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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development****Older persons deprived of liberty****Report of the Independent Expert on the enjoyment of all human rights  
by older persons, Claudia Mahler\****Summary*

In the present report, submitted pursuant to Human Rights Council resolution 42/12, the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, provides an overview of her activities during the reporting period and a thematic analysis of the situation of older persons deprived of their liberty in different contexts. The report examines what deprivation of liberty means from the perspective of older persons and how it affects the full enjoyment of their human rights; analyses some of the underlying causes of deprivation of liberty of older persons; highlights the human rights challenges and risks in three specific contexts (criminal justice; immigration-related detention; and care settings); and suggests ways to protect the human rights of older persons deprived of their liberty. The report concludes with a set of recommendations to States and other stakeholders.

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\* Agreement was reached to publish the present report after the standard publication date owing to circumstances beyond the submitter's control.



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## I. Activities of the Independent Expert

1. The present report is submitted by the Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler, pursuant to Human Rights Council resolution 42/12. The report contains an overview of the activities of the Independent Expert during the reporting period and includes a thematic analysis of the situation of older persons deprived of their liberty.

### A. Country visits

2. The Independent Expert thanks the Governments of Bangladesh, Finland and Nigeria for their invitations to conduct official visits. She is grateful for the cooperation extended to her during her official country visit to Finland, undertaken in 2021, and looks forward to her visits to Bangladesh and Nigeria, scheduled for the second half of 2022. She also wishes to thank the Governments of the Dominican Republic and the Republic of Moldova for inviting her to conduct visits and looks forward to their future cooperation. She strongly encourages Member States to respond positively to her outstanding requests.

### B. Other activities

3. During the reporting period, the Independent Expert addressed communications to Governments, individually and jointly with other mandates, about the human rights of older persons. The Independent Expert also issued press releases individually and with other mandate holders, including statements on ageism and age discrimination, marking the International Day of Older Persons in 2021, and on violence, abuse and neglect against older women, marking World Elder Abuse Awareness Day in 2022.

4. In line with her mandate, the Independent Expert participated in the twelfth session of the Open-ended Working Group on Ageing and provided remarks for two expert panels on: (a) the contributions of older persons to sustainable development; and (b) normative inputs on the focus area, "Access to justice". She also attended two side events on the margins of the twelfth session of the Open-ended Working Group, one on older women and one on economic insecurity among older persons.

5. Between August 2021 and July 2022, the Independent Expert participated in several international, regional and national meetings, events and conferences, providing remarks on themes related to the human rights of older persons. She was also invited to participate in side events on the human rights of older women and on digitalization and digital equity organized on the International Day of Older Persons in 2021, on the margins of the sixty-sixth session of the Commission on the Status of Women in 2022 and during the high-level political forum in 2022.

6. The Independent Expert also jointly filed *amicus curiae* briefs in court proceedings to elaborate on the principles and obligations of States regarding older women and climate change and on the rights of older persons and the triage protocols related to the coronavirus disease (COVID-19) pandemic.

7. In the preparation of the present report, the Independent Expert held two online expert consultations, on 2 and 3 March 2022, to collect information and good practices about older persons deprived of liberty. In response to her call for submissions, the Independent Expert received 48 written contributions for the report.<sup>1</sup> She thanks all of the participants in the consultations and those who sent submissions for their valuable inputs.

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<sup>1</sup> See <https://www.ohchr.org/en/calls-for-input/2022/report-older-persons-deprived-their-liberty>.

## II. Older persons deprived of liberty

### A. Deprivation of liberty in older age

#### 1. Conceptualizing the deprivation of liberty of older persons

8. The right to personal liberty is a core human right for all people, including for older persons. International human rights law bestows the right to life, liberty and security of person, without distinction or discrimination,<sup>2</sup> guaranteeing “freedom from confinement of the body”.<sup>3</sup> States parties must protect the right to liberty of person against deprivation, including by third parties.<sup>4</sup>

9. The right to personal liberty is not an absolute right and States may deprive persons of their liberty in circumstances established clearly under international human rights law and provided that such deprivation is necessary and proportionate to the pursuit of a legitimate objective. For instance, imprisonment of a person convicted within the criminal justice context, where all of the substantive and procedural guarantees of a fair hearing and related rights have been observed, may be justified. Deprivation of liberty may also be justified if it is demonstrated to be a necessary and proportionate measure to protect public safety and health. Although the right to personal liberty can be lawfully restricted, such limitation or denial should not be based on discriminatory grounds, including age or disability, or implemented through discriminatory procedures. Deprivation of liberty is therefore considered arbitrary when it is unjustified, disproportionate or discriminatory or where due process has not been afforded to individuals deprived of their liberty.<sup>5</sup>

10. Older persons may be considered to have been deprived of their liberty if they are confined to a specific space or placed in a public or private institution, for different reasons, without permission to leave at will, and when the arrangements taken to restrict their freedom were made without their free and informed consent.<sup>6</sup> Such instances usually involve more restrictions than mere interference with freedom of movement.<sup>7</sup> Decisions of this nature are usually made by order of, or under the de facto control of, a judicial, administrative or other authority.

11. In the present report, the Independent Expert recognizes the broad definition of deprivation of liberty and places of detention as understood in general comment No. 35 of the Human Rights Committee and in article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>8</sup> Despite the emphasis on deprivation of liberty within the criminal justice system in the Optional Protocol, the Subcommittee on the Prevention of Torture takes the view that the phrase “places of detention” in article 4 has a broad meaning, extending beyond mainstream places of detention.<sup>9</sup> It establishes that “places of detention” can encompass all places where individuals, including older persons, may be deprived of their liberty, such as prisons, pre-trial detention facilities, police stations, caregiving establishments, psychiatric institutions and hospitals, mental health centres and immigration detention centres.

12. In the present report, the Independent Expert examines three specific situations in which older persons may be deprived of their liberty for which the State holds direct or indirect responsibility based on its obligations under international human rights law: (a) when they have committed crimes or legal offenses; (b) when they have been detained because of their migration status; and (c) when they are under the control and supervision of certain institutions or caregiving arrangements, including those provided through legal guardianship

<sup>2</sup> Universal Declaration of Human Rights, art. 3; and the International Covenant on Civil and Political Rights, art. 9.

<sup>3</sup> Human Rights Committee, general comment No. 35 (2014), para. 3.

<sup>4</sup> *Ibid.*, para. 7.

<sup>5</sup> *Ibid.*, para. 17; and [A/HRC/40/54](#), para. 39.

<sup>6</sup> Human Rights Committee, general comment No. 35 (2014), para. 6.

<sup>7</sup> *Ibid.*, para. 5.

<sup>8</sup> General Assembly resolution 57/199, annex.

<sup>9</sup> [CAT/C/50/2](#), para. 67.

by family members.<sup>10</sup> The responsibilities and obligations of States vary depending on the context in which older persons are deprived of liberty.

13. While there is currently no specific international legal binding instrument addressing the human rights of older persons, they are entitled to the same rights as other persons under international human rights law.<sup>11</sup> The United Nations Principles for Older Persons also set out general principles, which apply to the rights and needs of all older persons, including the standards that should guide policies and programmes developed for older persons deprived of liberty.<sup>12</sup>

14. Regional human rights standards provide a solid legal framework to protect older persons deprived of liberty. The Inter-American Convention on Protecting the Human Rights of Older Persons recognizes that States parties should develop specific approaches for older persons who are vulnerable and those who are victims of multiple discrimination, including when deprived of their liberty.<sup>13</sup> Article 13 of the Inter-American Convention guarantees older persons the right to personal liberty and safety, obliging States parties to ensure that measures to deprive or restrict liberty are in accordance with the law and that older persons have access to special and comprehensive care programmes to respond effectively to their specific needs. Article 6 of the African Charter on Human and Peoples' Rights protects the right of all people, including older persons, to liberty and not to be arbitrarily deprived of their liberty except for reasons and conditions established by law. In Europe, deprivation of liberty of older persons must be in compliance with article 5 of the European Convention on Human Rights.<sup>14</sup> European jurisprudence has also imposed obligations on States to take measures providing for the effective protection of persons with vulnerabilities, such as older persons.<sup>15</sup>

**(a) In the context of criminal justice**

15. When the deprivation of liberty is decided by court as being lawful and non-arbitrary for the commission of crimes or legal offenses, it is essential that the human rights of older persons be protected and respected, as established by international standards. States must treat older persons with dignity during the entire duration of their detention and must take into consideration their specific needs with respect to their age, health and disability status. Those considerations are especially critical at every stage of the criminal justice process (especially pretrial, trial, sentencing, appeal and post-sentencing detention).

16. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted in 2015, also provide standards for older persons detained in the criminal justice context as they apply to all prisoners, without discrimination. While older persons are not explicitly mentioned, rule 2 of the five "basic principles" that underpin the Nelson Mandela Rules states that custodial administrators "shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings".<sup>16</sup> Equality of treatment and access to services obliges prison authorities to take affirmative action to ensure equal access to all prison facilities and programmes for the most vulnerable groups in prison settings, including older prisoners.<sup>17</sup> Furthermore, the Nelson Mandela Rules also reflect the realities experienced by older persons with disabilities in

<sup>10</sup> Organization of American States, "Principles and best practices on the protection of persons deprived of liberty in the Americas", March 2008; Office of the United Nations High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR, 2012; [A/HRC/30/43/Add.2](#), paras. 48–50.

<sup>11</sup> International Covenant on Civil and Political Rights, arts. 2 (1), 10 and 26; International Covenant on Economic, Social and Cultural Rights, arts. 2 (2) and 6–15; Convention on the Elimination of Discrimination against Women; and Convention on the Rights of Persons with Disabilities.

<sup>12</sup> General Assembly resolution 46/91, annex, principles 12, 17 and 18.

<sup>13</sup> Inter-American Convention on Protecting the Human Rights of Older Persons, art. 5.

<sup>14</sup> Submission from Dr. Lucy Series and Professor Judy Laing.

<sup>15</sup> European Court of Human Rights, *Storck v. Germany*, Application No. 61603/00 (2018), para. 143.

<sup>16</sup> General Assembly resolution 70/175, annex, rule 2.2.

<sup>17</sup> United Nations Office on Drugs and Crime (UNODC), *Handbook on Prisoners with Special Needs*, 2009, p. 131.

detention.<sup>18</sup> The United Nations Rules for the Treatment of Women Prisoner and Non-custodial Measures for Women Offenders (the Bangkok Rules), adopted in 2010, comprise 70 rules ensuring fair and human rights-based treatment of women and addressing their particular needs, including those of older women.<sup>19</sup>

17. Special attention should be paid to applying the principles of necessity and proportionality when the deprivation of liberty is decided, considering the severity of the offence, and whether the dignity of older persons is being protected based on their age and intersectional factors.

**(b) In the context of migration-related detention**

18. The deprivation of the liberty of older persons in the context of immigration is subject to refugee and human rights norms.<sup>20</sup> Immigration detention should be a measure of last resort. International human rights bodies have regularly advised that older migrants and asylum-seekers should be exempted from immigration detention.<sup>21</sup>

19. Immigration-related deprivation of liberty may only be applied for a legitimate purpose. To respect their obligations towards the right to seek asylum, States are obliged to provide open and humane reception arrangements for asylum-seekers and refugees, including safe, dignified and human rights-compatible treatment.<sup>22</sup> Failure by States to provide special care and assistance to older persons detained in this context may render their detention unlawful.<sup>23</sup>

**(c) In the context of care**

20. Deprivation of liberty based on age or disability, or both, is prevalent and common around the world. Such forms of deprivation usually involve the limitation or denial of the right to legal capacity and consent of older persons, based, in particular, on perceived or actual needs of care, treatment or hospitalization. Such situations are usually enforced based on existing laws, policies and practices allowing such deprivation of liberty and are also fuelled by ageism and ageist attitudes. Like disability,<sup>24</sup> youth,<sup>25</sup> gender<sup>26</sup> or older age should not be used to justify depriving persons of their liberty and when the law authorizes such deprivation on the grounds of older age, alone or in combination of other grounds, it violates international human rights law.

21. Whether older persons are deprived of liberty in the context of care, States have the duty to take appropriate measures to protect their right to liberty, including by non-State actors and in private settings (including private care, health facilities and private homes).<sup>27</sup>

22. Although older age should not be considered as grounds for the limitation of rights, the autonomy and independence enjoyed by older persons earlier in life are often denied in

<sup>18</sup> See Advisory Opinion of Inter-American Court of Human Rights on the Rights of Older Persons Deprived of Their Liberty, submission of the Independent Expert on the enjoyment of all human rights by older persons to the Inter-American Commission, 2021, paras. 25–26 (see [https://www.ohchr.org/sites/default/files/Documents/Issues/OlderPersons/Advisory\\_Opinion\\_submission.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/OlderPersons/Advisory_Opinion_submission.pdf)).

<sup>19</sup> General Assembly resolution 66/229, annex.

<sup>20</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 6.

<sup>21</sup> [A/HRC/39/45](#), annex, para. 41; see also Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 5 (2021), para. 52.

<sup>22</sup> UNHCR, *Guidelines on the Applicable Criteria*, 2012, pp. 6 and 39.

<sup>23</sup> *Ibid.*, p. 39.

<sup>24</sup> [A/HRC/40/54](#), para. 42; and Committee on the Rights of Persons with Disabilities, “Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: the right to liberty and security of persons with disabilities”, 2015, para. 6.

<sup>25</sup> [A/74/136](#), paras. 19–20.

<sup>26</sup> See [A/HRC/41/33](#).

<sup>27</sup> Human Rights Committee, general comment No. 35 (2014), paras. 7–8.

older age.<sup>28</sup> As such, the right to personal liberty for older persons must also be understood in the context of their right to autonomy and independence. The Convention on the Rights of Persons with Disabilities clearly defines the understanding of a person's rights to autonomy and independence, and while ageing should not be associated with disability, the Convention offers a solid legal framework applicable to older persons with disabilities deprived of liberty.

23. As recognized in article 3 (a) of the Convention, persons with disabilities have the right to individual autonomy and independence, including the freedom to make their own choices. Article 14 of the Convention states that persons with disabilities shall enjoy the right to personal liberty on an equal basis with others and cannot therefore be deprived of liberty unlawfully or arbitrarily. Respect for the right of older persons to free and informed consent to choice of treatment, services and care is also crucial to prevent deprivation of liberty. States have a duty to establish safeguards to ensure informed consent of older persons, especially in the context of guardianship, and to build their capacity to fully understand and make use of care and health-related information.<sup>29</sup>

## 2. Defining “older age” in situations of deprivation of liberty

24. Older age and older persons are often defined in chronological terms, which fails to consider local life-course realities and perceptions, including psychological, social and intersectional factors. Beyond biological changes, the notion of ageing is a social construct associated with life transitions and conditions.<sup>30</sup>

25. The notion of older age as a social construct and the significant heterogeneity of older persons as an age group should both be considered when any decision to deprive older persons of their liberty is taken and in determining whether they have access to services and other opportunities.

