

Do we need a World Convention on the Law of the Ancient World?

There are separate UN human rights conventions for children, people with disabilities and women, but not for older people. A UN working group has been discussing the possibility of such a convention since 2011. The consultations are still highly controversial.



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The COVID 19 pandemic as a burning glass

The current COVID 19 pandemic has raised awareness of the situation of older people as if through a burning glass. The partial suspension of visiting rights for older people in nursing and care facilities has put the issue of human rights for older people back on the agenda - but initially with few consequences. For example, the first draft of the Plan for Global Humanitarian Action in response to the World Health Organization's (WHO) COVID-19 of March 2020 did not address this group. This was only corrected in the May and July 2020 versions after world organisations for the elderly such as Help Age International (HAI) and the Global Alliance for the Rights of Older Persons (GAROP), as well as the UN High Commissioner for Human Rights, Michelle Bachelet, intervened with UN Secretary-General António Guterres. ² Guterres took this as an opportunity to publish his own brief on the situation of older people in the same year. ³

The document highlights the gaps in the equal treatment of older people in the pandemic and was signed by 146 states, including China and Germany, but not Russia and the USA. ⁴ In doing so, the states committed themselves to closing the gaps identified in the report. To date, however, no significant progress has been made.

draw.

In debates on discrimination against vulnerable groups, the focus is regularly on children and women, followed by people with disabilities. Older people, on the other hand, are less frequently discussed. They are generally on the margins of the United Nations' human rights documents. Is a World Convention on the Rights of the Elderly therefore necessary? This question has been discussed since 2011 in a UN working group, the Open-ended Working Group on Ageing (OEWGA). ¹ The following is about the working group and its deliberations on the question of a World Convention on the Rights of the Elderly.

¹ On the OEWGA, see also social.un.org/ageing-working-group/index.shtml. Documentation of the OEWGA can be found at GAROP at rightsofoldpeople.org/open-ended-working-group/, HAI at www.helpage.org/what-we-do/un-convention/ and the DIMR at www.institut-fuer-menschenrechte.de/themen/rechte-aelterer/nationale-aktivitaeten.

² UN Office for the Coordination of Humanitarian Affairs (OCHA), Global Humanitarian Response Plan - COVID-19, www.unocha.org/publication/global-humanitarian-response-plan/global-humanitarian-response-plan-covid-19-july-0

³ UN, Policy Brief: The Impact of COVID-19 on Older Persons, May 2020, unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf

⁴ UN DESA, Statement of Support to the UN Secretary-General's Policy Brief on the Impact of COVID-19 on Older Persons, www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2020/05/ENG_final_-with-countries.pdf.



Different generations of women and a child, all belonging to the Hmong indigenous people in Thailand and living in Mae Salong. UN PHOTO: KIBAE PARK

The situation of older people is a comprehensive global challenge, not only in the pandemic. A World Convention on the Rights of the Elderly would oblige states, among other things, to set binding standards for the social security of older people and the care of those in need of care. It would also be essential to guarantee unrestricted participation in education, the legal system and the digital world. In many countries, the protection of older people from violence and abuse is not sufficiently ensured by law. Above all, a World Convention on the Rights of the Elderly would address age discrimination and negative age stereotypes, which are omnipresent in work and everyday life. In the international debate, this is referred to as 'ageism'.⁵ The demographic development, namely the ageing of the population as a result of increasing life expectancy and a simultaneous decline in the birth rate, gives more weight to the demand for the rights of the elderly.⁶

While the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the 1989 Convention on the Rights of the Child (CRC) and the 2006 Convention on the Rights of Persons with Disabilities (CRPD) have received much attention, the work of the OEWGA has not. There is little research on this working group.⁷

Elderly policy and human rights policy - a difficult relationship⁸

Two strands of global politics intersect in the OEWGA: politics for the elderly and human rights politics. The relationship between the two strands is distant: Global policy on the elderly has difficulty with human rights, just as the UN human rights system is unfamiliar with older people.

