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OLDER PERSONS, HEALTH & HUMAN RIGHTS: ARE WE READY FOR POPULATION AGEING?

Saray Noda*

I. INTRODUCTION

Expanding longevity has been a consistent goal of the human race as people throughout history have tried to fight biology and fulfill their innate desire to live forever. Perhaps most famous were the ventures of new world explorers looking for the mythical fountain of youth. In many ways, we have made significant inroads; the twentieth century witnessed a worldwide increase in lifespan as a result of better nutrition, improved living conditions, and the advent of vaccinations. The twenty-first century brings new trends in this area, including exponential growth in the elderly population and increases in chronic disease that come naturally with age progression.

The global population has aged dramatically in the past fifty years as people live longer and have fewer children.¹ By 2050, the current population of 700 million people over the age of sixty will grow to two billion, composing twenty percent of the world's population.² Every month, one million people turn sixty, and eighty percent of them live in the developing world.³ Not surprisingly, there are considerable regional variations in how quickly

populations are aging. Asia has aged the most due to low childbearing trends, which is further precipitated by China's one-child policy.⁴ Countries in the Middle East and Western and Eastern Africa have witnessed slower increases in their populations largely due to lower life expectancy in underdeveloped regions.⁵ HIV/AIDS, maternal death, tuberculosis and malaria are the main factors contributing to high mortality in Africa.⁶ Despite these variations, demographic analyses indicate that the number of countries with ageing populations will continue to increase over the next forty years.⁷

Accomplishing increased longevity without including adequate human rights protections for older persons that assure dignity and access to resources needed by this group will constitute an immense failure by our global community. This population shift will require great adaptation by countries worldwide. The World Bank has described the next forty years as:

[A] period of rapid population aging that will pose new social and economic challenges to the society and require the *implementation of public policies and programs* in multiple areas, including the provision of long term health care and the financing of pensions for a progressively ageing population.⁸

This paper will discuss current trends affecting older persons including age and employment discrimination, poverty, elder abuse, and inaccessibility to health care and increased chronic disease. Next, this paper will present current human rights instruments along with their ability to deal with these problems.⁹ Finally, this paper will discuss future population trends along with the imminent need for a convention specific to older persons.

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II. CURRENT TRENDS & HUMAN RIGHTS INSTRUMENTS APPLICABLE TO OLDER PERSONS

A. Age discrimination & employment discrimination

Older persons continue to live in the shadows of stereotypes that reflect negative feelings towards the elderly and varying perceptions of what they are capable of accomplishing in the workplace and society. A recent longitudinal study in the United States found that sixty-three percent of older adults reported at least one type of everyday discrimination, of which thirty percent was based on age and twenty-two percent based on reported physical disability or appearance.¹⁰ “[E]veryday discrimination still has significant independent effects on changes in emotional health, such as depressive symptoms and self-rated health.”¹¹ Previous studies have also shown that individuals with disadvantaged statuses have overall poor physical and emotional health.¹² With negative outcomes associated with age discrimination, countries must make an effort to curtail and eventually eliminate this trend. Older persons, especially those who live in countries that do not provide pensions and are dependent on labor income, should be free of discrimination in the workplace. Changing population trends may require adjustment of pension systems (in countries where they exist) to sustainable models which will likely translate into later retirement for the workforce. Elder discrimination must be eliminated in order for those models to work.

Trends. Unfortunately, there is a gap in data regarding worldwide age discrimination in the workplace. In the United States, employment discrimination claims brought under the Age Discrimination in Employment Act have increased over forty percent since 2006.¹³ Despite employees’ seniority and expertise, companies often consider how older workers generally cost more when companies face financial difficulties. It may sometimes involve hiring a younger, less qualified candidate for a position as opposed to the older person, or refusing to consider applications from people over retirement age.

Daniel Cotlear, lead health economist at the World Bank, stated that “[e]nacting laws against age

discrimination should be explored because of indications in some Latin American countries that older workers already face real discrimination in the workplace.”¹⁴ In Latin America, labor market income is a significant source of income for the ageing, especially those who do not receive pensions or other sources of income.¹⁵ For those older persons (over age sixty) who do not receive pensions, over forty percent remain in the labor market, and a significant portion continue to work past the age of eighty.¹⁶ In low pension countries, wages for older persons are a fraction of the wages received by younger adults.¹⁷ However, in pro-ageing and high pension countries, the elderly work if paid attractively, which usually means at higher wages than for younger adults.¹⁸

Some pension countries have mandatory retirement ages, which have traditionally encouraged early retirement. Involuntary retirement can be detrimental to social adjustment and wellbeing.¹⁹ However, increasing countries’ dependency ratios and concerns regarding unsustainable pension liabilities may reverse this trend; and instead, increase older worker participation in the labor force. Once countries increase retirement ages, the concern then becomes preserving the ability of older persons to retire with dignity and economic security while continuing to build a sustainable pension model.²⁰ Countries must work to establish this balance.

Efforts by Countries. Countries have made varied efforts to respond to calls for action by the UN and Inter-American bodies regarding age discrimination. Several countries already have provisions in their constitutions regarding age discrimination either by explicit reference or by disallowing general discrimination based on “any other grounds.”²¹ The United States Supreme Court has refused to treat the elderly as a suspect class subject to Equal Protection,²² although claims can be made through the Age Discrimination in Employment Act. National legislation is also a channel through which other countries are addressing age discrimination.²³ Other countries have delegated implementation of policies to local governments, reasoning that localities understand the needs of beneficiaries and have a closer link to the communities they serve.²⁴ Decentralization, however, is not effective if local governments are not provided the funding or effective

powers to help the elderly. Delegation brings about the most critical delays in implementation of programs for older persons.²⁵

Current Human Rights Instruments. Because no specific binding instrument for older persons has been adopted, the legal protections available to older persons have come as a result of interweaving various general human rights instruments.²⁶ The norms in existing international human rights treaties apply to older persons in the same way as to other persons.

