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Diego Rodríguez-Pinzón
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Human Rights of Older People

Universal and Regional Legal
Perspectives

Human Rights of Older People

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Introduction

A. Framing the International Landscape

Great strides have been undertaken since the first legal article on older persons' rights was published in 2002.¹ This work builds on that international foundation. It focuses on descriptions of developments in legal frameworks and policy. It also includes a side-by-side comparison of the work of regional human rights mechanisms, which have picked up some momentum in the past decade. Through its inclusion of law, policy, and current processes, the widest net possible has been cast to collect a descriptive resource for advocates.

In the concluding chapter, some inferences and critiques on these existing laws, policies and processes are drawn. Weaknesses are present in the existing international and regional systems this text addresses; readers will see gaps in the international legal system's protection of older persons' human rights. These shortcomings are discussed in the concluding chapter as well.

Human rights are universal, indivisible and interdependent. This book pays equal regard to the civil and political rights of older persons as well as the economic, social and cultural rights of older persons. These explorations of rights are organized into these two categories because of existing systems of organization, not as a statement of the primacy of one set of rights over another. One of its main objectives is facilitation of comparison of the rights of older persons across different regions and legal frameworks. This sheds light on the state of play of older persons' existing rights around the world. It may leave the reader wanting to know more about where the gaps are: for example, if social security rights are being litigated in Europe for 65 year-olds, does that mean that older persons' participation in political affairs is equally protected? This is an exciting time to research older

¹Diego Rodríguez-Pinzón & Claudia Martin, THE INTERNATIONAL HUMAN RIGHTS STATUS OF ELDERLY PERSONS, 18 Am. U Int'l L. Rev. 915, 969 (2002).

persons' rights because these questions are just starting to be asked and answered. International law informs regional frameworks and vice versa. As different systems grapple with answers, the whole human rights framework stands to benefit.

The movement toward equal rights for persons of all ages is in a state of transformation: old age is making the transition from being simply a question of demographics, social issues, and welfare to being a question of rights. This book has shown that the conversation is changing rapidly as social scientists, legal advocates, and human rights experts learn from each other and explore how to work together. Seven core international human rights treaties already recognize specific groups, and experts from each of these recognized fields are contributing to the shared emerging understanding of older persons' human rights.

Social scientists at the Economic Commission for Latin America and the Caribbean (ECLAC), lawyers at the American Bar Association (ABA), and other powerful professional organizations have crafted thoughtful arguments for involvement in discussions of older persons' rights. ECLAC points to a "Paradigm Shift," which includes, among other things, the movement toward a rights-based approach to aging. The ABA has urged the US Dept. of State to participate in efforts and consultations toward an international and regional human rights instrument on the rights of older persons. These are just a few examples of the influence different disciplines can make when they begin thinking about older persons' rights.

Frameworks for older persons' rights are starting to emerge. The United Nations' Open Ended Working Group toward Strengthening the Human Rights of Older Persons (OEWG) began its work in 2011, as did the Organization of American States' working group drafting an Inter-American Convention on older persons' human rights. The question of what makes older persons a unique group in need of special protection, and the normative gaps that exist to prevent their access to equal rights, and what the articulation of their rights should be are all subjects of inquiry.

One of the main themes running through this work is the cumulative effect of multiple discriminations across the life course. This can be viewed through the lens of vulnerable groups, or culture by culture. Women, for example, are biologically predisposed to longer life expectancy and where available, must often depend on pensions based on lower earnings than men.² The region of Latin America and the Caribbean has recognized the importance of promoting and strengthening affirmative actions for elderly women and for increasing their access to resources.³ Exactly which groups of older persons are at heightened risk for discrimination

²U.N. Econ. and Soc. Comm'n for Asia & the Pac., *The Highlights of Progress and Challenges in Implementing the Beijing Platform for Action: Good Practices, Obstacles and New Challenges*, 36, http://www.unescap.org/esid/GAD/Events/HLM-2009/download/BPA09_2E.pdf (last visited Oct. 22, 2014).

³Report of the Ninth Session of the Regional Conference on Women in Latin America and the Caribbean, ECLAC, (June 10–12 2004), at 14, <http://www.un.org/womenwatch/daw/Review/english/documents/ECLACOutcomeDocument-English.pdf> (last visited Oct. 23, 2014).

may vary from region to region and culture to culture. For example, where older men and women experience a bar from formal employment in countries in one region, they may face long-term discrimination in health care in another.

There are two main implementation methods for protecting rights: “soft law,” which includes documents such as the United Nations Madrid International Plan of Action on Ageing (MIPAA); and “hard law” which refers to statutes and conventions which link national law with international law and carry expectations of implementation and accountability. In international “soft law” there has been a treatment of issues and strategies, but the discourse is not couched in legal terms or terms of rights, and affected groups are left without redress or enforceability. No sanctions for non-performance or rights infringements are attached.⁴ Soft law can, over time create a body that can become customary law.⁵ And the normative principles therein ... “may lack the supposedly harder edge of a “rule” or an “obligation”, but they are certainly not legally irrelevant.”⁶

In international “hard law,” human rights primary responsibility rests with the state to respect human rights to protect individuals and groups, to make positive actions. State responsibility includes resourcing the implementation and administration of law. New law often requires both paradigm and attitudinal shifts, which can be resource-intensive to achieve.⁷ Some such resulting policy changes may be attained through soft law measures, without such resource-intensive outlay.⁸ State constitutions may provide protection of older persons’ rights,⁹ for example, and hard law can change state constitutions. The enforcement of such law depends on domestic legal and political environments.¹⁰ With soft law, even in favorable legal and political environments, enforceability is not a possibility.

