



Update on Normative Gaps

Bridget Sleep, Senior Researcher, Rights of Older People, Human Rights Watch

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First of all, I'd like to thank the organizers for giving me this opportunity to speak today. It is an honor and a privilege.

I work for Human Rights Watch, and what Human Rights Watch does is investigate human rights abuses, expose them, and then advocate for change.

What I am going to talk are about some of the gaps within the normative framework that we have found in our work on older persons' rights. I will look at the rights to live independently within the community; freedom from violence, neglect and abuse; access to justice; and rights in situations of risk and humanitarian emergencies. These are illustrative examples and are not intended in any way as a comprehensive review.

The right to live independently within the community

And I'm going to start in Cape Town, South Africa, where I recently met a 75-year-old woman who told me that she lived alone, in a rented house in a state of complete disrepair, and with no hot water since 1996. What she was scared of most was dying alone. But she also didn't want to end up in an old age home. What she wanted was the government to fund more caregivers and social workers to visit older persons like her in their own homes. And this was something I heard time and again from the older persons I spoke to across the country.

Despite promising laws to shift the emphasis away from institutional care and towards community-based services,¹ hundreds of thousands of older persons in

¹ Older Persons Act, Section 2 (c).

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South Africa are still unable to access the basic care and support services they are entitled to so they can live with dignity in their own homes and communities.²

This lack of community and home-based support services negatively impacts older persons' physical well-being and safety. It may impede their dignity, autonomy, and independence and cause profound distress of being institutionalized against their wishes.

Our research in the United States showed the harms of institutionalization on older persons, including extreme weight loss, dehydration, untreated bedsores, inadequate hygiene, and mental and physical decline.³

All older persons are guaranteed the right to live independently within the community under international human rights law, but this guarantee is fragmented across different international human rights standards, including the right to an adequate standard of living and the right to adequate housing under the International Covenant on Economic, Social and Cultural Rights (ICESCR),^{4 5} and the right of older persons with disabilities to live independently in the community under the Convention on the Rights of Persons with Disabilities (CRPD).⁶

This fragmentation across different human rights standards has resulted in a profound protection gap. Consolidation of these fragmented rights protections in one provision on the right to live independently within the community would provide clear and specific guidance to states on their obligations towards all older persons, and clarity to older persons about what their rights are. It would also ensure systematic reporting on and monitoring of this right under one treaty.

Violence, Neglect and Abuse

The fragmentation of a right across different standards and treaties is not the only reason for gaps in the normative framework. Another is where international human rights law does not address a particular right explicitly with respect to older persons.

² Human Rights Watch, *"This Government is Failing Me Too:" South Africa Compounds Legacy of Apartheid for Older Persons* (New York: Human Rights Watch, 2023), <https://www.hrw.org/report/2023/06/27/government-failing-me-too/south-africa-compounds-legacy-apartheid-older-persons>.

³ Human Rights Watch, *"US: Concerns of Neglect in Nursing Homes; Pandemic Exposes Need for Improvements in Staffing, Oversight, Accountability,"* (New York: Human Rights Watch, 2021), <https://www.hrw.org/news/2021/03/25/us-concerns-neglect-nursing-homes>.

⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 11, adopted December 16, 1966, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 993 UNTS 3. See also Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), UN Doc. A/810 at 71 (1948), Preamble and art. 25.

⁵ United Nations Human Rights Council, "Report of the Independent Expert on the enjoyment of all human rights by older persons," A/HRC/39/50, July 10, 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/210/00/PDF/G1821000.pdf>, paras. 66 and 67.

⁶ Convention on the Rights of Persons with Disabilities (CRPD), adopted December 13, 2006, G.A. Res. 61/106, Annex I, UN GAOR, 61st Sess., Supp. (No. 49) at 65, UN Doc. A/61/49 (2006), entered into force May 3, 2008, art. 19, ratified by South Africa November 30, 2017.

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This is the case with the prohibition of violence, neglect and abuse, including where it reaches the threshold of torture and other cruel, inhuman or degrading treatment or punishment.

