* (1991), the *Madrid International Plan of Action on Ageing* (2002) and multiple advisory opinions by specialized agencies such as the International Labour Organisation (ILO) and UNHCR provide additional guidance as to the specific application of many international legal provisions for older people. Given this, is it possible to argue that a normative gap exists in international law with respect to the rights of older people?

Such a gap can be discerned in situations where the law fails to respond adequately to a recurrent event, act or structural factor which deprives human beings of their dignity.²³ By scrutinizing the evolution of analogous human rights conventions, most notably CEDAW and the *Convention on the Rights of the Child* (CRC), 1989, one can see even when the existing generic instruments provided protection for the relevant groups, advocates were still able to argue successfully that a normative gap existed. Specifically, in these cases, new instruments were considered an appropriate response to the dispersal of standards throughout various general texts as they allowed for both the collation and elaboration of rights and responsibilities. New precepts specific to the group in question could be articulated, most notably the overarching principle of the best interests of the child encoded in CRC; new rights could be recognised, such as the right of the child not to be separated from its parents in CRC or reproductive rights in CEDAW; and specific duties on states which were not clearly defined in general instruments could be elaborated, such as the duty to ensure that discrimination against women does not occur in private as well as public sphere. The CRPD is also innovative in that it references the actions of the international community and demands that private sector actors and individuals respect the rights encoded in the Convention.

So, what of the rights of older people? Can a similar case be made that the existing provisions fail to adequately protect them? The following points are put forward for consideration:

- The standards which offer older people protection are **dispersed through many human rights texts** and are usually only explicitly articulated in interpretative or advisory documents. The reasoning that informed the development of CEDAW, CRC, and CRPD, that bringing relevant provisions together in a single text provides greater clarity as to the nature of the rights as well as corresponding responsibilities, could clearly be invoked.
- Almost all the key human rights texts fail to identify **age as a ground for discrimination**, resulting in a reliance on the catch-all category of “and other status”. This has arguably obscured the discriminatory experiences of older people as states and other actors have not been sufficiently alerted to their presence.
- There are numerous obligations on states vis-à-vis older people which are **implicit in the general texts** and have been identified through general comments and the like. However, they remain largely “below the line” of both state and public attention and as a result are little acted upon. Consequently an argument could be developed that these should all be brought more explicitly into focus through their collection in one instrument.
- It is open to question whether the special vulnerability of **older women** has been adequately captured by human rights law although further elucidation is expected shortly in the form of the General Recommendation on the rights of older women from CEDAW.
- The impact that **private sector actors** and **individuals within families** can have on older people has been outlined above and yet current human rights texts provide only limited protection against acts by such agents.
- There may be **practices which specifically target older people** that are arguably not covered adequately by any of the current provisions in human rights law, most notably allegations of witchcraft. However, it should be noted that prohibiting traditional practices is a particularly contentious area of human rights law as it brings one into contact with questions of cultural relativity.
- Finally, the fact that older people are often especially vulnerable in **conflict and natural emergencies** has arguably not been addressed effectively by international law.

3. Human rights mechanisms and the rights of older people

There is an extensive network of bodies at an international level which scrutinize the observance of human rights law and comment more broadly on its development. This section provides information on some of the key human rights mechanisms. First, through an analysis of the work some key treaty monitoring bodies, it explores the extent to which an implementation gap can be identified with respect to existing human rights provisions and older people. Second, this section sets out some key aspects of the working methods of the main bodies involved with standard setting, which may have a bearing on any campaign for a new convention for older people.

3.1 An implementation gap?

The failure of states to abide by the commitments that they have signed up to through human rights instruments amounts to what some have called an “implementation gap”.²⁴ This is clearly distinct from a normative gap where the current provisions fail to capture adequately ongoing practice which denies rights. Instead, an implementation gap suggests a failure to incorporate international standards into domestic legislation and procedures, or a lack of institutions or other actors competent to implement measures that would result in the fulfillment of the relevant rights. So, is it possible to detect such a gap with respect to the rights of older people?