For a long time, global policy on the elderly has been dominated by an orientation towards the protection and care of the elderly,⁹ partly combined with a problem discourse in which old age appears as a problem or even a burden for society. Old-age policy in this sense does not primarily aim at strengthening individual rights of older people, but at expanding the social infrastructure related to old age, combined with a development discourse that focuses more on collective 'development' of society than on individual rights. Compared to 'protection and care', the discursive framework of 'rights', which is gaining in importance, marks a "paradigm shift"¹⁰ in policies for the elderly.

Conversely, UN human rights documents mention older people only in passing.¹¹ The first World Assembly on Ageing, with the Vienna In-

⁵ WHO, Global Report on Ageism, Geneva 2021.

⁶ See also the article by Frank Swiaczny in this issue.

⁷ Some works are dedicated to jurisprudential aspects, such as Claudia Mahler, *Wie steht es um die Menschenrechte Älterer?* UN Open-ended Working Group on Ageing - Review and Outlook, *Journal of Gerontology and Geriatrics*, 50th ed., 4/2017, pp. 281-286, and Annie Herro, *The Human Rights of Older Persons: The Politics and Substance of the UN Open-Ended Working Group on Ageing*, *Australian Journal of Human Rights*, 23rd ed, Other contributions trace the historical antecedents of the OEWGA in the UN system, such as Léon Poffé, *Towards a New United Nations Human Rights Convention for Older Persons*, *Human Rights Law Review*, 15th ed, 3/2015, pp. 591-602.

⁸ This and the following sections draw on the more detailed study by Lutz Leisering, *Die Legitimität der Menschenrechte - Die Open-Ended Working Group on Ageing der Vereinten Nationen als Testfall*, in: Martin Nonhoff et al. (eds.), *Politik und Gesellschaft verstehen*, Frankfurt/Main 2022, pp. 413-428.

⁹ Jennifer D. Scuibba, *Securing Rights in the Twenty-First Century: A Comparison of the Disability and Older Persons' Rights Conventions*, *Journal of Human Rights*, 15th ed, 4/2016, pp. 533-549.

¹⁰ Mahler, *Wie steht es um die Menschenrechte Älterer?*, op. cit. (note 7), p. 286; Herro, *The Human Rights of Older Persons*, op. cit. (note 7), p. 1.

¹¹ Early documents on elderly issues are: UN Doc. A/RES/2542 v. 11.12.1969; A/RES/2842 v. 18.12.1971; A/RES/3137 v. 14.12.1973; A/RES/3138 v. 14.12.1973.

The International Plan of Action on Ageing (1982) and the Second World Assembly on Ageing with the Madrid International Plan of Action on Ageing (2002) mark the first central thematisation of the issue of ageing.¹² Although these documents also speak of the rights of older people, the protection and care paradigm dominates in connection with a development discourse. The OEWG, on the other hand, addresses the issue of the elderly from the perspective of human rights.

Why categorical human rights conventions?

The Universal Declaration of Human Rights of 1948 was made more binding in 1966 in the form of two covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Therefore, there could be no compelling reason to draft group-related, 'categorical' human rights declarations in addition to the Universal Declaration of Human Rights and the two covenants implementing it. In addition to the three general UN human rights documents, however, there have subsequently been six others, four of which apply to specific social groups: the three mentioned above on women, children and people with disabilities, as well as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) from 1990. In addition, there are regional human rights conventions and, in the area of older persons, above all the Inter-American Convention on Protecting the Human Rights of Older Persons from 2015.¹³ A human rights convention for older persons (Convention on the

Rights of Older Persons (CROP) or the Convention on the Rights of the Elderly (ARC) would be another global categorical instrument.¹⁴

Categorical human rights conventions are generally ambivalent. There are arguments for and against them, and some of these arguments were also put forward in the context of the OEWG. The arguments in favour of categorical conventions are that they allow group-specific needs and rights to be specified more precisely and that they make the respective group more visible and thus support political lobbying.¹⁵ The massive consequences of the Convention on the Rights of Persons with Disabilities, especially in German politics, make this clear. One argument against categorical agreements is that by highlighting a special group with good intentions, this group is potentially stereotyped and victimised. The target group thus increasingly becomes the object of juridification and bureaucratisation. At the same time, there is a danger that general interests will take a back seat to group-specific particular interests. Thus, the Social Covenant, which concerns all people, is actually used much less for purposes of political mobilisation than categorical conventions, especially those for women, children and people with disabilities.