The International Covenant on Civil and Political Rights (“ICCPR”), a binding instrument, holds in Article 10 that persons “shall be treated with humanity and with respect for the inherent dignity of the human person.”²⁷ Article 26 views all persons as equal and entitled to be free of discrimination with full protection of the law.²⁸ Also, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) when coupled with the committee’s General Comment 6, provides the most comprehensive analysis of the rights of older persons currently available. Article 6 recognizes the right to work, at any age, including “policies to achieve steady economic, social and cultural development.”²⁹ This means freedom from age discrimination in the workplace as the elderly face a number of problems finding and maintaining employment when they reach retirement age.³⁰

Most notably, the Convention on the Rights of Persons with Disabilities (CRPD) specifically addresses age in many of its provisions.³¹ According to the Convention, States Parties should adopt immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on age.³² In relation to access to justice for persons with disabilities, states parties shall provide “age-appropriate accommodation.”³³ The CRPD further provides that States shall ensure freedom from exploitation, violence and abuse and provide “age-sensitive” assistance and support³⁴; in the context of the right to health, to provide services designed to minimize and prevent further disabilities, including among children and older persons,³⁵ and to social protection programs for older persons with disabilities.³⁶

Ensuring freedom from age discrimination is consistent with the UN’s Vienna International Plan of Action on Aging,³⁷ which recognizes the ability of older persons to enjoy a life of fulfillment where they are appreciated as integral parts of society.³⁸ The Vienna Plan has been considered a “very useful guide” by member states.³⁹ Another plan, The Madrid Plan, also adopted by the UN, recognizes active participation by older persons in the economies of their countries.⁴⁰ The Madrid Plan places the primary responsibility on national governments and fails to call for the development of a specific human rights instrument for the protection of older persons.⁴¹ Basic civil and political rights in the CPR provide immediate protection and supervision, as opposed to those rights classified as economic social and cultural rights in the ESCR, which are often thought of as goals or aims that do not resemble private enforceable rights.⁴² Elderly rights are frequently characterized as “rights of progressive implementation,” which means that “states are not immediately required to fully realize those rights in their jurisdictions, as they are only goals or aims that will be attained to the maximum of the states’ available resources.”⁴³ Most frequently civil and political rights are used to protect the elderly against labor prison sentences, serving jail time, inhumane treatment in health facilities, and for preservation of rights to pensions and social security benefits.⁴⁴

From the Universal Declaration of Human Rights, perhaps the most commonly accepted provision, holding that all people deserve an adequate standard of living, health, and wellbeing, arguably come a penumbra of rights including equality and freedom from employment discrimination. In many countries, the economic survival of the elderly is dependent on their success in the workplace, which cannot occur if they are subject to discrimination.

B. Poverty

Trends. Older persons over the age of eighty experience greater vulnerability and poverty.⁴⁵ This is due to the tendency of those eighty and older to be dependent on a variety of sources of income.⁴⁶ Moreover, although individuals over sixty are generally no more likely to be impoverished than individuals of other ages, many people over age

sixty face financial challenges associated with their age. In addition to employment discrimination, inadequate pensions are a problem for older persons in many countries.⁴⁷

“[T]he incidence of income poverty among those who receive pensions is significantly lower than the incidence of poverty among beneficiaries and non-beneficiaries of pensions,” reports the World Bank.⁴⁸ In most Latin American countries, less than forty percent of the aging population over sixty receives pensions.⁴⁹ Pensions play a greater role in Argentina, Brazil, Chile, and Uruguay — countries known as “pro-aging.”⁵⁰ Labor market income in Latin American Countries is also significant for the elderly, especially those not receiving pensions.⁵¹ Over forty percent of those over sixty who do not receive pensions stay in the labor market.⁵² Poverty for the elderly in the U.S. was measured at 15.9% in 2011, almost double the ordinary measure.⁵³ In calculating poverty, the Census Bureau now deducts medical expenses from income, which accounts for the great increase in the measure of poverty for the elderly in the U.S.⁵⁴ Older women often experience poverty at higher rates.⁵⁵ “The impact of gender inequalities in education and employment becomes most pronounced in old age.”⁵⁶ As a result, older women are more likely than older men to be poor,” reported the UN.⁵⁷

In Latin America, greater inequality in household per capita income exists in all countries with the exception of the four pro-aging countries — Argentina, Brazil, Chile, and Uruguay. “Everywhere, pensioners have significantly lower poverty rates than non-pensioners [...] But in most countries, pensions are not a significant source of income for most over-60’s, since less than 40 percent of the ageing receive pensions.”⁵⁸ The regional survey of ageing, health, and well-being (“SABE”) found that sixty-two percent of older persons could not meet basic needs for daily living on their monthly income.⁵⁹ Poverty in older persons is especially concerning due to poor health outcomes and access to healthcare.

Current Human Rights Instruments. The International Covenant on Economic Social and Cultural Rights (“ICESCR”) asks countries to ensure the equal footing of men and women in economic, social and cultural rights.⁶⁰ This includes

the provision of non-contributory old-age benefits for the elderly, regardless of sex, to account for the fact that some women are left without pension because they spent all or part of their lives caring for their families.⁶¹ Article 11 of the ICESCR gives all the right to an adequate standard of living including adequate food, clothing and housing with continued improvement of living conditions, “recognizing the fundamental right of everyone to be free from hunger.” Adequate housing includes policies to help the elderly live at home for as long as possible, and the improvement of spaces to allow continued access and use.⁶² However, as discussed above the classification of these rights as economic and social rights gives the perception that they are only aims or goals.

