

**UN Open-ended Working Group on Ageing  
Fourth working session (12-15 August 2013)**

***Item 4 International frameworks and instruments on the human rights of older persons and identification of existing gaps at the international level***

**Panel 2: Update on multilateral processes  
(Tuesday, 13 August, 10 a.m. – 1 p.m.)**

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Pleased and proud for the opportunity to represent the Council of Europe and speak about our experience and our ongoing work on the human rights of older persons

**Introduction**

As you know, the Council of Europe is currently working on the elaboration of a recommendation on the human rights of older persons, and I am the secretary of the intergovernmental drafting committee in charge of this work. This is not the first time the Council of Europe intervenes in this area. In fact, the Council of Europe has been advocating the rights of older persons for many years, and I think I need to briefly recall existing relevant texts.

First and foremost, we should mention the European Convention on Human Rights. Even though the Convention does not explicitly refer to older persons, some general provisions, such as the right to life, the prohibition of torture and inhuman and degrading treatment, the right to a fair trial, the right to family life, protect this category, and several cases in the case-law of the European Court of Human Rights have directly or indirectly dealt with issues relevant in particular for older persons<sup>1</sup>.

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- the right to life: with regard to state's procedural obligations to investigate the disappearance from a nursery home of an older persons suffering from Alzheimer;
- prohibition of torture and inhuman and degrading treatment or punishment: the minimum level of severity for such behaviour is a relative one, and age may be considered as a factor; in a pending case against one member state, the Court will have to look at the envisaged expulsion of a 91-year old woman who is reported to suffer from dementia and near-blindness;
- the right to liberty and security: concerning the involuntary placement of an older person in a nursery home;

Then, the Revised European Social Charter contains one of the few provisions in international treaties explicitly referring to older persons – Article 23 – which states that they have the right to social protection. The European Committee of Social Rights, the monitoring body for the Charter, held that the objective of this provision is to enable elderly persons to play an active part and have some influence in society, to guarantee them sufficient resources to live independently, to provide housing and an environment suited to their needs, and to guarantee adequate health care and social services. So, as you can see, this is mainly interpreted as an empowering provision for older persons. Article 23 also includes protection of the elderly against discrimination especially with regard to the access to goods, services and facilities. The Committee has developed the social rights contained in the revised Charter mainly through its “conclusions” when reviewing state reports; collective complaints are rarer.

Apart from these two treaties, there exist numerous soft-law standards such as the recommendations and resolutions of our Committee of Ministers and Parliamentary Assembly promoting the rights of older persons and their social inclusion. Although soft-law, these texts can be powerful as they represent the common understanding of the 47 governments in Europe.

In addition, older persons receive protection indirectly through their inclusion in other vulnerable groups. For instance, the Council of Europe Action Plan to promote the rights and full participation of people with disabilities (2006-2015) contains several provisions relevant for older persons, and also the Istanbul Convention on preventing and combating violence against women and domestic violence is applicable to them.

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- right to a fair trial: the Court has decided in several cases that age may be a relevant factor in considering whether a case was considered by national courts “within a reasonable time” as required by Article 6 ECHR.
  - “age” is not particularly mentioned in Article 14 which guarantees that everyone enjoys the Convention rights without discrimination on grounds such as, for example, sex, race, colour, language, religion or other status. However, it is recognised that “age” is considered under the notion “other status” under that provision. There is hardly any case-law yet in this respect (except in a case on a difference in the retirement age for men and women in one member state, which was however rather a discrimination on grounds of sex than of age). Moreover, age would probably be included in the notion of “other status” under Article 1 of Protocol 12 containing a general prohibition of discrimination.

## **CDDH-AGE work**

Many of these standards exist since longtime. And still, there is the clear perception that the human rights and dignity of older persons are not sufficiently guaranteed, and that the demographic changes and the increasing number of older persons, in Europe but also elsewhere, will pose even bigger challenges for their human rights and dignity. It is on this basis that the Committee of Ministers in 2012 gave the mandate to the steering committee for human rights, which in turn set up the drafting group, to address the promotion of the rights older persons at regional level. The drafting group is composed of experts from 12 European states and representatives of the civil society and of international NGOs.

The drafting group took a gradual approach, starting with a study identifying existing gaps and possible ways to deal with these gaps. The group decided to prepare a Recommendation on the promotion of the human rights of older persons providing specific guidance and practical examples based on good practices coming from all the member states, by essentially consolidating in a single text existing standards and case law as minimum common standards at the European level. The text is already in a final stage, the substantive provisions have been agreed at the level of the drafting group, and the final meeting is scheduled in September to complete the guide of good practice and the explanatory report before submitting it to the CM for adoption.