UN human rights documents mention older people rather marginally.

Critics also fear a "convention fatigue" among global actors¹⁶, as well as an overburdening and sometimes excessive fragmentation of the human rights system. National governments fear high follow-up costs of a convention, as experienced by the German government as a result of the Convention on the Rights of Persons with Disabilities, political pressure to take new measures for the group in question, and increased reporting obligations to the UN. At

¹² UN Doc. A/CONF.113/31 v. 26.7.-6.8.1982; A/CONF.197/9 v. 8.-12.4.2002.

¹³ Claudia Martin/Diego Rodríguez-Pinzón/Bethany Brown, Human Rights of Older People: Universal and Regional Legal Perspectives, Heidelberg 2015.

¹⁴ As early as 1995, a commentary under international law on the rights of the elderly was published within the framework of the Social Pact, see UN Doc. E/1996/22 of 8.12.1995, General Comment No. 6.

¹⁵ Mahler, *Wie steht es um die Menschenrechte Älterer?*, op.cit. (note 7), p. 286.

¹⁶ Sciubba, *Securing Rights in the Twenty-First Century*, op. cit. (note 9), p. 543.

In addition, competition is to be expected with a growing number of categorical agreements, as public attention is a scarce commodity.¹⁷

The Open Working Group on the Ageing

The initiative for the drafting of an ARC came from Latin American states in 2007¹⁸, while earlier initiatives in 1948, 1991 and 1999 came to nothing.¹⁹ When the Universal Declaration of Human Rights was drafted in 1947 and 1948, Latin American states were already particularly committed to social rights, including the rights of older people. The OEWGA was founded at the instigation of Argentina and Brazil through UN General Assembly resolution 65/182, which called for the "follow-up to the Second World Assembly on Ageing" to "establish a working group open to all Member States of the United Nations for the purpose of strengthening the protection of the human rights of older persons [...]".²⁰

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Even at the beginning of the OEWG, there were considerable differences of opinion between the states as to whether an ARC was desirable. For this reason, negotiations have not been held directly on the issue itself for a long time, but at the 7th session in 2016 it was decided that negotiations in future should focus on selected substantive issues - generally two issues or thematic blocks each, in order to identify possible gaps in existing human rights instruments.

A large number of actors operate in the field of OEWGA. Actors of the OEWGA in the narrower sense

are only those who are allocated a seat in the plenary hall of the negotiations at the UN headquarters in New York and have the right to speak. These are primarily the UN member states, who have the primary right to speak. Non-governmental organisations (NGOs) have areas and seats in the galleries. Another group of actors are the National Human Rights Institutions (NHRIs), for Germany the German Institute for Human Rights (DIMR) in Berlin. It was not until the 7th session in 2016 that it was decided that NHRIs would be accredited and could participate.

National and international NGOs are now the largest group of actors. It was not until the 4th session in 2013 that NGOs were more present and the first dialogues with UN member states took place. The number of NGOs has increased steadily. Among the international NGOs, GAROP takes the leading role; also important are the organisations 'Age Platform Europe', HAI, and globally operating nationally based NGOs, above all the British 'Age International', 'Help Age Deutschland' and the office for international policy on older people of the Federal Association of Senior Citizens' Organisations (BAGSO) Germany. A fourth group of actors besides the states, the NGOs and the NHRIs are actors from the UN system, especially the UN Department of Economic and Social Affairs (UN DESA) and the Office of the United Nations High Commissioner for Human Rights (OHCHR). The Independent Expert on the enjoyment of all human rights by older persons, Claudia Mahler of the DIMR since 2020, is also entitled to speak. Finally, there is a chair, which has been held by Argentina since the OEWG was founded.