The Committee on Economic, Social and Cultural Rights has recognized that although the ICESCR does not make an explicit reference to older persons within the “right to social security,” their rights are implicitly recognized within Article 9 which provides for, “the right of everyone to social security, including social insurance.”⁶³ The CESCR has also clarified that the right to social security encompasses both contributory, insurance-type schemes and non-contributory, tax-funded schemes (sometimes referred to as “social assistance”).⁶⁴ Older persons may also use civil and political rights to protect their rights to social security and pensions. Unfortunately, case law has demonstrated the limitations of creative use of instruments, as civil and political rights have mainly been applied to the field of social security only where the country has already independently enacted those benefits. The rights to fair trial, equal protection, and property have been and continue to be used to ensure non-capricious provision of social benefits including pensions.⁶⁵ However, potential for greater change using these rights has limitations.

The Human Rights Committee in *Brooks v. Netherlands*,⁶⁶ recognized that, although Article 26 of the ICCPR requires equality under the law, the provision could not require a state to enact laws to provide social security, and could only play a role once legislation granting social security was adopted by the state.⁶⁷ The petitioner in *Brooks* was contesting legislation that solely provided disability benefits to married women who were breadwinners or separate from their husbands.⁶⁸ *Brooks* did not

fall under either category.⁶⁹ The committee held that Article 26 was not applicable because the right to social security was not covered by the ICESR.⁷⁰ It is also notable that litigation in human rights fora tends to involve a lengthy process — often plaintiffs must exhaust all remedies in their respective countries — and receiving a hearing in a reasonable amount of time can be difficult.⁷¹ In *Deumeland v. Germany*,⁷² the European Court on Human Rights found a violation of the right to a hearing within a reasonable time where the petitioner waited eleven years for a hearing regarding her widow pension. The court also noted that social security cases require “particular diligence.”⁷³

It was also noted that poverty is not a unique problem plaguing the elderly, as it is common in other groups such as women and children. However, the elderly are frequently left out of development agendas. The UN in the Madrid Plan recognized the continued need for social and economic growth of developing countries so that the elderly (along with other groups) can receive the adequate care and support they need.⁷⁴ The Madrid Plan also asks countries to keep in mind the needs of both the young and old.⁷⁵

C. Elder Abuse

Trends. Elder abuse is severely underreported, with estimates from the World Health Organization of only one in fifteen cases to one in six cases actually being reported.⁷⁶ There has also been a great deal of underreporting of elder abuse by physicians, an alarming two percent as compared to reports from family members (20 percent), hospitals (17.3 percent) and home health aides (9.6 percent).⁷⁷ Calculating prevalence rates of elder abuse itself is a problem, and poor statistics are available largely due to underreporting and refusal by societies to admit the prevalence of abuse, neglect, and financial exploitation of elders.⁷⁸

“[R]eview of legislation in the Latin American region shows that 80 percent of countries have some form of legislation or policy that protects the rights of older persons, including the training and monitoring of elder abuse in long term facilities.”⁷⁹ However, resources are not allocated for adequate enforcement of policies. The needless use of restraints on older persons is also a violation of their

human rights.⁸⁰ Restraints are commonly misused to substitute for lack of personnel in long term facilities and to replace therapeutic interventions.⁸¹ Although there is a lack of statistical data on trends surrounding the widespread use of restraints, a study of institutionalized persons with physical and mental disability found that seventy-three percent of facilities surveyed stated that the reason for restraining residents was to protect them from falls.⁸² In the U.S., statistical data regarding restraints is usually obtained from Medicare reporting by institutions; researchers doubt the reliability of self-reporting by facilities that show a decrease in the use of restraints.⁸³

Current Human Rights Instruments. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, included a commitment by countries to “take effective legislative, administrative, judicial, or other means to prevent acts of torture in any territory under its jurisdiction.”⁸⁴ The Convention against Torture can be used for the protection of older persons living in public institutions if their mental and physical health is in danger.⁸⁵

The Committee against Torture has also specifically clarified that State Parties should prohibit, prevent and redress torture and ill-treatment including, *inter alia*, in institutions that engage in the care of the aged.⁸⁶

The Inter-American Convention to Prevent and Punish Torture gives States the responsibility to prevent torture and other forms of cruel, inhuman treatment in their jurisdiction. Both of these instruments can be used to protect the elderly receiving inhumane treatment in healthcare facilities. However, the conventions arguably could not be used to ensure that countries implement preventative measures, including training of health care professionals and inspections of facilities. These instruments have force once the human rights violation has already occurred.

Some decisions adopted by the Inter-American System of Human Rights are relevant to older persons. They can result in preventive policies and practices where older men and women are deprived of their liberty in public or private institutions (such as hospitals, psychiatric facilities, health centers,

prisons, or other institutions) without sufficient guarantees or respect for their personal integrity, thereby harming older people's physical and mental health.⁸⁷

In December 2003, the Inter-American Commission of Human Rights for the first time granted precautionary measures to stop and prevent further ongoing abuses in a psychiatric institution in Paraguay.⁸⁸ Further, in *Congo vs. Ecuador*, the Commission asserted that “a violation of the right to physical integrity is even more serious when a person is under the custody of the State in a particularly vulnerable position.”⁸⁹

Most recently, in an unprecedented decision, the Inter-American Court of Human Rights in *Ximenes-Lopes v. Brazil*,⁹⁰ imposed liability on Brazil for human rights violations related to institutionalized people with mental disabilities.⁹¹ Damiao Ximenes-Lopes was placed in the care of a public clinic for his psychiatric treatment and died three days after admission due to ill-treatment and violent attacks from clinic personnel.⁹² His family sought redress on the local level but faced numerous irregularities with the investigation and autopsy.⁹³ The court found Brazil in violation of Articles 1, 4, 5, 8 and 25 of the American Convention of Human Rights including the right of physical integrity and life and rights to due process and justice.⁹⁴ “The Court considers that the States must regulate and supervise all activities related to the health care given to the individuals under the jurisdiction thereof, as a special duty to protect life and personal integrity, regardless of the public or private nature of the entity giving such health care.”⁹⁵

The precedents set by the Inter-American human rights system can also be applied to protect and to prevent violations of the rights of older persons in the context of institutionalization in long-term care facilities.