26. The notion of the relativity of older age is crucial when addressing the situation of older persons deprived of liberty, especially in the context of the criminal justice system. For instance, a detained person may display biological signs of ageing earlier than those who continue living in their communities. Poor socioeconomic and health backgrounds, along with the harmful effect of imprisonment on health and well-being, tend to accelerate the ageing process in prison.<sup>31</sup> Due to this phenomenon of “accelerated ageing”, many criminal justice systems consider people to be older by the age of 50 or 55. In some jurisdictions, people deprived of liberty with ethnic or indigenous backgrounds are considered to be “older” at ages as low as 40.<sup>32</sup> However, treating all detainees aged 50 or above in the same way, without considering the heterogeneity of that population, amounts to discrimination.<sup>33</sup>

## B. Underlying causes for the deprivation of liberty of older persons

27. While examining the issues of older persons deprived of liberty, some underlying causes emerge from situations of deprivation. While the reasons vary from one context to another, it appears that in most situations where older persons are deprived of liberty, ageism and age discrimination play underlying roles. Ageist attitudes remain persistent worldwide and lead to discriminatory laws, policies and practices that hinder the right of older persons to personal liberty.

<sup>28</sup> Bridget Sleep, “The freedom to decide: what older persons say about their rights to autonomy and independence”, *HelpAge International*, January 2018.

<sup>29</sup> A/HRC/18/37, para. 65; and Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), para. 37.

<sup>30</sup> A/HRC/45/14, para. 36.

<sup>31</sup> Meredith Greene et al., “Older adults in jail: high rates and early onset of geriatric conditions”, *Health & Justice*, vol. 6, No. 1 (2018); Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, “The fate of critically ill detainees in Europe”, 2015, para. 8; Tina Maschi et al., “Forget me not: dementia in prison”, *The Gerontologist*, vol. 53, No. 4 (2012), p. 443; and International Committee of the Red Cross (ICRC), *Ageing and Detention*, Geneva, 2020, p. 4.

<sup>32</sup> ICRC, *Ageing and Detention*, p. 5; and submissions from the Penal Reform Initiative, Vicki Prais and Rebecca Lawrence.

<sup>33</sup> *Ibid.*



28. As a heterogeneous group, older persons are not all equal when facing deprivation of liberty. Structural inequities, related to socioeconomic factors influence their prospects of being deprived of liberty in multiple ways, and there is a correlation between older persons and the likelihood of committing an offence. In this regard, few States have procedures that identify and manage age-related determinants,<sup>34</sup> and ageing is oftentimes linked with factors such as poverty and lower levels of formal education.<sup>35</sup>

29. Inadequate and ineffective State measures to deal with demographic changes and to address the needs of older persons may also provide an explanation as to why older persons continue to be deprived of liberty. States have the responsibility to adapt existing societal structures to reflect the needs of their changing population structures. In the criminal justice context in many countries, correctional settings are slowly adapting to the number of older prisoners, which has considerably increased in the recent years. Sentencing practices have become tougher, the use of long-term imprisonment has increased and mechanisms for early release have been restricted.<sup>36</sup> The global trend towards the abolition of the death penalty has resulted, in several countries, in an increase in the number of persons being sentenced to life imprisonment or to very lengthy terms of imprisonment.<sup>37</sup>

30. The lack of public policies catering to older persons and the abandonment of older persons by their families contribute to deprivation of liberty within the context of care.<sup>38</sup> The institutionalization of older persons, which may be the result of an autonomous decision of an older person, can also take the form of coerced institutionalization that may represent de facto deprivation of liberty.<sup>39</sup> The lack of age-friendly housing solutions and independent living support within communities and with families exacerbate the possibility that older persons will be institutionalized.<sup>40</sup>

31. Deprivation of liberty of older persons in care settings is often justified as being in their “best interests”, to ensure their security and protect them from self-harm or from causing harm to others. Such reasoning is often advanced as a persuasive basis for limiting the rights of older persons with disabilities on the basis of their impairment or in combination with other factors.<sup>41</sup> In some countries, the restriction or denial of the personal liberty and legal capacity of older persons has been codified on the basis of the “social duty of care”, mainly under national mental health laws.<sup>42</sup> Such safeguards rely on ageist and ableist stereotypes that may further generate a lack of self-esteem and disempowerment and undermine the perception and ability of older persons to exercise their autonomy and independence.

32. Intersectional factors, such as sex, gender, gender identity and sexual orientation, disability, race, ethnicity and class should also be taken into account when analysing the root causes of the deprivation of liberty of older persons. The intersection between such factors and older age may exacerbate older persons’ risk of being deprived of their liberty because of legal and policy frameworks in force. These factors also shape the experience of older persons in detention, placing them at heightened risk of discrimination, isolation, ill-treatment and violence.<sup>43</sup>

33. Gender discrimination, in intersection with ageism, has a particularly unique and aggravating effect on the right to personal liberty of older women. Gender stereotypes and attitudes associated with the persistence of patriarchal norms, which do not disappear with older age, may lead to and justify the unlawful deprivation of liberty of older women.<sup>44</sup> In its 2019 thematic report, the Working Group on the issue of discrimination against women in law and in practice concluded that “Deprivation of liberty is deeply gendered. While there

<sup>34</sup> ICRC, *Ageing and Detention*, p. 11.

<sup>35</sup> Submission from the Association for the Prevention of Torture.

<sup>36</sup> Contribution of UNODC to the work of the Open-ended Working Group on Ageing.

<sup>37</sup> Submission from Dr. Catherine Appleton.

<sup>38</sup> Submission from the Association for the Prevention of Torture.

<sup>39</sup> A/HRC/30/43, para. 74; and E/2012/51 and E/2012/51/Corr.1, para. 25.

<sup>40</sup> Submission from Dignity; see also A/77/192.

<sup>41</sup> A/HRC/40/54, para. 41.

<sup>42</sup> Submissions from ISL and from Dr. Lucy Series and Professor Judy Laing.

<sup>43</sup> Submission from Association for the Prevention of Torture.

<sup>44</sup> A/HRC/41/33, para. 76.



are many forms, they are all tied to causes rooted in discrimination against women”.<sup>45</sup> Such forms are based on harmful stereotypes created to belittle and silence them, punish them for perceived deviance or to over protect them.<sup>46</sup> Ageing women may also be perceived as “dangerous” and “in need of control” in some societies, resulting in forced confinement and banishment from their communities.<sup>47</sup> The mere existence of “witch camps” and the confinement of older widows in “safe spaces” arise from such harmful gendered stereotypes.<sup>48</sup>

34. Disability represents an additional risk factor for justifying the deprivation of liberty of certain groups of older persons, and stigma and misconceptions are often the cause.<sup>49</sup> As analysed in a 2019 report of the Special Rapporteur on the rights of persons with disabilities, a disability-specific deprivation of liberty occurs when laws or policies provide for or permit such deprivation based on an apparent or diagnosed disability or where specific places of detention are designed solely or primarily for persons with disabilities.<sup>50</sup> This may result in involuntary commitment to mental health institutions, institutionalization for “specialized care”, as well as detention as a result of diversion from the criminal justice system.<sup>51</sup> The deprivation of liberty of older persons with disabilities represents a failure by the State to protect their rights as guaranteed by the Convention on the Rights of Persons with Disabilities.

### C. Human rights risks and challenges in situations of deprivation of liberty

35. As people age, they may face systematic stereotyping and discrimination. Ageism combined with the deprivation of liberty have aggravated effects on the enjoyment of human rights by older persons and reinforce situations of risk for older persons. The right to personal liberty is inherently linked to other fundamental human rights, such as the rights to freedom of movement, personal integrity, privacy, health, work and education and to freedom of assembly, association, expression and religion or belief. Furthermore, older persons deprived of liberty find themselves at an increasing risk of experiencing violence and conditions of detention amounting to ill-treatment and even torture.<sup>52</sup>

36. The Independent Expert analysed the data gap in collecting information about older persons in a previous report and research shows that data on older persons deprived of liberty remains scarce and irregularly collected.<sup>53</sup> This lack of significant data and information affects the extent to which efficient and meaningful policies and laws can be designed and implemented in response to the needs of older persons deprived of their liberty.<sup>54</sup>

37. Since the outbreak of the COVID-19 pandemic, the challenges faced by older persons deprived of liberty and living in confined spaces have been exacerbated.<sup>55</sup> Age discrimination has persisted throughout the pandemic, shedding light on the barriers preventing older persons from fully enjoying their human rights. Older persons have been at high risk of violence and neglect during lockdowns and quarantine-imposed periods, especially older

<sup>45</sup> Ibid., para. 28.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., para. 28; see also Danwood M. Chirwa and Chipo I. Rushwaya, “Guarding the guardians: a critical appraisal of the Protocol to the African Charter on the Rights of Older Persons in Africa”, *Human Rights Law Review*, vol. 19, No. 1 (2019), pp. 53–82; and Silvia Federici, “Women, witch-hunting and enclosures in Africa today”, *American Journal of Political Science*, 2013, p. 10.