Member states have chosen a non-binding and illustrative instrument to tackle this issue, because in the view of the most of them, the existing human rights provisions already, explicitly or indirectly, protect the human rights of older persons, but suffer of an the “implementation” gap as regards older persons. Other arguments we heard had to do with the need to avoid duplication with existing international instruments and to avoid long negotiations for the drafting of a new Convention. Even the economic crisis may have played a role, insofar as in this moment some states may prefer to not

assume far-reaching engagements. In any event, the question of implementation of existing instruments is crucial. This is a common general line that we perceive whenever we discuss possible areas for development of Human Rights. This is what we were asked to work on, and this is mainly why we focused on a non-binding instrument providing specific guidance and practical examples as regards the application of the relevant existing provisions, in particular of the ECHR and of the European Social Charter to the elderly, by essentially codifying in a single text existing standards and case law, and thereby consolidating their recognition at least at European level as minimum common standards.

### **The Recommendation**

During the drafting process, particular attention has been paid to the existing instruments and on-going work of the United Nations and of the European Union. It is only through close cooperation that the Council of Europe can identify where it could add value and avoid duplication through its activities.

The Recommendation aims at promoting, protecting and ensuring the full enjoyment of all human rights by older persons on an equal basis with others, and promoting respect for their inherent dignity. This instrument empowers older persons by acknowledging their autonomy and legal capacity in daily lives. At the same time, it aims at ensuring them protection in societies where the ageism rises and in situations where they may be vulnerable. The aged may be discriminated against because of their age, they may face domestic violence, abuse or poverty, and they may lack adequate care. The Recommendation responds to these concerns and finds a balance between the autonomy and the protection of older persons. I think it is important not to be afraid to speak about protection, and to be felt as taking a “paternalistic” approach, because autonomy and protection are two faces of the same coin, and each is ineffective without the other.

In addition to the three operational paragraphs, it contains 53 provisions consolidated under seven themes, with a number of example of good practices provided for each theme. Let me say a few words about each of the chapters.

The Recommendation begins by defining its overall aim and scope and setting a number of general principles. It also attempts to indirectly define older persons by stating that the recommendation applies to “persons whose older age constitutes, alone or in interaction with other factors, including perceptions and attitudes, a barrier to the full enjoyment of their human rights and fundamental freedoms and their full and effective participation in society on an equal basis”. It does not attempt to define from when a person is considered as aged, but recognises that states may indicate a chronological age in their relevant national legislation.

Chapter II is entirely devoted to the non-discrimination of older persons, by inviting member states to make explicit reference to the ground of “age” in their anti-discrimination legislation. This chapter also addresses the need to avoid multiple discrimination, in particular as regards older women, older migrants or persons with disabilities.

Chapter III deals with the autonomy and participation in decision-making. The main idea is to recognize older persons’ right to self-determination and their legal capacity to decide in their best interests about their person and affairs. This part covers also situations where older persons may not be able to exercise their legal capacity and intends to ensure help for them and to prevent abuses. The explanatory report refers explicitly to art 12.4 of the UN CRPD, from which we take inspiration – and not only in this context. At the same time, our member states took the view that the recommendation could not simply endorse the CRPD provisions, but should adapt them to the specificities of the older persons.

Chapter IV calls upon member states to ensure protection of older persons from violence, abuse - physical, psychological, emotional, financial, sexual -, and intentional or unintentional neglect, irrespective of whether this occurs at home or within an institution. In order for the detection to become easier, awareness-raising measures, including training of the care givers should be implemented, and reporting should be encouraged (of course “whistle-blowers” should be given protection from dismissal or other reprisals). In the cases of maltreatment, older persons should receive appropriate support and an effective investigation should be carried out, which may lead to proceedings before a national authority and prompt redress for the harm suffered.

Chapter V entitled “social protection and employment” mainly concerns the living and the working conditions of the elderly. It relates firstly to the access to and adaptation of housing, facilitating the mobility and strengthening the participation in society. These matters require public support and finances. Secondly, it intends to offer older persons equal conditions of recruitment, training, working and retiring.

Chapter VI has been designed with a view to ensuring appropriate and affordable health and long-term quality care for older persons at home or in institution. Specific provisions deal with consent to medical care and to placement in institution and with situations where an older person may not be able to express consent. As to medical care, the Recommendation is primarily based on of the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Articles 5 to 9). This Chapter addresses also the issue of palliative care as necessary care providing an appropriate environment for older persons to cope with the pain and other distressing symptoms.

The last Chapter VII solicits member states to accommodate the justice system to the progressive needs of older persons by facilitating the access to justice (e.g. by providing free legal assistance or aid), ensuring a fair trial within a reasonable time (even an

expeditious trial), improving the detention conditions (ensure that the well-being and dignity are respected, consider alternatives to detention).

There have been some difficulties, but in general the work was based on large consensus, also with NGOs. Legal capacity and limitations thereto, end of life, pensions were among the most debated themes.

## **Conclusion**

In conclusion, I may say that if the future Council of Europe Recommendation does not address a new topic for the Organisation, it proposes however a series of special measures to contribute to older people's full enjoyment of human rights. The Recommendation is not binding, but expresses nonetheless not only the common views and practice of our member states but also what is their ambition as to how the rights of older persons should be enforced. And it also foresees a voluntary follow-up process 5 years after its adoption. We believe that this is an interesting contribution, from the European side, to the development of the rights of older persons in a wider perspective, without prejudice to further discussion and development at the international level. And we are ready to put our experience at disposal of your work. Thank you.