At every level, one of the biggest problems older persons face is their invisibility. Worldwide, the United Nations High Commissioner for Refugees (UNHCR) has estimated that older persons make up 8.5 % of the overall refugee population, and in some cases comprise more than 30 %.¹¹ International human rights training

⁴Expert Group Meeting on the Rights of Older Persons, Bonn, Ger., May 5–7, 2009, *Report of the Expert Group Meeting on the Rights of Older Persons*, 14, www.un.org/esa/socdev/ageing/documents/egm/bonn09/report.pdf (last visited Oct. 23, 2014).

⁵See A.E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 *Int’l & Comp. L.Q.* 901, 901–904 (1999).

⁶*Id.* at 907.

⁷*Report of the Expert Group Meeting on the Rights of Older Persons*, *supra* note 4, at 14.

⁸See I. Doron & I. Apter, *The Debate around the Need for an International Convention on the Rights of Older Persons*, 50 (5) *The Gerontologist* 590 (2010).

⁹*Report of the Special Rapporteur on the right to food, Mission to Cuba: A/HRC/7/5/Add.3*

¹⁰See O. Hathaway, *Why Do Nations Join Human Rights Treaties?*, 51 *Journal of Conflict Resolution* 590 (2007).

¹¹David Hutton, *Older People in Emergencies: Considerations for Action and Policy Development*, WHO, 2008 World Health Organization.

should sensitize trainees to the rights and needs of older persons.¹² Insofar as this book will be used as an educational tool, translation of the rights of older persons into every sphere of the law can be worked into any curriculum. Unfortunately, aging and the situation of older persons continues to be addressed from a “humanitarian” perspective at best, and a “charity” perspective at worst, both of which ignore the fundamental equality of individuals, and deny societies of the potential of older persons to contribute to reaching national developmental objectives and goals.¹³ Ignorance of the value of empowerment of older persons jeopardizes progress towards achieving global development goals.¹⁴ Older persons’ rights are an important part of their dignity, protection, and financial security.

Discrimination, violence and abuse, poverty and a lack of specific measures and services are all common threads running through the issues of older persons’ human rights.¹⁵ These issues have nothing to do with intrinsic vulnerability, and everything to do with disempowerment. The following chapters tell the story of the legal rights of this group in the international arena of the UN, the regional human rights systems, paying due attention to “soft law” mechanisms, and other international organizations which have begun to look at the critical challenges facing this diverse population group.

Soft and hard law continues to be a topic of discussion at the United Nations Open-Ended Working Group on Strengthening the Human Rights of Older Persons (OEWG), a working group that begun in 2011 and was tasked to explore main elements of a new legal instrument to protect the human rights of older persons, among other things. MIPAA, the group has discerned, has not had effects similar to the introduction of hard law.

Soft law and hard law are also part of the mandate of the new independent expert on the enjoyment of all human rights by older persons. On September 27, 2013, the Human Rights Council unanimously approved a resolution creating the new special procedure.¹⁶ This position will assess the implementation of existing international instruments with regard to older persons, raise awareness of the challenges faced in the realization of all human rights by older persons, and ensure

¹²U.N. High Comm’r for Human Rights, *Consultation on the Focus of the Second Phase of the World Programme for Human Rights Education: Rep. of the High Comm’r for Human Rights*, U.N. Doc. A/HRC/12/36 (Aug. 20, 2009).

¹³*See Older Persons in Emergencies: An Active Ageing Perspective* World Health Org. (WHO), (2008), <http://www.who.int/ageing/publications/EmergenciesEnglish13August.pdf> (last visited Feb. 18, 2015).

¹⁴*Id.*

¹⁵U.N. Secretary-General, *Follow-up to the Second World Assembly on Ageing: Submitted Pursuant to G.A. Res. 65/182*, U.N. Doc. A/ 66/173 (Jul. 22, 2011).

¹⁶U.N. Human Rights Council, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Twenty-Fourth Session, Agenda Item Three*, U.N. Doc. A/HRC/24/L.37/Rev.1 (Sep. 25, 2013), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/24/L.37/Rev.1 (last visited Oct. 23, 2014).

that older persons receive information about those rights. It will work in cooperation with UN Member States in order to foster the implementation of measures that contribute to the promotion and protection of the rights of older persons; taking the views of many stakeholders into account, with a perspective inclusive of other marginalized group identities.¹⁷

These activities will be undertaken with the goal of producing annual reports for the next two years, and a comprehensive report of all findings at the Human Rights Council's thirty-third session. In the Independent Expert's preliminary considerations, she has given her views on the need to consider in her work both civil and political, and economic, social and cultural rights, as well as hard and soft law issues.¹⁸

B. Regional Efforts

1. The Americas

International law can inform regional laws, and vice versa. The potential for cross-pollination is present in the work undertaken by the Organization of American States (OAS) to draft an international convention on the human rights of older persons for the region. Its work has begun between the second and third sessions of the UN's OEWG.

The OAS process began years ago, thanks to the pressures of some state champions, including Argentina and Brazil. In 2010, the OAS requested the Permanent Council for convening a special meeting, in which different actors like national representatives, scholars, international organizations and civil society individuals. The meeting was held the 28th of October, and it was discussed the need of preparing an inter-American convention on the rights of older persons.¹⁹ All states at that meeting, save the United States and Canada, positioned themselves supportively for embarking on a new program of work to prepare an inter-American convention on the rights of older persons.

In October 2011, a Work Plan of the Working Group on Protecting the Human Rights of Older Persons for 2010–2011 within the OAS was approved.²⁰ This plan outlined the way forward including contributions from civil society, and work

¹⁷See Id.