<sup>49</sup> A/HRC/40/54, para. 26.

<sup>50</sup> A/HRC/40/54, para. 14.

<sup>51</sup> Ibid.

<sup>52</sup> Submission from Association for the Prevention of Torture.

<sup>53</sup> See A/HRC/45/14; see also Penal Reform International and Association for the Prevention of Torture, *Older persons in detention. A framework for preventive monitoring*, June 2021, p. 10; and submission from Penal Reform International.

<sup>54</sup> A/HRC/45/14, para. 19; and Detention Forum, *Rethinking “Vulnerability” in Detention. A Crisis of Harm*, Report by the Detention Forum’s Vulnerable People Working Group, July 2015, p. 30.

<sup>55</sup> See <https://www.ohchr.org/en/press-releases/2020/03/unacceptable-un-expert-urges-better-protection-older-persons-facing-highest?LangID=E&NewsID=2574.8>.

persons in detention settings and care facilities.<sup>56</sup> A higher than average death toll from COVID-19 has been reported among older persons in such confined spaces than in the rest of society.<sup>57</sup>

38. In the following sections, the Independent Expert analyses the human rights of older persons in the context of the three specific situations of deprivation of liberty, in the criminal justice system, in immigration-related detention and in care settings.

### 1. In the context of criminal justice

39. Older persons detained within criminal justice systems are still an invisible group among the incarcerated population. From the State submissions received, it is evident that some countries collect and publish data about older persons in detention facilities.<sup>58</sup> A recent study shows that 149 out of 216 countries and territories impose life imprisonment as the most severe penalty and that there were roughly 479,000 persons serving formal life sentences around the world as of 2014, compared to 261,000 in 2000, a rise of nearly 84 per cent.<sup>59</sup>

40. However, this information is not collected equally by region and therefore does not permit the identification of global trends. Many countries do not disaggregate data on people in prison by age or by the differences within the age group that is considered “older” in prison (usually ranging from ages 50–60).<sup>60</sup> Even though the proportion of older prisoners varies between regions, available data show a steady increase in the number of older persons in prison in several countries.<sup>61</sup>

41. The growing ageing prison population faces several challenges that remain largely unaddressed by international human rights bodies. Due to the prevalence of ageist stereotypes and age discrimination within the criminal justice system, older persons face heightened risk of discrimination, abuse and violence at all stages of their incarceration, from their arrest, interrogation, pre-admission and classification and in their subsequent living conditions, the provision of adequate health care and rehabilitation and reintegration upon release.<sup>62</sup>

42. Older persons face more difficulties in navigating the justice system, often due to their limited knowledge about their rights and available effective remedies and their lack of access to the legal system, both of which may increase their possibility of being deprived of liberty.<sup>63</sup>

43. The intersectionality between age and other factors requires particular attention and specific considerations to meet the needs of older prisoners. Older persons, including those with disabilities, older women, older lesbian, gay, bisexual, transgender and intersex persons, older persons belonging to ethnic minorities and older indigenous people may be denied due process and incarcerated based on existing discriminatory laws and harmful stereotypes.<sup>64</sup> When incarcerated, older women and older lesbian, gay, bisexual, transgender and intersex persons may require special protection against violence as they have a greater statistical likelihood of experiencing sexual and gender-based violence. As a result of the failure of some States to provide necessary community-based resources for mental health care, older persons with psychosocial or intellectual impairments may be placed in prisons with inadequate care.<sup>65</sup>

<sup>56</sup> A/75/205, para. 69.

<sup>57</sup> Ibid., para. 41.

<sup>58</sup> Submissions received from Burundi, Germany, Italy, Lithuania, Mexico and Uruguay.

<sup>59</sup> Submission from Dr. Catherine Appleton.

<sup>60</sup> Submission from Dignity.

<sup>61</sup> Vicki Prais, “Elderly life-sentenced prisoners”, Penal Reform International, 2019; and submission from Penal Reform International.

<sup>62</sup> Submission from Association for the Prevention of Torture.

<sup>63</sup> Ibid.

<sup>64</sup> See A/HRC/40/54 and A/HRC/41/33; see also Penal Reform International, “Ethnic minorities and indigenous peoples”, available at <https://www.penalreform.org/global-prison-trends-2022/ethnic-minorities/>; and submission from Professor Natasha Ginnivan et al.

<sup>65</sup> Submission from the Southern Poverty Law Center.

44. Detention facilities are often not designed to accommodate older persons or to respond to their needs as they are generally planned for younger detainees, who constitute the majority of the global prison population.<sup>66</sup> Complications for older persons usually arise from the prison layout and detention conditions, such as climbing stairs, difficulties in accessing sanitary facilities, overcrowding, excessive heat or cold, noisy spaces and architectural features that may hinder those with physical and intellectual disabilities from satisfying their basic needs.<sup>67</sup>

45. Imprisoning older persons may also involve higher costs due to complex medical conditions and disabilities, which are often the result of substance abuse and long-term physical, psychosocial, intellectual or sensory impairments.<sup>68</sup> Access to age-appropriate health services in prisons, such as geriatric, palliative and other specialized health care, remains scarce and limited worldwide. Older detainees commonly suffer from mental health conditions, including anxiety related to their deprivation of liberty.<sup>69</sup> Older women and transgender persons require specific gynaecological, hygiene and other gender-sensitive health-care needs, and failure to provide for their needs may amount to ill-treatment.

46. The infection rate among older persons in prison due to infection by COVID-19 has been reported at twice that of the general population in some countries.<sup>70</sup> Reports show that due to overcrowding in places of detention, it has been difficult to apply rules of physical distancing.<sup>71</sup>

47. In prisons, correctional staff without adequate training struggle to interact with older persons and identify common age-related health problems and needs, often resulting in discrimination and abuse, ill-treatment and violence, and stigmatization and discrimination by younger inmates may be magnified in situations where detainees exercise de facto control over prisons.<sup>72</sup>

48. Prolonged incarceration increases the risk that older persons may be deprived of social interaction and contact with the outside. During the COVID-19 pandemic, family visits have been prohibited or limited, and some prisoners have experienced loneliness in detention.<sup>73</sup> Furthermore, the stigma associated with criminal detention in some countries may lead relatives to sever their ties with older prisoners, especially older women, who are often exposed to stigma and exclusion from society.<sup>74</sup>

49. Detention facilities often lack age-appropriate services, recreational activities and rehabilitation programmes.<sup>75</sup> Due to their disabilities and/or health problems, some older persons may not be in a position to work or participate in all activities. Training and education programmes to teach professional skills or competencies may not be adapted to the needs of older persons. An individualized approach is needed to adequately assess and respond to the needs of older prisoners.

50. Older persons released from prison also face challenges. When released, their special needs regarding reintegration in terms of housing, care or access to employment are often unmet.<sup>76</sup> In some contexts, older persons receive little preparation for life outside prison, and face challenges in obtaining medical and mental health care for longstanding, undertreated

<sup>66</sup> Submission from the Association for the Prevention of Torture.

