PROTECTION OF OLDER PERSONS' RIGHT TO HEALTHCARE BY UNITED NATIONS HUMAN RIGHTS TREATIES

Written by ***Alphonce Paul Mbuya***

Lecturer of Law, Moshi Co-operative University, Tanzania

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ABSTRACT

This article examines the protection of older persons' right to healthcare by the United Nations (UN) Human Rights treaties. Although there are diverse scholarly views on its nature and scope, health is firmly recognised as a right by UN human rights treaties which define health as a right and impose certain obligations on states for realising it. Therefore, the inclusion of the right to health in various human rights instruments is the basis for understanding the normative framework of the right as it applies to older persons and the nature of the measures which states must take to ensure its realisation. At the UN level, human rights treaties offer very limited protection to older persons, in part due to the absence of a specific treaty on older persons. However, soft law instruments adopted under the auspices of the said treaties elaborate the application of specific rights (including healthcare) to older persons. It is argued that the limited protection of older persons' rights in the UN treaties should not be an excuse for states to take special measures to ensure realisation of older persons' right to healthcare. Moreover, elaboration of older persons' rights in general comments adopted by UN treaty bodies is a clear indication of the need for a specific UN treaty for recognising and protecting older persons' rights, including healthcare which has been identified as a critical issue affecting older persons worldwide.

Keywords*: Older person, right to healthcare, UN human rights treaties, general comments.*

INTRODUCTION

Older persons across the world face numerous challenges which have prompted scholarly studies, discussions and activism over the need to protect and realise their rights at the national, regional and international levels. The main challenges include discrimination based on age (ageism), violence and abuse resulting from witchcraft accusations and other factors, exploitation, neglect, diseases, and difficulties in accessing healthcare services. Due to these challenges, older persons have been recognised as a vulnerable group and hence the need for specific measures to address their specific vulnerabilities, including in the area of healthcare.[i] This article examines the manner in which UN human rights treaties protect older persons' rights to healthcare. Significant normative developments on older persons' rights have taken place at the UN level with a climax on the demand for a specific UN treaty on older persons.

UNITED NATIONS HUMAN RIGHTS TREATIES AND GENERAL COMMENTS ON OLDER PERSONS' RIGHT TO HEALTHCARE

Context

The Second World War saw suffering, loss of life and destruction at a scale that shook the human conscience.[ii] Although the war-affected many people in different ways, it has been observed that older persons, women and children suffered the most.[iii] Studies have also shown that the survivors of WWII were (or are) more prone to diabetes, heart diseases and depression during their old age, in part due to the physical and psychological effects of the war.[iv] Suffice it to say that the war was catastrophic and caused unprecedented harm and loss. It is due to this reason that the international community vowed to prevent a similar war by establishing the UN with the main mission of maintaining international peace and security.[v] To achieve the broad vision of the UN, human rights were recognised as an important pillar in the United Nations Charter, which laid the foundation for international human rights law.[vi]

The UN Charter provides for general stipulations on the promotion and respect for human rights and fundamental freedoms without a specific mention of the rights in question.[vii] To fill this *lacuna*, the UN adopted human rights instruments to define and protect 'universal' human rights of all people.[viii] The UN Charter is the first international agreement to call for respect for

human rights by reaffirming faith in fundamental human rights as one of the pillars for maintaining international peace and security.[ix] Although the Charter does not contain an explicit provision on health as a right, it considers the question of health as a matter of international importance. The Charter mandates the General Assembly to initiate studies and make recommendations towards, *inter alia*, promoting international cooperation in the field of health.[x] Moreover, the UN is required to promote solutions to international problems, including health, to ensure stability and well-being of all the people which will help to nurture friendly relations amongst states.[xi] Besides, the UN Charter provides for the foundation of establishing a specialised UN agency in the field of health.[xii] It is on this basis that the World Health Organisation (WHO) was established in 1946 to coordinate global health initiatives.[xiii]

The Constitution of the WHO is the first instrument to recognise health as a right at the international level. The WHO Constitution was adopted by the International Health Conference held in New York from 19 – 22 July 1946. It was signed by representatives of 61 States and entered into force on 7 April 1948. The preamble to the Constitution provides:

> "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".[xiv]

Reference to 'every human being' in the above definition clearly covers older persons. It should also be noted that by the time the WHO Constitution was adopted, aging population and its associated challenges had not yet become an issue of international concern. Although age discrimination (ageism) does not explicitly feature in the prohibited grounds of discrimination, it may be argued that it falls under the broader ground of 'social condition'. Paula Braveman argues that social conditions are "social, economic, and political conditions encompassing a wide range of modifiable factors that are outside the scope of medical care" including various forms of discrimination.[xv] Ageism may be regarded as a social condition and therefore prohibited in the enjoyment of the right to the highest attainable standard of health.