¹⁸U.N. Human Rights Council, *Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons*, U.N. Doc. A/ HRC/27/46 (Rosa Kornfeld-Matte Jul. 23, 2014), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A-HRC-27-46_en.doc (last visited Feb. 18, 2015).

¹⁹*Record of the Special Meeting of the Permanent Council*, OAS Doc. CP/SA. 1776/10 (Oct. 28, 2010).

²⁰Permanent Council of the OAS, Committee on Juridical and Political Affairs, *Work Plan of the Working Group on Protecting the Human Rights of Older Persons*, OAS Doc. CAJP/GT/DHPM-1/11 rev. 2 (Oct. 21, 2011), <http://www.oas.org/consejo/cajp/personas%20mayores.asp> (last visited Feb. 18, 2015).

across the region with representatives from CARICOM, PAHO and ECLAC. In December 2011, the working group produced a plan of work that outlined its work on a Preliminary Draft Inter-American Convention on Protection of the Human Rights of Older Persons.²¹ In June 2015 the OAS General Assembly finally adopted the Inter-American Convention on Protecting the Human Rights of Older Persons. This book was finalized before that date.

2. Africa

In 2011, the African Union began drafting of a treaty on the rights of older persons.²² Also in 2011, the Network of African National Human Rights Institutions held its 8th Biennial conference in Cape Town, South Africa on the theme *Advancing the Human Rights of Older Persons and Persons with Disabilities – the Role of African National Human Rights Institutions*. At the opening of the 50th Session of the African Commission on Human and Peoples Rights, the situation of older persons were recognized as being “one of the most pressing human rights issues for states and public institutions.”²³

3. Other Regions

Other regional frameworks for the protection of the rights of older persons are not nearly so close at hand. The European Union opposed progress toward a dedicated human rights framework for older persons at each session of the UN’s OEWG since 2011.²⁴ On February 14 2014, the Council of Europe (CoE)

²¹Permanent Council of the OAS, Committee on Juridical and Political Affairs Working Group on Protection of the Human Rights of Older Person, *Report on the Situation of Older Persons in the Hemisphere and the Effectiveness of Binding Universal and Regional Human Rights Instruments with Regard to Protection of the Human Rights of Older Persons*, OAS Doc. CAJP/GT/DHPM-14/11 rev. 1 (Dec. 21, 2011).

²²African Comm’n on Human and Peoples’ Rights [ACHPR]. *Statement of Reine Alapini-Gansou: The Legal Protection of the Rights of Older Persons in Africa* (Apr. 20, 2011), <http://www.globalaging.org/agingwatch/convention/un/Alapini%20-PROTECTIONDPA%20AFRIQUE%5B1%5D.pdf>.

²³ACHPR, *Statement on Behalf of the Network of African National Human Rights Institutions at the Opening Session of the ACHPR 50th Ordinary Session* (Oct. 24, 2011–Nov. 7, 2011), <http://www.achpr.org/sessions/50th> (last visited Feb. 18, 2015).

²⁴See U.N. Department of Economic and Social Affairs, Open-Ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons, *EU Opening and Closing Statements* (July 30, 2014–August 1, 2014), <http://social.un.org/ageing-working-group/govstatementfifth.shtml> (last visited Oct. 23, 2014).

unanimously adopted a new soft law standard addressed to all 47 CoE member States.²⁵

Asia has neither a human rights organ nor a dedicated field of legal inquiry for older persons. They do, however, have a roadmap toward promoting social justice for different groups, including older persons.²⁶ Such efforts mark progress that can be built upon as other international and regional efforts continue to develop and take shape in the international community.

Note on International Disaggregated Data Collection

Some UN member states have registered their opinions that a determination on how to proceed to best protect the human rights of older persons should be made only after data on the current situation of older persons is collected to verify that older persons are indeed facing challenges to exercise their rights. This line of reasoning sounds logical, until one attempt to find data on older people. UNAIDS, for example, collects HIV prevalence data only for persons under age 50. Not only is this sort of exclusion discriminatory, but disaggregated data collection on disease is necessary for a state to fulfill its human rights obligations to its citizens as well as its reporting to international human rights bodies. Where countries face no pressure to collect disaggregated data for their citizens, they will continue to draw a curtain over duties shirked and failures to protect their citizens. A normative change in the value placed on older persons could improve data collection. With the International Convention on the Rights of Persons with Disabilities (ICRPD), disaggregated data collection only really began once the ICRPD came into force.

Note on Nomenclature

Some may wonder why the term “older persons” is in use, rather than “the elderly” or “senior citizens,” or “the aging.” Self-definition of a group, reclamation of once-derogatory labels, and political positioning can all be reasons for certain identifications. The term “older persons” is used throughout these chapters for a few reasons. The paramount reason is that other successful rights movements have also used “person.”²⁷ It is clearly understood -particularly for the purposes of

²⁵Council of Europe Comm. of Ministers, *Recommendation to Member States on the Promotion of Human Rights of Older Persons*, CM/Rec(2014)2 (Feb. 14, 2014), <https://wcd.coe.int/ViewDoc.jsp?id=2162283&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> (last visited Feb. 18, 2015).

²⁶Association of Southeast Asian Nations [ASEAN], *Roadmap for an ASEAN Community 2009–2015 - Social Justice and Rights* (2009), <http://www.asean.org/images/2012/publications/RoadmapASEANCommunity.pdf> (last visited Feb. 18 2015).

²⁷*See*, Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3.

human rights- that emphasis should always be on the person as an individual with humanity and dignity. Depending on the context, the idea of an “older person” may conjure images of the “golden years” of retirement, leisure, and golf courses. Or it may be seen as “nothing more than a euphemism used to mask the reality of old age, which is seen as a stigma, and to distance it from the associated idea of death.”²⁸ “Older” can mean comparatively so, socially constructed as such, or experiencing natural physical processes after attaining adulthood.