<sup>67</sup> UNODC, *Handbook on Prisoners with Special Needs*, p. 126–127; and submission from the national human rights institution of the Philippines.

<sup>68</sup> E/2012/51, para. 60; and Advisory Opinion of Inter-American Court of Human Rights on the Rights of Older Persons Deprived of Their Liberty, submission of the Independent Expert, para. 20.

<sup>69</sup> Submission from the Association for the Prevention of Torture.

<sup>70</sup> Submission from Penal Reform International.

<sup>71</sup> United Nations (2020), *Policy Brief: The Impact of COVID-19 on older persons*, p. 7; Human Rights Watch, *Human Rights Dimensions of COVID-19 Response*, 2020; and ICRC, “Somalia: COVID-19 in places of detention”, 2020.

<sup>72</sup> Submissions from the national human rights institution of the Philippines and the Association for the Prevention of Torture.

<sup>73</sup> Submission from the national human rights institution of the Philippines.

<sup>74</sup> UNODC, *Handbook on Prisoners with Special Needs*, p. 128.

<sup>75</sup> Submission from the Association for the Prevention of Torture.

<sup>76</sup> Submission from Crime Society Research.

chronic conditions.<sup>77</sup> In some countries, laws bar people with serious criminal convictions from public housing, leaving some older persons homeless.<sup>78</sup>

## 2. In the context of immigration-related detention

51. Older migrants and asylum-seekers are at risk of deprivation of liberty, especially of immigration detention.<sup>79</sup> Immigration and border-enforcement settings generally lack the capacity for individualized assessments of the needs of detainees and the intersectional approaches needed to assess necessity and proportionality when making decisions about the detainment of older persons.<sup>80</sup> As due process guarantees may not apply in such situations, older migrants and asylum-seekers who are arbitrarily detained for extended periods of time, often in overcrowded and unhygienic spaces, face precarious conditions that are unsuited to their specific needs.<sup>81</sup> Individuals detained in such facilities, who are usually fleeing persecution, generalized violence, conflict, economic insecurity and risks to their lives, may experience trauma in those settings.

52. In detention, older asylum-seekers and migrants, who may only have access to primary health care, may suffer from having their multiple and complex health issues and needs insufficiently addressed.<sup>82</sup> Older migrants and asylum-seekers are particularly vulnerable owing to the lack of accessible information and interpretation services in languages they understand, as well as lack of access to communication with relatives, lawyers, interpreters or consulates.

53. The lack of studies and data collection on immigration-related detention contributes to the perpetuation of inappropriate practices and inadequate policies and laws in relation to older migrants and asylum-seekers. As the result of the lack of visibility and reporting on their experiences in this context, older persons are at a heightened risk of age-based discrimination and violence.<sup>83</sup>

## 3. In the context of care

54. Older persons may also experience forms of deprivation of liberty in the context of care. When ageing, some people may need support and rely on the help of others, requiring varying degrees of specific care and support to live autonomous independent lives. Situations of deprivation of liberty include the coerced institutionalization of older persons in private and public institutions, such as residential care establishments, long-term care or nursing homes; in hospitals and psychiatric facilities; in restrictive community-based detention; or in forced home confinement, usually by relatives or caregivers.<sup>84</sup>

55. Deprivation of liberty through institutionalized care occurs in countries where older persons are placed in care or health-related facilities or institutions against their will and preference. In some countries, older persons are more likely to be de facto deprived of liberty in care facilities than in prisons.<sup>85</sup> In this context, older persons are often seen as lacking the legal and mental capacity to consent to these care arrangements, and decisions on such matters are made by others, often relatives. Older persons are unable to leave such institutions and are fully dependent on their caregivers for daily activities. However, neither older age nor a diagnosis of mental disorder is sufficient to determine their lack of capacity to make

<sup>77</sup> Submission from the Southern Poverty Law Center.

<sup>78</sup> Ibid.

<sup>79</sup> This includes any deprivation of liberty for the purposes of border governance and migration governance, in accordance with OHCHR, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, Geneva, 2017.

<sup>80</sup> Submission from Dignity.

<sup>81</sup> Information received during the expert consultations (2–3 March 2022).

<sup>82</sup> Asylum Information Database/European Council on Refugees and Exiles, “Conditions in detention facilities: Switzerland”, see <https://asylumineurope.org/reports/country/switzerland/detention-asylum-seekers/detention-conditions/conditions-detention-facilities/>.

<sup>83</sup> Information received during the expert consultations (2–3 March 2022).

<sup>84</sup> ICRC, *Ageing and Detention*, p. 7.

<sup>85</sup> Submissions from Dr. Lucy Series and Professor Judy Laing.

meaningful decisions.<sup>86</sup> In any case, if there is diminished capacity, it is the obligation of States to ensure that systems of supported decision-making are in place, as opposed to the systems and practices of substituted decision-making that are often employed.

56. Coerced institutionalization is likely to happen where there are no other forms of care available, including lack of a home and/or community-based services, or when relatives are unable or unwilling to provide care and support.<sup>87</sup> Older persons are exposed to heightened risks of violence, abuse and neglect when they are forcibly placed and deprived of their liberty. This may take several forms, including physical ill-treatment, verbal abuse or disrespectful behaviour by staff; violence among residents, including gender-based sexual violence; lack of adequate medical care; and prolonged use of physical, mechanical and/or chemical restraints.

57. The overuse of medication to control the behaviour of older persons with dementia without a proper therapeutic purpose remains a widespread and abusive practice that may lead to health complications and even death by overdose.<sup>88</sup> During the COVID-19 pandemic, the use of psychotropic medication has dramatically increased in a number of residential care establishments, justified by the prolonged social isolation and feelings of loneliness experienced by older residents during lockdowns.<sup>89</sup>

58. The shortage of adequately trained staff in age-related issues, including health, in institutionalized care further exposes older persons to the risk of being abused by both staff and other residents.<sup>90</sup> Inappropriate arrangements may further contribute to risks to the safety of older persons, for example they are mixed with residents who engage in what is characterized as “aggressive” behaviours, or do not have access to separate and protected bedrooms and sanitary facilities for men and women.<sup>91</sup>

59. The absence or low availability of adequate medical care, especially of palliative care, in care settings has also raised concerns. The denial of palliative care and pain relief is a human right violation, as recognized by international and regional experts.<sup>92</sup> Poor or limited health care, as well as limited access to essential medication and other support, have been exacerbated during COVID-19 lockdowns and have had a disproportionate impact on older persons deprived of liberty in care facilities.<sup>93</sup>

60. Deprivation of liberty in care and health-related facilities significantly subvert the quality of life and living conditions of older persons. Serious concerns about the rights of residents to dignity, privacy, autonomy and participation have been raised in several instances,<sup>94</sup> including the locking of older persons in their rooms without the possibility of opening the door from the inside; disrespecting their privacy and intimacy, especially when undressing and bathing; lack of appropriate heating or ventilation; insufficient food and incontinence products (to save money); and the removal of necessary aids such as glasses, crutches and walkers necessary to help prevent falls.

61. Social isolation and loneliness are also common among older persons deprived of liberty in care facilities, increasing risks of stress, anxiety and depression. Since the beginning of the COVID-19 pandemic, reports have emerged about the devastating impacts of contact restrictions, quarantine and isolation on the health and well-being of older persons living in

<sup>86</sup> Submission from the International Psychogeriatric Association and the World Psychiatric Association Section of Old Age Psychiatry.

<sup>87</sup> A/HRC/30/43, para. 74; and submission from Human Rights Watch.

<sup>88</sup> Human Rights Watch, “*Fading Away: How Aged Care Facilities in Australia Chemically Restrain Older People with Dementia*”, October 2019.

<sup>89</sup> Submission from Human Rights Watch.

<sup>90</sup> Submission from Dignity.

<sup>91</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, factsheet on social care establishments, December 2020, para. 9.

