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Keeping gaps in their place: how we can avoid missing the wood for the trees in thinking about a new convention on the human rights of older persons

The contribution of the 2021 and 2022 OHCHR analyses

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1. Introduction and basic argument

- A major aspect of debate over a new treaty on human rights of older persons has been identification and characterisation of “gaps”
- Gaps concern goes back to original resolution (GA Res 65/182 (2010)) (“possible gaps”)
- This focus has led to an impoverished analysis that potentially misses the bigger picture and departs from previous exercises in human rights treaty making
- We must embrace a broader approach that does take account of “gaps” but goes beyond them, locating them in the broader context: OHCHR 2021 and 2022 documents are two important examples of this approach.

2. The process of policymaking: method, evidence and outcome

- **Identification** of a specific factual situation as a “social problem”
- **Diagnosis** of the problem – causes?
- **Responses** to the problem – measures influenced by diagnosis to address causes

3. Debate over a new treaty: shared assumptions

Background assumptions

- international human rights treaties **can make a significant contribution** to protection and enjoyment of human rights at the national level.
- not always, not everywhere, not immediately
- not just an article of faith, but **backed by a significant body of empirical studies** (both quantitative and qualitative)

3. Debate over a new treaty: shared assumptions

Existence of a problem

- all engaged in the international level discussions agree that there are **widespread and persistent patterns of violations** of the human rights of older persons in all regions of the world
- all accept that **existing standards apply in theory to older persons** and are sometimes applied (but this is **in a fragmented and non-systematic way**)
- most accept, on the basis of evidence presented to international bodies and mechanisms, that the international human rights framework **is not delivering sufficiently** for older people around the world and that it could do better.

4. Diagnosis : avoiding gaps fetishism and zooming out

- In trying to explain *why* the IHRts framework is not delivering, there has been much attention given to gaps
- Focus on identifying and classifying gaps – as normative, protection, implementation, etc – has run into a cul-de-sac
- Has involved hairsplitting and differing views over manipulable concepts (“normative”, “gap”)
- **Extreme version – there are no normative gaps** because creative interpretation can apply existing norms to achieve the result we want in any given circumstance

4. Diagnosis: avoiding gaps fetishism and zooming out

- Also an assumption by some that a normative instrument can *only* be justified if it is responding to normative gaps
- Yet a normative instrument can generate action to address implementation and protection gaps as well (see CRPD experience).
- Too great a focus on identification and classification of limitations and deficiencies as gaps has the potential to miss the big picture
- Gaps and other “limitations and deficiencies” are symptoms of an underlying condition that goes beyond those specific problems.

5. The contribution of the 2021 OHCHR Updated Study (and the 2022 OHCHR Report)

- reviewed the **extensive evidence** on the extent to which the specific concerns of older persons were addressed by existing human rights norms and mechanisms
- **analysed the conceptual and practical reasons for these shortfalls** in the existing human rights framework
- argued that the **critical question was whether a new treaty would add a unique and significant impetus** to improving the human rights of older persons
- argued that the **existing system could improve, but at best it could achieve only incremental change**, not the needed paradigm shift

5. 2021 OHCHR Updated Study: Summary of Conclusions (paras 1-8)

“There is no clear articulation in any of the United Nations human rights treaties of the nature and significance of ageing, its social construction and the phenomenon of ageism. Without such a coherent conceptual framework to inform the interpretation and application of existing human rights norms and to frame the development of new norms and interpretations that address the realities of older persons’ lives, the international human rights system will continue to fall short in delivering on its promises to ensure that all persons, including all older persons, fully enjoy their human rights and fundamental freedoms, by stimulating changes at the national level.”

2021 OHCHR Updated Study, para 1

6. Over-optimistic mainstreamers and the realities of treaty body practice

“The assumption that existing United Nations human rights mechanisms, in particular the human rights treaty bodies, can give significantly greater time and attention to the human rights of older persons is unrealistic and impractical, given the many competing priorities they are mandated to consider under their constituent treaties, the pressure on the time and resources available to them and the limits on the length of treaty body and State party documents.

While there are some measures that the human rights treaty bodies, States parties and other stakeholders could take to improve consideration of ageing issues by existing bodies, these are likely to bring about only incremental change.” 2021 OHCHR Updated Study, para 7

Conclusion: two-track approach is needed

The **silences, neglect and relative invisibility** of human rights issues of central concern to older persons are so widespread and systemic in the international human rights system that it is clear that **fundamental change is required**. Simply exhorting existing mechanisms to do more and to include the perspectives of older persons in the execution of their mandates is not enough; **a new dedicated normative instrument is needed to comprehensively remedy those deficiencies.**

2021 OHCHR Updated Study, para 8

2021 OHCHR Updated Study, the 2022 OHCHR Report and other sources

The 2021 OHCHR Updated Study is available both in English and German:

- OHCHR, [*Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons*](#), eleventh session UNGA Open-ended Working Group on Ageing, March-April 2021*
- OHCHR, *Aktualisierung der 2012 durchgeführten analytischen Ergebnisstudie zu den normativen Standards im internationalen Menschenrecht in Bezug auf ältere Menschen*, <https://www.bmfsfj.de/resource/blob/185734/ef49e0de112cbd2ea63df833bcef8836/gaps-paper-data.pdf>

See also

- OHCHR, *Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons*, Report of the United Nations High Commissioner for Human Rights, UN Doc [A/HRC/49/70](#) (2022)*
- Website of the UN Human Rights Council Independent Expert on the human rights of older persons: <https://www.ohchr.org/en/special-procedures/ie-older-persons>
- Website of the UN General Assembly Open-ended Working Group on on Ageing, <https://social.un.org/ageing-working-group/>
- WHO et al, *Global Report on Ageism* (2021),, <https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>



Thank you for your attention!

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