²⁸Sandra Huenchuan and Luis Rodríguez-Piñero, U.N. Economic Commission for Latin America and the Caribbean, *Ageing and the Protection of Human Rights: Current Situation and Outlook*, 15, (Mar. 2011, Sandra Huenchuan & Luis Rodríguez-Piñero).

The United Nations and Older Persons: A Global Approach with Multiple Dimensions

A. A United Nations Introduction

Rich and poor countries alike are currently experiencing extraordinary demographic changes with respect to the rising number of older persons in their populations. Over the next four decades, the population over age 60 in developed countries is projected to double.¹ In developing countries, it is expected to triple, reaching a staggering 1.6 billion by 2050.² These changes will create a new set of challenges that should be dealt with coherently, including an acute need for redistribution of resources for access to justice, participation in political and social life, social security, and health care. Furthermore, states, as primary protectors of human rights, will face challenges related to upholding human rights in the new demographic landscape.

United Nations' Follow-Up to the Second World Assembly on Ageing³ describes the problem this way: “[An] absence of nuanced, targeted, and comprehensive approaches toward the rights of older persons leave them with chronic poverty, untreated illness, homelessness or inadequate shelter, violence and abuse, lack of education, low paying jobs, ineffective legal protection, vulnerability,

¹UN Secretary General, *Follow up to the Second World Assembly on Ageing*, 9 3, U.N. Doc. A/64/127 (Jul. 6, 2009).

²Peggy Kelly, *Intersection of Population and Human Rights: Rights of Older Persons in the International Context, Meeting of Experts Regarding Population, Inequality, and Human Rights* U.N. Econ. Comm. for Latin America and the Caribbean (2006), available at <http://www.eclac.org/celade/noticias/paginas/6/27116/KellyP.pdf>. (last visited Oct. 23, 2014). (*hereinafter* Kelly Report).

³United Nations, General Assembly, *Follow-Up to the Second World Assembly on Ageing* G.A. Res. 63/151, U.N. Doc. A/63/424 (Feb. 11, 2009) <http://www.worldlii.org/int/other/UNGARsn/2008/197.pdf> (Follow-Up to the Second World Assembly on Ageing).

exclusion, and isolation.”⁴ This diagnosis touches on almost every area of life - it is not just a problem of either economic, social and cultural rights, or civil and political rights.

This chapter focuses on international United Nations human rights frameworks and their impact on the status of the rights of older persons. The scope of analysis includes universal human rights instruments, as well as related work produced by treaty bodies including comments, recommendations, conclusions, and reports. This chapter will also endeavor to analyze older persons’ human rights through the lens of the spectrum of the life course. Additionally, this chapter identifies a number of group rights which have further impact on the situation of older persons represented in particular groups.

Although international human rights standards have gained increasing recognition for the rights of individuals generally, the rights of older persons have not yet received the international legal treatment they require. The current international standards and recommendations on the rights of older persons derive from the fundamental premises established by United Nations (UN) human rights instruments starting with the Universal Declaration of Human Rights (UDHR). The UDHR, together with the International Covenant on Civil and Political Rights (ICCPR), its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) form the International Bill of Human Rights. Article 25, paragraph 1 of the UDHR states that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, *old age* or other lack of livelihood in circumstances beyond his control.⁵

Since the adoption of the UDHR, more international and regional instruments addressing the protection and promotion of human rights have been created. The rights of older persons are theoretically addressed by virtue of their being human, even where they are not specifically mentioned, as above. Instruments have taken the form of treaties, agreements, conventions, and protocols. These instruments bind the contracting states to negotiated terms, agreed to by ratification or accession. However, none of these instruments explicitly refers to age as a prohibited ground for discrimination.⁶

The treaty bodies have developed protections that have expanded the scope of the respective treaties, including the rights of older persons, through General Comments (Economic, Social and Cultural Rights Committee) and through General Recommendations (Committee for the Elimination of all forms of Discrimination against Women). Standards for the rights of older persons are also enshrined in other instruments including plans of action, declarations, resolutions, and recommendations generated by the treaty bodies and a number of multilateral organizations.

⁴Id. at para. 49. *Id.* 49.

⁵Universal Declaration on Human Rights, Article 25. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Art. 25, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

⁶U.N. Secretary-General, *Report on Ageing*, 13 (2009).

In the context of an international human rights framework, the rights of older persons are universal and inalienable, indivisible, interdependent and interrelated,⁷ just as they are for any human being. Additionally, the concepts of equality and non-discrimination apply to these rights.⁸ This chapter will discuss the different types of rights as well as systems of protection in order to expand the understanding of the notion of older persons' rights, centering on specific international norms and their interpretation by treaty bodies and application in the Human Rights Council.

B. United Nations Human Rights Framework on Aging

a. *The UN System*

The UN aims to “bring all nations of the world together to work for peace and development, based on the principles of justice, human dignity and the well-being of all people.”⁹ It is structured such that states may “balance global interdependence and national interests when addressing international problems.”¹⁰

Article 10 of the UN Charter empowers the General Assembly to discuss any questions or any matters within the scope of the Charter. Further, the General Assembly can initiate studies and make recommendations for the purpose of assisting in the realization of human rights.¹¹ The General Assembly is composed of all UN member states. Although its resolutions are not per se legally binding, they are an important reflection of the collective will of the world community, and in some cases reflect binding customary law. Much of the debate and drafting surrounding resolutions occurs in six main committees of the General Assembly. This chapter deals in particular with the Third Committee of the UN General Assembly (Third Committee), which focuses on social, humanitarian, human rights and cultural issues.¹²

The UN Charter also outlines the role of the organization with regard to respecting equal rights and promoting higher standards of living, employment and the economic conditions of social progress. It strives to promote universal

⁷See *Report of the Expert Group Meeting “Rights of Older Persons”* United Nations Dep’t of Econ. and Soc. Affairs Division for Soc. Policy and Dev. Programme on Ageing (2009) <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>. Accessed 20 January 2014. See Expert Group Meeting on the Rights of Older Persons, Bonn, Ger., May 5–7, 2009, <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>.