<sup>92</sup> A/HRC/22/53; and Council of Europe, Committee of Ministers, recommendation CM/Rec(2014)2.

<sup>93</sup> Department of Economic and Social Affairs, policy brief No. 68, “COVID-19 and older persons: a defining moment for an informed, inclusive and targeted response”; and United Nations, policy brief, “The impact of COVID-19 on older persons”, 2020, pp. 6–7.

<sup>94</sup> Council of Europe, “The right of older persons to dignity and autonomy in care”, 2018.

care facilities.<sup>95</sup> Rules not allowing overnight visits of partners or not allowing couples to live together may have further exacerbated their social isolation and loneliness.<sup>96</sup>

62. While in some facilities, complaint mechanisms are available to report mistreatment, older persons may be less likely to assert their rights or to file a complaint about the conditions in which they are held or about their treatment.<sup>97</sup>

63. The challenges faced by older persons may be different in countries where there is no tradition of institutionalizing older persons and where they are usually cared for by their community or family members.<sup>98</sup> However, institutionalization can be replicated in community-based services and in family settings, where older persons have limited choice and control, low or inadequate quality of support and risk of abuse and violence.<sup>99</sup>

64. Home and family care remain the main source of care in many countries, and it is often culturally presumed that family members have a filial duty to care for older relatives. Due to the failure of States to provide families with adequate support services, older persons benefiting from in-home care are also at risk of human rights violations, especially those with intellectual or physical impairments and high support needs. In some countries, applications for legal intervention in situations involving the deprivation of liberty of an older person in their own homes is possible.<sup>100</sup> However, such cases usually lack specific regulations over their admissibility in the context of home or family care, as well as the supervision and monitoring from State mechanisms, which may result in grave human rights violations of older persons.

65. In some contexts, older persons with dementia may be forced to live in confined spaces for extended periods, locked into their rooms, chained to trees in their backyards and/or drugged in their own homes to restrain them.<sup>101</sup> Older persons are at higher risk of ill-treatment, neglect and abuse from their caregivers, of living in extremely unsanitary conditions and of lacking appropriate medical support and assistance. When family members are not able to provide care, they often employ immigrants as care workers. Those workers may be financially exploited, not speak the same language as the older persons whom they care for and may not have adequate training or knowledge about providing support and care for older persons.<sup>102</sup>

66. Data about older persons deprived of liberty remain scarce and are unavailable in many countries. In some countries in Latin America, up to 30 per cent of older persons are in care institutions against their will.<sup>103</sup> In Europe, one country reported that over 6 per cent of persons over age 85 had been subjected to authorized deprivation of liberty in care establishments or hospitals.<sup>104</sup> Without laws and policies implementing monitoring mechanisms to assess and determine the status of deprivation of liberty of older persons on a case-by-case basis, such information will remain invisible.

<sup>95</sup> Submission from the German National Association of Senior Citizens' Organizations.

<sup>96</sup> Submission from the Association for the Prevention of Torture.

<sup>97</sup> Israel Doron et al., "Unheard voices: complaint patterns of older persons in the health care system", *European Journal on Ageing*, vol. 8, No. 1 (2011).

<sup>98</sup> Submission from Dignity.

<sup>99</sup> Martin Knapp et al., *Crystallising the Case for Deinstitutionalisation: COVID-19 and the Experiences of Persons with Disabilities*, London School of Economics and Political Science, 2021, p. 6.

<sup>100</sup> Submission from ISL.

<sup>101</sup> Information received during expert consultations (1–2 March 2022); and Human Rights Watch, *Living in Chains: Shackling of People with Psychosocial Disabilities Worldwide*, 2020.

<sup>102</sup> Submission from Telefono anziani maltrattati; see International Organization for Migration, *The Role of Migrant Care Workers in Ageing Societies: Report on Research Findings in the United Kingdom, Ireland, Canada and the United States*, 2010, p. 37.

<sup>103</sup> See <https://www.gerontologia.org/portal/information/showInformation.php?idinfo=3622>.

<sup>104</sup> Submission from Dr. Lucy Series and Professor Judy Laing.



## D. Protecting the human rights of older persons deprived of liberty

67. In preparing the present report, the Independent Expert identified several promising practices to improve the protection of the human rights of older persons deprived or at risk of being deprived of their liberty.

### 1. Law and policy reform

68. Due to the absence of a comprehensive international human rights instrument on older persons, national legal and policy frameworks often fail to effectively address the needs of older persons. The Independent Expert notes that while States usually have laws and policies regulating the deprivation of liberty, most lack attention to the situation of older persons.<sup>105</sup> Despite the context in which they are deprived of liberty, older persons face the risk of a whole range of human rights violations if their needs are not taken into consideration in the design and implementation of laws and policies.

69. Some countries where institutionalization is common have adopted laws and regulations to protect the right of older persons to liberty, especially older persons with disabilities who have de facto been deprived of their liberty in care and support facilities and who are perceived as lacking the capacity to consent. Some of these laws may also apply to other care settings, such as care arrangements for older persons living in their own homes, with their families or within their communities.<sup>106</sup> These “safeguards” laws and regulations, which remain highly controversial and inadequate, represent significant social and legal challenges as they are usually understood as authorizations to render the deprivation of an individual’s liberty lawful, based on age or disability.<sup>107</sup> Such laws enable the deprivation of liberty and coercive care and health interventions and are contrary to international human rights standards, including the Convention on the Rights of Persons with Disabilities. Respecting older persons’ autonomy, independence and legal capacity is crucial when it comes to decision-making affecting their care and support.<sup>108</sup>

70. When older persons are detained in the criminal justice system, States have the obligation to uphold and protect their human rights and ensure their safety. As is done in some countries, it is good practice to adopt constitutional and legal age-related provisions ensuring the realization of the special needs of older persons lawfully deprived of liberty, in accordance with international human rights standards.<sup>109</sup>

### 2. Alternative solutions to deprivation of liberty

71. States have a positive obligation to protect the liberty of all individuals under their jurisdiction and should take measures to prevent the deprivation of their liberty.<sup>110</sup> As a heterogeneous group with complex needs, alternatives to deprivation of liberty for older persons should be prioritized and encouraged through State actions.

72. In the criminal justice context, several promising practices have emerged offering alternative solutions for older persons, such as prioritizing house arrest for persons aged 70 or above during pre-trial and for minor offense convictions;<sup>111</sup> prison sentences carried out (partially or fully) in hospitals, family care, in-home or in institutional care based on various criteria, including age;<sup>112</sup> overruling life imprisonment for persons over age 65 and affording amnesty,<sup>113</sup> parole, compassionate or early conditional release for older persons,<sup>114</sup> based on their age, the time served in prison and health status (chronic and/or life-threatening illnesses); temporary release; pardon or amnesty; or electronic monitoring to track and supervise older

<sup>105</sup> Based on submissions from States.

<sup>106</sup> Submission from Professor Rosie Harding.

<sup>107</sup> Ibid.

<sup>108</sup> A/HRC/30/43, para. 74.

<sup>109</sup> Submissions from Dignity and Penal Reform International.

<sup>110</sup> European Court of Human Rights, *Stanev v. Bulgaria*, Application No. 36760/06 (2012), para. 120.

<sup>111</sup> Human Rights Watch, *World Report 2022 – Events of 2021*.

<sup>112</sup> Submission from Dignity.

<sup>113</sup> Penal Reform International, *Global Prison Trends 2016*, p. 20.