Human Rights Watch has documented the widespread use of chemical restraint in aged care facilities in Australia.⁷ Chemical restraint is the use of medications to control behavior without consent or a therapeutic purpose. It is a form of violence and abuse against older persons and may amount to torture or ill treatment.

Australia's existing legal and regulatory framework is inadequate to protect older persons in aged care facilities from chemical restraint; in fact, it explicitly allows it. Despite regulations first introduced in 2019 to minimize the use of restrictive practices,⁸ between July 2020 and June 2021, Human Rights Watch's found the use of chemical restraint in more than 150 aged care facilities.⁹

Australia is currently developing a new Aged Care Act and an initial list of rights that it would protect include a right to "freedom from inappropriate restrictive practices."¹⁰ However, it is unclear in the current wording which practices are considered "inappropriate."

An explicit guarantee in international human rights law on older persons' right to live free from violence, neglect and abuse would provide specific and clear guidance to Australia and other states, including that all use of chemical restraints without consent should be prohibited.

Access to justice

As with freedom from violence, neglect and abuse, no international human rights treaty addresses the right of access to justice explicitly with respect to older persons, including in detention settings.

In Japan, Human Rights Watch has documented how the current prison system does not cater for the needs of the increasing number of older women in prison.¹¹ Guards are abusive towards older women and cellmates bullying older women is a serious concern. Older women lack access to adequate health care, and often have to deal

⁷ Human Rights Watch, *"Fading Away" How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia*, (New York: Human Rights Watch, 2019), <https://www.hrw.org/report/2019/10/15/fading-away/how-aged-care-facilities-australia-chemically-restrain-older-people#:~:text=Human%20Rights%20Watch%20documented%20several,staying%20awake%20during%20the%20day>.

⁸ Australian Government, Aged Care Quality and Safety Commission, "Minimising the Use of Restrictive Practices," undated, <https://www.agedcarequality.gov.au/minimising-restrictive-practices>.

⁹ "Australia: Chemical Restraint Persists in Aged Care: One Year After Royal Commission Report, Older People Still Not Protected," Human Rights Watch news release, March 20, 2022, <https://www.hrw.org/news/2022/03/30/australia-chemical-restraint-persists-aged-care>.

¹⁰ Australian Government, "The new Aged Care Act: The foundations – Consultation paper," September 28, 2023, <https://www.health.gov.au/resources/publications/the-new-aged-care-act-the-foundations-consultation-paper?language=en> (accessed October 13, 2023).

¹¹ Human Rights Watch, *"They Don't Treat Us Like Human Beings": Abuse of Imprisoned Women in Japan*, New York, November 14, 2003, <https://www.hrw.org/report/2023/11/14/they-dont-treat-us-human-beings/abuse-imprisoned-women-japan>.

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with chronic pain or illnesses without appropriate medical treatment or advice. They are also particularly at risk at the time of release and receive little or no assistance.¹²

A specific provision on the right of older persons to access to justice, including in detention settings, would make explicit the obligation on states to ensure that prison regimes accommodate the needs of older prisoners, including protection against violence, and support with reintegration into the community.

Situations of risk and humanitarian emergencies

The final area I want to look at are rights in situations of risk and humanitarian emergencies. Armed conflict and climate change-related crises are two such situations of risk, and the rights of older persons are particularly threatened in both.

Human Rights Watch's research from 2013 to 2021 in 15 countries found that older persons can experience the same abuses during armed conflict as younger people and in some circumstances face increased risk related to their older age.¹³

Government armed forces and non-state armed groups have unlawfully attacked and killed older civilians and subjected them to summary executions, arbitrary arrest and detention, torture and other ill-treatment, rape, abduction and kidnapping, and the destruction of their homes and other property. Older civilians have been killed and injured by small arms, heavy weapons, explosive weapons with wide area effects and chemical and other banned weapons.

While older persons are protected by international humanitarian law and international human rights law during armed conflict, in practice their needs and protections are often disregarded by the parties to the conflict, as well as the UN system there to protect them. Only one UN Security Council resolution, on Sudan in 2007, has condemned violent attacks on older civilians¹⁴ and the UN Secretary-General's Protection of Civilian reports have paid little attention to them.¹⁵ Even the Secretary-General's 2019 report on older persons in emergency crises, including those due to armed conflict, addressed barriers to humanitarian assistance but not abuses during conflict themselves.¹⁶

As for climate change-related crises, seventy-nine percent of those who died in the 2021 heat dome in British Columbia, Canada, were 65 years of age or older.