⁸Id.

⁹U.N. Cyber School Bus, *An Introduction for Students* (Oct. 23, 2014), <http://www.un.org/cyberschoolbus/unintro/unintro.asp>.

¹⁰Id.

¹¹U.N. Charter art. 13 (1945).

¹²Henry J. Steiner, Philip Alston, & Ryan Goodman, *Human Rights in Context* 739 (3d ed. 2008).

respect for human rights and fundamental freedoms for all, though it stops short of expressly recognizing prohibited distinctions other than race, sex, language, and religion.¹³ It does not include age as a prohibited ground for discrimination.

Human rights scholars from different regions and cultures tend to agree that human rights stem principally from the liberal tradition of Western political and legal thought.¹⁴ This tradition focuses on individuals rather than groups, and equality among individuals as paramount. The vital concept of equality informs the dignity of all human beings, the respect to which individuals are entitled, and the right for self-realization.¹⁵ However, the notion of human rights has quickly evolved to include collective rights, among other contemporary forms of rights now recognized in many international instruments.

At the UN, human rights are monitored in two ways. Firstly, the organs created directly through a mandate of the UN Charter, such as the General Assembly and the Human Rights Council, monitor human rights. Secondly, treaty-based bodies created by a range of UN human rights treaties monitor states' compliance with their obligations under each treaty, respectively.¹⁶

UN Social Policy and Soft Law

The Third Committee is the main committee of the UN General Assembly that addresses agenda items relating to a range of social, humanitarian affairs and human rights issues by drafting resolutions for consideration by the Assembly.¹⁷ The Commission for Social Development as a functional body of the Economic and Social Council has taken an increasingly active role in standard setting around social issues. For example, in 2001, a mandate for a draft of the Convention on the Rights of Persons with Disabilities stalled in the Commission on Human Rights. The Commission for Social Development established a special committee that successfully moved the CRPD forward. The Commission for Social Development has proven to be a body capable of developing new standards. This shows how bodies not belonging to the main UN human rights system can also be alternative fora to overcome stagnant processes. Its role in the

¹³United Nations, *Charter of the United Nations*, 1 UNTS XVI (October 24 1945), available at <http://www.refworld.org/docid/3ae6b3930.html>. Article 55, <http://www.un.org/en/documents/charter/chapter9.shtml>. (last visited Oct. 23, 2014).

¹⁴Philip Alston and Ryan Goodman, *International Human Rights*, 525 Oxford University Press (2013), at 525.

¹⁵Id.

¹⁶Id.

¹⁷U.N. General Assembly, *Social, Humanitarian, & Cultural* (Oct 23, 2014), available at <http://www.un.org/ga/61/third/third.shtml>.

Convention on the Rights of Persons with Disabilities may be considered evidence of this standard setting work.¹⁸

The UN secretariat, or agencies, also conduct social policy work, which can result in soft law. In 1982 the UN General Assembly held the first world conference on aging: the World Assembly on Ageing. This Assembly issued the Vienna International Plan of Action on Ageing (hereinafter “Vienna Plan”).¹⁹ This first world conference was followed in 2002 by the Second World Assembly on Ageing that adopted the Madrid International Plan of Action on Ageing (hereinafter “Madrid Plan” or “MIPAA”).²⁰ The Second World Assembly was preceded a decade earlier by the 1991 United Nations Principles for Older Persons adopted by the General Assembly, and by the 1992 International Conference on Ageing as a follow up to the Vienna Plan. In this two-decade process, the UN refined its approach in identifying its main concerns regarding older persons.

In this chapter, the work of UN human rights mechanisms, other UN institutions, and UN specialized agencies are addressed. Older persons have been surprisingly absent from much of the ongoing work in each of these spheres, given the directives of the 1982 and 2002 world conferences and related UN resolutions, 2002 UN Madrid International Plan of Action on Ageing (MIPAA), which called for the mainstreaming of older persons in all UN programs of work.

Old age is a contextual, social concept with real implications for older persons. Older persons experience direct and indirect discrimination, and the cumulative effects of chronic poverty; violence and abuse; exclusion from social and political participation; and barriers to redress through access to justice.²¹ In many developed countries, old age is sometimes thought to be commensurate with the age at which a person becomes eligible for a social pension. In those cases, society, through the government, determines that older persons reaching this age should be entitled to additional protections. In other societies, a person may become “old” when they have grandchildren, or great grandchildren. Whatever the societal construct, becoming “old” can mean facing discrimination, and invisibility.

Older persons’ human rights have always been closely associated with the “economic and technical co-operation undertaken by United Nations bodies, agencies, funds, and regional commissions, particularly in the field.”²² Since 2002, the inter-

¹⁸The Commission is the Organ Implementing MIPAA (Madrid International Plan of Action on Ageing) (See Report of the Second World Assembly on Ageing, 1–43, U.N. Doc. A/CONF.197/9, U.N. Sales No. E.02.IV.4 (2002) (outlining the Madrid Plan)). (See U.N. World Assembly on Ageing, Apr. 8–12, 2002, *Report of the Second World Assembly*, U.N. Doc. A/CONF.197/9, 1–43.