<sup>114</sup> Penal Reform International, *Alternatives to the death penalty information pack*, 2015.



persons convicted of minor offenses. Studies show that older persons are far less likely to reoffend following release from prison.<sup>115</sup>

73. During the ongoing COVID-19 pandemic and due to the overcrowding in some detention settings, several States privileged non-custodial measures and allowed for the early release of older prisoners to ensure their protection and safety, as older age represents a significant risk for contracting the virus.<sup>116</sup> In a study reviewing emergency-release mechanisms in response to COVID-19, 38 per cent of the 53 countries surveyed included age-based criteria that prioritized older persons for release.<sup>117</sup> In a few countries in the Asia and Pacific region, older detainees have been moved to less crowded areas of the prison or housed separately as a precautionary measure. However, the extended separation of older detainees from the rest of the prison population has also produced negative impacts on their mental health and social inclusion in some European countries.<sup>118</sup>

74. Given the heavy financial burden of providing adequate health in prison, measures of compassionate and humanitarian release on health grounds have been implemented by prison administrations in some countries for low-risk older detainees with medical problems. Such release measures should be reviewed and granted on a case-by-case basis, and when released, older persons should be granted assistance in obtaining appropriate health care and housing. The early release of older persons convicted of serious human rights violations (for example, war crimes, atrocity crimes and crimes against humanity) should not undermine international human rights law and their release should be based on the absolute incompatibility of their detention with their health status.<sup>119</sup>

75. In care settings, the development of care arrangements through adequate financial means would permit older persons to choose their place of residence and guarantee their right to live in dignity without being deprived of their liberty. In this regard, it is essential to respect the concept of “ageing in place”,<sup>120</sup> and States have the obligation to provide adequate care and support arrangements to ensure that older persons can live in places of their own choosing, based on their full and informed consent. With the aim of progressively ending the institutionalization of older persons and supporting the autonomy and independence of older persons, investing in appropriate support services and allowing older persons to live independently in their communities and to be part of inclusive societies would contribute to their better health and their personal and emotional needs.

76. While for many older persons, family care is preferred, adequate, affordable and quality parallel support services should be provided to family members and informal caregivers to prevent any deprivation of their liberty. This would include respite care services, needs assessment, counselling and advice, self-support groups and practical training in caregiving, as well as information about measures to protect the physical and mental health of carers, including weekend breaks and integrated planning of care for older persons and families.<sup>121</sup> In addition, the heavy burden of care work, which is often unpaid and carried out by women and by older women, should be recognized and valued by States.<sup>122</sup>

### 3. Monitoring practices and access to justice

77. Independent monitoring of places of deprivation of liberty is recognized as one of the most effective preventive measures to protect the rights of older persons.<sup>123</sup> Through visits to places of detention, including private interviews with older persons and unrestricted access to all relevant documentation, independent national oversight mechanisms, such as national prevention mechanisms and national human rights institutions, allow for first-hand evidence

<sup>115</sup> Submission from the Southern Poverty Law Center.

<sup>116</sup> Dignity, “Reducing overcrowding in pre-trial detention and prison in the context of Covid-19”, 2020.

<sup>117</sup> DLA Piper, *A Global Analysis of Prisoner Releases in Response to COVID-19*, 2020, p. 27.

<sup>118</sup> Submission from Penal Reform International.

<sup>119</sup> European Court of Human Rights, *Rozhkov v. Russia*, Application No. 64140/00, para. 104.

<sup>120</sup> Understood in this context as the living environment and community chosen by older persons.

<sup>121</sup> A/HRC/30/43, para. 72.

<sup>122</sup> See A/HRC/26/39; and A/76/157, para. 80.

<sup>123</sup> Richard Carver and Lisa Handley, *Does Torture Prevention Work*, ICRC, Geneva, 2016; and submission from the Association for the Prevention of Torture.

and investigation into the conditions and treatment of older persons in such settings. Such mechanisms identify the risks to which older persons are exposed, including deficiencies in standards and procedures, make recommendations, publish reports and engage in constructive dialogue with the authorities.

78. An increasing number of States are establishing such mechanisms. The Independent Expert notes that several mechanisms consider age and intersectionality in their mandates, as well as the monitoring of all places of where older persons may be deprived of liberty, including care and health-related institutions.<sup>124</sup> Such monitoring allows for evidence-based reforms of policies, regulatory frameworks and practices, especially in the criminal justice context where non-custodial measures may be encouraged. The COVID-19 pandemic has created conditions that have made it necessary to prioritize visits to such places because of the heightened risk presented to the health of older persons. Some mechanisms also have encouraged the use of alternative measures to detention and addressed the need for the deinstitutionalization of the care for older persons.<sup>125</sup>

79. States have an obligation not only to prevent and punish human rights violations in State-managed institutions, but also to take all necessary measures to protect older persons from violations of such rights by non-State actors.<sup>126</sup> They must also investigate all allegations of violations of the rights of older persons, notably the right to life, including through arbitrary detention and torture and other ill-treatment, as well as violations perpetrated by private entities.<sup>127</sup> Investigations should be effective, prompt, thorough and impartial.<sup>128</sup> Effective accountability mechanisms also provide ways to ensure access to justice and reparations for older persons. Caregiving and health-related facilities should have mechanisms in place allowing residents to file complaints if they believe their human rights have been violated, which is also a good way to improve the quality and efficiency of health services and maintain client satisfaction.<sup>129</sup> Failure to ensure accountability for the negligence of care-home staff resulting in the death of an older individual should amount to a violation of the right to life.<sup>130</sup> This should also apply within the criminal justice system.

#### 4. Ensuring living conditions with dignity

80. Within the criminal justice system, the Independent Expert notes good practices in terms of infrastructure and living conditions adapted for older persons, including the creation of separate areas with adequate equipment; adjustable beds; hot water; barrier-free environments; ramps and handles for older detainees; and signage in large print.<sup>131</sup>

81. There is a need for adequate lifelong learning opportunities for older persons in prisons as part of their rehabilitation, including: access to skills training and knowledge development to reduce the risk of isolation; physical and intellectual aptitude activities based on comprehensive assessment upon admission; and exercise classes for older women to reduce their dependency on nursing care.

82. Providing access to appropriate medical care to older persons while in detention is essential.<sup>132</sup> The Independent Expert has identified the following promising practices: the provision of personal care; the presence of specialized medical staff in gerontology and aged

<sup>124</sup> Submissions from human rights institutions and national prevention mechanisms.

<sup>125</sup> Submission from the Association for the Prevention of Torture.

<sup>126</sup> OHCHR, Update to the 2012 analytical outcome study on normative standards for older persons, working paper, 2021, para. 121.

<sup>127</sup> Convention against Torture, art. 12; and Human Rights Committee, general comment No. 36 (2019), paras. 21 and 27.

<sup>128</sup> General Assembly resolution 60/147, annex; European Convention on Human Rights, art. 13; and Inter-American Court of Human Rights, *Villagrán Morales et al. v. Guatemala*, Judgment of 19 November 1999, para. 225.

<sup>129</sup> Israel Doron et al., “Unheard voices: complaint patterns of older persons in the health care system”, *European Journal of Ageing*, vol. 8, Issue 1, 2011.

<sup>130</sup> See European Court of Human Rights, *Dodov v. Bulgaria*, Application No. 59548/00, 2008.

<sup>131</sup> Submission from Penal Reform International.