Differences of opinion within the OEWGA

The debates within the OEWGA show a broad consensus on many issues as well as striking dissent. The suggestion of common basic convictions runs through the debates. Prac-

¹⁷ Ibid.

¹⁸ Ibid, p. 537; Marijke De Pauw, Global Population Aging from a Human Rights Perspective: The Need for a UN Convention on the Rights of Older Persons, in: Global Europe - Basel Papers on Europe in a Global Perspective No. 114, Basel 2017, p. 28, doi.org/10.24437/global_europe.v0i114.165

¹⁹ Jennifer D. Sciubba, Explaining Campaign Timing and Support for a UN Convention on the Rights of Older People, The International Journal of Human Rights, 18th ed, 4-5/2014, p. 468.

²⁰ UN Doc. A/RES/65/182 v. 21.12.2010; A/RES/67/139 v. 20.12.2012 strengthened this objective, but did not find majority support.

tically all stakeholders agree that demographic change is a key challenge, as repeatedly emphasised by António Guterres²¹, that older people are a great asset and that more needs to be done for them, and that all people need to be enabled to participate.

The main disagreement relates to the question of whether there should be an ARC or not. The primary argumentation front is between supporters who diagnose gaps in existing human rights conventions and derive the need for an ARC from this, and opponents who only see implementation deficiencies in existing conventions, which is why a new convention is unnecessary, as well as opponents who reject human rights in general or pursue alternative strategies. Accordingly, the search for 'gaps' runs through many discussions.

Some opponents of an ARC generally oppose the progressive fragmentation of the UN human rights system. The opponents argue that the mobilisation function of a separate, all-encompassing convention would be an advantage. A recurring procedural disagreement concerns the mandate of the OEWG. Naturally, opponents of an ARC, such as Russia, interpret the mandate narrowly. They also reject documents on the outcome of the meetings, while supporters demand such documents in order to record partial consensus reached and to be able to continue working from there.

Most states reject an ARC for very different reasons. China, the Holy See, Cameroon, Russia, Sweden and the USA, among others, are against an ARC. Germany and other European countries, including the European Union (EU), are undecided. At the 3rd session in 2012, the EU had even signalled that an ARC and therefore a continuation of the OEWG was not necessary. The EU only opened up at the 7th session in 2016. The positions within the influential Group of 77 (G77), which includes China, are mixed. Latin American and African states in particular are in favour of an ARC. There is a tendency for governments to reject the idea, and the growing presence of higher-ranking UN representatives has recently shown that this is not the case.

representatives that the UN should give the working group a greater role.

s importance. Canada and Spain, as well as countries in the Australia-Pacific region, have shown willingness to support an ARC from 2019. Some hostile governments boast of their success in improving infrastructure for the elderly in their country, without even mentioning human rights. Others explicitly prioritise the goal of collective socio-economic and infrastructural development over human rights or interpret this goal as a contribution to the implementation of human rights.

Some opponents of an ARC generally oppose the progressive fragmentation of the UN human rights system.

Accordingly, some consider the existing conventions to be sufficient, especially the World Plan on Ageing, according to Hungary's position. China also regularly refers to the World Plan on Ageing, saying that the rights of older people are sufficiently covered there. However, the World Plan on Ageing is not a genuine human rights document, and it only selectively covers the areas that are important for older people. This also applies to the German report on the review summit of the World Plan on Ageing, which was written by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ),²² which was criticised in statements by German civil society.

The 2030 Agenda for Sustainable Development (Agenda 2030) and its Sustainable Development Goals (SDGs) are no substitute for an ARC.²³ According to the Chinese Director of UN DESA, Liu Zhenmin, the human rights issue is not at the centre of international discussions; goals 16 and 17 of the 2030 Agenda are sufficient.²⁴ However, the SDGs mention 'elders' only three times (SDG 2.2; 11.2; 11.7). Also people with disabilities, among whom many are older people,

²¹ The International Charlemagne Prize of Aachen, Speech by the Secretary-General of the United Nations, 30.5.2019, www.karlspreis.de/de/preistraeger/antonio-guterres-2019/speech-from-secretary-general-antonio-guterres

²² BMFSFJ, Country Report Federal Republic of Germany, For the Fourth Review and Appraisal Cycle of the Implementation of the Madrid International Plan of Action on Ageing and its Regional Implementation Strategy (MIPAA/RIS), unece.org/sites/default/files/2022-01/mipaa20-report-germany%20%281%29.pdf

²³ UN Doc. A/RES/70/1 v. 25.9.2015.