D. Health Care and Chronic Diseases

Trends. Countries have also failed to address the health care needs of the elderly. In its Follow-up to the Second Assembly on Ageing, the U.N. stated the following:

Currently, the discourse on health care in low and middle income countries remains strongly focused on maternal and child

health There is also limited attention to non-communicable diseases, despite that ageing is a key driver of such diseases ... Additionally, the cost of accessing health care and medicines still remains prohibitive for many of the most marginalized older women and men.⁹⁶

These systems of health care encourage the entry of older persons at advanced stages of illness when there is little to be done to ensure positive health outcomes but where costs tend to be the highest. Long term care continues to be inadequate and of low quality, as well as mainly a private industry, which affects government's abilities to regulate and sustain these systems.⁹⁷ A study by the Special Rapporteur on the Right to Health of Older Persons suggests that a paradigm shift from a “needs-based approach” to a “rights based approach” for health care is necessary to address access problems in the elderly.⁹⁸

Although chronic disease is an inevitable consequence of living longer, preventative care has a great influence on the combined number of chronic diseases suffered, age of onset, and severity. The WHO estimates that heart disease, stroke and diabetes alone account for an estimated one to five percent reduction of yearly Gross Domestic Product in developing countries.⁹⁹ The cost of chronic disease is associated not only with seeking medical treatment but also with loss of labor.¹⁰⁰ The World Bank estimates that chronic diseases plague one-third of the poorest in developing countries.¹⁰¹ About sixty percent of all deaths globally are caused by the main non-communicable diseases: diabetes, heart disease, cancers and chronic respiratory diseases.¹⁰² “The epidemic of NCD's ... is the product of failed development: of unhealthy urbanization, of poor trade and policy choices and of health systems unprepared for those most in need of care. A fundamental economic and development choice is thus facing the world today.”¹⁰³ The UN estimates that forty to fifty percent of those who present with heart disease, stroke, and type-2 diabetes are in premature stages and could largely be prevented by eliminating tobacco, promoting healthy diets, increasing physical activity and reducing alcohol consumption.¹⁰⁴

Current Human Rights Instruments. Article 12 of the ICESR asks countries to secure the right of citizens to “the enjoyment of the highest attainable standard of physical and mental health” by providing prevention and treatment of diseases (which can be interpreted to include chronic illnesses).

Clearly, the growing number of chronic, degenerative diseases and the high hospitalization costs they involve cannot be dealt with only by curative treatment. In this regard, States parties should bear in mind that maintaining health into old age requires investments during the entire life span, basically through the adoption of healthy lifestyles.¹⁰⁵

Much like the right to pensions, health care has been classified as an economic and social right, an “aim or goal” to be attained by countries. However, this classification is unacceptable because health is an essential right and fundamental for the exercise of all other “basic” rights, such as civil and political rights.

The Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”) acknowledges the equal right to adequate healthcare.¹⁰⁶ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,¹⁰⁷ a binding instrument on countries that have adopted it in the Inter-American system, guarantees in Article 10 that every person should enjoy the highest level of physical, mental, and social well-being. “In order to achieve the ‘right to health,’ the States must agree to recognize health as a public good, prevent further abuses, and promote education on health problems,” states the Pan-American Health Organization.¹⁰⁸

Article 17 contains a special provision for the protection of older persons by pledging to gradually supply suitable facilities as well as food and specialized medical care for older persons who lack them. Article 18 recognizes the right of the disabled, including older persons, to have special medical care and rehabilitation.

III. THE FUTURE STATUS OF OLDER PERSONS AND THE CALL FOR AN EFFECTIVE INSTRUMENT

Projections of world-wide population shifts, specifically in regard to exponential growth in elderly populations are eye-opening and incredibly concerning. On a world-wide scale, projections indicate that by 2050, the number of persons over sixty will increase from 700 million to 2 billion.¹⁰⁹ “Currently 1 person in every 10 is aged 60 years or over; by the year 2050 more than 1 in every 5 will be aged 60 years or over.”¹¹⁰ The amount of older persons is expected to match that of the youth population for the first time in history around 2050.¹¹¹ By 2050, the older population is expected to surpass the youth population by thirty percent.¹¹² In many countries, including the U.S. and Mexico, the elderly are expected to compose one-fourth of the population. By 2025, the percentage of older women in the developing world will increase to seventy-five percent.¹¹³ For developing countries the old age dependency ratio — the number of persons sixty-five and over per one hundred persons aged fifteen to sixty-four years — could more than double in the next fifty years; whereas, in the past doubling has only occurred within spans of 150-200 years.¹¹⁴

The United Nations has recognized that as a global community we need to change the way we think about aging. “When ageing is embraced as an achievement, the reliance on human skills, experiences and resources of the higher age groups is naturally recognized as an asset in the growth of mature, fully integrated, humane societies.”¹¹⁵ It is not constructive to perceive the elderly as detached from our social and economic systems. “Active Aging” needs to be our goal. Given the increase in dependency ratios and longevity, current pension systems no longer meet the needs of many elderly populations. We must therefore increase the retirement age and availability of tasks that the elderly can perform within the workplace. This will increase the amount of funds available so that the governments can continue to support the economic needs of the elderly. We must also build and maintain a positive perception of the elderly. The elderly are equally as important as younger population groups,

especially since they are increasingly becoming a larger part of the composition of our population.