Answering this question is not easy. To make a conclusive assessment, one would have to analyse which states had signed up to which instruments, to note any reservations they had made to the obligations contained therein, and then compare policies and practice against these commitments. Moreover, as many of the rights of particular relevance to older people are encoded in ICESCR, one also encounters the principle of progressive realization, thus demanding that any assessment of compliance considers resource constraints and trade offs made by governments. Undertaking such an analysis even for one state would require some sophisticated tools; to do so globally would be an immense challenge.

However, it is possible to look for proxies that give one at least a sense of governments’ commitment to furthering the rights of older people. One source is the reports that states submit to human rights monitoring bodies. Most human rights instruments establish a corresponding body tasked with assessing state compliance with the provisions of the text. Thus, ICCPR establishes the Human Rights Committee; ICESCR the Committee on Economic, Social and Cultural Rights; and CEDAW the Committee on the Elimination of Discrimination Against Women.²⁵ Each year selected states report to the relevant committee on the actions they have taken to respect, protect and fulfill human rights. An analysis of these reports in the light of the rights of older people is revealing:

- From 2000-2008²⁶ the **Human Rights Committee** considered 124 state reports. Of these, only 3 made specific reference to actions taken to address age discrimination, and 1 highlighted the vulnerability of older people in long term care homes.
- For the same period, the **Committee on Economic, Social and Cultural Rights** considered 122 state reports. In these, 24 references were made to older people and their rights. Pension provision and retirement age were referenced in 8 reports; the vulnerability of older people to poverty was referenced in 4 reports; anti-discrimination legislation that had been enacted which expressly covered age discrimination was mentioned in 3 reports; another 3 reports raised concern about health and social services coverage for older people and a further 3 considered issues connected to housing and institutional care. Finally, 2 reports pointed to the especial vulnerability of older people in disaster situations and 2 highlighted the plight of older women.
- During its sessions for the same period, the **Committee on the Elimination of Discrimination Against Women** considered 190 state reports, with the experiences of older women referenced 32 times. States expressed concerns about the exposure of older women to poverty in 7 reports with 3 others highlighting their plight in rural areas; reference to older women in the labour market and their lack of pension provision was found in 8 reports; 3 states each expressed concern about abuse, about health and social service

provision, and about legal title to land and other property. Additional reports also highlighted illiteracy among older women and older women and displacement as key areas of concern.

It is open to question whether such figures provide telling evidence of a lack of action on the part of governments to address the rights of older people but these figures do reveal that many states are “age-blind” in their reporting. Moreover, it should be noted that even those states that referenced older people were not always testifying to positive actions taken. Instead, some were merely expressing concern for the situations with which older people were faced (although of course raised awareness is a necessary precursor of action).

Let us assume for the time being, however, that there is an implementation gap. The obvious response to this is to demand that states dedicate more attention to the rights in question. They should, for example, allocate additional resources, design more sensitive programmes and train staff in new procedures to ensure that rights are fulfilled. Most suggest that an implementation gap does not constitute a ground for a new instrument: the rights are already articulated, they would contest, it is just a question of taking action to transform them into reality. While that is indeed likely to be the case in many situations of non-implementation, it is arguable that when the rights of certain groups are so obscured, often not through any malign intent but simply the result of a particular set of societal values, there is a basis for a new instrument.

The development and negotiation of CRPD provides a useful analogy. In this case, activists were able to argue that although the principle of non-discrimination should have enabled people with disabilities to enjoy general human rights as much as the able bodied, in reality the welfare approach of most states towards disability conspired against this. The UN itself acknowledged that “the Convention does not establish new human rights”.²⁷ CRPD does, however, set out with much greater clarity the obligations on states to promote, protect and ensure the rights of persons with disabilities. Moreover, it also goes beyond merely prohibiting discrimination and instead identifies positive steps states should take.

3.2 Setting new standards

Evidence of a normative gap and, as noted above, the arguable existence of an implementation gap together provide a strong impetus to develop new standards for older people and encode them in international law. However, how is this to be done? There is no single procedure for the elaboration of new human rights standards at an international level; new norms emerge in international law for numerous reasons and through various channels. They are the result of a complex interplay of political, legal and moral debates; involve numerous state and non-state actors; and can be initiated, and indeed blocked, by various bodies.

