

Protection gaps in international human rights law and the advantages of an internationally binding legal instrument

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1 What gaps exist in the protection of the human rights of older persons under international human rights law?

1.1 Definition of gaps

Gaps include both normative protection gaps and gaps in the implementation of existing rights. There is no clear agreement on how to distinguish between differentiation between the two terms in international expert discourse and in discussions in human rights bodies. It is unclear what can be subsumed under them and where there may be overlaps. Based on a detailed analysis of the material presented to the Open-ended Working Group on Ageing, the Human Rights Council and other fora, the German Institute for Human Rights has concluded that there are clearly significant gaps in a considerable number of individual areas. The COVID-19 pandemic has clearly highlighted the problems in the practical implementation of human rights protection for older persons.¹ Normative gaps have also arisen due to changes in the lived realities of older persons, such as digitalization or climate change, which did not play a role at the time the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UN International Covenant on Civil and Political Rights (ICCPR) were formulated and are therefore not reflected in the existing international human rights framework.

1.2 Normative gaps

In the view of the German Institute for Human Rights, there are gaps in the following areas in particular:

1.2.1 Equality and non-discrimination

Except for the UN Migrant Workers Convention² and the UN Convention on the Rights of Persons with Disabilities (CRPD), age is not explicitly enshrined as a ground for discrimination in existing human rights law. Therefore, there is a normative gap for all older persons who are neither covered by the Migrant Workers Convention nor have a disability. The gap in the other conventions is the result of the fact that older persons are not a priority, indeed are often invisible, in the interpretation of the general

¹ Office of the UN High Commissioner for Human Rights (OHCHR) (2021): Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons. Working paper prepared by the Office of the High Commissioner for Human rights, paras. 54ff.; online: <https://social.un.org/ageing-working-group/documents/eleventh/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>.

² Germany has not ratified the UN Migrant Workers Convention

provisions in those treaties: the protection of older persons against discrimination is not a priority in human rights law. The protection of older persons against discrimination does in theory fall within protection against discrimination under the ICESCR and ICCPR on the basis of “other status”.³ This could include protection against discrimination on grounds of age by way of an extended interpretation. However, the practice of the UN treaty bodies, which monitor the implementation of the human rights treaties, shows that the normative gap is not sufficiently closed by the extended interpretation, either in the way in which these bodies generally approach issues relating to older age and its intersection with other characteristics, and the few instances in which such issues are considered. The existing treaties are not designed to adequately address the violation of the rights of older persons and the UN treaty bodies have neither the capacity nor in most cases the expertise to adequately address the rights of older persons.

This leads to a lack of anchoring and enforcement. Before the adoption of the Convention for the Rights of Persons with Disabilities, a similar situation existed in relation to disability. The fact that the existing treaties had not conceptually included disability was an important argument for the creation of the. To close this comparable gap in international and regional human rights law, age must be explicitly recognized as a ground of discrimination.⁴

The absence of the discrimination criterion “age” in the human rights treaties – and also in Article 3 of the Basic Law (“Grundgesetz”, GG) – means that age is not sufficiently taken into account as a ground of discrimination in national law. Although the General Act on Equal Treatment (“Allgemeines Gleichbehandlungsgesetz”, AGG) has been implemented in Germany by giving effect to the EU legal framework, not all areas of life in which ageism and age discrimination occur relating to age are covered in the EU framework and as a result they are not covered in the German law either. This underlines the important stimulatory effect that international norms can provide to enacting and implementing rights protection for older persons at the national level.

1.2.2 Ageism

Ageism was coined as a term by Robert Butler in 1969 and describes negative attributions based on age (in the sense of older age). Ageism is defined as stereotypes, prejudices and/or discriminatory actions or practices against older persons that are based on their chronological age or on a perception that the person is “old” (or “elderly”).⁵ The negative connotation leads to structural discrimination, which is also reflected in the interpretations of the UN bodies, for example in the General Comment of the ICESCR Committee on the economic, social and cultural rights of older persons adopted in 1995. That General Comment at times uses language which embodies a deficit view of older age or one based on a purely medical perspective, which is in stark contrast to the supportive and empowering approach of the UN CRPD.⁶ Currently, there are no explicit, standardized guarantees in existing human rights law to address violations due to ageism; nor is there any explicit obligation for states to take active measures to eliminate ageism and its discriminatory consequences.⁷ In contrast, norms against sexism and ableism can be found in existing human rights law, but only in specific conventions such as the UN Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and the UN CRPD.

1.2.3 Palliative care⁸

Article 12 of ICESCR, which affirms the right to the highest attainable standard of physical and mental health, does not mention either long-term care and support or palliative care in its text. These can only be read into the text through a broad interpretation of the right, as has been expressed on occasion by

³ See Article 2 (2) ICESCR and Article 2 (2) ICCPR.

⁴ OHCHR (2021), paras. 103, 107.

⁵ A/HRC/48/53, para. 21.

⁶ A/HRC/48/53, para. 43.

⁷ OHCHR (2021), paras. 37ff.

⁸ OHCHR (2021), para. 148.

the CESCR Committee in its General Comments. However, the interpretations adopted by UN human rights treaty bodies in their General Comments are not in themselves legally binding, and are not always accepted by States. The inclusion of an explicit affirmation of a right to palliative care in a convention would put the existence of a legally binding obligation beyond dispute.