Elder abuse must also be given recognition as a serious social and public health issue.¹¹⁶ Elder abuse is currently considered taboo, akin to domestic violence before it was recognized as a legitimate social concern. “Twenty or thirty years ago, societies throughout the world denied the existence of violence against women and child abuse. Then, through research, came the evidence. As a result the civil society exercised the appropriate pressure for action from governments. The parallel with elder abuse is clear.”¹¹⁷

Also, given the discrepancy in life expectancy between elderly women and men, we must increase resources to protect those women who are left alone after the death of their significant other. Elderly women can also be especially vulnerable due to former customs of economic dependence on others and tendencies to stay out of the labor market. “Physicians and policy makers should understand that aging affects women and men differently. This recognition is critical to ensuring equality between older men and women and for providing adequately for their physical, mental, and social needs.”¹¹⁸ Health care systems also need to respond and adapt to the increase in elderly population. We must establish adequate systems of long-term care. Coordination of care is also very important along with encouraging better self-care.

In order to best address the needs of the elderly, countries have to stop thinking of aging as a cookie cutter process for every individual. “Older persons are not a homogenous group and should not be treated as such. The experience of old age is different for men and women and it also differs significantly between someone in his or her 60s or 80s.”¹¹⁹ However, older persons share the experience of living under the stereotype of societal perceptions of ageing, political disempowerment, and economic and social disadvantage.

The human rights situation of the elderly has been analogized to that of children, but distinguished based on the large amount of specific protections for children. Aging leaves older persons equally as vulnerable as children — dependent on others

for essential needs and victims of abuse. The “convention [on the Rights of the Child] focuses on a group that is defined on the basis of age and that is considered to be especially vulnerable.”¹²⁰ In addition, other regional instruments have chosen to focus on other specific vulnerable populations including the indigenous and disabled communities providing a model of how to address the rights of the elderly within a legal framework.¹²¹ Future drafters of an instrument focused on the elderly must think about enforcement and the type of supervision necessary to assure adequate compliance.¹²² For example, the UN designates supervisory bodies for each treaty and the Inter-American system has designated monitoring to the Inter-American Court and Inter-American Commission.¹²³ The current situation of the elderly clearly demonstrates that self-regulation by individual countries is simply not enough to promote enforcement and change. The need for an internationally enforceable specific instrument to address the needs of the elderly is clear. Roedolf Kay of the South African Older Persona Forum said it best: “All older persons, whether healthy or frail, deserve to be treated with respect and dignity and to have their rights upheld. Human rights don’t stop at 60!”¹²⁴

1 U.N. Dep’t of Econ. and Soc. Affairs Population Div., *Worldwide Population Ageing: 1950-2050*, 5, U.N. Doc. ST/ESA/SER.A/207 (2001) [hereinafter *Worldwide Population Ageing*], available at <http://www.un.org/esa/population/publications/worldageing19502050/pdf/8chapter1.pdf>.

2 U.N. Secretary-General, *Follow-up to the Second World Assembly on Ageing*, ¶ 4, U.N. Doc. A/66/173 (July 22, 2011) [hereinafter *Follow-up on Ageing*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/428/83/PDF/N1142883.pdf?OpenElement>.

3 WORLD HEALTH ORGANIZATION, MISSING VOICES: VIEWS OF OLDER PERSONS ON ELDER ABUSE 2 (2002), http://whqlibdoc.who.int/hq/2002/WHO_NMH_VIP_02.1.pdf [hereinafter *Missing Voices*].

4 *Worldwide Population Ageing*, supra note 1, at 5.

5 *Worldwide Population Ageing*, supra note 1, at 6; see also U.N. Dep’t of Econ. and Soc. Affairs Econ. and Soc. Council, *Regional Dimensions of the Ageing Situation* 73 (2008) [hereinafter *Regional Dimensions of Ageing*], available at <http://www.un.org/esa/socdev/ageing/documents/publications/regional-dimensions-ageing.pdf> (discussing environmental and political factors in Eastern Africa which places inhabitants at great risk of death).

6 *Regional Dimensions of Ageing*, supra note 4, at 24.

7 *Id.*

⁸ THE WORLD BANK, *Population Ageing: Is Latin America Ready?* 64 (Daniel Cotlear, ed., 2011) [hereinafter *Population Ageing*] (emphasis added), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/01/07/000356161_20110107011214/Rendered/PDF/588420PUB0Popu11public10BOX353816B0.pdf.

⁹ As a matter of introduction to human rights instruments, the reader must keep in mind that treaties and conventions are only enforceable against countries who adopt them. Even when they are adopted countries can include more protections or water down provisions which they believe are incongruent with or unattainable under domestic policy.

¹⁰ Ye Lou, et al., *A Longitudinal Study of Status, Perceived Discrimination, and Physical and Emotional Health Among Older Adults*, RESEARCH ON AGEING 10 (Dec. 14, 2011), <http://roa.sagepub.com/content/early/2011/12/06/0164027511426151.full.pdf+html>.

¹¹ *Id.* at 21.

¹² *Id.* at 2.

¹³ See *Age Discrimination in Employment Act (ADEA) Charges*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (last visited Sept. 22, 2012), <http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm> (showing receipt of charges by the EEOC increasing from 16,548 receipts in 2006 to 23,465 in 2011).

¹⁴ Daniel Cotlear & Phillip Hay, *Is Latin America Ready for its Aging Revolution?* 11 GLOBAL HEALTH MAGAZINE 10 (2012), available at <http://issuu.com/globalhealthcouncil/docs/issue-11-summer-2011>.

¹⁵ *Population Ageing*, *supra* note 8, at 131.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See William T. Gallow, et al., *Health Effects of Involuntary Job Loss Among Older Workers: Findings From the Health and Retirement Survey*, 55 JOURNAL OF GERONTOLOGY 131 (2000); see also Kenneth S. Shultz, et al., *The Influence of Push and Pull Factors on Voluntary and Involuntary Early Retirees' Retirement Decision and Adjustment*, 53 JOURNAL OF VOCATIONAL BEHAVIOR 45, 54 (1998) (concluding that those forced to retire generally have a lower self rating of physical and emotional health, and lower retirement and life satisfaction).