That said, some patterns can be discerned. Most human rights treaties in the past have evolved through a process whereby a working group was mandated, usually by the Commission on Human Rights but on occasion by the UN General Assembly, to develop a text. After a period of (often lengthy) negotiation, this would then be forwarded by the Commission to the General Assembly and opened up to states for ratification. As mentioned previously, the treaty is activated only after a specified number of states have ratified its provisions.

However, this picture is complicated by the fact that some of the UN organs involved in standard setting have changed in recent years and their working methods are not yet always clear. The following outlines some noteworthy changes:

- The **Human Rights Council** (formerly the Commission on Human Rights) is a new body established in 2006 with core responsibility for addressing situations of human rights violations. Unlike its predecessor which was accountable to ECOSOC, the Council reports direct to the UN General Assembly and thus is seen as a more important body than the Commission. Composed of government representatives, it has a clear mandate to make recommendations to the General Assembly for the further development of international law in the field of human rights.
- The Council's work is supported by an **Advisory Committee** composed of 18 experts. Established in 2008, this body replaced the former Sub-Commission on the Promotion and Protection of Human Rights. Regarded as the "think tank" of the Council, the Committee is expected to provide expertise, studies and research-based advice, and to have a practical orientation. Moreover, it is expected to be open to the opinions of NGOs and others. However, it is primarily reactive to the Council's concerns, providing advice only at their behest. Unlike its predecessor, the Committee cannot initiate recommendations.
- The **Commission for Social Development** is a functional committee of ECOSOC set up in the wake of the World Summit on Social Development in 1995. Its primary role is to implement the *Copenhagen Declaration and Plan of Action* but in recent years it has taken a role in standard setting. In 2001, a mandate for a draft CRPD was stalled in the Commission on Human Rights and in response to this, the Mexican President proposed a special committee be established at the CSD to take the idea forward which it did with great success. The evolution of CSD into a body capable of initiating new standards illustrates how less visible bodies in the UN system can sometimes provide a more efficient forum for contentious issues. Moreover, its work on CRPD may be regarded as a useful precedent, particularly as the Commission is responsible for the implementation of the Madrid Plan.
- The **Office for the High Commissioner for Human Rights** (OHCHR) is expected to provide services to human rights bodies engaged in standard setting as one of its core functions. To date it has been criticized for not being more actively engaged in identifying gaps in human rights law, but the appointment of a new Commissioner in 2008 may herald change in this respect.

In this state of flux, is it possible to identify any general lessons for a campaign seeking to elaborate new standards? As the International Council for Human Rights Policy (ICHRP) has noted, processes that on the surface look formal and rational are often not.²⁸ Instead, in an analysis of the elaboration of ten recent human rights standards, they identify a range of factors that have played a key role in a successful treaty negotiation.

To begin, it is clear that personalities count, especially that of the chair of the working group that produces any text. Their analysis shows that the chair's concerns are imprinted into any draft and also that his or her skills in forging consensus are paramount. A legislative history of the CRC echoes this point, and also asserts that the personalities of state representatives can be equally critical either in driving forward or in inhibiting the process.²⁹ It is important to appreciate the complexity of state positions. As the ICHRP's work shows, governments are not monolithic: divisions are sometimes apparent between foreign and justice ministries as well as

between those ministries involved in drafting and those who are the likely implementers of any treaty. Another point about state involvement: it is key that a range of states from around the globe champion any new standard setting exercise for the outcome to gain sufficient credibility to be regarded as universally relevant.

Both the ICHRP's and the CRC analyses note the important part played by NGOs in setting new standards. They play a crucial role in identifying gaps in protection as well as galvanizing pressure at a domestic level to inspire governments to take forward a new text. NGOs with UN accreditation are automatically invited to participate in the development of new standards and can facilitate the involvement of those people directly affected by the issues being discussed or act as conduits for their voices. Such a role clearly comes with the responsibility to represent beneficiaries' concerns faithfully although tension can then arise when compromise is essential to move a text forward. Necessary compromise can also be a sticking point when forging NGO alliances which evidence shows are a key method for leveraging NGO engagement at the international level.