¹⁹U.N. World Assembly on Ageing, Jul. 26–Aug. 6, 1982, *Vienna International Plan of Action on Ageing*, <http://www.un.org/es/globalissues/ageing/docs/vipaa.pdf>.

²⁰U.N. World Assembly on Ageing, Apr. 8–12, 2002, *Political Declaration & Madrid International Plan of Action on Ageing*, http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf.

²¹*United Nations Mechanism for the Human Rights of the Older Person*, A/HRC/AC/4/CRP.1 (Chinsung Chun 2009).

²²Sandra Huenchuan and Luis Rodríguez-Piñero, *Ageing and the Protection of Human Rights: Current Situation and Outlook*, 51 (Sandra Huenchuan & Luis Rodríguez-Piñero, 2011).

national community has engaged in a number of efforts geared toward the protection of older persons: the United Nations Department of Economic and Social Affairs has led 5-year and 10-year reviews of MIPAA, the Committee for the Elimination of Discrimination against Women came out with a General Recommendation on older women's rights²³; and the UNFPA has turned its attention to the compilation of a report on the "State of the World's Older Persons," prepared in conjunction with the 10-year review of MIPAA.²⁴ MIPAA, as has been mentioned in the introduction, is a soft law instrument, and will be more fully addressed subsequently in this book. These activities did not all engage in the advancement of older persons' rights, but some may have heightened the international profile of the situation of older persons. UNFPA in particular has integrated a human-rights based approach to development,²⁵ which has been important in the discussion of the equal rights of older people.

The UN OEWG

Much of this thinking may be changing with the creation of the UN's Open-Ended Working Group on Strengthening the Human Rights of Older Persons (OEWG), a political meeting of the UN Member States. In September, 2010, the UN Secretary General released a report on the human rights of older persons.²⁶ This was released in response to a 2009 General Assembly resolution requesting more information on the full picture of the situation of older persons.²⁷ While it

²³Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 27: The Rights of Older Women*, U.N. Doc. CEDAW/C/GC/27 (Dec. 16, 2010). <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>.

²⁴Ann Pawliczko, Presentation at the U.N. Celebration of the International Day of Older Persons (Oct. 5, 2011).

²⁵See, e.g. UNFPA, 2009. *Integrating Human Rights, Culture and Gender in Programming A Human Rights Based Approach to Programming* (2010). http://www.unfpa.org/webdav/site/global/shared/documents/publications/2010/hrba/module_1.pdf (last visited Feb. 18 2015); See, e.g. U.N. Population Fund, *Integrating Human Rights, Culture and Gender in Programming: A Human Rights Based Approach to Programming* (2009), http://www.unfpa.org/webdav/site/global/shared/documents/publications/2010/hrba/module_1.pdf. (last visited Oct. 23, 2014); *UNFPA at Work, Six Human Rights Case Studies*, http://www.unfpa.org/webdav/site/global/shared/documents/publications/2008/6human_rights_cases.pdf. (last visited Oct. 23, 2014). U.N. Population Fund, *Human Rights Based Programming: What It Is*, (2006). http://www.unfpa.org/webdav/site/global/shared/documents/publications/2007/human_rights.pdf (last visited Feb. 18 2015).

²⁶U.N. Secretary-General, "Follow-up to the Second World Assembly on Ageing" Submitted Pursuant to the General Assembly Res. 65/182 U.N. Doc. A/66/173 (Dec. 2010) (July 22, 2011).

²⁷*Follow-Up to the Second World Assembly on Ageing*, G.A. Res. 64/132, U.N. Doc. A/RES/64/132 (Feb. 5, 2010).

took note of policies and programs within the UN system targeting older persons, it also discussed the legal problems older persons face. The report outlined discrimination and ageism, poverty, violence and abuse, and the lack of specific measures and services for older persons today, and in the future. It sought to explore options to improve the situation of older persons worldwide, and created the OEWG.

In August 2011, the OEWG highlighted four main gaps: “norms, monitoring, implementation, and data surrounding older persons.”²⁸ Likewise, it is stressed that at an international level, the “existing rights have not been specifically applied, and thus proper implementation cannot be achieved.”²⁹ Among the member states present, there was consensus for continued support of the work of the OEWG, and various expressions of the desire for the intensification of the inquiry.³⁰

The OEWG’s initial mandate allowed it to “consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.”³¹ The mandate of this working group changed with General Assembly resolution 67/139 of 20 December 2012. It is now charged to “Consider proposals for an international legal instrument to promote and protect the rights and dignity of older persons, based on the holistic approach in the work carried out in the fields of social development, human rights and non-discrimination, as well as gender equality and the empowerment of women...” This change in mandate was not reflected in the program of work at the fourth session of the OEWG in 2013. It was also not reflected in the program of work at the fifth session of the OEWG in 2014, although the lack of direct response to the changed mandate was discussed by Member States present.

A CESCR representative noted at the first OEWG meeting in April, 2011, that at this point, dedicated human rights committees *extend* human rights to older persons; before an argument or complaint can be made about the violation of an older person or group of older persons’ rights, applicants must first explain how supposedly universal law applies to them.³² As a matter of course human rights cannot be accessed by older persons in the current framework.

²⁸U.N. Open-Ended Working Group on Ageing, *Daily Summary of the 2d Session* (Bethany Brown, Aug. 4, 2011), <http://globalaging.org/agingwatch/convention/un/OEWG%20August%20Day%204.html>.

²⁹Id.