²⁰ *Regional Dimensions of Ageing*, *supra* note 5, at 19.

²¹ *Follow-up on Ageing*, *supra* note 2, ¶ 42.

²² See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316-17 (1976) (holding that state police officers subject to mandatory retirement at age fifty did not constitute a suspect class for equal protection analysis).

²³ *Follow-up on Ageing*, *supra* note 2, ¶ 43.

²⁴ *Id.* at ¶ 44.

²⁵ *Id.* at ¶ 45.

²⁶ Javier Rodriguez, *Human Rights & Health: Older Persons*, PAN AMERICAN HEALTH ORGANIZATION, 4 (Aug. 8, 2012) [hereinafter *Human Rights & Health*], http://www.paho.org/english/dd/pub/10069_OlderPersons.pdf.

²⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967).

²⁸ *Id.* art. 26.

²⁹ *Id.* art. 6.

³⁰ *See id.*

³¹ See Convention on the Rights of Persons with Disabilities, U.N. Doc. A/RES/61/106 (Mar. 30, 2007) [hereinafter *Convention on Disabilities*] (stating, for example, state parties shall ensure equal and effective access to justice, including age-appropriate accommodations, for persons with disabilities).

³² See *id.* art. 8 (establishing the provisions that States Parties should undertake as part of awareness-raising measures).

³³ See *id.* art. 13 (delineating the actions that States Parties must take to ensure that persons with disabilities are able to participate in legal proceedings).

³⁴ See *id.* art. 16 (establishing, for example, that providing information on how to avoid exploitation, violence, and abuse to the affected persons, families, and caregivers would help prevent these issues from occurring).

³⁵ See *id.* art. 25 (delineating ways for States Parties to ensure that persons with disabilities enjoy the "highest attainable standard of health").

³⁶ See *id.* art. 28b (including with older persons with disabilities that women and girls are also as specific subsections of disabled persons that should receive this type of protection).

³⁷ See generally World Assembly on Aging, July 26-August 6, 1982, *The Vienna International Plan of Action on Aging* (1983) [hereinafter *The Vienna Plan*], available at <http://www.un.org/es/globalissues/ageing/docs/vipaa.pdf> (establishing what the humanitarian aspects of aging are and recommending actions and methods of implementation for UN States to take).

³⁸ See *id.* at Preamble (stating that the countries participating in the World Assembly on aging recognize the collective concern for the aging and are determined to work to incorporate the aging into society).

³⁹ See U.N. Comm. on Econ., Soc. and Cultural Rights, The Economic, Social, and Cultural Rights of Older Person: General Comment 6, ¶ 4., U.N. Doc. E/C/12/1995/16/Rev. (Aug. 12, 1995) [hereinafter General Comment 6] (recognizing the Vienna Plan as an important international policy relating to older persons).

⁴⁰ See Rep. of the Second World Assembly on Ageing, April 8-12, 2002, Art. 5, U.N. Doc. A/CONF.197/9 (2002) [hereinafter *Rep. of the Second World Assembly on Ageing*] (reaffirming a commitment to eliminate forms of discrimination against elderly people as they should enjoy active participation in economic life in their society).

⁴¹ See Diego Rodriguez-Pinzon & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT'L L. REV. 915, 950 (2003) (discussing how the Madrid Plan's recommendations are tailored to national governments and the international level of implementation).

⁴² *Id.* at 918 (noting that ECSR Rights are more often closely linked to political processes instead of judicial activity).

⁴³ *Id.* at 920.

⁴⁴ See *id.* at 921 (enumerating a list of rights that are fundamental to elderly persons).