²⁴ Liu said on the occasion of the publication of the 'Global SDG Accountability Report' on 24.6.2021.

are only marginally addressed in the Agenda. For the most part, the general formulation in the preamble of the agenda remains that no one will be left behind.

In its update of the German Sustainability Strategy since 2021, the Federal Government has not addressed the rights, participation and involvement of older people in greater detail.²⁵ Older people are only explicitly considered once, in the description of the employment rate (age 60-64) in a graph. The generation aged 65 and over is completely excluded. In the voluntary state report²⁶ describing the implementation status of the 2030 Agenda, Germany did not address these obvious gaps at the high-level political forum on sustainable development in New York in July 2021, despite reminders from civil society.

A Convention on the Rights of the Elderly remains a desideratum

It has become apparent that older people are marginalised in the UN human rights system and that, conversely, a protection and care paradigm rather than the paradigm of individual rights has traditionally prevailed in global policies for the elderly. The OEWGA offers the opportunity that policies for the elderly

and human rights come closer together. Advocates of a separate human rights convention for older people point to gaps in existing universal human rights conventions with regard to older people. Other global conventions, in particular the Global Plan of Action and the 2030 Agenda, are no substitute for a genuine human rights convention. The human rights conventions for women, children and persons with disabilities have shown that independent, categorical human rights conventions can significantly increase the visibility of vulnerable groups with significant consequences for political mobilisation.

However, as shown above, the idea of an ARC is not shared by all states. The work of the OEWGA not only reveals different positions on human rights for older people, but also fundamental reservations about human rights and collectivist interpretations of human rights. Beyond the issue of older people, the example of the OEWGA shows the limits of the legitimacy of human rights that is often taken for granted in Germany.

There was an unexpected impulse at the last, 12th session of the OEWGA in April 2022. Argentina proposed to form a supra-regional core group at state level. This was actually formed at the end of May with the participation of Germany. In a meeting with German NGOs and human rights organisations, the German representative indicated that Germany could play an active role in this process. The core group is to prepare a draft resolution for the 13th session of the OEWG in 2023 so that a working group can be set up to prepare a text on the gaps in human rights protection for older people by the following session. Should a majority for an ARC be reached at the 14th session of the OEWG in 2024, the course would be set for expanding the range of human rights conventions for particularly vulnerable groups through a World Convention on the Rights of the Elderly.

English Abstract

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Do We Need A World Convention on the Rights of Older Persons?

pp. 111-116

The United Nations has established separate human rights conventions for children, people with disabilities, and women, but not for older persons. Non-governmental organisations (NGOs) as well as national human rights institutions and some governments call for a convention for older persons. Since 2011, the UN Open-ended Working Group on Ageing (OEWGA) has been exploring the need for such a convention, as of yet to no avail. A developmental approach that gives priority to collective development through economic growth and building social infrastructure often prevails over individual human rights.

Keywords: discrimination, convention/protocol, human rights, pandemic, seniors/older persons, discrimination, convention/ protocol, human rights, pandemic, seniors/older persons

²⁵ Federal Government, German Sustainability Strategy, Further Development 2021, 15.12.2020, www.bundesregierung.de/resource/blob/998194/187_5176/3d3b15cd92d0261e7a0bcd8f43b7839/deutsche-nachhaltigkeitsstrategie-2021-langfassung-download-bpa-data.pdf.

²⁶ Federal Government, Report on the Implementation of the 2030 Agenda for Sustainable Development, German Voluntary National Review to the HLPF 2021, sustainabledevelopment.un.org/content/documents/279522021_VNR_Report_Germany.pdf.