The WHO Constitution further defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[xvi] The definition embraces the vision of a healthy society and does not clearly set the standards for establishing what exactly people are entitled to and the role of the State in realising the right to health. Moreover, the content of the 'highest attainable standard of health' is not made explicit in the

WHO Constitution. Despite this shortcoming, the WHO Constitution remains an important foundation for the recognition of health as a fundamental right at the international level. The recognition and elaboration of the right to health and its application to elderly persons gained more attention within the UN system with the adoption of binding and non-binding human rights instruments including the Universal Declaration of Human Rights.

Older persons are recognised in the Universal Declaration which guarantees everyone's right to security in the event of, among other circumstances, old age.[xvii] On the right to health, the Universal Declaration provides:

> "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".[xviii]

Article 25(1) does not expressly recognise healthcare as a right but rather a component of the right to an adequate standard of living. In other words, for a person to enjoy a standard of living adequate for the health and well-being of himself and his family, he/she needs, *inter alia*, medical care. The Declaration, therefore, guarantees the right to an adequate standard of living whose fulfilment depends on the provision of food, clothing, medical care and other essential social services. With regards to older persons, article 25(1) guarantees the right to security in event of, among others, sickness and old age. In this context, security about sickness and old age may be interpreted to mean means which enable a sick person to access medical care and measures which help older persons to live a dignified life free of oppression, discrimination, poverty and other socio-economic predicaments. Article 25, therefore, covers two basic rights namely, the right to a standard of living adequate for the health and well-being of a person and his/her family and the right to security. Be it as it may, the Universal Declaration is not a binding instrument which imposes obligations on states. It is merely a persuasive source of inspiration and normative guidance.

After the adoption of the Universal Declaration, the first UN human rights namely, the International Convention on the Elimination of All Forms of Racial Discrimination[xix], recognised the right to health particularly public health and medical care. In particular, the Convention requires states parties to eliminate all forms of racial discrimination and ensure all

people enjoy their economic, social and cultural rights, including the right to "public health, medical care, social security and social services" without distinction as to race, colour, or national or ethnic origin.[xx] The right to health was further recognised and elaborated in the UN's efforts to make the norms in the Universal Declaration legally binding.

International Covenant on Economic, Social and Cultural Rights

Two important human rights treaties namely, the International Covenant on Civil and Political Rights (ICCPR)[xxi] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[xxii] were adopted by the UN General Assembly in 1966.[xxiii] The adoption of the ICCPR and the ICESCR in 1966 was a key milestone in international human rights law and given their normative significance, the two Covenants and the Universal Declaration were designated the 'International Bill of Rights.' [xxiv] The Universal Declaration does not explicitly recognise the rights of older persons. Article 2 of the Declaration provides:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*" [Emphasis added]

The ICESCR contains an important provision on health which has been regarded as the most comprehensive definition of the right to health at the international level. The ICESCR requires states parties to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. To fully realise the right, States are further required to take steps necessary for the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.[xxv]

To elaborate the right to health, in 2000 the Committee on Economic, Social and Cultural Rights adopted General Comment No. 14 on the Right to the Highest Attainable Standard of Health coved in article 12 of the ICESCR.[xxvi] The General Comment affirms health as a fundamental right necessary for a person to enjoy other rights[xxvii], unpacks the nature and scope of the rights and elaborates on the nature of the State obligations and other necessary arrangements for realising it. On its nature and scope, the right to health is intricate. It is closely

related to other rights in that its realisation depends on the fulfilment of other rights including the right to: housing, food, education, work, dignity, non-discrimination, life, equality, the prohibition against torture, access to information, privacy, freedom of assembly and movement. These and other rights touch on the integral components of the right to health.[xxviii]