³⁰NGO Committee on Ageing, *Recap Aug. 4: UN Open-Ended Working Group on Ageing* (Aug. 4, 2011), <http://www.ngocoa-ny.org/the-second-un-open-ended/recap-aug-4-un-open-ended.html>.

³¹<http://social.un.org/ageing-working-group/>. G.A. Res. 67/139, U.N. Doc. A/RES/67/139 (Feb. 13, 2013).

³²See comments of Rocio Barahona Riera, April 19, 2011, OEWG, New York. See Rocio Barahona Riera, Comments at the U.N. Open-Ended Working Group on Ageing (April 19, 2011).

Civil Society and the UN OEWG

Through its mandate, the OEWG has given civil society the opportunity to play an active role in its work. In many sessions, equal time was devoted to interventions from states and civil society at the 2011 meetings of the OEWG. NGO's involved in the OEWG so far have ranged from groups of gerontologists, to retired civil servants, to the International Network for the Prevention of Elder Abuse. Through this exchange, organizations that serve or advocate for older persons directly have had a platform to share evidence of how the existing human rights framework does not adequately protect the rights of older persons.

Work is also being done in partnership with the UNFPA to strengthen civil society's support of ongoing work for older persons' rights. Professors Martin and Rodriguez-Pinzon, together with the UNFPA, have convened two training sessions for older persons' advocates from around the world in 2010 and 2011. Similar meetings should be convened to better train advocates at all levels in the understanding of human rights, and existing mechanisms.

A way to amplify civil society's voice is an important resource in an advocacy movement.³³ One such group was created among some of the largest NGO's after the first session of the OEWG. In 2013, it announced plans to accept membership of the broader community of organizations advocating for the rights of older persons. It aims to be a source of information, a communications resource, and to support the writing of strategic positioning papers.³⁴

1. Overview of International Law

This chapter will review the instruments in greater depth, but this section provides an overview of basic human rights sources. The Universal Declaration of Human Rights (UDHR)³⁵ was adopted by the UN General Assembly. It is the world's common standard of respect and universal recognition and observance of basic rights and freedoms.³⁶ It is a statement of objectives to be pursued by governments, and therefore it is not per se part of binding international law. Nonetheless, it remains a potent way to apply moral and diplomatic pressure on states that

³³J. Sciubba, *Explaining Campaign Timing and Support for a UN Convention on the Rights of Older People*, 18 Int'l J. Hum. Rts. 462, 474 (2014), <http://www.tandfonline.com/eprint/XuIpnacg7NKbEkTAFeb3/full>. (last visited Oct. 23, 2014).

³⁴See Global Alliance for the Rights of Older Persons, www.rightsofolderpeople.org. (last visited Oct. 23, 2014).

³⁵Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). <http://www.un.org/en/documents/udhr/>.

³⁶Preamble, Universal Declaration of Human Rights <http://www.un.org/en/documents/udhr/>. (last visited Oct. 23, 2014).

violate the UDHR's principles, and many of its provisions are indeed a reflection of international customary law.³⁷

The International Covenant on Civil and Political Rights (ICCPR),³⁸ is a multi-lateral treaty adopted by the General Assembly, which defends core civil and political rights including the right to life,³⁹ movement,⁴⁰ expression,⁴¹ association⁴² and stipulates that “no one shall be subjected to torture;”⁴³ slavery⁴⁴; or forced or compulsory labor, among others.⁴⁵

The Human Rights Committee (HRC),⁴⁶ a body of independent experts, monitors the implementation of the ICCPR by state parties. It accepts and examines reports and then addresses its concerns and recommendations to the state party in the form of “Concluding Observations.” It also considers individual complaints against state parties to the ICCPR Optional Protocol, which provides for an individual petition system.⁴⁷

The Human Rights Council (HR Council), which replaced the Commission on Human Rights, is responsible for strengthening the promotion and protection of human rights around the world.⁴⁸ The success of any human rights reporting “will frequently depend upon the composition of the supervisory body, its commitment to the case of human rights, its creativity and the larger political climate within which it exercises its functions.”⁴⁹ Toward that end, the HR Council was created in 2006 as an organ of the General Assembly.⁵⁰ Its main purpose is to address situations of human rights violations and make recommendations, as well as administer a Universal Periodic Review (“UPR”) mechanism, which assesses the human rights situations in all UN Member States over the course of a four-year

³⁷U.N. Association in Canada, *Questions and Answers about the Universal Declaration of Human Rights*, <http://www.unac.org/rights/question.html> (last visited Oct. 23, 2014).

³⁸International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966), <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>. (*hereinafter* ICCPR).

³⁹*Id.* at art. 6.

⁴⁰ICCPR, art 12 *Id.* at art. 12.

⁴¹ICCPR, art 19 *Id.* at art. 19.

⁴²ICCPR, art 22 *Id.* at art. 22.

⁴³ICCPR, art 7 *Id.* at art. 7.

⁴⁴ICCPR, art 8 *Id.* at art. 8.

⁴⁵ICCPR art 8.3 literal c *Id.* at art. 8.3, lit. c.

⁴⁶U.N. Human Rights Committee, *Monitoring Civil and Political Rights*, <http://www2.ohchr.org/english/bodies/hrc/> (last visited Oct. 23, 2014).

⁴⁷*Id.*

⁴⁸U.N. Human Rights Council, *About the Human Rights Council*, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Oct. 23, 2014).

⁴⁹Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context* 347 (3d ed. 2008) (quoting Thomas Buergenthal, *The U.N. Human Rights Committee*, 2001 U.N.Y.B.341, 347).