Persons who want to claim their right to palliative care encounter the obstacle that they cannot refer to a treaty provision with certainty, as the right is not explicitly guaranteed in a treaty provision. In order for persons to claim the right to palliative care with reference to binding international human rights norms, they must attempt to prove that they have a legal entitlement by referring to a variety of normative instruments and putting forward interpretations of them that may not have been accepted by States parties to those treaties as legally binding and may have been contested by those States parties.⁹

In the regional context of the Organisation of American States, this normative gap has been closed, for example, by Article 6 of the regional Inter-American Convention on the Protection of the Rights of Older Persons. It states: "States Parties shall take steps to ensure that public and private institutions offer older persons access without discrimination to comprehensive care, including palliative care."

1.2.4 Lifelong learning and digitalization

Article 13 of ICESCR regulates the right to education and has a focus on school education. Older persons face a number of specific barriers to full participation in education and vocational training, lifelong learning and capacity building, which are not addressed in the general guarantees of the right to education. On their face and as interpreted in practice, these general guarantees are far from ensuring that the right to education and lifelong learning can be fully enjoyed by older persons.

For example, none of the existing norms explicitly refer to the importance of intergenerational learning – because older persons are not only recipients of knowledge or learners of new skills, but also sources of knowledge, experience, and culture. There is also no treaty provision that specifically addresses the need to collect and analyze data solely on the basis of age (divided into a number of age cohorts) and in relation to other individuals, groups and characteristics.¹⁰

With regard to the right to education, training, lifelong learning and capacity building, it is clear that there is a need for detailed elaboration in a specific normative provision that takes into account the needs and situations of older persons.¹¹

1.2.5 Protection from violence

The general provisions of the main UN human rights treaties do apply to some of the forms of violence, neglect, exploitation and abuse of older persons, yet there is no explicit reference to the specific situation of older persons.¹² As a result, those guarantees are often not realised in practice because of the invisibility of older persons in discussions of violence and related issues. This is also reflected in the fact that the existing standards are not sufficiently extended to financial abuse of older persons, neglect and social isolation.

One of the main areas in which the existing normative framework is deficient is the financial exploitation and abuse of older persons. Fraud against older persons and financial exploitation and abuse by family members are widespread. The gap in the international human rights framework is clearly reflected in the lack of or inadequate regulation at the national level, as submissions to the OEWGA from non-

⁹ OHCHR (2021), para. 146.

¹⁰ OHCHR (2021), para. 173; A/HRC/45/14.

¹¹ OHCHR (2021), para. 182.

¹² OHCHR (2021), para. 123; A/HRC/54/26.

governmental organizations, national human rights institutions, UN agencies and states plainly demonstrate.

UN treaty bodies are largely unable to take up these issues due to their already overloaded agendas and limited resources. Where some aspects of these issues have been addressed under reporting procedures, there has been only modest follow-up in the subsequent consideration of State party reports. This is also reflected in the low profile of these issues in the concluding observations adopted by the treaty bodies following consideration of State reports. As a result, there is a lack of clarity about the obligations of States. A specific new provision that would apply to all forms of violence, neglect, exploitation and abuse of and against older persons would close these gaps at the international level and stimulate corresponding change at the national level.

1.2.6 Autonomy and independent living

Many aspects of autonomy and independent living are neither generally nor explicitly addressed for older persons in existing human rights law.¹³ UN-CRPD covers older persons with disabilities in this area and has therefore contributed a great deal to the development of these rights. However, UN-CRPD remains limited in its scope of application, meaning that a normative gap can also be identified in relation to these two rights as regards many older persons. This deficit has already been extensively discussed in the OEWGA and these discussions have indicated that a new normative provision on this subject would add value to the existing normative and implementation frameworks.¹⁴

2 What is the added value of a new convention?

A convention would fulfill the following five functions:

- The convention would close the above-mentioned normative gaps by formulating rights in these areas explicitly adapted to the circumstances of older persons.
- Rights to which older persons are entitled under existing treaties (ICESCR, ICCPR, CRPD, CEDAW) could be adapted in their target group-specific codification for the needs of older persons and thus have a tailor-made effect.
- The convention would close a major underlying conceptual gap in human rights law, as the existing treaties are not based on a comprehensive understanding of and response to the nature and social significance of older age and its social construction: this is what underlies the many gaps that have been identified. A new convention could lead to a paradigm shift towards an understanding of older persons as rights holders and away from their treatment predominantly as mere recipients of benefits and non-contributors to their societies.
- A new convention brings together all rights for the group of older persons in a legally binding treaty, making it easier for states to align their national laws and for those affected to claim their rights.
- A new convention could establish a treaty body with relevant expertise that could contribute to the visibility of the rights of older persons and their enforceability, as well as informing the understanding and practice of existing mechanisms. A smart design of this mechanism could reduce the scope of states' reporting obligations to a minimum.

A convention would also include new rights in areas that were not known when the existing human rights treaties were formulated – such as digitalization and climate change. It would also address phenomena that already existed but of which there was no awareness that this involved human rights dimensions –

¹³ OHCHR (2021), para. 119.

¹⁴ OHCHR (2021), para. 18.

such as age discrimination and ageism. It would also systematically bring together existing rights for older persons. This would allow the generally formulated rights to be adapted to the living situations of older persons and their needs, thereby increasing the enjoyment and protection of rights. The enjoyment and enforceability of rights would also be strengthened by the treaty body. Overall, this would promote the visibility of the group – the world's fastest growing population group – particularly in the numerous areas that have been underexposed to date.