On its normative content, the right to health does not denote the right to be healthy. The right has both freedoms and entitlements. The freedoms are the aspects which can be controlled and decided upon by every individual. This includes the right to control one's health and body, sexual and reproductive decisions, and the right to make healthcare choices including those related to non-consensual treatment and medical experiments. On the other side, the entitlements concern the necessary conditions and facilities, mostly provided by the State, for people to enjoy the highest attainable state of health.[xxix] In conceptualising the concept of the highest attainable standard of health, peoples' biological factors and socio-economic conditions and the State's ability to allocate resources for meeting health-related facilities are all taken into account. This means the state alone cannot be held responsible for all the aspects related to the realisation of the right to health. In other words, the state cannot guarantee its people good health and protect them from all possible causes of sickness. In this regard, the right to health should be broadly understood to mean peoples' right "to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health."[xxx] The Committee interpretates the right to health as:

> "An inclusive right extending not only to timely and appropriate healthcare but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels."[xxxi]

There is no provision in the ICESCR which makes explicit reference to older persons. A remote coverage of older persons can be inferred from Article 9 which guarantees the right to social security. The underlying assumption is that older persons' entitlement to old-age benefits is a matter that goes without saying. Nevertheless, since the ICESCR is a generic instrument which applies to everyone, older persons are equally entitled to the full range of the rights contained in it. Besides, given the vulnerability of older persons (including health-related challenges),

states parties are required to take special measures to the maximum of their available resources towards the full realisation of older persons' social, cultural and economic rights which include the right to health.[xxxii] It is also observed that the right to access medical services in the event of sickness, which is the main focus of this study, is a component of the right to health which, according to the ICESCR, involves taking preventive and other measures for ensuring live safely. In relation to older persons, the Committee on Economic, Social and Cultural Rights has adopted one important general comment.

In 1995 the CESCR adopted General Comment No. 6 on the Economic, Social and Cultural Rights of Older Persons.[xxxiii] The General Comment was developed to elaborate on the rights of older persons in relation to the ICESCR. On the right to physical and mental health which is provided in article 12 of the ICESCR, the General Comment first requires states to take into consideration the Vienna International Plan of Action on Aging particularly its recommendations 1 to 17 which set out guidelines for preserving the health of older persons through an approach which embodies prevention, rehabilitation and care for the terminally ill.[xxxiv] Moreover, it is observed in the General Comment that curative treatment alone cannot address health problems facing the elderly due to the increasing number of chronic and degenerative diseases and costly hospitalisation services. Thus, states are required to take measures which help people to maintain good health as they age. This includes promoting healthy lifestyles, prevention of diseases through regular medical checkups which suit the needs of older persons, rehabilitation and active ageing.[xxxv] In the 2012 report of the UN High Commissioner for Human Rights to the UN Economic and Social Council, General Comment No. 6 was described as offering "the most comprehensive guidance on older persons on rights such as the right to health, an adequate standard of living including food and housing, to work and to social security."[xxxvi]

Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) aims to address various forms of discrimination against women. In the field of employment, CEDAW requires states parties to use appropriate measures to eliminate discrimination against women to ensure women and men equally enjoy the same rights including the right to social security in various situations including old age.[xxxvii] The Preamble to CEDAW recognises the fact that women in situations of poverty have the least access to basic needs including

health.[xxxviii] CEDAW also requires states parties to take all appropriate measures towards eliminating discrimination against women in the area of healthcare to ensure women and men can access healthcare services equally.[xxxix] CEDAW further requires states parties to recognise the specific challenges faced by rural women and the essential they play in ensuring the survival of their families. In this regard, states have an obligation to ensure rural women have, without any form of discrimination, equal access to adequate healthcare facilities including relevant information and counselling.[xl] CEDAW also requires States to eliminate discrimination against women in the field of employment and ensure women and men equally enjoy the right to protection of health and safe working conditions.[xli] Although CEDAW does not make specific mention of older women in relation to healthcare, at a basic level it applies to all women including older women. In this regard, Tanzania and other states parties have an obligation to ensure all role women enjoy their rights as guaranteed by CEDAW. The treaty body for CEDAW namely the Committee on the Elimination of All Forms of Discrimination against Women has adopted general comments and recommendations which clarify certain state obligations relating to older women and healthcare.