<sup>132</sup> European Court of Human Rights, *Mouïsel v. France*, Application No. 67263/01, 2002, para. 40, and *Farbtuhs v. Latvia*, Application No. 4672/02, 2004, para. 51.

care in prisons; staff trained to learn how to work with older persons with dementia, Alzheimer’s disease or any degenerative diseases, and how it impacts their capacity for communication and their memory; and the availability of palliative care and end-of-life care accompanied by guidelines and protocols.<sup>133</sup> The prioritization of vaccination against COVID-19 for older detainees as a vulnerable group is recognized as a promising practice.<sup>134</sup>

### III. Conclusions and recommendations

83. **Deprivation of liberty, which is a significant concern worldwide, has a pervasive impact on older persons. Ageism, combined with deprivation of liberty, has aggravated effects on the enjoyment of human rights by older persons. Whatever the context in which they are deprived of liberty, older persons are more likely to suffer serious human rights violations, as well as violence, abuse, ill-treatment and even torture.**

84. **Due to the lack of research and data, the human rights of older persons deprived of liberty remain largely invisible and unaddressed. Regardless of the reasons justifying their detention and the restriction of their personal liberty, older persons generally find themselves in situations that are detrimental to their human rights and that do not provide adequate safety and protection.**

85. **The current legal framework lacks comprehensive and specific obligations to effectively protect the human rights of older persons, including in situations of deprivation of liberty. Ageism remains widespread and largely unrecognized, even when States adopt and implement laws, policies, strategies and practices related to the limitation of liberty of older persons, especially those in apparent or perceived need of care.**

86. **With the aim of progressively dismantling ageism within our current societies, the Independent Expert provides the following recommendations for the consideration of States and other relevant stakeholders.**

87. **The Independent Expert makes the following general recommendations:**

(a) **States must recognize and codify the right to personal liberty and security of older persons, as set out in international human rights law, and through support for an international comprehensive legally binding instrument on the human rights of older persons;**

(b) **States must adopt laws that prohibit harmful traditional, cultural, social and religious practices that lead, inter alia, to the deprivation of liberty of specific groups of older persons, including older women, older lesbian, gay, bisexual, transgender and intersex persons or older persons with disabilities;**

(c) **States and other stakeholders should consider not only chronological age but also psychological and socially constructed age when determining who is an older person in the context of the deprivation of liberty;**

(d) **A system of systematic data collection with age-based disaggregation at the national level should be established, involving all relevant ministries and other State agencies, to efficiently inform laws, policies and practices with regard to the situation of older persons in all places of detention; data should be disaggregated by gender, ethnicity, disability, health conditions and needs and should be made widely available to inform the public about the realities faced by older persons deprived of liberty;**

<sup>133</sup> Ambitions for Palliative and End of Life Care Partnership, “Dying well in custody charter: A national framework for local action”, April 2018; United Kingdom of Great Britain and Northern Ireland, Justice Committee, “Ageing prison population: Fifth report of session 2019–2021”, House of Commons, 22 July 2022; “Ageing prison population: Government response to the Committee’s fifth report”, Parliament of the United Kingdom, 26 October 2020.

<sup>134</sup> Submission from Penal Reform International.

(e) Older persons and their representatives should be actively involved and consulted in all decision-making processes regarding law and policy reforms related to their deprivation of liberty;

(f) States should establish their own independent and impartial entities, procedures or bodies, possibly within existing independent bodies, with mandates to examine complaints pertaining to older persons and to monitor the treatment and conditions in all places where older persons are deprived of their liberty; such independent national preventive mechanisms should be granted the necessary powers and resources to carry out their mandates;

(g) Independent monitoring bodies, along with legal safeguards, must be in place to ensure access to justice and effective remedies for older persons at risk of or experiencing deprivation of liberty against their will and who have suffered wrongdoings, including discrimination, violence, abuse and neglect; action must urgently be taken to restore the liberty of these older persons;

(h) Independent monitoring bodies should carry out unannounced visits in all places of detention where older persons might be deprived of liberty; during such visits, independent monitoring bodies should, inter alia, request data on the number of individuals considered as “older” in the establishment; enquire whether there is a dedicated policy for older persons; highlight the challenges and risks faced by older persons, especially regarding their complex health and specific needs; enquire about the registration and reporting of deaths in deprivation of liberty, including deaths from natural causes, as well as all incidents of violence, neglect and ill-treatment; monitor older persons’ accommodations, facilities and living conditions to determine if they are age-appropriate; visits and reporting by independent monitoring bodies will facilitate the development of age-responsive recommendations to guarantee the human rights of older persons;

(i) International and regional human rights mechanisms in charge of assessing situations of ill-treatment, torture and deprivation of liberty should be provided with the means and capacities to examine the situation of older persons in detail, within their investigation and reporting phases; such assessments provide transparency regarding the experiences of older persons deprived of liberty and assist human rights mechanisms in formulating tailored recommendations to States and other stakeholders.

88. In the context of criminal detention, the Independent Expert makes the following recommendations:

(a) States must adopt age-sensitive policies and strategies in the criminal justice context to ensure respect for and protection of the human rights of older persons, in line with international and regional human rights standards regulating the deprivation of liberty;

(b) Age-friendly detention environments, including appropriate infrastructure, accommodations and living conditions, and age-sensitive training for custodial staff to foster respectful communication and informed decision-making should be ensured; older persons should have access to age-appropriate services and activities, including opportunities for lifelong learning and vocational training;

(c) Appropriate health-care services for older persons should be provided to meet their individual needs, according to the principle of equality in health care; screening upon admission, transition and throughout the period of detention must be in place to identify the risks and specific needs of older detainees;

(d) States should ensure that, when released, older persons have benefited from individualized pre-release programmes designed for their specific needs and wishes, including access to medical and mental health care for longstanding, undertreated health conditions, housing solutions, access to pensions and financial support;

(e) Intersectional factors should be given due consideration throughout all stages of the criminal justice process, especially when older persons have other intersecting bases for discrimination, such as gender, disability, indigenous or ethnic identities; individual care plans should be created to ensure that older persons at higher risk of violence, ill-treatment and persecution are provided with security in detention, including older women, older lesbian, gay, bisexual, transgender and intersex persons and older persons belonging to ethnic, religious or indigenous groups;

(f) States, through their judicial systems, should consider the necessity and proportionality of detaining older persons with complex health conditions and in need of palliative care; States should also examine the possibility of non-custodial alternatives at all stages of detention, including serving sentences in facilities where the needs of older persons would be addressed through or benefit from humanitarian or compassionate release.

89. In the context of immigration-related detention, the Independent Expert recommends that:

(a) States must progressively end all forms of deprivation of liberty in the context of immigration for older persons and their families;

(b) If detained, alternative non-custodial immigration processing measures should be prioritized for older persons; States should take appropriate measures to ensure respect for the human rights of older migrants and asylum-seekers, ensuring that conditions of detention are age-appropriate and that older persons are provided with health care and skilled professional support, as needed; the rights of older migrants and asylum-seekers to dignity and to be treated fairly when in immigration-related detention should be respected, in line with international and regional legal standards;

(c) Data collection related to migrants and asylum-seekers should be systematically disaggregated by age and other relevant intersectional factors to better inform immigration policies;

(d) States should ensure that older migrants and asylum-seekers have access to legal remedies and legal assistance while in detention and that they are duly informed of the reasons for their detention and about the legal proceedings in a language they understand.

90. The Independent Expert makes the following recommendations in the context of care:

(a) All laws and regulations justifying the deprivation of the personal liberty of older persons based on their age or on perceived or actual needs for care and allowing for “substituted decision-making” must be repealed, including so-called “mental health legislation”;

(b) Age-related adequate care arrangements should be developed and appropriately funded by States to ensure that older persons may live independently in their communities, with dignity, in line with their will and preferences, in accordance with the concept of “ageing in place” and with the objective of ending the institutionalization of older persons;

(c) Private services providers should adopt a rights-based approach to care and living arrangements for older persons; such arrangements and activities should be regulated and monitored by States in line with their obligations under international human rights law;

(d) Caregiving personnel and care facility management should be provided with adequate training on the needs of older persons in order to prevent their deprivation of liberty and any act or practice amounting to ill-treatment, violence or neglect;

(e) States should refrain from allocating funding to services that allow for the deprivation of liberty of older persons based on advanced age or on perceived or actual

**disability or need of care; funding should be increasingly allocated to fund research and technical assistance to end all forms of deprivation of liberty in the context of care;**

**(f) States must uphold the principles of autonomy, independent and legal capacity, including informed consent, of older persons in national legislation, as set out in the Convention on the Rights of Persons with Disabilities.**

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