- ⁴⁵ See *Population Ageing*, *supra* note 8, at 130 (establishing that the population over sixty is not more likely to be poor, but the population over eighty is).
- ⁴⁶ See *id.* (comparing the over eighty population to the rest of the population).
- ⁴⁷ See *id.* (explaining that while some pensioners have lower poverty rates in most countries pensions are not a significant source of income).
- ⁴⁸ *Id.* at 106.
- ⁴⁹ See *id.* at 130 (providing examples of the areas where pensions are higher than others).
- ⁵⁰ See *id.* (explaining that in these countries the poverty rate of the young is twice the average for the rest of the population).
- ⁵¹ *Population Ageing*, *supra* note 8, at 131.
- ⁵² See *id.* (establishing that nonpensioners often work beyond the age of eighty).
- ⁵³ See Sabrina Tavernise and Robert Gebeloff, *New Way to Tally Poor Recasts View of Poverty*, N.Y. TIMES, Nov. 18, 2011, at A17 (discussing how the new assessment gives policy makers a sense of how effective social safety-net programs are).
- ⁵⁴ See *id.* (stating that the poverty rate among people 65 and over was 9 percent under the old measurement standard).
- ⁵⁵ *Follow-up on Ageing*, *supra* note 2, ¶ 7.
- ⁵⁶ *Id.*
- ⁵⁷ *Id.*
- ⁵⁸ *Population Ageing*, *supra* note 8, at 130.
- ⁵⁹ *Regional Dimensions on Ageing*, *supra* note 5, at 28.
- ⁶⁰ International Covenant on Economic, Social and Cultural Rights, art. 3, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).
- ⁶¹ General Comment 6, *supra* note 39, ¶¶ 20-21.
- ⁶² *Id.* at ¶ 33.
- ⁶³ See General Comment 6, *supra* note 39, ¶¶ 26-30; U.N. Comm. on Econ., Soc. And Cultural Rights, The Right to Social Security: General Comment 19, ¶ 15., U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008) [hereinafter General Comment 19].
- ⁶⁴ See General Comment 6, *supra* note 39, ¶ 30; see also *General Comment 19*, *supra* note 63, ¶ 4.
- ⁶⁵ Rodriguez-Pinzon & Martin, *supra* note 41, at 923.
- ⁶⁶ Communication No. 172/1984, U.N. GAOR 39th Sess., U.N. Co. CCPR/C29/D/172/1984 (1987).
- ⁶⁷ *Id.* at ¶ 12.4.
- ⁶⁸ *Id.* at ¶ 8.2.
- ⁶⁹ *Id.*
- ⁷⁰ *Id.* at ¶¶ 12.4, 12.5, 13.
- ⁷¹ See Rodriguez-Pinzon & Martin, *supra* note 41, at 925-26 (explaining how a widow's petition was brought to the European Human Rights System only after she exhausted domestic remedies).
- ⁷² 100 Eur. Ct. H.R. (ser B) (1986) at 24.
- ⁷³ *Id.*
- ⁷⁴ *Rep. of the Second World Assembly on Ageing*, *supra* note 40, art. 7.
- ⁷⁵ *Id.* art. 16.
- ⁷⁶ WORLD HEALTH ORGANIZATION, A GLOBAL RESPONSE TO ELDER ABUSE AND NEGLECT: BUILDING PRIMARY HEALTH CARE CAPACITY TO DEAL WITH THE PROBLEM WORLDWIDE: MAIN REPORT 1 (2008) [hereinafter *Elder Abuse*], available at http://www.who.int/ageing/publications/ELDER_DocAugust08.pdf.
- ⁷⁷ *Id.* at 4.
- ⁷⁸ *Missing Voices*, *supra* note 3, at 4.
- ⁷⁹ *Regional Dimensions on Ageing*, *supra* note 5, at 114.
- ⁸⁰ *Id.* at 115.
- ⁸¹ *Id.*
- ⁸² *Id.* at 115.
- ⁸³ Julie Appleby & Jack Gillum, *Fewer Care Facilities Use Restraints for Elderly Residents*, USA TODAY (Feb. 16, 2009), available at http://www.usatoday.com/news/nation/2009-02-16-nursing-home-restraints_N.htm.
- ⁸⁴ U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.
- ⁸⁵ *Human Rights & Health*, *supra* note 26, at 4.
- ⁸⁶ See U.N. Comm. Against Torture, *General Comment 2, Implementation of Article 2 by State Parties*, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).
- ⁸⁷ See Organization of American States, American Convention on Human Rights, art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (recognizing the right to humane treatment and respect for physical, mental, and moral integrity); see also *id.* art. 7.2 (stating that no one should be deprived of his physical liberty except by conditions established by law); *id.* art. 7.3 (stating that "arbitrary arrest or imprisonment" is prohibited).
- ⁸⁸ See Allison A. Hillman, *Protecting Mental Disability Rights: A Success Story of the Inter-American Human Rights System*, 12 AM. U. HUMAN RIGHTS BRIEF 25 (2005) (discussing the successful intervention by the American Convention of Human Rights in protecting over 450 individuals held in inhuman and degrading conditions).
- ⁸⁹ Congo v. Ecuador, Case 11.427, Inter-Am. Comm'n H.R., Report No. 63/99, OEA/Ser.L/V/II.95, doc. 7 rev. 475 (1998).
- ⁹⁰ Case 12.237, Inter-Am. Comm'n H.R., Report No. 38/02, doc. 5 rev. 1 (2006) available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf.
- ⁹¹ *Id.*
- ⁹² *Id.* at 33-35.
- ⁹³ *Id.* at 14.
- ⁹⁴ *Id.* at 91-92.
- ⁹⁵ *Id.* at 28.
- ⁹⁶ *Follow-up on Ageing*, *supra* note 2, ¶ 60.
- ⁹⁷ *Id.* ¶ 63-65.
- ⁹⁸ Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Thematic Study on the Realization of the Right to Health of Older Persons*, ¶ 70(c), Human Rights Council, U.N. Doc. A/HRC/18/37 (July 4, 2011) (by Anand Grover).
- ⁹⁹ The World Health Organization, *Addressing Non-Communicable Diseases and Injuries: Uniting Development and Public Health Agendas*, in ACHIEVING THE GLOBAL PUBLIC HEALTH AGENDA: DIALOGUES AT THE ECONOMIC AND SOCIAL COUNCIL 213 (2009), available at http://www.un.org/en/ecosoc/docs/pdfs/achieving_global_public_health_agenda.pdf.
- ¹⁰⁰ *Id.*
- ¹⁰¹ *Id.*

- ¹⁰² *Id.*
- ¹⁰³ *Id.* at 214.
- ¹⁰⁴ *Id.*
- ¹⁰⁵ General Comment 6, *supra* note 39, ¶ 35.
- ¹⁰⁶ U.N. Convention on the Elimination of All Forms of Discrimination against Women, art. 11, Dec. 18, 1979, 1249 U.N.T.S. 13.
- ¹⁰⁷ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, Nov. 17, 1988, 28 I.L.M. 161.
- ¹⁰⁸ *Health and Human Rights*, *supra* note 26, at 8.
- ¹⁰⁹ *Follow-up on Ageing*, *supra* note 2, ¶ 4.
- ¹¹⁰ *Regional Dimensions of Ageing*, *supra* note 4, at 5.
- ¹¹¹ *Follow-up on Ageing*, *supra* note 2, ¶ 4.
- ¹¹² *Population Ageing*, *supra* note 8, at 53.
- ¹¹³ *Missing Voices*, *supra* note 3, at 3.
- ¹¹⁴ *Regional Dimensions of Ageing*, *supra* note 5, at 5.
- ¹¹⁵ *Rep. of the Second World Assembly on Ageing*, *supra* note 40, art. 6.
- ¹¹⁶ *Elder Abuse*, *supra* note 76, at 4.
- ¹¹⁷ World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse*, 2 (2002), available at http://www.inpea.net/images/TorontoDeclaration_English.pdf.
- ¹¹⁸ *Health and Human Rights*, *supra* note 26, at 2.
- ¹¹⁹ *Follow-up on Ageing*, *supra* note 2, at 11.
- ¹²⁰ Rodriguez-Pinzon & Martin, *supra* note 41, at 1008.
- ¹²¹ *Id.*
- ¹²² *Id.*
- ¹²³ *Id.*
- ¹²⁴ U.N. Office of the High Commissioner for Human Rights, *Human Rights Don't Stop at 60*, (Aug. 18, 2012, 3:30 PM) <http://www.ohchr.org/EN/NewsEvents/Pages/HRdontstopat60.aspx>.