¹² They Don't Treat Us Like Human Beings": Abuse of Imprisoned Women in Japan, op. cit..

¹³ Human Rights Watch, *No One is Spared: Abuses Against Older People in Armed Conflict* (New York: Human Rights Watch, 2022), <https://www.hrw.org/report/2022/02/23/no-one-spared/abuses-against-older-people-armed-conflict>.

¹⁴ UN Security Council, "Resolution 1755 (2007)," S/RES/1755 (2007), April 30, 2007, [https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F1755\(2007\)&Language=E&DeviceType=Desktop&LangRequested=False](https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F1755(2007)&Language=E&DeviceType=Desktop&LangRequested=False) (accessed October 18, 2023).

¹⁵ See UN Secretary General reports on protection of civilians in armed conflict, https://www.securitycouncilreport.org/un_documents_type/secretary-generals-reports/?ctype=Protection%20of%20Civilians&cbtype=protection-of-civilians (accessed October 18, 2023).

¹⁶ UN General Assembly, "Follow-up to the International Year of Older Persons: Second World Assembly on Ageing Report of the Secretary-General," A/74/170, July 15, 2019, <https://undocs.org/Home/Mobile?FinalSymbol=A%2F74%2F170&Language=E&DeviceType=Desktop&LangRequested=False> (accessed October 18, 2023).

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Temperatures reached 49.6°C but, despite older persons being at particular risk of heat-related illness and death, British Columbia's then draft Climate Preparedness and Adaptation Strategy did not even mention heat-related impacts on older persons.¹⁷

There is no specific provision in international human rights law protecting the rights of older persons in situations of risk and humanitarian emergencies, as there is for persons with disabilities in the Convention on the Rights of Persons with Disabilities.

A specific provision on older persons' rights in situations of risk and humanitarian emergencies would obligate states to pay extra attention to, and positively accommodate, the difference of older age in established norms on protection in armed conflict¹⁸ and in climate change preparedness, adaptation and response plans and implementation.¹⁹

Conclusion

These are just some examples where protection of the rights of older persons is fragmented or missing under existing international human rights law.

Greater implementation of this already deficient framework will not address these gaps. How can it? More implementation of an already deficient system will only perpetuate and reinforce those deficiencies.

A new UN declaration on the rights of older persons has also been suggested. A declaration would be a measure of international solidarity and consensus but would not be legally binding on states and would have no reporting and monitoring system. As such, as "soft law," it would provide no additional obligation or incentive for implementation beyond the existing "soft law" documents devoted to ageing and older persons, such as the UN Principles for Older Persons and the Madrid International Plan of Action on Ageing.

A further option suggested is an optional protocol to an existing international human rights treaty. However, rights relevant in older age are spread across the full range of international human rights treaties, with the exception of the Convention on the Rights of the Child. And so optional protocols could be required to each of these treaties. The development of so many optional protocols would be time consuming, take place at a varying pace, be drafted by different bodies, and further entrench the fragmentation of rights protection that already exists.

Instead, we need a new international legally binding treaty.

¹⁷ govTogetherBC, "ClimateReady: Climate Preparedness and Adaptation Strategy (2019-2021)," June 2021, <https://engage.gov.bc.ca/govtogetherbc/engagement/climateready-2019-2021/#summary> (accessed October 13, 2023).

¹⁸ See UN Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities, Gerard Quinn, A/76/146, July 19, 2021, <https://undocs.org/en/a/76/146>, para. 23.

¹⁹ See UN Human Rights Council, Report of the Special Rapporteur on the rights of persons with disabilities, Gerard Quinn, A/76/146, July 19, 2021, <https://undocs.org/en/a/76/146> (accessed January 2, 2022), para. 23.

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A new treaty would have profound normative value. It would provide the comprehensive framework necessary to effectively address abuses of older persons' rights, and catalyse action at the national level, both of which the current international human rights system fails to do.