In 1999 the Committee on CEDAW adopted General Recommendation No. 24: Article 12 of the Convention (women and health).[xlii] Through the Recommendation, the Committee expresses concern about the conditions of healthcare services for older women, not only because women often live longer than men and are more likely than men to suffer from disabling and degenerative chronic diseases, such as osteoporosis and dementia, but because they often have the responsibility for their ageing spouses. Therefore, states parties are called upon to take appropriate measures to ensure access to healthcare by older women to health services that address the handicaps and disabilities associated with ageing. [xliii] Besides, in 2010, the Committee on the Elimination of Discrimination against Women adopted General Recommendation No. 27 on the gendered nature of ageing and the disproportionate impact of discrimination against older women. Three other CEDAW Committee General Recommendations include paragraphs on particular needs and vulnerabilities of older women. These provide valuable insight into the Committee's interpretation from the lens of older women. According to the Recommendation, lack or limited access to healthcare services for diseases and conditions that mostly affect women coupled with other factors such as discrimination, and widowhood prevent older women from fully enjoying their human rights.[xliv] The Recommendation further notes that older women living in rural areas or slums

often suffer severe challenges including access to healthcare services.[xlv] Moreover, older women's right to consent to healthcare services is not always respected. The Recommendation calls upon states to adopt comprehensive healthcare policies which protect the health needs of older women.[xlvi]

In 2016 the Committee adopted General recommendation No. 34 on the rights of rural women. The Recommendation calls upon states parties to CEDAW to, *inter alia*: safeguard the right of rural women and girls to adequate healthcare, and ensure high-quality healthcare services and facilities are physically accessible to and affordable for rural women, including older women. Services should be provided free of charge, when necessary, culturally acceptable to them and staffed with trained medical personnel and should include mental health services; counselling on nutrition, mammography and other gynecological examinations services; the prevention and treatment of non-communicable diseases, such as cancer; access to essential medicines, including pain relief; and palliative care.[xlvii]

Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD) contains a range of provisions on health, for all persons with disabilities and older persons in particular. In its Preamble, the Convention recognises the importance of ensuring access by persons with disabilities to, *inter alia*, "physical, social, economic and cultural environment, to health and education and information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms."[xlviii] The CRPD requires the protection of states parties to respect the right of persons with disabilities right to privacy in relation to their personal, health and rehabilitation information. In this regard all, persons with disabilities, including older persons with disabilities, should enjoy the right on an equal basis with other persons.[xlix]

In its specific provision on health, the CRPD affirms that persons with disabilities should, without any form of discrimination based on disability, enjoy the right of persons with disabilities to the highest attainable standard of health. To realise the right, states parties are obligated to take appropriate measures towards ensuring access to gender-sensitive health services—including health-related rehabilitation—by persons with disabilities.[l] The specific steps to be taken in implementing the right include: the provision of quality and standard free or affordable healthcare programmes and health services which are specifically needed by

persons with disabilities; ensuring health services are provided "as close as possible to people's communities, including in rural areas"; ensuring healthcare professionals provide care of the same quality to persons with disabilities as other people; prohibiting discrimination on the basis of disability in the provision of health and life insurance; and prohibiting discriminatory denial of healthcare services on the basis of disability.[li]

On habilitation and rehabilitation, states parties are required to support persons with disabilities "to attain and maintain maximum independence, full physical, mental, social and vocational ability and full inclusion and participation in all aspects of life." To attain this, States are required to organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health."[lii] States are also required to "promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation."[liii]

The Committee on the Rights of Persons with Disabilities has adopted one relevant general comment namely, General Comment No. 6 on equality and non-discrimination by the Committee on the Rights of Persons with Disabilities was adopted in 2018 and aims to elaborate on states parties' obligation regarding non-discrimination and equality as provided in article 5 of the CRPD.[liv] In implementing article 5 at the national level, the General Comment calls on states parties to "adopt specific measures to achieve inclusive equality, in particular for persons with disabilities who experience intersectional discrimination, such as women, girls, children, older persons, and indigenous persons with disabilities."[lv] On this basis, it is important for states parties to the CRPD to pay particular attention to the healthcare needs of older persons with disabilities.

CONCLUSION

Although United Nations human right treaties do not expressly protect older persons' right to healthcare, general comments developed to elaborate the rights in the treaties clearly show the need to pay particular attention to the healthcare needs of older persons. These general comments are important in providing guidance on developing principles and standards to be incorporated in national health policies, plans, legislation and other frameworks on older persons' rights and welfare. In this regard, the need to realise older persons' right to healthcare

roots itself in the broader need to protect older persons' rights. Besides, the growing body of UN soft law instruments on older persons' rights is a clear indication of the need for adoption of a specific UN treaty for the protection of older persons' rights.