ANNEX: WORKING GROUP RECOMMENDATIONS

Listed below are recommendations that will serve to advance the use of international human rights instruments and standards as tools to review and reform health policies, plans, programs and laws.

These recommendations have been suggested by the Working Group on Older Persons that convened on March 21 and 22, 2012 at the Inaugural Conference on Global Health, Gender and Human Rights, which was organized by the American University Washington College of Law and PAHO/WHO. These recommendations do not necessarily reflect the views of the author(s) of the preceding article.

The recommendations are divided by the following set of questions based on principles extracted from the PAHO Resolution “Health and Human Rights” (CD 50 R.8):

Taking into account the national context, financial and legal framework and budgetary constraints of countries:

- a. Which areas require special attention from government agencies?
 - Promote and strengthen training programs for health workers working in long term care facilities for older persons on the applicable international human rights instruments;
 - Strengthen the technical capacity of the health authority to provide support for the formulation of health policies and plans on aging consistent with the applicable international human rights instruments related to health;
 - Establish a process to review the legal capacity for older persons who have been placed in long term care facilities by their families and provides a mechanism to transfer those persons who can return to the community;
 - Raising awareness among care providers about the capacity of older persons to make medical decisions; and
- b. What key factors should be identified and included by health authorities and other governmental actors when formulating national health policies and plans consistent with the applicable international human rights instruments that protect older persons rights to physical and mental health and other related human rights?
 - Establish mechanisms to protect private patients’ information and provide access to their own information (medical files, etc.).
 - Ensure participation of older persons and their organizations in the design; implementation and monitoring of national health policies, plans and laws; and
 - Educational materials about the rights of older persons should be developed and distributed in governmental agencies, universities and schools, among others.
- c. Which key provisions should be included by legislators and other actors when reviewing and reforming national health legislation, incorporating the international human rights instruments especially those protecting older persons?
 - Adopt laws and policies that bar discrimination against older persons in the workplace and provide enforceable remedies for violations;
 - Right to a periodic review of admissions in long term care facilities;
 - Incentivize family caregivers that provide for older persons. (For example, Medicaid provides subsidies for family members who provide care);
 - Right to the protection of private data; and
 - Create incentives for corporations to employ older persons.
- d. What measures should governments take to ensure the effective implementation of national health policies, plans and laws that protect older persons?

- Establish training programs in technical areas, especially those most closely involved in protecting the health of older persons gradually incorporate the international human rights instruments related to health into their programs;
 - Revise existing curricula in universities to include the human rights of older persons; and
 - Make modules (user friendly and efficient) available on human rights instruments protecting human rights of older persons.
- e. Parliaments and domestic courts play a key role in promoting and protecting the human rights and fundamental freedoms of older persons.
- Formulate and, if possible, adopt legislative, administrative, educational, and other measures to disseminate the applicable international human rights instruments on protecting the right to the enjoyment of the highest attainable standard of health and other related human rights among the appropriate personnel in the legislative and judicial branches and other governmental authorities.
- f. What measures could be taken by all those members of society at large who are involved in protecting the human rights of older persons? Consider for example:
- Promote, as appropriate, the dissemination of information and knowledge among civil society organizations and other social actors on the applicable international human rights instruments related to health, to address stigmatization, discrimination, and exclusion of older persons;
 - Promote the inclusion of older persons' rights into the agenda of human rights organizations; and
 - Encourage law schools and civil society to bring target litigation on behalf of older persons and thereby expand case law at domestic, regional and universal levels.

Taking into account the important role of international organizations, civil society and academic institutions on the promotion and protection of the right to health and other related human rights in the context of older persons:

- a. What measures could be taken by PAHO and technical teams of Washington College

of Law and other universities to strengthen technical cooperation with the human rights committees, organs and rapporteurships of the United Nations and Inter-American systems (such as the Inter-American Commission on Human Rights) in order to promote and protect the right to health and other related human rights of older persons?

- Formulation of technical opinions on health;
 - Participation in thematic hearings at the Inter-American Commission on Human Rights and UN treaty bodies;
 - Visits to health centers and other institutions such as long term care facilities for older persons and prisons in countries; and
 - Provide support to the drafting and adoption of an international and or Inter-American Convention on the human rights of older persons to address their specific needs, rights and challenges.
- b. How could PAHO and other international agencies promote and stimulate collaboration and research with academic institutions, the private sector, civil society organizations and other social actors, when appropriate, to promote and protect human rights in keeping with the international human rights instruments that protect older persons?
- Work with the media as to how to spread a positive image of older persons;
 - Engage universities to train the media about changes in demographics and health and human rights of older persons; and
 - Incentivize more research in academic institutions regarding discrimination in the workplace for older persons.
- c. How could PAHO and other international agencies, governments and academic institutions and civil society promote the sharing of good practices and successful experiences among countries so as to prevent stigmatization, discrimination and exclusion of older persons?
- Coordination of joint initiatives in order to set up a network for global, regional and national collaboration and dissemination to share good practices related to the human rights of older persons.