Finally, it is clear that informal corridor meetings are often where key aspects of texts are worked out rather than the formal on the record sessions in which state representatives behave much more cautiously. Final texts are adopted formally provision by provision, or in some cases line by line, and often stall on key contentious points. As the CRC history shows, a dilution of standards is sometimes the only way to move forward, although Adam Lopatka, the Chair of the Working Group points out that a weaker text usually garners more signatures and can always be bolstered through the development of optional protocol.³⁰ The need for any final text to be credible enough to attract ratification is confirmed by the International Council's work which points to the case of the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990). Although adopted by consensus by the General Assembly, this treaty has not been ratified by key states with high numbers of migrants and thus, in effect, has weak authority and limited impact.

4. Strategic considerations

This final section aims to bring together the preceding analysis and pose some key questions. The following points are offered for consideration:

- Is a **rights-based approach the most appropriate path** to follow for NGOs who wish to advance the interests of older people? A rights approach has many strengths: it has a clear moral imperative, a long established discourse to work within, obvious bodies to lobby and well mapped-out routes of influence. But a rights approach can have some downsides. By setting the bar high, rights approaches can become disconnected from the reality of hard choices that governments must make every day. Activists can make unreasonable demands on states which can alienate potential allies. And when one sees little impact on the ground, it is easy to feel frustrated.³¹ Rather than becoming entangled in the power politics that underpins all elaboration and application of international law, and over which one often has little control, could NGOs not more usefully work with government bodies and other agencies who actually deliver services to older people to improve standards?
- Even if a rights based approach is seen as appropriate, is a convention the most appropriate objective for such a campaign? Are there other **soft law routes** that should be explored? Within the human rights world there are various options such as establishing a Special Rapporteur or Working Group

dedicated to the rights of older people. These could provide cross-cutting expertise on older people, act as a conduit for NGO concerns to all other bodies at the international level, and invigorate current reporting. Moreover, such bodies may themselves initiate the development of new standards.

- Another soft law approach is to **work with technical agencies** to elaborate standards on specific issues of particular relevance to older people. These would be both easier to negotiate and may have more traction in reality. For example, it may be possible to lobby the World Health Organisation (WHO) on health issues, the ILO on social protection and employment, and the World Bank on the need to sensitize poverty reduction strategies to the concerns of older people.
- Another soft law approach would be to campaign for existing and possibly new standards to be collated in a **non-binding declaration** rather than a convention. Such instruments do not create compelling obligations on states and because of this they have traditionally been regarded as easier to negotiate. However, some contest this, arguing that declarations can be just as contentious and time consuming as binding treaties.³² Moreover, while the *UN Principles on Older Persons* and the *Madrid Plan* do not amount to a declaration, in a sense they already occupy the soft law space at an international level with respect to the rights of older people. A declaration may have little to add to their provisions, and indeed may even lead to their dilution.
- Assuming it is decided to pursue a hard law option, it is important to be aware of the **costs of a convention campaign**. First, there is the very real risk that it fails, as efforts to develop a convention on housing rights and a third optional protocol for ICCPR have in recent years. The time commitment is significant: even a convention such as CRPD which resulted from what most see as a speedy negotiation process took eight sessions of the General Assembly. Any such campaign will require significant financial resources: for research, for meetings, for alliances and the like. And finally, the convention is not the end of the process: instead, it is the beginning of a long-term programme of implementation that NGOs need to be part of as much as governments.
- Opponents of a new convention will argue that current human rights law sufficiently encompasses the experiences of older people. The **key argument to win** will be that the generic provisions of human rights law are refracted through discriminatory attitudes and practices and hence do not sufficiently protect older people. This argument will need to be underpinned by excellent research with uncontested methodology. However, does the heterogeneity of older people's interests militate against this? After all, it will always be possible for opponents to find evidence of contradictory experiences. Moreover, the histories of the development of CRC and CRPD both testify to an underlying paradigm shift in the way people perceived children and people with disabilities which was critical in informing the development of the new texts. Is it possible to effect such a shift with respect to older people?
- That said, if a campaign for a new convention is pursued, it may be helpful to build in various **secondary objectives**. A convention need not be the only measure of success. It may, for example, operate as a stimulus to action at a domestic or regional level, or raise awareness in society more broadly. In the end, the failure of any convention campaign need not be fatal if the externalities of the process are sufficiently celebrated along the way.