⁵⁰G.A.Res. 60/251.U.N.Doc.A/60/L.48 (Apr. 3, 2006) (creating the HRC).

schedule.⁵¹ The most contentious issues in its creation were related to its deliberations, composition and functions, including the UPR, and its relationship to the special procedures and the mechanisms it ‘inherited’ from the Human Rights Commission.⁵²

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵³ commits state parties to the progressive realization of individual economic, social, and cultural rights within the global human rights framework.⁵⁴ The Committee on Economic, Social and Cultural Rights⁵⁵ (CESCR) is the body of independent experts that monitors implementation of the ICESCR by its state parties.⁵⁶ The United Nations has pointed out that “the process of reporting provides an opportunity for an individual state party to conduct a comprehensive review of the measures it has taken to bring its national law and policy into line with the provisions of the treaties to which it is a party. The preparation of reports provides a platform for national dialogue on human rights amongst the various stakeholders in a State party”. Likewise, reporting “facilitates public scrutiny at the national level of government approaches to implementation, and stimulates constructive discussion with civil society of a way to advance enjoyment by all of the rights laid down in the various conventions.”⁵⁷ The value of the reporting process is truly national and it can be assessed on how it helps improve the lives of the persons for which states are responsible.

After the submission of the State report on the implementation of the ICESCR, CESCR proceeds to its analysis and the issuing of its observations. This process can be described as follows: “Upon completion by the Committee of its analysis of reports by state parties, the committee concludes its consideration of the State parties’ reports by issuing “Concluding Observations,” which constitute the decision of the Committee regarding the status of adherence to the Covenant in a given

⁵¹U.N. Human Rights Council, *About the Human Rights Council*, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Oct. 23, 2014).

⁵²Steiner & Alston, *supra* note 42, 791 and 803.

⁵³International Covenant on Economic, Social & Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (hereinafter ICESCR) <http://www2.ohchr.org/english/law/pdf/cescr.pdf>.

⁵⁴*See Fact Sheet No. 16 (Rev. 1)*, Comm. on Econ., Soc., and Cultural Rights, (July 1 1991), <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>.

⁵⁵U.N. Committee on Economic, Social, and Cultural Rights, *Monitoring the Economic, Social, and Cultural Rights*, <http://www2.ohchr.org/english/bodies/cescr/>.

⁵⁶Office of the High Commissioner for Human Rights, *Ratification of the International Covenant on Economic, Social, and Cultural Rights*, (Aug. 2014) <http://www2.ohchr.org/english/bodies/cescr/>.

⁵⁷International Human Rights in Context, p. 851, quoting ‘Concept Paper on the High Commissioner’s proposal for a unified standing treaty body’, UN doc. HRI/MC/2006/2 (2006) summarizing the approach of Committee on Economic, Social and Cultural Rights, General Comment 1 (1989): Reporting by States Parties, UN Doc. HRI/GEN/1/Rev.8, p.9, para.8. Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context* 851 (3d ed. 2008) (quoting U.N. Secretariat, *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body*, U.N. Doc. HRI/MC/2006/2 (2006) (summarizing the approach of U.N. Committee on Economic, Social, and Cultural Rights, *General Comment 1: Reporting by States Parties*, 8, UN Doc. HRI/GEN/1/Rev.8 (1989)) <http://www.iilj.org/courses/documents/ConceptPaperonUnifiedStandingTreatyBody.pdf>. (last visited Oct. 23, 2014).

state party.”⁵⁸ However, the CESCR has indicated that “while the Committee’s concluding observations, in particular its suggestions and recommendations may not carry legally binding status, they are indicative of the opinion of the only expert body entrusted with and capable of making such pronouncements. Consequently, for state parties to ignore or not act on such views would be to show bad faith in implementing their Covenant-based obligations.”⁵⁹

The CESCR also publishes its interpretation of the provisions of the ICESCR as General Comments.⁶⁰ The most relevant General Comments for older persons so far are: General Comment No. 3 on The Nature of States Parties Obligations⁶¹; General Comment No. 4 on The Right to Adequate Housing⁶²; General Comment No. 5 on the Rights of Persons with Disabilities⁶³; General Comment No. 6 on The Economic, Social and Cultural Rights of Older Persons⁶⁴; General Comment No. 12 on The Right to Adequate Food⁶⁵; General Comment No. 13 on The Right to Education⁶⁶; General Comment No. 14 on The Right to the Highest Attainable Standard of Health; and General Comment No. 19 on The Right to Social Security.⁶⁷

⁵⁸Committee on Economic, Social, and Cultural Rights. *Fact Sheet No. 16 (Rev. 1)*, 16 (July 1991), <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>.

⁵⁹*Id.* at 17.

⁶⁰U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comments*, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 (last visited Feb. 18 2015).

⁶¹U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Par. 1 of the Covenant)*, U.N. Doc. E/1991/23 (Jan. 1 1991), [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1991%2f23\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1991%2f23(SUPP)&Lang=en).

⁶²U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11.1 of the Covenant)*, U.N. Doc. E/1992/23 (Jan. 1, 1992), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1992%2f23&Lang=en.

⁶³U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, U.N. Doc. E/1995/22 (Jan. 1, 1995), [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1995%2f22\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1995%2f22(SUPP)&Lang=en).

⁶⁴U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, U.N. Doc. E/1996/22 (Oct. 7, 1996), [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1996%2f22\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1996%2f22(SUPP)&Lang=en).

⁶⁵U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, U.N. Doc. E/C.12/1999/5 (May 12, 1999), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f5&Lang=en.

⁶⁶U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.13: The Right to Education (Art. 13 of the Covenant)*, U.N. Doc.E/C.12/1999/10 (Dec. 8, 1999), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en.

⁶⁷U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant)*, U.N. Doc. E/C.12/GC/19 (Aug. 11, 2000), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en.