ENDNOTES

[i] MÉGRET, Frédéric (2011), *The Human Rights of the Elderly: An Growing Challenge*, Human Rights Law Review, Vol. 11 Issue 1, 12011.https://www.researchgate.net/publication/274557608_The_Human_Rights_of_Older_Persons_A_Growing_Challenge - accessed on 24 February 2020.
[ii] The opening recital to the UN Charter affirms that World War I (WWI) and WWII brought "untold sorrow to mankind." See also the second recital of the Preamble to the Universal Declaration.
[iii] The elderly in situations of armed conflict, Address by Françoise Krill, ICRC Deputy Director of operations, Helsinki, September 1999. https://www.icrc.org/en/doc/resources/documents/misc/57jqx9.htm - accessed on 15 March 2020.
[iv] https://www.rand.org/news/press/2014/01/21/index1.html - accessed on 8 March 2020.
[v] Article 1 (1), UN Charter.
[vi] Preamble of the UN Charter, second recital, article 1 (3), article 55 (c).
[vii] See Articles 1(3) and 55(c) of the UN Charter.
[viii] DUTTON, Yvonne (2013), Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms, University of Pennsylvania Journal of International Law, Vol. 34:1, p. 1. https://www.law.upenn.edu/live/files/1732-dutton34upajintll12012pdf - accessed on 10 June 2017. See also CONNORS, Jane & SCHMIDT, Markus (2014), "United Nations", in: MOECKLI, Daniel et al. (eds.) International Human Rights Law, Oxford University Press. p. 359.
[ix] Second recital of the Preamble to the UN Charter.
[x] Article 13 (1) (b) of the UN Charter.
[xi] Article 55 (b) of the UN Charter.
[xii] Article 57 (1).
[xiii] Article 2 (a), WHO Constitution.
[xiv] Preamble (second recital) to the Constitution of the World Health Organisation, Forty-fifth edition, Supplement, October 2006.
[xv] BRAVEMAN, Paula (2010), 'Social conditions, health equity, and human rights, Health and Human Rights Journal, 12/2. https://www.hhrjournal.org/2013/08/social-conditions-health-equity-and-human-rights/ - accessed on 13 September 2021.
[xvi] WHO Constitution, *ibid*, first recital.
[xvii] Article 25 (1).
[xviii] Article 25 (1).
[xix] Adopted by the UN General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969.
[xx] Article 5(e)(iv) of the Convention.
[xxi] Entered into force on 23 March 1976 after its adoption by the UN General Assembly in its Resolution 2200A (XXI) of 16 December 1966.
[xxii] Entered into force on 3 January 1976 after its adoption by the United Nations General Assembly in its Resolution 2200A (XXI) of 16 December 1966.
[xxiii] According to DUTTON, Yvonne, *op. cit.* (note 7) p. 1, the ICCPR and the ICESCR laid the foundation for the international human rights regime.
[xxiv] UN Fact Sheet No.2 (Rev.1), The International Bill of Human Rights. http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf - accessed on 7 June 2017. However, the first international human rights treaty under the UN is the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in 1965.
[xxv] Article 12, ICESCR.

[xxvi] Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4).
[xxvii] Para 1.
[xxviii] Para 3.
[xxix] Para 8.
[xxx] Para 9.
[xxxi] Para 11.
[xxxii] General Comment No. 6 of the Committee on Economic, Social and Cultural Rights, para 10.
[xxxiii] Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1995 (Contained in Document E/1996/22).
[xxxiv] Para 34 of the General Comment.
[xxxv] Para 35 of the General Comment.
[xxxvi] Report of the United Nations High Commissioner for Human Rights (E/2012/51), April 2012, p. 6.
[xxxvii] Article 11(1)(e), CEDAW.
[xxxviii] 8th Recital of the Preamble.
[xxxix] Article 12(1), CEDAW.
[xl] Article 14(1) & (2)(b), CEDAW.
[xli] Article 11(1)(f), CEDAW.
[xlii] A/54/38/Rev.1, chap. I.
[xliii] Para 24
[xliv] Para 14
[xlv] Para 12
[xlvi] Para 45
[xlvii] Para 39.
[xlviii] Para (v) of the Preamble.
[xlix] Article 22(2), CRPD.
[l] Article 25, CRPD.
[li] Article 25(a) – (f), CRPD.
[lii] Article 26(1), CRPD.
[liii] Article 26(3), CRPD.
[liv] Adopted by the Committee at its nineteenth session (14 February–9 March 2018).
[lv] Para 73(o) of the General Comment.