To conclude, this paper has sought to provide an overview of how the experiences of older people potentially articulate with international law. Given its audience, it has erred on the side of providing more background information from the human rights world than an in-depth analysis of issues faced by older people. As stated at the outset, this paper, of necessity, provides only a selective treatment of many issues and various areas it has overviewed could usefully be explored in greater depth. Nonetheless, it is hoped that this paper will stimulate thinking, and will contribute to the development of a successful campaign to protect and promote the rights of older people.

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List of Acronyms

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, 1979
CERD	Convention on the Elimination of All Forms of Racial Discrimination, 1966
CRPD	Convention on the Rights of People with Disabilities, 2006
ECOSOC	UN Economic and Social Council
HAI	HelpAge International
ICHRP	International Council for Human Rights Policy
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
IFA	International Federation on Ageing
ILO	International Labour Organisation
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights, 1948
UNHCR	United Nations High Commissioner for Refugees
WHO	World Health Organisation

References

- ¹ Jose E. Alvarez (2006)
- ² Article 2(1) and Article 2(2) respectively.
- ³ The one notable exception is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Article 7 which forbids discrimination on the basis of, age
- ⁴ Committee on Economic, Social and Cultural Rights (1995)
- ⁵ *Ibid.*, para. 11
- ⁶ *Ibid.*, para. 12
- ⁷ Committee on Economic, Social and Cultural Rights (1995), para. 22
- ⁸ See also ILO Convention No. 102 Social Security (Minimum Benefits), 1952 and ILO Convention No. 128 concerning Invalidity, Old Age and Survivors' Benefits, 1967
- ⁹ Committee on Economic, Social and Cultural Rights (1990)
- ¹⁰ Article 12(2)(c) and Article 12(2)(d) respectively
- ¹¹ Committee on Economic, Social and Cultural Rights (1995), paras. 34-35
- ¹² United Nations Department of Economic and Social Affairs, 2007
- ¹³ Article 25 and Article 11(1) respectively
- ¹⁴ Committee on Economic, Social and Cultural Rights (1995), para. 33
- ¹⁵ Committee on Economic, Social and Cultural Rights (1995), para. 31
- ¹⁶ Human Rights Committee (1996)
- ¹⁷ Committee on Economic, Social and Cultural Rights (1995), paras. 38-41
- ¹⁸ See, for example, the reports by the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises available at www.ohchr.org
- ¹⁹ Geneva Conventions, Additional Protocol IV, 1977 Article 14
- ²⁰ World Disasters Report, (2007)
- ²¹ United Nations High Commissioner for Refugees (2000)
- ²² Sphere Project (2004)
- ²³ This definition of a normative gap comes from the very useful paper by the International Council of Human Rights Policy (2006)
- ²⁴ International Council for Human Rights Policy (2006)
- ²⁵ The website of the Office of the High Commissioner for Human Rights provides an excellent overview of the composition, location and working practices of the various treaty committees. See www.ohchr.org
- ²⁶ This section draws on analysis by Help Age International which is current until September 2008. It therefore does not consider state reports submitted for the late autumn sessions of 2008.
- ²⁷ See www.un.org/disabilities for further details
- ²⁸ International Council for Human Rights Policy (2006)
- ²⁹ Office of the High Commissioner for Human Rights (2007)
- ³⁰ *Ibid.*
- ³¹ See Uvin (2004) for a balanced assessment of rights-based approaches
- ³² International Council for Human Rights Policy (2006)